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CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1951

JOHN SOPCICH, APPELLANT, V. AGNES TANGEMAN, EXECUTRIX OF THE ESTATE OF MARY SOPCICH, ET AL., APPELLEES.

45 N. W. 2d 478

Filed January 5, 1951. No. 32792.

1. **Appeal and Error.** A proper judgment under the pleadings and the evidence will not be reversed on appeal merely because the trial court did not give the right reason for the decision.
2. **Wills.** The making of a will which violates unperformed obligations of testator under a valid oral contract, after full performance by the other party, does not destroy the contract.
3. **Specific Performance: Wills.** A suit in the district court to enforce the specific performance of a parol agreement to devise real property and to quiet title in the plaintiff, as against those claiming under a will duly allowed and admitted to probate in the county court, is not a collateral attack on the judgment admitting such will to probate.
4. **Courts: Specific Performance.** When such contract and relation are established under a single and indivisible contract, and the promisor dies without having complied with the terms of his promise, the county court is without, and the district court has, jurisdiction of an action for the specific performance of such contract.
5. **Appeal and Error.** Actions in equity, on appeal to this court, are triable de novo in conformity with section 25-1925, R. R. S. 1943, subject, however, to the rule that when the evidence on material questions of fact is in irreconcilable conflict this court

will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying and must have accepted one version of the facts rather than the opposite.

6. **Specific Performance.** One seeking specific performance of an oral contract to will property to him has the burden not only of proving the contract but also that he has performed the obligations imposed upon him thereby.
7. ———. Equity will grant specific performance of a parol agreement to leave property to another if it is proved by evidence convincing and satisfactory, if it has been wholly performed by one party, and if its nonperformance would be a fraud on him.
8. **Frauds, Statute of: Specific Performance.** Such contracts 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.
9. **Specific Performance: Wills.** Specific performance of an oral agreement to make a will will not be enforced where there has been a substantial failure of performance by the party seeking enforcement of the agreement.
10. **Contracts.** 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.
11. **Specific Performance: Contracts.** The right of a party to the specific performance of his contract may be lost by his failure of performance, by his abandonment thereof, by his acquiescence in the breach of the other party, by laches, or by conduct inconsistent with the right to relief which amounts to a waiver or an estoppel.

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

George M. Tunison and *Thomas P. Leary,* for appellant.

Rosewater, Mecham, Stoehr, Moore & Mecham, for appellees.

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

CHAPPELL, J.

Plaintiff brought this suit in equity to obtain specific performance of an alleged oral contract entered

into by him with his mother, Mary Sopcich, in 1933, whereby, "in consideration that John Sopcich would to the best of his ability live with Mary Sopcich, make a home for her, assist in the care and maintenance of the premises, provide for the support of Mary Sopcich, and as well as he was able purchase and provide for the needs of Mary Sopcich, then she, Mary Sopcich, would execute a will providing that at her death all of her property, real and personal, would descend to the plaintiff John Sopcich in fee simple." Plaintiff also prayed for an accounting and damages for waste.

He alleged that, relying upon the promises made by his mother, he faithfully performed his obligations under the contract, but that his mother was persuaded by her daughter, defendant Agnes Tangeman, to violate her oral contract with plaintiff and execute a will naming the daughter as sole beneficiary of all her property without any provision for plaintiff, which facts were unknown to him until in May 1948.

With regard to plaintiff's contention that he lacked the knowledge aforesaid, competent evidence in the record discloses that he was informed in February 1946 that such a will would be made by the mother giving all of her property to the daughter, whereupon plaintiff said: " 'That was the way I figured it.' * * * That was what he expected." Also, in July 1946, plaintiff was informed that such a will had been made, whereupon he said: " 'That is what I expected.' * * * 'Agnes is doing a good job taking care of my mother; that is the way it should be,' " or "that was what he expected. 'Ag was doing a wonderful job taking care of her mother, no more than right.' "

Further, petition for probate of such will was filed on November 5, 1947, and after notice as required by law, it was on December 6, 1947, admitted to probate without objections, and, as nominated in the will, the daughter was on December 8, 1947, appointed executrix without objections. In that regard, plaintiff's conten-

tions that the executrix was guilty of concealment or bad faith during the probate proceedings is not sustained by the record.

The primary issues presented by plaintiff's petition were traversed by the answer of defendant Agnes Tangeman, both as executrix and personally, and by her husband, defendant Noah Tangeman. The other defendants, heirs at law of deceased, and their respective husbands and wives, either defaulted or filed like answers prepared and submitted to them by plaintiff's counsel, wherein they admitted the allegations of plaintiff's petition, and joined in the prayer thereof.

After a hearing upon the merits, the trial court entered its decree, finding and adjudging the issues generally in favor of defendants, Agnes Tangeman, executrix, Agnes Tangeman, and her husband, Noah Tangeman, quieting title to the property in her, and dismissing plaintiff's petition at plaintiff's cost, primarily upon the ground that plaintiff had failed to prove the contract alleged.

In that connection the reasons given therefor by the court, whether right or wrong, are unimportant because: "A judgment will not be reversed, merely because the court gave a wrong reason for the rendition thereof." Kelley v. Wehn, 63 Neb. 410, 88 N. W. 682. As stated in 49 C. J. S., Judgments, § 22, p. 51: "Although it has been said that every court should state on the record the legal grounds for its judgment, the reasons assigned by the court for the judgment rendered do not constitute a part of the judgment. Also if the judgment given is correct, it is immaterial whether the reasons adduced for giving such a judgment are correct." See, also, 33 C. J., Judgments, § 59, p. 1104. As held in Kanaly v. Bronson, 97 Neb. 322, 149 N. W. 781: "A proper judgment under the pleadings and the evidence will not be reversed on appeal, merely because the trial court did not give the right reason for the decision." See, also, Crawford Co. v. Hathaway, 60 Neb. 754, 84

N. W. 271; Bastian v. Weber, 150 Neb. 709, 35 N. W. 2d 791; 3 Am. Jur., Appeal and Error, § 1008, p. 563.

Plaintiff's motion for new trial was overruled, and he appealed. His assignments of error may be summarized as contending that the judgment was not sustained by the evidence but contrary thereto, and contrary to law. We conclude that the assignments have no merit.

At the outset we are met with defendants' contention that the district court had no jurisdiction of the subject matter in any event because the county court had exclusive jurisdiction of probate of the will, and that final orders made therein upon due and proper notice were binding upon all the parties and not subject to collateral attack, as attempted in this action. That contention has no merit.

In that regard, this court held in Best v. Gralapp, 69 Neb. 811, 96 N. W. 641, on rehearing at page 815, 99 N. W. 837: "A suit in the district court to enforce the specific performance of a parol agreement to devise real property and to quiet title in the plaintiff, as against those claiming under a will duly allowed and admitted to probate in the county court is not a collateral attack on the judgment admitting such will to probate." As held in In re Estate of Skade, 135 Neb. 712, 283 N. W. 851: "The making of a will which violates unperformed obligations of testator under a valid oral contract, after full performance by the other party, does not destroy the contract." See, also, Lacey v. Zeigler, 98 Neb. 380, 152 N. W. 792, wherein it was held: "And when such contract and relation are established under a single and indivisible contract, and the promisor dies without having complied with the terms of his promise, the county court is without, and the district court has, jurisdiction of an action for the specific performance of such contract."

It is well established that: "Actions in equity, on appeal to this court, are triable de novo in conformity

with section 25-1925, R. S. 1943, subject, however, to the condition that when the evidence on material questions of fact is in irreconcilable conflict this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying and must have accepted one version of the facts rather than the oppoosite." O'Brien v. Fricke, 148 Neb. 369, 27 N. W. 2d 403. See, also, Kuenzli v. Kuenzli, 150 Neb. 855, 36 N. W. 2d 247.

As in the case at bar, Lunkwitz v. Guffey, 150 Neb. 247, 34 N. W. 2d 256, involved an alleged oral contract. Therein it was not only held that: "Each case is to be determined from the facts, circumstances, and conditions as presented therein," but also held that "Such contracts 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."

In Riley v. Riley, 150 Neb. 176, 33 N. W. 2d 525, it was held that: "One seeking specific performance of an oral contract to convey real estate has the burden of showing that he has performed the burdens imposed on him by the contract."

In Peters v. Wilks, 151 Neb. 861, 39 N. W. 2d 793, it was held: "Equity will grant specific performance of a parol agreement to leave property to another, if it is proved by evidence convincing and satisfactory, if it has been wholly performed by one party, and if its nonperformance would be a fraud on him."

In Gilgren v. Price, 140 Neb. 124, 299 N. W. 325, we held that: "Specific performance of an oral agreement to make a will will not be enforced where there has been a substantial failure of performance by the party seeking enforcement of the agreement." See, also, 58 C. J., Specific Performance, § 327, p. 1073, and § 330, p. 1075.

In 49 Am. Jur., Specific Performance, § 40, p. 54, it is

said: "The failure or inability or refusal to carry out the terms of the contract at the time when performance is due will ordinarily be grounds for refusing specific performance, since specific performance will not generally be decreed in favor of a party who has himself been in default, or who has wilfully violated his part of the contract, whereby the defendant has been deprived of a substantial benefit under it." Also, as stated in section 78, p. 95: "Courts of equity do not enforce specific performance of a contract where circumstances have arisen which makes its performance inequitable, or where there has been delay amounting to laches on the part of the plaintiff, and, as a general rule, will not grant a decree of specific performance in favor of a party who has himself once refused to perform the contract or who has been guilty of such conduct as amounts to a refusal to perform it. * * * A party cannot be permitted to violate his contract and wait until he sees that his bargain will be profitable, and then invoke the aid of a court of equity to have it executed."

Also, as held in Nelson v. Cross, 152 Neb. 197, 40 N. W. 2d 663, reaffirming numerous other cited cases: "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." See, also, State ex rel. Spillman v. First State Bank, 119 Neb. 39, 226 N. W. 805. As stated in 58 C. J., Specific Performance, § 65, p. 909: "The right of a party to the specific performance of his contract may be lost by his abandonment thereof, by his acquiescence in the breach of the other party, by laches, or by conduct inconsistent with the right to relief, which amounts to a waiver or an estoppel."

Ultimate decision in the case at bar is dependent upon the application of such foregoing rules to the facts, circumstances, and conditions appearing in the record. As we view the situation presented, it may be ad-

mitted, for the purpose of argument only, that plaintiff established by competent evidence that the alleged oral contract was made with his mother, but nevertheless we are at once confronted with the question of whether or not plaintiff fully performed the obligations imposed thereby, or waived performance by the promisor, or abandoned the contract. We conclude that he did.

In that connection, the record discloses that plaintiff lived in his mother's home most of his life until he left in 1927 or 1928 because he had a fight with his stepfather. The stepfather died on February 9, 1933, and that day or the next, at most three or four days thereafter, plaintiff moved back into his mother's home. She was then in good health, owned the home here involved free and clear of encumbrances, and had cash on hand including insurance benefits and salary due deceased aggregating admittedly more than $1,000, and there is competent evidence that it was as much as $3,745. She also had the use of and some income from a garden, grape arbor, and chickens.

Whether or not the agreement, if existent, was made before or after plaintiff moved into his mother's home, is immaterial and not decisive here. It is true that from 1933 to 1943, plaintiff did live with his mother and, so far as he was able, substantially performed the agreement, although his questionable personal conduct by lack of sobriety on week ends and often during the week, was established without question. The details thereof need not be recited.

In 1940, he was ill at his mother's home for some time. During that period his mother, while caring for him, fell and was injured, necessitating hospitalization for several weeks, after which, under medical treatment over a period of months, she gradually recovered.

From 1933 to 1943, defendant Agnes Tangeman, her daughter who lived nearby, went to the mother's home two or three times a week and often every day, where she looked after the mother, and often when necessary

cleaned the house, did the washing, cooked the meals, and worked in the garden, as did her husband and their children.

In 1942 the mother's state of physical health had declined and become such that she was unable to care for herself without assistance. Seven or eight months prior to October 1943, both the mother and plaintiff began to persistently urge Agnes Tangeman and her husband to move into the home and care for the mother. They were also urged to do so by a Catholic priest who, knowing her physical condition, came into the home frequently to give the mother spiritual comfort.

At that time the Tangemans owned their own home nearby, free and clear of encumbrances. This they were persuaded to and did sell, and they moved in with the mother during 1943, whether in October or December is not entirely clear. Plaintiff claimed that the Tangemans were to be given rent free as consideration for taking care of the mother. This was denied by the Tangemans, but it is of little importance in the light of subsequent events.

When they moved in the roof was leaking, and the house was in need of repair. The property was then worth $4,500. Thereafter, plaintiff made no pretense of assuming any responsibility for his mother's care and support, or maintenance of the home, but for several weeks paid the Tangemans $10 a week for his board. From then until in November 1944 plaintiff lived in the home, during which period his personal conduct, caused by alcoholic intemperance, was intolerable at times. There is ample competent evidence that in November 1944, on election night, he celebrated the victory of his favorite candidate for President by becoming intoxicated. In that condition he went home late at night or early the next morning, bringing liquor with him. There he then created a scene, aroused and disturbed his ill mother and the entire family, vilified his brother-in-law who tried to get him to go to his room, and struck

at the brother-in-law, whereupon plaintiff's arm went through the two glass panels of a door and storm door, and he went down, kicking at his brother-in-law who struck plaintiff, giving him two black eyes and a bruised face. Plaintiff claimed that the brother-in-law told him to get out, grabbed him and started to beat him up, and that he, plaintiff, was not drunk although he admittedly had consumed a few bottles of beer and had brought four bottles home with him.

After the foregoing had happened, nothing was said to him that night about leaving, but he testified that later the sister said "something about she could not stand it any longer * * * She told me that she did not want me around." That statement was denied by the sister, and it was denied as well that anyone had ever told him to leave.

The next night the brother-in-law told plaintiff that he was sorry about what happened "last night" but told him to remember not to come home drunk and bother his mother and the children any more. He told him that he liked him and that he had a home there as long as he lived there. Then the brother-in-law told him to " 'Please brace up and come home like a man, and don't do like you did last night,' " whereupon plaintiff said " 'Okey.' " Thereafter plaintiff stayed in the home for ten days or two weeks, during which period nothing was said about him leaving, but he then moved out despite the fact that his mother, the daughter, the brother-in-law, and all the family tearfully begged him to stay. Thereafter he did have Thanksgiving and Christmas dinners with the family and came at times on Saturdays to visit with his mother. He testified that he moved because "I had trouble with my brother-in-law." He said he left "Because I thought it would be a good idea if they were talking about leaving, so after they beat me up and he was going to put me out of the house, which he tried, so, in order to keep peace in the family, and have some one home, why, I thought it would be the best

that I would move out in order to have them to keep peace at home."

From 1943 until the mother's death on October 27, 1947, the mother, almost a total invalid and confined first to a wheel chair or bed, and later entirely to her bed, was affectionately and efficiently cared for by Agnes Tangeman and her family. In the meantime until her death, the Tangemans provided for the mother, except for some items of clothing given the mother by plaintiff. They also paid the taxes, maintained the property, put a new roof and siding on the house, and improved it and other buildings in other material respects, at a cost of some $2,800. In December 1948, after this action was brought, the property was admittedly worth $7,000.

Admittedly the mother was mentally alert and entirely competent at all times until she suffered a stroke 24 to 48 hours before her death. On April 8, 1946, while so competent and without any evidence of undue influence, she executed a will in which, after direction for payment of all her just debts and funeral expenses, she gave, devised, and bequeathed all the rest, residue, and remainder of her property, real, personal, and mixed, to her daughter, Agnes Tangeman, to be hers absolutely, and nominated her as executrix. Therein she expressed great love and affection for her children and the children of her deceased children, naming all of them, including plaintiff, after which she said: "Because of the attention and care which my daughter Agnes Tangeman has given to me, it is my desire that she have absolute ownership of all of my property and for that reason, I have made no provision in my will for my other living children or for any of my grandchildren, the children of my deceased children."

In the light of the record before us and the law applicable thereto, we conclude that plaintiff failed to perform the obligations imposed upon him; voluntarily abandoned the contract; waived performance thereof by his conduct; and was not entitled to specific per-

formance. In that regard, cases relied upon by plaintiff are clearly distinguishable upon the facts. In such cases plaintiffs faithfully and fully performed their contractual obligations, or were ready, able, and willing at all times to so perform, but were prevented from doing so by action of defaulting promisors, who, without reason or excuse, repudiated or renunciated their contractual obligations.

For the reasons heretofore stated, the judgment of the trial court dismissing plaintiff's petition and quieting title to the property involved in defendant Agnes Tangeman should be and hereby is affirmed.

AFFIRMED.

IN RE APPLICATION OF PETERSEN & PETERSEN, INC. BEE LINE MOTOR FREIGHT ET AL., APPELLANTS, V. PETERSEN & PETERSEN, INC., APPELLEE.

45 N. W. 2d 465

Filed January 5, 1951. No. 32806.

1. **Public Service Commissions: Courts.** The grant or denial of a certificate of convenience and necessity by the Nebraska State Railway Commission requires the exercise of administrative and legislative functions and not of judicial powers.
2. **Public Service Commissions: Appeal and Error.** On an appeal to the Supreme Court from an order of the Nebraska State Railway Commission administrative or legislative in nature, the only questions to be determined are whether the Nebraska State Railway Commission acted within the scope of its authority and if the order complained of is reasonable and not arbitrarily made.

APPEAL from the Nebraska State Railway Commission: *Affirmed.*

Rosewater, Mecham, Stoehr, Moore & Mecham, for appellants.

R. H. Beatty and *R. E. Powell,* for appellee.

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

SIMMONS, C. J.

This is an appeal from an order of the Nebraska State Railway Commission which granted a certificate of convenience and necessity to Petersen & Petersen, Inc. Appellants are motor carriers holding certificates of convenience and necessity. We affirm.

The Nebraska State Railway Commission will be hereinafter referred to as the commission.

A copartnership doing business as State Transfer Company held an intrastate certificate of convenience and necessity for extensive routes. The copartnership will be herein referred to as State Transfer.

It appears that State Transfer became and was adjudged bankrupt sometime early in 1949. On April 1, 1949, the commission entered an order to State Transfer to show cause why its certificate should not be revoked unless annual fees were paid. No appearance was made, and such an order was entered effective May 5, 1949.

On July 18, 1949, joint application was made by Petersen & Petersen, Inc., and the trustee in bankruptcy of State Transfer to transfer the certificate of State Transfer to Petersen & Petersen, Inc. Petersen & Petersen, Inc., will be hereinafter referred to as Petersen.

On July 7, 1949, our opinion in the case of In re Application of Neylon, 151 Neb. 587, 38 N. W. 2d 552, was filed.

The commission issued a notice of hearing on July 18, 1949, on the Petersen-State Transfer application, setting it for hearing on August 1, 1949, at 10 a. m., and specifically reciting that applicants must comply with the requirements of the Neylon case.

On July 26, 1949, two of the objecting carriers herein filed a motion to dismiss the application to transfer. This motion, based on the Neylon decision, presented the question of the jurisdiction of the commission to transfer the certificate.

On August 1, 1949, Petersen filed application "for new authority," based on public convenience and neces-

sity. Petersen recited in its supporting statement that the application was supplemental to the joint application of July 18, 1949, and for the same routes and territory. Petersen set up the discontinuance of service by State Transfer, and that the public convenience and necessity required the continuance of the service previously afforded by State Transfer and the granting of "this present application."

Petersen further alleged that Nielsen & Petersen, Inc., a competing motor carrier, had filed an application seeking authority to sell its operating rights to Union Pacific Motor Freight Company. These parties will be referred to herein as Nielsen and Motor Freight. It was alleged that Motor Freight joined in the application. It further was alleged that in this joint application it was stated that any authority to be issued to Motor Freight was to be limited to coordinated rail service with the Union Pacific Railroad, the property transported to be limited to that moving between Union Pacific Railroad stations on railroad bills of lading and at railroad rates; that Nielsen was then performing all-out regular motor transportation service; and that in the event the Nielsen-Motor Freight application was granted, the shipping public would not have available the same kind of service then being rendered by Nielsen, and, for that reason also, public convenience and necessity required the granting of "this present application." Petersen prayed that "this present application be granted," and that hearing be held jointly on it with the joint application of Petersen and State Transfer.

On August 2, 1949, the commission issued notices of hearing. In the Petersen-State Transfer matter it was recited that it had been continued at the request of protestants and was set for August 15, 1949, at 10 a. m., in the commission hearing room. In the Petersen application matter notice was given of a hearing at the same time and place, the notice reciting that Petersen sought a certificate of public convenience and necessity, the

authority sought being the same as that in the Petersen-State Transfer application, and reciting that the application had "been docketed as a new or original application."

It appears by inference from the various proceedings that the trustee in bankruptcy of State Transfer had filed on July 18, 1949, a request that the commission vacate its show-cause order of April 1, 1949. Notice was given of a hearing on that matter for 10 a. m., August 1, 1949. At the request of protestants that matter was continued and reassigned for hearing on August 15, 1949, at the same hour and place as the other applications.

Thereafter, beginning August 15, 1949, and continuing for several days, hearings were held before an examiner on the application of the trustee for vacation of the order to show cause, the transfer application of Petersen-State Transfer, and the application of Petersen for a certificate of public convenience and necessity. Protestants were several holders of certificates of public convenience and necessity covering routes and territory involved in the applications. Applicant offered evidence going generally to the advantage of one carrier dock-to-dock service over multiple and interline carrier service and the need for service such as State Transfer had rendered. Applicant's witnesses likewise testified to the need of service such as that at that time being rendered by Nielsen, but which would not be had if the Nielsen-Motor Freight application were granted.

At the close of applicant's case-in-chief, the protestants moved to consolidate hearings on the Petersen application with the hearing on the Nielsen-Motor Freight application. The motion was denied.

Thereafter on November 2, 1949, the examiner filed a consolidated report in which, after stating generally the situation, he dealt with each application separately. The examiner recommended that the application of the trustee to vacate the show-cause order be denied.

He recommended that the application of Petersen-State Transfer be granted in part and all authority issued thereunder be merged with the authority issued in the Petersen application. Specifically he recommended that the present and future public convenience and necessity required the service proposed in the Petersen-State Transfer and Petersen applications, and that the applicant in the two matters was fit, willing, and able properly to perform the proposed service. He recommended that the Nielsen-Motor Freight application be granted as modified. The record is not here in this application. It comes into this proceeding by virtue of the Petersen application and its inclusion in the examiner's consolidated report.

To this report exceptions were filed on November 15, 1949, praying that the applications be denied. Oral argument was held thereon on November 23, 1949.

On December 3, 1949, the commission entered a consolidated opinion, findings, and order in the Petersen-State Transfer and Petersen applications in which it reviewed the proceedings in the various applications herein mentioned and specifically stated that "Each of the various applications will be separately considered by the Commission on the record made pertaining to the particular application and separate orders are being entered on this date concerning the subject matter of each of the following applications: * * *." This is followed by reference to the other applications by identifying number. The commission further said: "The Commission, upon due consideration of the evidence adduced at the hearing on the instant applications, the pleadings filed therein, the Examiner's report and recommendation, the exceptions thereto and oral argument thereon as pertaining to this proceeding, * * * and being fully advised in the premises, * * * finds: * * *." The commission then held that the exceptions to the examiner's report concerning these two applications should be overruled and the "report and recommendations

approved insofar as it concerns said applications"; that the present and future public convenience and necessity require the proposed service, setting out the service and the route or territory authorized; that Petersen was fit, willing, and able to perform the proposed service; and that the two applications be merged and a certificate of public convenience and necessity be issued under the Petersen application. It ordered that that be done. The commission denied the application in all other respects.

On the same day, based on similar recitals, the commission entered an order denying the application to vacate the order to show cause which it recites became effective May 5, 1949. Likewise, on the same day by separate order, it granted the Nielsen-Motor Freight application as amended.

On December 20, 1949, petition of protestants was filed for rehearing, reconsideration, and to vacate the order of December 3, 1949, in the Petersen-State Transfer and Petersen application cases. The commission denied it on January 30, 1950. Protestants appeal, assigning error in many particulars. They will be referred to hereinafter as appellants.

The assignments are reviewed under the rules that:

"The grant or denial of a certificate of convenience and necessity by the Nebraska State Railway Commission requires the exercise of administrative and legislative functions and not of judicial powers."

"On an appeal to the Supreme Court from an order of the Nebraska State Railway Commission administrative or legislative in nature, the only questions to be determined are whether the Nebraska State Railway Commission acted within the scope of its authority and if the order complained of is reasonable and not arbitrarily made." In re Application of Neylon, *supra.*

Appellants' first argued assignment is that an order of the commission which rests on alleged facts or information extraneous to the record, or which is entered

under or induced by circumstances reflecting bias or prejudice, is void as denying due process of law and a fair and proper hearing in contravention of Article I, section 3, of our Constitution, and Article XIV, section 1, of the Constitution of the United States.

This contention does not rest on any charge that the examiner did not grant a full, fair, and impartial hearing on the two applications involved in this appeal. Nor is it based on a contention that the commission in hearing the exceptions to the examiner's report was other than fair and impartial. It rests on this situation.

The examiner in his report, after reviewing the different applications herein discussed, stated it was his opinion that "* * * from an analysis of the evidence in all the proceedings, the type of proof submitted, a study of the briefs filed herein and from a consideration of the public interest that it is necessary that all these proceedings be consolidated" as "* * * the over-all issues relating to public interest are the same and each are component parts of the same problem."

Further, it is complained that the examiner, in discussing the particular problems in the applications involved in this appeal, drew upon the "consolidated pool of evidence" for the fact stated as appearing in the Nielsen-Motor Freight hearing evidence to the effect that the Union Pacific Railroad had recently inaugurated coordinated rail-truck refrigeration service on one of its branch lines; that the examiner in the report stated that "A final analysis of all the applications herein make certain that they inevitably turn one upon the other"; and that the examiner stated, "From a consideration of the evidence adduced at the hearings, * * * the Examiner is of the opinion and recommends * * *." This is followed by a series of separate recommendations as to each of the several applications.

Bias and prejudice on the part of the examiner was one of the grounds of exception to the examiner's report. The charge of bias and prejudice goes to statements

made and conclusions announced by the examiner in the course of his reasoning. There is no charge of bias and prejudice on the part of the commission, save as it is argued that the claimed attitude of the examiner inheres in the commission's attitude as the result of the approval of the examiner's report as hereinafter stated.

As hereinbefore recited, the commission specifically stated that it "separately considered" the various applications on the record made as to the particular application, considered "the evidence adduced," the examiner's report and recommendations, and the exceptions as to the applications involved in this appeal, and on that basis approved the examiner's report and recommendations "insofar as it concerns said applications" and issued a certificate of convenience and necessity.

The appeal here is not from the examiner's report but from the order of the commission. We think the commission by its statements, findings, and order made upon consideration of the examiner's report clearly removed the vice, if any there was, in the examiner's report in the matters here complained about. The fact that the examiner, and later the commission, considered the interrelationship of the various applications when determining the action to be taken on them separately does not invalidate the order. That is the obvious duty of the commission in carrying out the legislative policy as expressed in section 75-222, R. R. S. 1943. The matters to which this contention is directed do not establish unreasonable or arbitrary action on the part of the commission.

Appellants' next contention is that the orders of the commission in the application here on appeal and in Nielsen-Motor Freight create multiple or duplicate certificates with no change in service to or benefit of the shipping public and are in essence merely approving an arrangement for private gain offensive to and having no relationship to public interest and public policy.

This argument rests on the following factual situation stated generally.

Nielsen, first as a copartnership and then as a corporation, has been in this class of transportation business in Nebraska for many years. Petersen of Nielsen & Petersen, Inc., is the principal stockholder and active in the management of the business. For some years Nielsen had a contract to carry freight for the Union Pacific Railroad, mentioned earlier in this opinion. The Union Pacific Railroad organized Motor Freight and the application of Nielsen-Motor Freight followed. That application involved Nielsen restricting its general commodity hauling. Motor Freight proposed to pay Nielsen a substantial amount for the transfer of its certificate. Nielsen expected to operate its contract with Motor Freight at a profit. That matter was involved in the order of the commission issuing a certificate of public convenience and necessity to Motor Freight and the cancellation of operating rights granted by certificate of public convenience and necessity to Nielsen. That order is not involved in this appeal.

Petersen (of Nielsen & Petersen, Inc.) had two sons who grew up with him in the business. They were minority stockholders, officers, and employees of Nielsen in managerial positions, and participated in the plans out of which these applications flow. The two sons sold their stock, resigned as officers of Nielsen, but remained as employees.

The two sons incorporated Petersen & Petersen, Inc., on June 18, 1949. The father had no interest in the Petersen corporation. The paid-in stock subscriptions furnished the necessary capital for the preliminary operations. Petersen expects to get some of its motor equipment from Nielsen by lease or otherwise, and to lease Nielsen docks and terminal facilities where available. Petersen expects to recruit its employee staff and stockholders in part from Nielsen employees. It is apparent that when and as the entire plan is consummated

Nielsen will be largely restricted to Motor Freight hauling, and Petersen will be in the general transportation field under a certificate of convenience and necessity covering the routes formerly served by State Transfer, and to a certain extent those served by Nielsen at the time of the orders. All these facts were fully revealed to the commission through the hearings of the examiner and were before the commission when the order here assailed was entered. On the basis of these facts, and inferences and conclusions which appellants contend may be taken from them, the appellants seek to have the orders here involved held to be void.

The facts here disclosed, the conclusions to be drawn from them and their impact on the matter of public convenience and necessity, and the fitness of the applicant to properly perform are all within the jurisdiction of the commission to consider and determine. They do not constitute the sole elements to be so considered by the commission, nor is the above the sole evidence on the questions for their determination.

We are not cited to any statutory provision denying the power to the commission that it here exercised. The situation is not such as to bar the order as unreasonable and arbitrary.

Appellants' next contention arises from this situation. As hereinbefore stated, from the recitals in the pleadings it appears that the commission entered an order against State Transfer to show cause why the certificate should not be revoked for failure to pay annual fees, which became effective May 5, 1949, and that when the Petersen-State Transfer application was filed, the referee in bankruptcy also filed an application to set aside that order. Later the Petersen application for a certificate of public convenience and necessity was made. The commission denied the application to vacate the show-cause order.

The commission made a finding and entered an order that the Petersen-State Transfer application and the

Petersen application should be merged and considered as one, and granted in part and issued a certificate of public convenience and necessity to Petersen "under Application No. M-9448, Supplement No. 1"—that being the number assigned to the Petersen application.

The appellants argue that when a denial of the application to show cause was entered, it effectively put an end to the State Transfer certificate and State Transfer was not then a carrier under the act; that the Petersen-State Transfer application therefore became moot and should have been dismissed; and that the commission was without authority to merge it with the Petersen application. The effect of the order entered was to deny that application and to grant the certificate of convenience and necessity under the Petersen application. The authority of the commission to do that is not challenged by this assignment.

Appellants' next contention is that the order of the commission is unreasonable and arbitrary because it has no rational basis in the evidence, is unsupported by requisite findings, and is destitute of evidential integrity.

It is necessary to restate that we are here dealing with an appeal from the order entered in the Petersen-State Transfer and Petersen applications. In that order the commission found that the examiner's report and recommendations should be approved "insofar as it concerns said applications"; that present and future public convenience and necessity require the proposed service to the extent set out in the findings; that applicant Petersen is fit, willing, and able to properly perform the proposed service; and that a certificate of public convenience and necessity should be issued to Petersen, subject to such further orders as the commission may find necessary in the future in the public interest. The validity of the order in Nielsen-Motor Freight is not before us in this appeal.

The argument here is that if the granting of the Nielsen-Motor Freight application would leave the ship-

ping public without proper motor carrier service, the application should have been denied, and, conversely, if the granting of that application did not have that effect, then there was no warrant for granting the Petersen application; that the public need for the Petersen certificate arose as a result of the action of the commission in granting the Nielsen-Motor Freight application; that there is radical error in granting a transfer in Nielsen-Motor Freight because shippers prefer a coordinated railroad-motor freight service and in granting a certificate to Petersen because shippers prefer an independent motor carrier service; that since the evidence shows that these appellants are meeting the reasonable and normal requirements of the shippers, there is no justification for granting the certificate to Petersen; and that the findings of the examiner are mutually repugnant and contradictory.

We are in effect asked to review the record de novo and make independent findings, and on that basis hold the order involved in this appeal to be unreasonable and arbitrary.

It seems to us that appellants oversimplify the shipper, his problems and requirements, and in effect deal with all shippers as in one group. There is ample evidence here that there are shippers who prefer and use the coordinated rail motor service; there are other shippers who prefer and use the one carrier dock-to-dock or "peddle" service; and there are other shippers who prefer and use the single, multiple, or interlined service offered by the appellants. Some prefer and require refrigerated service; others do not. Some prefer and require dock-to-dock service; others do not. This argument of appellants requires us to consider together the action taken by the commission in the Petersen and Nielsen-Motor Freight applications. So considered, it is patent that the action taken is one that reasonably will develop and preserve a highway transportation system properly adapted to the needs of the commerce

of this state, and is in accord with the legislative policy as declared in the act under which the commission acted. § 75-222, R. R. S. 1943. The duty of making that determination rests with the commission. We do not find the solution of the problems presented by these applications to be unreasonable or arbitrary.

Finally, appellants, relying on our holdings in the case of In re Application of Moritz, *ante* p. 206, 43 N. W. 2d 603, contend that before a certificate of convenience and necessity can be lawfully issued to Petersen, they, as existing carriers, should be given the opportunity to render the service, and that they are willing and able to provide any additional equipment and service to meet the reasonable requirements of the shipping public, and hence the order appealed from cannot stand.

The rules relied upon are:

"In determining the issue of public convenience and necessity, controlling questions are whether the operation will serve a useful purpose responsive to a public demand or need; whether this purpose can or will be served as well by existing carriers; and whether it can be served by applicant in a specified operation without endangering or impairing the operations of existing carriers contrary to the public interest."

"The method of regulating public utilities in Nebraska is based upon the theory of regulated monopoly rather than competition and, before one carrier is permitted to take the business of another already in the field, it must be shown that the existing carrier is rendering unsatisfactory service and is unable or unwilling to provide adequate transportation facilities and that the operation proposed by the new carrier will better serve the public convenience and necessity." In re Application of Moritz, *supra.*

The commission here was not dealing with a case where an existing carrier offered to render the service for which a competing carrier sought authority. Here State Transfer had had a certificate of convenience and

necessity and had rendered service which the evidence showed had met a need of commerce. Here Nielsen had for many years rendered a service in the same general commodity field that likewise met a need of commerce. Here appellants, operating independently under a variety of certificates as to routes and authority, had been competing with State Transfer and Nielsen and rendering a service that met a need of commerce. Here State Transfer, because of bankruptcy and inability to operate, was out of business. Here Nielsen proposed by the Nielsen-Motor Freight application to limit its hauling largely to the restricted Motor Freight application. Here the appellants proposed that the service which they had rendered and were willing to render under then existing certificates was sufficient to meet the needs of commerce in this state. Here there was evidence that the service which the appellants rendered, either alone or in connecting or interlined service, was sufficient to meet the needs of a substantial segment of the shipping public. Here, also, there was evidence that a substantial segment of the shipping public preferred the one-carrier service, such as had been had from State Transfer and was then to be had from Nielsen. They gave persuasive reasons for their selection of one-carrier service over the other kind or kinds. Here the commission knew that the public had used extensively the type of service which Petersen proposed to render, although having at all times available the service rendered by appellants. Here the over-all effect of the orders entered was to put Petersen generally in the competing place held by State Transfer and Nielsen. It did not disturb in a substantial way the available carrier service. Had the commission denied the Peterson application then, the one-carrier service of Nielsen being eliminated, the shipping public would have been compelled to accept the materially different service of appellants whether they willed or not.

Under these circumstances the commission obviously

determined that application met the tests as to public convenience and necessity and that the operation proposed by Petersen would better serve the public convenience and necessity than would that being rendered and proposed to be rendered by the appellants. We find no sound basis upon which to place a holding that the commission's order was unreasonable or arbitrary.

The order of the commission has ample evidentiary support in the record and resulted from the exercise of powers within those vested in the commission. Under these circumstances we are without authority to interfere.

AFFIRMED.

GRACE HENDRIX, APPELLANT, V. JUSTINA VANA ET AL., APPELLEES.

45 N. W. 2d 429

Filed January 5, 1951. No. 32856.

1. **Automobiles: Negligence.** 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.
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.
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.

4. **Negligence.** 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.
5. **Negligence: Automobiles.** The negligence of a husband while driving an automobile, in which his wife is a guest, may not be imputed to her.

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

Kennedy, Holland, DeLacy & Svoboda, Samuel P. Caniglia, and *L. J. Tierney,* for appellant.

Webb & Kelley, for appellees.

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

SIMMONS, C. J.

This is an action for damages brought by a guest passenger in an automobile against the owner and the driver of a truck. The injuries claimed resulted from a collision of the two vehicles. The cause was tried to a jury resulting in a verdict for the defendant. Plaintiff appeals, presenting alleged errors in the instructions. We reverse the judgment and remand the cause.

Before trial the action was dismissed as to Justina Vana.

The accident happened on 24th Street south of N Street in South Omaha. Distances stated were given by the witnesses as approximations. The street is 60 feet wide. There are north- and south-bound car tracks in the street, being 15 feet from outer rail to outer rail. It is 20 to 22 feet from the east rail to the curb line. The sidewalk on the east side of the street is 20 feet wide. There is a garage on the east side of 24th Street with a driveway about 100 feet south of the intersection of N Street and 24th Street. The driveway is 15 feet wide.

At the time of the accident there were cars, parked

diagonally, along the street south of the driveway. There were no cars parked north of the driveway. There was a three-wheeled motorcycle standing somewhere in that north 100 feet.

The accident happened about noon on March 20, 1948. The weather was clear and mild; the pavement, dry; the traffic, heavy. There is little dispute in the evidence. Plaintiff's husband was the owner of a Ford Tudor. He was driving north in the car, with his wheels astride the east car track. His speed was five to ten miles an hour. He was looking for a parking place. There was at least one moving car ahead of the Ford about 15 feet. Plaintiff was riding in the right front seat, opposite her husband, sitting with her back somewhat to the right side of the car, and facing toward her husband. She was paying no attention to traffic conditions. Her husband was going slowly and nothing occurred to cause her to be concerned.

Defendant, the driver of the truck, backed into the car in which plaintiff was riding. Defendant's truck is described as a dump truck. There was a metal guard built up over the cab to protect it from materials dumped into the truck. This guard prevented any view through the rear of the cab, with the exception of three small holes, each 9/16 of an inch in diameter. The left rear corner of the truck body struck the car at the right door, breaking the glass and the handle, pushing the door in, and injuring the frame.

Plaintiff's husband testified as to the cause of the accident. He said that when he got to a point about 15 feet south of the driveway he observed a truck standing on the driveway, its rear wheels at about the curb. He paid no further attention to it but rather watched the car and the road ahead. He did not see the truck move or hit his car. He heard no signal by horn or otherwise. Neither did the plaintiff. Plaintiff gave no warning of danger. After the collision the

Ford stopped within a foot of the point of impact with a part of the truck body sticking into the car.

Defendant testified that he backed the truck out of the garage, stopping with the rear end of his truck at the east edge of the sidewalk, and there signalled with his horn to pedestrians. He did not thereafter sound his horn. He then backed his truck west for 40 feet so that it came to a place where its front wheels were at the curb line and the truck was generally in a direction southwest-northeast. He said he stopped there in the position of a car parked diagonally to the curb. His truck remained in that position while he looked to the south. He could see a distance of 200 feet and saw two cars coming from the south. He waited while those cars passed, looked to the north to be sure they had, and then looked again to the south and saw no cars coming. He then put his truck into the lower of two reverse gears, cramped his wheels slightly so as to get in a position to drive north, eased the truck out into the street at a speed of less than a mile an hour, and, after moving four or five feet, heard the tinkling of breaking glass caused by the impact. He testified that the Ford moved several feet beyond the point of impact before stopping. Plaintiff suffered injuries.

The trial court submitted the issue of contributory negligence to the jury and gave an instruction on comparative negligence. In one instruction the court set forth the elements of proof required of plaintiff before she could recover, and that if plaintiff had proved those elements, the verdict should be for the plaintiff "unless you find the plaintiff herself to have been negligent or the driver of the car in which the plaintiff was riding to have been negligent to an extent to defeat her recovery * * *." Plaintiff contends that this instruction submitted imputed negligence to the jury.

Plaintiff assigns these instructions as error.

Defendant argues that plaintiff was negligent in sitting sidewise in the car, her back to the right, and in

so doing must have obstructed her husband's vision. He further argues that plaintiff was negligent in not seeing defendant's truck standing or moving, in not warning of danger, in not watching the traffic, and, in short, in riding without paying attention to what was going on.

In Costello v. Hild, 152 Neb. 1, 40 N. W. 2d 228, we restated the rules applicable here as follows:

"The duty of a guest riding in an automobile is to use care in keeping a lookout commensurate with that of an ordinarily prudent person under like circumstances. The guest is not required to use the same degree of care as devolves upon the driver. If the guest perceives danger, or if at certain times and places should anticipate danger, he should warn the driver. Ordinarily, the guest need not watch the road or advise the driver in the management of the car."

"It is the duty of an invited guest 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."

"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."

Weighed by these rules we see no basis in the evidence for a holding that plaintiff was guilty of contributory negligence. Certainly a truck standing outside the line of travel of a slowly moving car, 15 to 20 feet according to plaintiff's husband or four or five feet ac-

cording to defendant, does not present a situation that requires a guest to constantly watch it anticipating that someone without warning, as admittedly was done here, would back it out into and against the flow of traffic, and into the side of a car in which a guest is riding.

The rule is: "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, *supra*.

The rule also is: "The negligence of a husband while driving an automobile, in which his wife is a guest, may not be imputed to her." Remmenga v. Selk, 150 Neb. 401, 34 N. W. 2d 757.

The giving of the instructions about which complaint is here made was prejudicial error.

The remaining assignments of error need not be determined.

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

JESSE E. SPENCER ET AL., APPELLANTS, V. VILLAGE OF WALLACE, NEBRASKA, ET AL., APPELLEES.

45 N. W. 2d 473

Filed January 5, 1951. No. 32868.

1. **Municipal Corporations.** A village, city, or county is a municipality within the provisions of the Revised Airports Act and the powers and authority granted by it may be exercised by the state.
2. **Eminent Domain: Municipal Corporations.** A village may not condemn real estate for airport purposes by virtue of the statute providing a method of condemnation by cities of the first class, when it alone is interested in acquiring the property, and its charter provides a different method of procedure for condemnation of real estate needed by it.
3. ——: ——. The provisions of the Revised Airports Act that if but one municipality is involved and its charter pre-

scribes a method of acquiring property by condemnation, proceedings shall be as provided by its charter is unambiguous and mandatory that a village, provided with a method of condemnation by its charter and being alone interested, may only condemn real estate for airport purposes by the method prescribed by its charter.

4. Statutes. A word in the singular number may be construed to include the plural when necessary to effectuate the intended meaning or scope of legislation. The word "municipality" used in the first sentence of the Revised Airports Act may include more than one municipality.
5. **Eminent Domain: Municipal Corporations.** The authority granted by the Revised Airports Act to municipalities to resort to proceedings prescribed by sections 16-602 to 16-604, R. S. 1943, is limited to (1) joint condemnation of real estate for airport purposes by two or more municipalities, and (2) to condemnation of real estate for airport purposes by one municipality, the charter of which does not contain a method of taking property by the exercise of eminent domain.
6. **Eminent Domain.** Since the power of eminent domain is an attribute of sovereignty and inherent in the state, only those agencies to whom the Legislature has delegated the power can exercise the right, and it must be resorted to only on the occasion, in the mode or manner, and by the agency prescribed by the Legislature.
7. **Eminent Domain: Municipal Corporations.** Condemnation is a matter of state-wide concern, and a provision of a charter of a city which has adopted a home rule charter contrary to or in conflict with a statute on the subject is void.

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

Beatty, Clarke, Murphy & Morgan, for appellants.

Crosby & Crosby, for appellees.

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

BOSLAUGH, J.

Appellants sought an injunction to prevent appellees from attempting to appropriate, by condemnation for airport purposes, land of appellants as authorized by

the provisions of an ordinance of the Village of Wallace, Nebraska.

The district court denied appellants relief and dismissed the case. This is an appeal from the judgment of dismissal.

The facts are stipulated. Appellants are the owners and in possession of the southwest quarter of Section 14, Township 10 North, Range 34 West of the 6th P. M., in Lincoln County, Nebraska. The inhabitants of the Village of Wallace do not exceed one thousand. It is organized as an incorporated village and its charter is the statutes of the state relating to villages. It desired to acquire for airport purposes the land of appellants, and had unsuccessfully negotiated with them for the purchase of it. Thereafter the village, in the manner and form provided by law, passed and published an ordinance purporting to appropriate and condemn the land for the purposes stated, appointing appraisers to assess the damage to appellants because of the appropriation, fixing the time and place of the meeting of the appraisers, the assessment of the damage by them, and the making of a report thereof, providing for publication of the ordinance and delivery of a copy of the paper in which the publication was made to each of the owners of the land who resided and were found in the village. Wallace was the only municipality in any manner interested, involved, or concerned in the acquisition of the real estate. The appraisers named in the ordinance would have at the time, place, and in the manner stated therein, viewed the real estate and made and returned to the village in writing an assessment of damage sustained by appellants by reason of the appropriation of the real estate, if they had not been prevented by order of the court in this case. The village intended to take possession of the premises, to dispossess appellants therefrom, and to deprive them of the use thereof by the exercise of the power of eminent domain by causing condemnation thereof as provided

by the ordinance at as early a time as could lawfully be done. It had secured approval by the Civil Aeronautics Administration of the real estate for the airport site.

The Village of Wallace asserts the only procedure available to it to appropriate real estate, against the wishes of the owners thereof, for airport purposes is that provided for cities of the first class authorizing them to condemn real estate for public purposes. §§ 16-602 to 16-604, R. S. 1943. It claims this results from the provisions of the Revised Airports Act. §§ 3-201 to 3-238, R. S. Supp., 1949. It instituted and conducted the proceedings involved in this case on that basis until this litigation intervened to stay them.

The Revised Airports Act contains these provisions: "Property needed by a municipality for an airport * * * or for other airport purposes may be acquired by purchase, * * * or other means, if such municipality is able to agree with the owners of said property on the terms of such acquisition, and otherwise by condemnation in the same manner as is provided by sections 16-602 to 16-604, full power to exercise the right of eminent domain for such purposes being hereby granted every municipality both within and without its territorial limits. If but one municipality is involved and the charter of such municipality prescribes a method of acquiring property by condemnation, proceedings shall be had pursuant to the provisions of such charter and may be followed as to property within or without its territorial limits." § 3-203, R. S. Supp., 1949. Municipality is defined in the act as village, city, or county. § 3-201, R. S. Supp., 1949.

The method of condemnation by cities of the first class requires that: "When it shall become necessary within or without the city to appropriate private property for the use of the city, such appropriation shall be made by ordinance. There shall be appointed by the council, in the ordinance making the appropriation, three

disinterested freeholders of the city to assess the damages, * * *. They shall meet at the time and place fixed in such ordinance, and, * * * shall on the same day view the property appropriated, and on the same day, or as soon thereafter as practicable, make, sign and return to the city clerk in writing a just and fair assessment of the damages for each piece or lot of property, the whole or part of which is so appropriated." § 16-602, R. S. 1943.

The charter of an incorporated village prescribes a method of acquiring property by condemnation: "* * * villages shall have power * * * to take private property for public use * * *. The power of eminent domain shall be exercised in the manner provided for condemnation proceedings by railway companies." § 17-559, R. S. 1943.

The manner of condemnation by railway companies is by proceedings in county court, notice to and the right of all interested parties to be heard at the time the damages are assessed for the appropriation, the right of appeal to the district court and a trial of all claims and rights de novo, and a right of appeal to this court. § 74-309, R. R. S. 1943.

The position of appellants is that only one municipality, the Village of Wallace, is involved and concerned in acquiring the real estate in this instance, that the charter prescribes a method of acquiring property by condemnation, that the part of the Revised Airports Act that provides if but one municipality is involved and its charter prescribes a method of acquiring property by condemnation the proceedings shall be as provided by its charter is controlling and mandatory, and that the attempted condemnation herein is void. Appellants say the village may only acquire the real estate for the desired purpose by condemnation proceedings as provided by its charter. § 17-559, R. S. 1943.

Appellees contend that the language of the Revised Airports Act that "If but one municipality is involved

and the charter of such municipality prescribes a method of acquiring property by condemnation, proceedings shall be had pursuant to the provisions of such charter," (§ 3-203, R. S. Supp., 1949), refers to and includes only a municipality that has adopted and has a home rule charter; and that all other municipalities may only condemn property for airport purposes by complying with sections 16-602 to 16-604, R. S. 1943.

A determination that an incorporated village may not condemn real estate for airport purposes by virtue of the provisions of the statute authorizing condemnation by cities of the first class, where it alone is interested in acquiring the real estate and its charter provides a different method of procedure for acquiring property by condemnation will be decisive of this case.

All the rights, powers, and authority granted by the act may be exercised by a village, city, county, or the state. §§ 3-201 and 3-221, R. S. Supp., 1949. The power of a municipality by virtue of this act to condemn real estate for airport purposes may be exercised jointly by two or more municipalities within or without the territorial limits of either or any of them, or within or without the State of Nebraska, or by the State of Nebraska or any municipality in the state jointly with some other state or a municipality in some other state. §§ 3-221 and 3-222, R. S. Supp., 1949. Two or more municipalities may agree with each other for joint action in establishing an airport (§ 3-223, R. S. Supp., 1949), and for joint ownership and operation of airports. § 3-224, R. S. Supp., 1949. It is provided that: "Condemnation proceedings shall be instituted, in the names of the municipalities jointly, and the property acquired shall be held by the municipalities as tenants in common. The provisions of subdivision (2) of section 3-203 shall apply to such proceedings." § 3-229, R. S. Supp., 1949. Subdivision (2) referred to in the quotation (Laws of Nebraska 1945, c. 34, § 2, p. 157) is now section 3-203 of the act.

It is certain that if two municipalities of different classes, such as a village and a city of the first class, were to be authorized to jointly appropriate real estate for airport purposes, additional legislation would be required to provide by what method it might be accomplished. Otherwise it would not be certain whether it should be done by complying with the condemnation statute relating to a village, or the one in reference to cities of the first class, or neither of them, or at all. Inherent in this legislation was the necessity for a method for condemnation applicable to any situation resulting from the rights created thereby and not then provided for by the laws of the state.

If a county and a village were to seek appropriation of real estate for airport purposes, as the terms of the act provide they may, in the absence of provisions to accomplish it, resort could not be made to either the statute allowing the county to condemn (§ 23-326, R. S. Supp., 1949), or the one conferring the power upon the village (§ 17-559 R. S. 1943, and § 74-309, R. R. S. 1943) with any confidence or certainty of correctness of procedure or result. The former requires the county judge to select and designate three appraisers to determine and assess the damage resulting from a condemnation by the county and the latter provides for the appointment of six appraisers by the county judge to fix the damage caused by an appropriation by the village.

If the state should desire to condemn real estate jointly with a village, the difficulty would be that the state is required to file a plat in the office of the clerk of the district court of the county where the land lies, and the Governor shall then appoint six disinterested freeholders, residents of the state, not more than two of whom shall be residents of the county, as appraisers, (§ 83-602 et seq., R. R. S. 1943) but the procedure for villages requires that six disinterested freeholders be appointed by the county judge, and all of them must be residents of the county. § 17-559, R. S. 1943 and 74-309, R. R. S. 1943.

If the construction urged by appellees was adopted, Hastings, a city of the first class without a home rule charter, would be required under the first sentence of section 3-203, R. S. Supp., 1949, to condemn real estate for an airport site by resort to the method provided by statute for a city of that class, but Grand Island, a city of the same class with a home rule charter, is enjoined by the act to proceed in accordance with its charter, a thing it is prohibited from doing by determination made by this court about two years before the Revised Airports Act was passed, that condemnation is a matter of state concern and in all cities of the first class the procedure therefor must be uniform and charter provisions must give way to the general laws governing it. Nagle v. City of Grand Island, 144 Neb. 67, 12 N. W. 2d 540.

This act authorizes a village, city, county, and the state to jointly appropriate real estate for the purposes recited therein. It would be impossible to have a lawful and effective condemnation without a provision specifying a method therefor. Similar situations to those above supposed might be multiplied but what has been said is sufficient to demonstrate the reason that it is provided in the first sentence of the act that property needed by a municipality for an airport or for other airport purposes may be acquired by purchase if possible, otherwise by condemnation in the manner provided by sections 16-602 to 16-604, full power to exercise the right of eminent domain being granted for such purposes. § 3-203, R. S. Supp., 1949. The word "municipality" in this sentence was intended to and may include more than one municipality as defined in the act. It is permissible and not infrequent to construe words in the plural number to include the singular, and vice versa. § 49-802, R. S. Supp., 1949. The authority granted by this act to resort to sections 16-602 to 16-604, R. S. 1943, is limited to (1) joint condemnation of real estate for airport purposes by two or more municipalities, or (2) condemnation of real estate for airport purposes by

one municipality, the charter of which does not contain a method of taking property by the exercise of eminent domain.

It is also clear and certain that it was not intended to interfere with the existing statutory method of condemnation in all instances free from complications arising from the unusual and broad grants of power made by the act. This is evidenced by the second sentence thereof that "If but one municipality is involved and the charter of such municipality prescribes a method of acquiring property by condemnation, proceedings shall be had pursuant to the provisions of such charter * * *." § 3-203, R. S. Supp., 1949. The Village of Wallace is the only municipality concerned in the taking of the property. Its charter furnishes a method of acquiring private property needed by it for any public purpose, and the Revised Airports Act is unmistakable in its mandate that proceedings by the village to condemn real estate for an airport "shall be pursuant to the provisions of such charter * * *." This is plain, unambiguous, and mandatory. Proceedings to subject the property of another for public use under the doctrine of eminent domain must be conducted in the manner prescribed by the statute delegating the power. State ex rel. Nelson v. Butler, 145 Neb. 638, 17 N. W. 2d 683; Goergen v. Department of Public Works, 123 Neb. 648, 243 N. W. 886; Consumers Public Power District v. Eldred, 146 Neb. 926, 22 N. W. 2d 188; State v. Several Parcels of Land, 79 Neb. 638, 113 N. W. 248; 29 C. J. S., Eminent Domain, § 215, p. 1140. In State ex rel. Nelson v. Butler, *supra,* this court said: "Since the power of eminent domain is an attribute of sovereignty and inherent in the state, only those agencies to whom the legislature has delegated the power can exercise the right and it must be exercised only on the occasion, in the mode or manner, and by the agency prescribed by the legislature."

The judgment of the district court should be, and is hereby reversed, with directions to the district court

to render and enter a decree in this case enjoining appellees, and all persons acting for them, and each of them, from in any manner going upon or interfering with the ownership, possession, and use of appellants of the real estate involved herein because of any action heretofore taken or proceedings had by the Village of Wallace, Nebraska, or at all, unless and until they have acquired by due process of law a right to do so.

REVERSED AND REMANDED WITH DIRECTIONS.

MINNIE BRUDEVOLD, APPELLANT, V. EDWARD W. BRUDEVOLD, APPELLEE.

45 N. W. 2d 443

Filed January 5, 1951. No. 32874.

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; 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.

APPEAL from the district court for Thayer County: STANLEY BARTOS, JUDGE. *Modified and affirmed.*

Harvey W. Hess and *John L. Richards,* for appellant.

Robert B. Waring, and *Baldwin & Pike,* 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 Thayer County by Minnie Brudevold against Edward W. Brudevold. The trial court entered a decree awarding plaintiff an absolute divorce, fixed the property rights of the parties, and awarded plaintiff alimony in the sum of $3,025. From this decree plaintiff appealed.

The only question presented by this appeal is the appellant's contention that the amount of alimony awarded her is inadequate. We have often set forth what should be considered in determining this question. One of the most recent cases is Kroger v. Kroger, *ante* p. 265, 44 N. W. 2d 475. Therein we set forth the rule as follows: "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; 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." See, also, Strasser v. Strasser, *ante* p. 288, 44 N. W. 2d 508; Nickerson v. Nickerson, 152 Neb. 799, 42 N. W. 2d 861; Peterson v. Peterson, 152 Neb. 571, 41 N. W. 2d 847.

The parties hereto are residents of Hebron, Nebraska, but were married at Beloit, Kansas, on March 26, 1945. After their marriage they continued to make their home in Hebron where appellee operates an auto parts business.

They started married life in the home of appellant. She owned this home and had been living therein prior to the marriage.

At the time of the marriage appellant was about 46 years of age. She had previously been married twice. The first time was in 1920 to Carl Uphoff. To this marriage one daughter, Doris, was born. Uphoff died in 1926. She thereafter, in 1930, married John George. This marriage ended in 1932 by divorce. To this second marriage one son, Donald, was born. Appellee had never been married before. He was about 54 years of age at the time. There are no children of this marriage.

The two children, Doris and Donald, lived with these parties after the marriage; Doris for about a year while she was teaching in the public schools of Hebron and Donald until he joined the armed forces on May 10, 1948.

They lived in appellant's house until April 1946. At that time they moved into the apartments located on the second floor of the building which appellee owned and in which he conducted his business. They lived there until they separated on March 26, 1949. During this time appellant helped run the business as appellee was, by the nature of the business, gone from Hebron on either two or three days of each week.

At the time of their marriage appellant owned the home already referred to and the household furniture and furnishings located therein. She also had a note for $1,000. She sold the home for $4,150 in April 1946 about the time they moved into the apartments above the business. She furnished the apartments with the furnishings and furniture from her home, selling some surplus. She also received $800 from the collection of the note. During their married life she bought an automobile for $1,250. At the time of the divorce she had $1,875 invested in government bonds, the car she bought, and the household furniture and furnishings that were left. It should here be said that she paid $525 for a lot on which the parties were building a home

at the time the marriage broke up. This lot was given to appellee.

At the time of their marriage appellee owned his business and the building in which it was located; also a farm, cash in the sum of $2,400, money loaned to others of $1,100, and accounts receivable of $500. All of his property at that time was reasonably worth about $18,000.

The business which appellee conducted seems to have been reasonably successful and it appears he is a good businessman. Just what the annual net income was is not clearly set forth but it would appear to have averaged between $4,000 and $4,500 a year. At the time of the divorce his net assets were around $18,500.

While the question of appellant's right to the divorce is not here questioned we take into consideration the nature of appellee's conduct which constitutes the grounds upon which appellant is entitled thereto. The grounds were extreme cruelty, both physical and mental. In this respect it appears appellee was in the habit of using intoxicating liquors and very frequently to excess. When he used it to excess he became mean and on occasion physically mishandled appellant and caused her physical injury. From these injuries she suffered severe after effects as will be hereinafter more fully set forth.

At the time of the marriage, or shortly before, appellant had some trouble with the fingers of one hand due to poor circulation. She apparently completely got over this condition. Shortly after they moved into the apartments in April 1946 she fell part way down the steps leading to the first floor. As a result of this fall she hurt her arm and shoulder. However, she apparently completely got over the results of this accident. Then in February 1949, shortly before they separated, appellant hurt her back and shoulder when she was mishandled by appellee. On the first occasion he caused her to fall backward onto a gas stove. The condition caused by these two injuries gradually became worse

until she was confined to a hospital on October 31, 1949. She stayed in the hospital about 15 days. She was again hospitalized on January 19, 1950, for a period of between four and five weeks. Her condition is due to injury to her back and requires the wearing of a neck brace when she is up and to be in traction when she is retired. The medical testimony is that it will be permanent to a certain degree. This condition considerably handicaps her ability to work and also to care for herself.

During the pendency of this action, which was filed on March 28, 1949, appellee has been required to pay temporary alimony both by the trial court and this court. It also appears that during this same period appellee has been required to pay her doctor, nursing, and hospital bills.

The decree provides for the division of property by each keeping their own, except for the lot on which the house was being constructed. This lot appellant had purchased for $525 but, by the court's decree, it is given to appellee. In the division of property we find appellee should have been required to pay appellant that amount. In view of all the record, particularly the physical condition in which appellant finds herself, we think the alimony allowed is too low and should be increased to $4,500 payable $75 a month until fully paid.

We therefore find the amount allowed appellant as alimony should be increased from $3,025 to $5,025, which latter amount includes the item of $525 awarded appellant for the lot given appellee. Of this amount the item of $525 should be paid within 30 days after the modification of its decree by the trial court to comply herewith. The balance of $4,500 is to be paid in monthly installments of $75 commencing on the first of the month following the modification of its decree by the trial court in accordance herewith and is to continue until the full amount has been paid. These payments are to be made to the clerk of the district court.

We return the cause to the district court for Thayer County with directions to the trial court to modify its decree in accordance herewith. Appellant is allowed an attorney fee of $200 for services in this court, same to be taxed as costs. Costs of this appeal are to be taxed to appellee.

MODIFIED AND AFFIRMED.

MYRTLE FITZSIMONS, APPELLEE, V. VIRGINIA R. FREY, APPELLANT, WYONA FREY, APPELLEE.

45 N. W. 2d 603

Filed January 12, 1951. No. 32796.

1. **Trover and Conversion.** An action in trover for the conversion of personal property cannot be maintained unless title, absolute or special, or right to immediate possession at the time of the alleged conversion is in the plaintiff.
2. ———. In order to maintain an action for conversion of chattels, a party must have had actual possession of the property, or the right to immediate possession, at the time of the conversion.
3. **Appeal and Error.** This court will not disturb the findings of a jury unless on examination of the record it may be said that such findings are not supported by any evidence or are clearly wrong.

APPEAL from the district court for Lancaster County: JOHN L. POLK, JUDGE. *Affirmed in part, reversed in part, and remanded with directions.*

Ginsburg & Ginsburg, for appellant.

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

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

YEAGER, J.

The action here as it comes to this court is by Myrtle Fitzsimons, plaintiff, against Virginia R. Frey and Wyona Frey, defendants. It is in two causes of action. By the

first cause of action plaintiff charges that the defendants on April 4, 1948, converted personal property of the plaintiff of the value of $18,384.80. On account of this alleged conversion she seeks to recover this amount with interest.

The second cause of action is for damages to real property.

A verdict was directed in favor of the defendant Wyona Frey on both causes of action. A verdict was returned in favor of plaintiff and against the defendant Virginia R. Frey on the first cause of action for $3,500, and in favor of Virginia R. Frey and against the plaintiff on the second cause of action. Judgment was entered on the verdict.

The defendant Virginia R. Frey has appealed from the judgment on the first cause of action. The plaintiff has cross-appealed from the direction of the verdict in favor of the defendant Wyona Frey on the two causes of action and from the judgment against her on the second cause of action.

For convenience hereinafter, where separate identification is required, the plaintiff will be referred to as Mrs. Fitzsimons, the defendant Virginia R. Frey as Mrs. Frey, and the other defendant as Wyona Frey.

The incidents, to the extent necessary to be stated here, are that prior to April 4, 1948, Mrs. Frey and Mrs. Fitzsimons were negotiating for the exchange of real estate and the contents of the buildings which were situated on the properties. The buildings and the contents of the properties which Mrs. Fitzsimons was proposing to convey to Mrs. Frey are of no concern here insofar as description is concerned. The property of Mrs. Frey is located at the southeast corner of Twenty-seventh and Van Dorn Streets in the city of Lincoln, Nebraska. It consists of a large lot, a large residence, and its contents, or most of its contents.

The property at the time was occupied by Mrs. Frey as a residence except two apartments therein, one of

which was occupied by Wyona Frey and the other by a tenant. The furniture and furnishings in Wyona's apartment belonged to her.

On April 4, 1948, Mrs. Fitzsimons and Mrs. Frey prepared and signed the following memorandum of agreement:

"Between Vergina Frye and Myrtle Fitzsimons agreement on furniture.

Party 2. Fitzsimons agrees To Leave ~~refrigerator~~ and Stove on 2nd floor Electric range In Kitchen also deep freeze White Handles.

Mrs. Frey takes 2 bedroom sets the furniture Known as In Wyona's apt also her refrigerator. Also her desk and Duano. rose. this is our personal agreement between we two

Virginia Frey
Myrtle Fitzsimons

April 4 - 1948"

After this instrument was executed, on April 5 or 6, 1948, these two parties had a conference with their attorneys and arranged to have a contract drawn for the exchange of their properties. This contract was executed and delivered on April 20, 1948.

The contract was an executory one for the exchange of real estate and in it no mention was made of furniture, furnishings, or any other kind of personal property contained upon any of the real estate described. It provided for abstracts showing merchantable title, time for clearance of title if it was not clear, the obligations of the parties with reference to the exchange, and for closure and delivery of instruments of transfer on or before May 1, 1948. The transfer did not take place however until May 5, 1948.

On or about April 22, 1948, pursuant to mutual understanding Mrs. Frey proceeded to and did remove from the house she had contracted to convey to Mrs. Fitzsimons and on the same day Mrs. Fitzsimons moved into this house.

The claim of Mrs. Fitzsimons' first cause of action is that by the instrument quoted herein and on the date thereon appearing she became the owner of the personal property described in the petition and that this property was removed by Mrs. Frey on or about April 22, 1948, thus she converted the same. Her cause of action is in conversion.

The defendants duly pleaded among other defenses that there was no conversion and there could have been none for the reason that at the time of the alleged taking and removal Mrs. Fitzsimons did not have title to or ownership or the right to possession of the property, the substantial theory being that title to the property described, if in fact it existed, did not and could not have passed until May 5, 1948, when the exchange of real estate took place. The basis of this contention is that the conveyance of the contents of the house was a part and incident of the transaction relating to the real estate and that everything with regard to both remained executory until May 5, 1948.

The issue of conversion was submitted to the jury and as indicated the verdict was favorable to the plaintiff and against Mrs. Frey.

At the close of plaintiff's evidence and again at the conclusion of all of the evidence the defendants moved for a directed verdict on the first cause of action on the ground that the evidence was insufficient to sustain a finding that there had been a conversion of this property. These motions were overruled. The rulings on these motions were assigned as error in a motion for new trial and a motion for judgment notwithstanding the verdict. The assignment is preserved in the assignments of error in this court.

The first question for consideration here therefore is that of whether or not a verdict should have been directed in favor of the defendants on the first cause of action.

It is well settled in order to maintain an action for

conversion a party must have actual possession of the property or the right to have immediate possession. This court said in Kimball v. Cooper, 134 Neb. 536, 279 N. W. 194: "An action in trover for the conversion of personal property cannot be maintained unless at least either title, absolute or special, or right to immediate possession at the time of the alleged conversion is in the plaintiff."

In Burchmore v. Byllesby & Co., 140 Neb. 603, 1 N. W. 2d 327, it was said: " 'To maintain an action for conversion of chattels, a party must have actual possession of the property, or the right to immediate possession.' " Obviously this court in employing this language, which was first employed in Coulter v. Cummings, 93 Neb. 646, 142 N. W. 109, meant to say that to maintain an action for conversion of chattels a party must have had actual possession of the property, or the right of possession at the time of the conversion.

In 53 Am. Jur., Trover and Conversion, § 68, p. 863, it is said: "The general rule is that an action for conversion is not maintainable unless the plaintiff, at the time of the alleged conversion, is entitled to the immediate possession of the property. An interest in the property which does not carry with it a right to possession is not sufficient; the right to maintain the action may not be based upon a right to possession at a future time."

In 65 C. J., Trover and Conversion, § 92, p. 57, it is said: "The correct rules appear to be that: It is necessary and sufficient that plaintiff shall have had either possession or the right to possession at the time of the alleged conversion; he must have had at least a right to immediate possession; and as a right of possession ordinarily depends on some title or right of property, general or special, he must have had, generally speaking, either actual possession or ownership and right of possession."

It is the contention of plaintiff that by the agreement

quoted herein she became entitled to the immediate possession of this property, the theory apparently being that this represented a transaction separate and apart from and independent of the transfer of the real estate. In her examination in chief she gave some testimony which might be said to equivocally support this theory but in her cross-examination her position in that respect became positive and a complete negation of the theory, and a complete confirmation of the theory of the defendants that the matter of transfer of the personal property was a part of and dependent upon the transfer of the real estate. Her testimony as to this matter is the following: "Q. Mrs. Fitzsimons, with reference to this Exhibit 1 and 1-A, you are familiar with the instruments I am referring to, are you not? A. That's right. Q. Were you trading a stove, electric range, and a deep-freeze for Mrs. Frey's furniture? A. No. Q. Is that the deal? A. No. Q. You mean by that, no, is that right? A. That's right. Q. What were you giving to Mrs. Frey for her promise to give you the furniture as set forth in this Exhibit 1? A. We were trading property and furniture. Q. In other words, then, if I understand it correctly, you wouldn't have made Exhibit 1 unless you would have made Exhibit 2, is that correct? A. Yes. Q. In other words, it was understood Exhibit 1 would have no effect unless and until you made the trade on the real estate, is that right? A. That's right. Q. And if anything were to happen in the meantime that the trade on the real estate wouldn't go through, then of course there wouldn't be anything between you, as far as Exhibit 1 is concerned, is that right? A. That's right. Q. If, for example, Mrs. Frey couldn't have delivered, or didn't have a good abstract of title to her property, and you would have refused to go through with the deal, you would not have wanted to go through with Exhibit 1, is that right? A. That's right. Q. Now I'll ask you, Mrs. Fitzsimons, I don't want to have any mistake about this, whether it

isn't a fact that you had previously stated in giving your deposition, that the furniture deal had nothing to do with the real estate deal? A. She preferred to keep them separate. Q. What I mean is, did you tell Mr. Kier, for example, that the furniture deal had nothing to do with the real estate deal? Is that right? A. In a manner they are connected, yes. Q. But my question was whether you had told Mr. Kier at one time, the two didn't have any connection? A. That's right. Q. And you at one time also told Mr. Kier that as far as the furniture was concerned, it really was a trade of the electric range and deep-freeze for Mrs. Frey's furniture? You say you didn't tell him that? A. No trade like that. Q. And you say you didn't make that statement to Mr. Kier? A. Each depended on the other. Q. That's what I understand now, but I am asking you whether you had formerly told Mr. Kier that the furniture deal didn't have anything to do with the real estate, when Mr. Kier took your deposition? A. I think it has always been said, each depended on the other. Q. Well, let me ask you if you remember this, in Mr. Kier's office at 539 Stuart Building, when your deposition was taken on the 9th day of July, 1948, Mr. Kier asked you this question: 'You say the furniture deal was a separate deal entirely?' And you said, 'That's right.' Do you remember that? A. That's right. Q. And Mr. Kier also asked you this: 'And had nothing to do with the real estate deal whatsoever?' And you said, 'No.' Is that right? A. That's right. Q. But now you want the court and jury to understand that actually the two deals were tied up? A. Each depended on the other. Q. In other words, the furniture deal definitely wouldn't have been given, if the real estate deal wasn't made, isn't that right? A. Yes. Q. And until the real estate deal was completed, you didn't know whether you would even complete your furniture deal, isn't that right? A. We were sure of completion, or we wouldn't have moved. Q. If there had been anything wrong

with the title? A. We would have corrected it. Q. Supposing that wouldn't have been possible? Supposing it developed she didn't own the property, then what would have happened? A. We wouldn't have signed the contract. Q. But it was your understanding the furniture deal depended on the completion of the real estate deal? A. Each depended on the other."

This evidence applied to the legal principles enunciated herein makes clear that the plaintiff had no possession or right of immediate possession of the articles in question, if she ever acquired any such right, on April 4, or April 22, 1948, and that she acquired no such right until May 5, 1948, the date when the transfer of property became effective.

It follows that she may not maintain this action in conversion. The motion for directed verdict should have been sustained and the trial court not having sustained it should have sustained the defendants' motion for judgment notwithstanding the verdict as to plaintiff's first cause of action.

As earlier indicated herein the plaintiff has presented for consideration a cross-appeal. This cross-appeal presents matters dealing with both the first and the second causes of action. In the light of the determination made upon the first cause of action the cross-appeal as to it requires no consideration.

The second cause of action is for damages to the residence at Twenty-seventh and Van Dorn Streets which came to plaintiff in the exchange of properties. The plaintiff substantially contends in this connection that the exterior and interior of the residence were damaged while the defendants were moving therefrom for which damage they are liable.

On this cause of action the court directed a verdict in favor of Wyona Frey. There is no evidence whatever that Wyona Frey had anything to do with the moving or that anything connected with it was under her super-

vision or control. The court therefore properly directed a verdict in her favor.

The issue in this respect as to Mrs. Frey was submitted to a jury and a verdict was returned thereon in her favor. The error assigned in this regard is that the verdict is against the clear weight of evidence and is contrary to the evidence and law.

On behalf of plaintiff there is circumstantial evidence that during moving there was some damage to the exterior of the building and some to the interior occasioned by removal of some of the articles claimed by plaintiff to have been removed in the first cause of action. This was denied by Mrs. Frey and it cannot be said that her evidence is incapable of belief. The question was one for a jury and it cannot be said that the verdict is clearly wrong.

The appropriate rule is that this court will not disturb the findings of a jury unless on an examination of the record it may be said that such findings are not supported by any evidence or are clearly wrong. Keyser v. Allen, 149 Neb. 449, 31 N. W. 2d 309; Willoughby v. Swett, 150 Neb. 258, 34 N. W. 2d 287; Kunkel v. Cohagen, 151 Neb. 774, 39 N. W. 2d 609.

It is concluded therefore that the judgment of the district court as to the first cause of action be and it is reversed and the district court is directed to render judgment notwithstanding the verdict on said cause of action in favor of the defendants.

It is further concluded that the judgment as to the second cause of action be and it is affirmed.

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

GERALD V. INSLEE ET AL., APPELLANTS, V. THE CITY OF BRIDGEPORT, NEBRASKA, ET AL., APPELLEES.

45 N. W. 2d 590

Filed January 12, 1951. No. 32814.

1. **Municipal Corporations: Electricity.** Section 18-412, R. S. 1943, authorizes any city or village to construct, purchase, or otherwise acquire an electric light and power plant and real and personal property needed or useful in connection therewith, and pay the cost thereof by the issue and sale of revenue bonds or debentures or by pledging and hypothecating the revenue and earnings of any such plant owned or to be owned by such city or village only if the proposition is first submitted to the electorate and approved by a majority voting thereon.
2. ———: ———. A submission by a city council to the voters of such city of a proposition to issue revenue bonds in a stated amount for the purpose of constructing, purchasing, or otherwise acquiring an electric light and power system, distribution system, transmission lines, and real and personal property needed and used in connection therewith to serve said city and its inhabitants is not a dual proposition but a single one.
3. ———: ———. Such a proposition, if submitted in the language of section 18-412, R. S. 1943, is sufficient.
4. **Elections.** Revenue bonds issued under the authority of a special election cannot be set aside simply because all that may have been said by interested parties during the campaign which preceded the election does not turn out to be in every respect true.
5. ———. Generally, inducements in the way of statements and representations made to influence a voter will not invalidate an election if it does not appear that by coercion or fraud the voter was compelled to vote in a way he did not desire to vote.
6. **Estoppel.** The doctrine of equitable estoppel may under certain conditions apply to municipalities, and is based on the grounds of public policy and good faith, and interposed to prevent injury, fraud, injustice, and inequitable consequences. Where such do not appear the doctrine does not apply.

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

Davis, Stubbs & Healey, for appellants.

Van Pelt, Marti & O'Gara, and *Robert J. Bulger,* for appellees.

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

MESSMORE, J.

This is an action brought in the district court for Morrill County by certain taxpayers, electors, and users of electric energy in the city of Bridgeport, to enjoin the public officials of the city from the issuance and sale of revenue bonds authorized by a municipal election.

The city of Bridgeport is a city of the second class, with a population of between 1,700 and 1,750, and will hereinafter be referred to as the city. Where we have occasion to refer to the Consumers Public Power District we will do so as the Consumers District.

For several years, since 1935, a group of citizens of the city has been interested in municipal ownership of electrical facilities to serve the city. This was at a time when the franchise of the corporation serving the city with electric energy expired. The Consumers District has served the city with electric energy since January 2, 1942.

On October 2, 1947, the mayor and city council appointed a special attorney, Robert J. Bulger, to handle the board of health operations and the electric light and general transactions dealing therewith for the city. The special attorney performed legal services for the city in connection with an election held in April 1948, to authorize the issuance of $14,000 of municipal bonds to construct a street lighting system for the city. The bonds failed to carry at the election. His next legal work for the city was in the instant case to enjoin the taking of depositions. Thereafter he performed no legal work for the city on power matters.

On January 1, 1948, the mayor and council for the city employed the engineering firm of Fulton and Cramer of Lincoln, Nebraska, to prepare an engineering report on the construction of a municipal electric system, and surveys and estimates of costs on the main

street lighting system pursuant to their proposal by letter dated December 10, 1947, signed by the mayor. On or about May 12, 1948, the engineer's report was filed with the city clerk and will be discussed later in the opinion in connection with the questions presented on this appeal.

On July 1, 1948, the mayor and council of the city met in regular session in the city hall, and at that time passed a resolution calling for a special election for the 3d day of August 1948, at which time they proposed to submit to the electors of the city for their approval or disapproval the following: "Shall the City of Bridgeport, Nebraska, construct, purchase or otherwise acquire, an electric light and power plant, distribution system, and transmission lines, and real and personal property needed and useful in connection therewith to serve said City and its inhabitants and pay the cost thereof by pledging and hypothecating the revenue and earnings of said electric light and power plant, distribution system and transmission lines, to be owned by said City, and

"Shall the City, in the exercise of said authority, issue and sell its Revenue Bonds of the principal amount of Two Hundred Twenty-five Thousand One Hundred Dollars ($225,100.00) and enter into such contracts in connection therewith as may be proper and necessary. Said Revenue Bonds shall be a lien only upon the revenues and earnings of the electric light and power plant, distribution system and transmission lines to be owned by said City and shall not be general obligations of the City and no taxes shall ever be levied upon property for their payment. Said bonds shall be issued at such time or times as the Mayor and Council may determine and be dated at the time of their issuance and shall become due and payable at such times as may be fixed by the Mayor and Council but in not exceeding twenty years from the date of their issuance and shall bear interest at a rate not exceeding four per cent (4%) per

annum, payable semi-annually; provided, however, any or all of said bonds shall be redeemable at the option of the City at any time on or after five years from the date of issuance thereof or at any earlier time fixed by the Mayor and Council. The proceeds received from the sale of said bonds shall be used and applied only to construct, purchase, or otherwise acquire, said electric light and power plant, distribution system, and transmission lines, and real and personal property needed and useful in connection therewith for the service of the City and its inhabitants?"

In the latter part of June 1948, L. B. Winter, a local merchant and city treasurer for about twenty years and interested in municipal ownership for a considerable length of time on his own initiative called two public meetings to be held in the city hall for the purpose of discussing municipal ownership of an electric system for the city. Upon his invitation the mayor was present at both meetings, and at the evening meeting several members of the city council, the city clerk, the city attorney, and the special city attorney were present. These were not council meetings, and no minutes were kept by the city clerk. Mr. Winter presided, and stated the purpose of the meeting was to determine what to do about putting the question of municipal ownership to the electorate. He told those present that "we wanted to carry a bond issue in an election, if possible, and we might need an organization to further that * * *." The matter was generally discussed. The mayor addressed the meeting and said that it was up to the people of the city to decide whether or not they wanted to own their own electric light system; that he was not going to do anything about it; that he and the council were not going to sponsor and promote an advertising campaign or have anything to do with the election; and that if the people of the city wanted it bad enough, the mayor and the council would put it on the ballot.

At the evening meeting three joint-chairmen were

selected, one of which was the city treasurer, to head an organization which was formed and known as the Bridgeport Taxpayers and Property Owners. In addition, four standing committees were selected, the absent voters committee, funds and finance, advertising and publicity, and automobile and transportation committees. None of the public officers of the city except the city treasurer, were asked to, or served on any of these committees. The co-chairmen of the Bridgeport Taxpayers and Property Owners organization were to use their judgment as they thought best in promoting the acquiring of an electric system for the city.

Several committee meetings were held, most of which were in Mr. Winter's hardware store, to map strategy from time to time as to what might be done to further the cause, and as to what advertising might be put out in such respect. The evidence is not clear as to the presence of members of the city council at these meetings, or whether Mr. Bulger, referred to as special city attorney, attended any of the meetings. The mayor was present on one or two occasions, one when he was asked to come and bring the engineer's report.

Prior to the election, at the request of the Bridgeport Taxpayers and Property Owners organization, Bulger visited certain cities operating electric systems under municipal ownership to ascertain the manner of operation, the income, the expenses, the profits, and other matters pertaining to such ownership. The results of these visits and the data received therefrom were reported to the co-chairmen of the organization.

A public meeting was arranged for the evening of July 29, 1948, at the American Legion hall, called by the Bridgeport Taxpayers and Property Owners, and at which Bulger presided. Representatives from cities having municipal ownership of electric systems were present, introduced, and expressed their views on the subject. Representatives of the Consumers District were present, and an official of the district was introduced

and spoke upon the district's side of the issue. Robert Fulton, one of the consultant engineers employed by the city, was present, having been invited by Bulger to attend. He made a talk with reference to his experiences on the subject of municipal ownership and certain items contained in the engineering report.

Facts not heretofore set out but which may be pertinent to a determination of this appeal will be discussed as occasion requires in connection with the assignments of error.

At the conclusion of the plaintiffs' evidence the trial court sustained the defendants' motion to dismiss the cause. Upon the overruling of the plaintiffs' motion for new trial, plaintiffs perfected appeal to this court.

The plaintiffs' amended petition alleges that the election for the issuance and sale of the bonds is invalid, null, and void.

The question as presented on the ballot conforms to the resolution heretofore set out and to section 18-412, R. S. 1943, which authorizes any city or village to construct, purchase, or otherwise acquire an electric light and power plant and real and personal property needed or useful in connection therewith, and pay the costs thereof by the issue and sale of revenue bonds or debentures, or by pledging and hypothecating the revenue and earnings of any such plant owned or to be owned by such city or village, only if the proposition is first submitted to the electorate and approved by a majority voting thereon. The election resulted in favor of the city acquiring an electric system.

"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, 152 Neb. 578, 42 N. W. 2d 172. We bear this rule in mind in analyzing the evidence.

The plaintiffs assign as error (1) the exclusion by the trial court of testimony and numerous exhibits, and

(2) the action of the trial court in sustaining a motion to dismiss at the conclusion of the plaintiffs' case and dismissing the cause.

Two primary questions are involved in this appeal and will be taken up in chronological order: (1) Is the election invalid in that the language appearing on the ballot is multifarious, ambiguous, and garbled so that the ballot does not clearly state the substance of the proposition submitted? (2) Were there such misrepresentations, misstatements of fact, and concealment of material facts exclusively in the possession of the public officers of the city, a special attorney, and consulting engineer employed by the city, sufficient to invalidate the election?

The plaintiffs rely on the case of Drummond v. City of Columbus, 136 Neb. 87, 285 N. W. 109, as conclusive of the case at bar as to the validity of the election.

We have previously set forth the proposition appearing on the ballot submitted to the voters of Bridgeport. The plaintiffs contend that the language appearing on this ballot presented to the voters several alternatives or courses of action, that is, that the council might (1) construct, (2) purchase, or (3) otherwise acquire (a) an electric light and power plant, (b) a distribution system, (c) transmission lines, and (d) real and personal property needed. In the cited case the proposition submitted, insofar as necessary to consider here, was: "Shall the city of Columbus, Nebraska, construct, purchase, or otherwise acquire an electric light and power distribution system, and/or transmission lines, and real and personal property needed or useful in connection therewith and pay the costs thereof by pledging and hypothecating the revenue and earnings of such distribution system and/or transmission lines to be owned by such city * * *." The plaintiffs contend that the proposition submitted to the voters in each instance was analogous, therefore the ballot in the instant case was designed to secure the assent of those voters who

favored the purchase of the electric light and power distribution system already in use, and, on the other hand, the ballot was designed to secure the favorable votes of the voters who might favor the construction of an entirely new electric light and power system to compete with the one already in existence in the city.

The cited case determined that the use of the symbol "and/or" as it appeared on the ballot prepared to be presented to the voters of Columbus led to confusion of the voters, who were absolutely unable to determine definitely what they were voting for or against. In the opinion denying the motion for rehearing, 136 Neb. 99, 286 N. W. 779, which distinguished the case of Hurd v. City of Fairbury, 87 Neb. 745, 128 N. W. 638, and the Drummond case, this court said: "But, in the case now before us, more than one question was submitted. The proposition in effect submitted these questions: Shall the city acquire an electric light and distribution system? Shall the city acquire transmission lines? The use of the 'and/or' certainly makes the proposition submitted indefinite and uncertain and leaves to the city authorities, not an administrative decision, but the absolute discretion as to whether either one or both of two separate and distinct properties shall be acquired. This deprives the electors of the right to determine for themselves the property to be acquired as contemplated by the statute and the scope of the activity in which the city was intending to engage."

We believe the language as it appears in the opinion denying the motion for rehearing is plain and explicit in that the symbol "and/or" led to uncertainty, ambiguity, and multiplicity which confused the voters who were unable to determine definitely the effect of their votes at this special election. The cited case is not conclusive of the case at bar as contended for by the plaintiffs.

In the case of Hurd v. City of Fairbury, *supra,* sections 8927 and 8994, Ann. St. 1909, were involved, which

are not like section 18-412, R. S. 1943, however, certain language contained in said sections is pertinent to like language contained in the latter section of the statutes cited. One of the propositions submitted in the case of Hurd v. City of Fairbury, *supra,* which at that time was a city of the second class the same as the city of Bridgeport in the instant case, was that of issuing the bonds of the city of Fairbury in the sum of $20,000 for the purpose of raising a sum sufficient to purchase or install and establish an electric light system within said city. The other was to issue bonds of the city in the sum of $115,000 for the purpose of purchasing or erecting, constructing, locating, and maintaining a system of waterworks within said city. It was held that under the statutes the bonds voted at the election constituted a valid obligation against the city, the proposition not being dual, nor in the alternative, to the extent of rendering the bonds void. With reference to section 8927, Ann. St. 1909, which authorized a city of the second class to purchase, erect, or construct a system of waterworks with necessary mains, etc., within the city, and to issue bonds for the purchase, erection, or construction and maintenance of such waterworks, etc., it was held that the submission was not a dual or alternative question, and was in compliance with the statute, and that the bonds were valid.

The language in the instant case as to the proposition submitted to the voters is comparable to that of Hurd v. City of Fairbury, *supra,* and the proposition submitted to the voters of Bridgeport is a single proposition, and not dual, selection of the method being administrative only. See, also, Drummond v. City of Columbus, *supra.*

The rule in the majority of jurisdictions is that a proposition submitted to the voters to erect or purchase a plant, public building, or other public utility is a single proposition, and that, on the adoption thereof, the option to erect or to purchase becomes a matter of discretion, vested in the proper representatives of the municipality.

See annotation in 5 A. L. R. 538 and cases cited therein.

With reference to the second question presented, the plaintiffs cite Drummond v. City of Columbus, *supra,* as follows: "The voters at an election on public utilities are entitled to definite information which will enable them to consider, weigh, discuss, and vote upon the actual merits of the proposition. If unfounded facts are set out which obscure the issues, or mislead the voters on material questions of fact, the election will be held to be null and void."

In the cited case the preamble to the petition circulated by the Citizens' Committee to get signatures of the voters contained statements that were unfounded upon which the voters relied. It is the plaintiffs' contention that the record in the instant case reflects unfounded facts which obstructed the issues and misled the voters on the material questions of fact, and that the case of May v. City of Kearney, 145 Neb. 475, 17 N. W. 2d 448, is applicable on a factual situation somewhat analogous to the instant case as to the interest taken by public officials, by unofficial conduct on their part in a municipal election to acquire an electric system, and the doctrine of estoppel is applicable.

In this connection the plaintiffs direct attention to the history with reference to acquiring an electric system for the city, which may be briefly summarized as follows: Prior to January 2, 1942, the Western Public Service Company, a corporation, was the owner and operator of an electric producing and generating system with distribution lines and equipment in and extending outside the city of Bridgeport, and certain real estate and leases on real estate used in the business. All of these holdings were on January 2, 1942, conveyed and transferred to the Consumers District. On December 22, 1941, the city council enacted an ordinance whereby February 17, 1942, was fixed as the date whereupon the voters would be called upon to vote on the question of whether or not the city would take by condemnation

certain of the property and rights of the Western Public Service Company. The proposal to condemn was approved by a sufficient vote of the people. The result of the election was duly certified to the Supreme Court and pursuant to statute, a court of condemnation was appointed. The Consumers District brought an action in the district court against the members of the condemnation court, the mayor, the members of the city council, the city clerk, the city attorney and special city attorney, and the city treasurer, for the purpose of enjoining further proceedings in condemnation. The members of the condemnation court demurred to the petition of the Consumers District. These demurrers were sustained, and the cause dismissed. The Consumers District appealed. This court held that the city was barred from condemning under the proposal involved on account of inaccuracy and insufficiency of description in the proposal. The court said: "* * * it is imperative that the proposal shall name the persons in favor of whom an award may be assessed in order to render the condemnation valid as to them." The court also held that the city was limited in a proceeding against the Consumers District for the taking of an electric system for the reason the proceedings were violative of the power granted under section 70-650, R. R. S. 1943. The judgment of the district court was reversed with directions. See Consumers Public Power District v. Eldred, 146 Neb. 926, 22 N. W. 2d 188.

Plaintiffs argue that the city is now attempting to do as it did in Consumers Public Power District v. Eldred, *supra,* that is, to get authority by some means to permit the members of the city council to use their discretion in determining what to do and how to do it in order to enable the city to acquire an electric system.

The question of estoppel with reference to the character of the information given to the voters was raised in the last-cited case, but was deemed unnecessary to determine.

We find nothing in Consumers Public Power District v. Eldred, *supra,* that would be beneficial in determining this appeal, but cite the case and the determination of the principal issues involved to disclose the history of the proceedings with reference to the city endeavoring to acquire an electric system and the plaintiffs' contention of the methods employed by the city officials in attempting to accomplish such purpose.

The plaintiffs assert that immediately after the decision in the case of Consumers Public Power District v. Eldred, *supra,* the mayor and city council embarked upon another campaign to enforce the issue of municipal ownership of an electric system and an election authorizing the issuance and sale of revenue bonds in connection therewith. First, to accomplish these purposes, the mayor and council employed a special city attorney to conduct their campaign for them with reference to electric light matters. Next, the mayor and city council employed a special consulting engineer to give them some facts and figures upon which to stage a campaign. Thereafter the mayor and council approached the question on how the campaign should be conducted. Plaintiffs further assert that since the preceding election involving the condemnation proceedings, the case of May v. City of Kearney, *supra,* was decided, so in order to avoid participation in the campaign and the election to ensue, it would be necessary for the mayor and city council not to actively engage in the campaign and election for fear of the doctrine of estoppel as determined in May v. City of Kearney, *supra.* An organization was set up called the "Bridgeport Taxpayers and Property Owners," spearheaded by the city treasurer who had held that office for 20 years and was an advocate of municipal ownership, and who consulted the mayor and members of the council and other public officials with respect to the campaign and the election. Several meetings were held under the direction of this organization, and committees appointed by it to develop the strategy of the

campaign. We have heretofore made reference to the presence of the mayor and members of the council at some of the meetings and what action, if any, they took in the matter. To spread the propaganda for the election, the advocates of municipal ownership resorted through its organization to the one newspaper in the city, the editor being a member and chairman on publicity.

The plaintiffs further assert that the appointed special city attorney advised the organization, the mayor and council, and the committees of the organization during the campaign, and his employment was from time to time as the electric business developed; also, they were advised by the consulting engineer who had a personal interest in the matter, a contingent fee of $20,500, dependent upon the result of the election; and further, the mayor and council had contracted in advance of the election with a banking house to purchase the revenue bonds without competitive bidding.

The plaintiffs direct attention to the consulting engineer's report which recommended the construction of a complete generating station and distribution system, urged the construction of a standby station, and discussed the purchase of a portion of the power from the United States Bureau of Reclamation to supply the city. The report contained an estimate of the revenue that would be derived by the city, and an estimate of the net profits which would accrue in 10 years that would be available to retire the bonds. The report estimated the cost of purchasing power from the Bureau of Reclamation at $9,139 a year, while in fact an official letter from the Bureau of Reclamation fixes the minimum cost of such power at $12,000 a year. Plaintiffs further assert that the consulting engineer estimated in 1949 there would be 1,843,900 kilowatt hours sold and the revenue to be derived from such sale would amount to $53,470, while the actual revenue reflected by the books of the Consumers District showed $35,811 for the 12 months ending June 30, 1948, which plaintiffs argue

could be the only basis for actually figuring the revenue. It appears however that this figure did not include electricity sold to a sand and gravel company, residence properties located adjacent to the city limits, the fair grounds, or a locality a mile distant from the city, all of which were furnished power by the Consumers District.

Plaintiffs also assert that the estimate made by the consulting engineer was by comparison with other cities, instead of accepting the figures of the Consumers District as reflected by its books which were open to inspection as provided by section 70-622, R. R. S. 1943. Further, the report contained no engineering costs for operating a standby plant, which would cost between $3,000 and $4,000 annually; consequently, upon the actual factual situation, the engineer's report was in error to the extent of $25,000 a year, which constituted a gross overstatement and misstatement of the true facts.

Plaintiffs suggest the engineer's contingent fee of $20,500 might reflect a personal interest in formulating the report, and a desire to have the election carry to obtain the benefits of the contingent fee. This reference to a contingent fee is based on a letter from one of the engineers directed to the mayor of the city under date of December 10, 1947. There is nothing conclusive with reference to the amount of the engineer's fee. That, by necessity, must depend upon the cost of the work to be done.

A review of the engineer's report discloses it is founded on estimates and comparisons. The engineer, in addressing the evening meeting of July 29, 1948, stated that in the event the revenues were not as shown by the estimates in the report, it would take longer to retire the bonds.

There is no evidence to show what contract, if any, the banking house mentioned by the plaintiffs had with the city. No representative of this banking institution was present at any meeting or participated in the cam-

paign or the election in any manner. While there is some intimation that the law firm representing this banking institution prepared the resolution and the ballot upon which the proposition appeared and upon which an election was held, it rather appears from the record that such counsel was obtained through the efforts of the city attorney.

Further, the plaintiffs make reference to several newspaper articles or advertising, and which were not admitted in evidence. It appears that the mayor and members of the city council who are directly responsible for the passage of resolutions or ordinances such as in this case were in no way involved in preparing the advertising media, nor was it authorized by them or signed by them, and is not binding upon the city. It is true that the advocates for municipal ownership and those opposed to it engaged in a strenuous campaign, and both sides of the issue were presented by advertising. It appears that this advertising in behalf of municipal ownership was formulated, prepared, and written by members of the publicity committee of the Bridgeport Taxpayers and Property Owners organization, with their acquiescence and consent, which organization and the committees thereof consisted of citizens and taxpayers, and was not formed by the mayor or members of the city council, nor did they participate in the formation thereof but specifically refrained from doing so. It is true that the city treasurer, an advocate of municipal ownership for a number of years, did so participate and become one of the joint chairmen of the organization. The duties of the city treasurer of cities of the second class, as defined by section 17-606, R. S. 1943, constitute nothing more nor less than a bookkeeping job, and he has no vote in the council, nor can he bind the mayor and council by any acts outside of those that constitute his legal duties as defined by law.

Reference is made to the interpretation of section 70-650.01, R. R. S. 1943, by the special city attorney, to

the effect that the city would not receive its electric distribution system debt free when the original bonds issued for its purchase by the Consumers District had been paid, due to the fact that other indebtedness of the Consumers District might be included, and such indebtedness would also have to be retired, which could be a continuing process. This interpretation of the cited statute was challenged by a representative of the Consumers District. However, the interpretation was not withdrawn. It occurred at the public meeting held July 29, 1948. This section of the statutes has not been litigated, and is not an issue in this case. It is referred to simply for the reason that the plaintiffs contend it is an erroneous interpretation of this section of the statutes and one that could prejudice the voters against the Consumers District in the election.

Some reference is made to concealment on the part of the mayor, city council, and city officials. This involves an estimate for street lighting. The Consumers District offered to install such system free of charge to the city. It appears, however, in return the Consumers District wanted a five-year contract to furnish the electric energy used by this system. Some contention is made that certain meetings were held unofficially by the mayor, city council, and other public officials, and no minutes were kept of these meetings, but they were held for the purpose of accomplishing the desires of the mayor, city council, and other public officials in obtaining an electric system for the city. We find no evidence to sustain this contention.

The plaintiffs conclude that, in the light of the whole record and the principle of law cited in Drummond v. City of Columbus, *supra,* the conduct of the mayor, city council, and city officials in participating in the election was such conduct as is condemned by May v. City of Kearney, *supra,* and for that reason the city officials should be enjoined from the issuance and sale of the revenue bonds in question. We find nothing in the

record that shows participation on the part of the mayor, the council, the city attorney, the engineer, or any other public officer in the campaign or the election analogous to the situation in May v. City of Kearney, *supra*. The special city attorney and the consulting engineer were not privileged and had no authority to speak for the mayor, the city council, or other public officers, and to bind them or the city in any manner. The report of the consulting engineer was based on experience in the field of municipal ownership, by comparisons with cities of the same size and under similar circumstances, and estimates were given—nothing conclusive and nothing definite. We can see no harm in having such estimates prior to the time of election as a matter of information to those who may be required to act in their official capacity as provided for in section 18-412, R. S. 1943.

There is no evidence of participation by the mayor and members of the city council in the campaign or the election. Specifically the record discloses that the mayor and city council made it emphatic that there would be no participation in the campaign or the election by the mayor or members of the council.

In the case of May v. City of Kearney, *supra,* the mayor and members of the city council took a great interest and active part in the campaign and the election. They formed an organization in which they participated in mapping the strategy of the election. They also participated in writing and checking written matter that appeared in newspaper advertisements for which they were responsible in an endeavor to carry the election. Further, the mayor actively engaged in radio broadcasts to present the issue as he conceived it and as members of the city council and other public officers conceived it, and urged that their viewpoint be accepted by the electorate.

We conclude that in such respect May v. City of Kearney, *supra,* is not applicable to the factual situation as it appears in this case.

The following authorities are applicable.

In the case of Detroit United Railway v. Detroit, 255 U. S. 171, 41 S. Ct. 285, 65 L. Ed. 570, an action to enjoin the acquiring of a system of street railways by means of bonds voted in a municipal election held for that purpose, the court said: "The bill abounds in allegations that voters were misled by the fraudulent conduct of the officials of the city in their efforts to procure the property of the complainant at less than its value by misrepresenting in a circular, and otherwise, the purpose and effect of the vote to be taken upon the question of acquiring a municipal system of transportation. * * * This feature of the bill is an attempt to inquire in a collateral way into the validity of an election which was held without steps being taken to enjoin, and which was vigorously contested to a final result."

"Bonds issued under the authority of a popular election cannot be set aside simply because all that may have been said by interested parties, in public speeches during the canvass which preceded the election, does not turn out to be in every respect true." County of Greene v. Daniel, 102 U. S. 187, 26 L. Ed. 99.

Courts must, as a rule, whenever possible uphold the validity of municipal bond elections. See, In re Validation of East Bay Municipal Utility District Water Bonds, 196 Cal. 725, 239 P. 38; Bullitt v. City of Louisville, 213 Ky. 756, 281 S. W. 1031; Anselmi v. Rock Springs, 53 Wyo. 223, 80 P. 2d 419, 116 A. L. R. 1250.

1 Dillon on Municipal Corporations (5th ed.), § 213, p. 430, states the general proposition that: "Inducements in the way of statements and representations made to influence a voter, although false and fraudulent, will not invalidate the election if it does not appear that by force and fraud the voter was compelled to vote in a way he did not desire to vote."

For the reasons given herein we conclude that the second question raised by the plaintiffs is without merit.

We affirm the judgment of the district court dis-

missing the plaintiffs' cause at the conclusion of their evidence.

AFFIRMED.

SADIE R. ZOPPELLI, APPELLANT, V. ADOLPH E. ZOPPELLI, APPELLEE.

45 N. W. 2d 599

Filed January 12, 1951. No. 32866.

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 the division of the 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.

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

Coufal & Shaw, and *G. E. Hendricks,* for appellant.

E. O. Richards, for appellee.

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

MESSMORE, J.

This is a divorce action commenced in the district court for Deuel County by Sadie R. Zoppelli against

Adolph E. Zoppelli. The court granted the plaintiff a divorce and dismissed the defendant's cross-petition praying for a divorce. The plaintiff perfected appeal to this court.

The basis of the appeal is that the district court was in error in not awarding her the full and complete title to the real estate known as the home place, described as the south half of the southeast quarter of Section 12, Township 12 North, Range 44 West of the 6th P. M. The parties are agreed that division of the real estate and personal property otherwise has been settled between them to their entire satisfaction.

We shall refer herein to the parties as they appeared in the original action.

"An appeal lodged in this court from a decree rendered in a divorce action brings the case here for trial de novo." Nickerson v. Nickerson, 152 Neb. 799, 42 N. W. 2d 861. See section 25-1925, R. R. S. 1943.

The parties were married August 23, 1919, at Denver, Colorado. They established their home in Deuel County, Nebraska, in September 1920. They lived together as husband and wife until about Christmas of 1947. To the marriage two children were born, both of which are of age and married.

The plaintiff's cause of action was based upon extreme cruelty. The petition alleged certain specific acts constituting extreme cruelty which were denied by the defendant's answer, and his cross-petition charged the plaintiff with extreme cruelty, setting forth certain acts of the plaintiff constituting extreme cruelty. The evidence with reference to the charges so made need not be related, and the sufficiency thereof to award the plaintiff an absolute divorce is not contested in this court by the defendant. A review of the evidence discloses that it was sufficient to warrant the district court in granting the plaintiff a decree of absolute divorce.

The record discloses that at the time the parties were married the plaintiff owned four head of cows which

gave the parties a start in the dairy business. In 1921, the defendant became a bankrupt. Thereafter, by borrowing money from the First National Bank at Julesburg, Colorado, other cattle were purchased, and the plaintiff started a dairy business which developed to some considerable extent. She testified that she conducted this business for a period of some 15 or 16 years, and applied the money she received from the business to the household expenses, the purchase of machinery, a truck, oil, and all necessary equipment to carry on the dairy business and the business of farming, and paid out in that course of time an amount of $29,000. The defendant was engaged in farming, and at the time of the trial was farming 600 acres most of which was wheat land.

On September 24, 1945, the plaintiff and defendant entered into a written agreement to the effect that differences had arisen between them as to their marital relations and concerning their property interests, and agreed upon a future conduct of their business interests until such time as they could settle the matters between them. This contract related that the real and personal property then owned and operated by the parties, or either of them, as a farm and dairy was the joint property of the parties, having been earned, acquired, and accumulated as the result of their joint efforts and contributions during their married life. Further, they desired to carry on the business, maintain and operate the business, until their son was discharged from the military service, at which time the intention of the parties was to arrange for the son to operate the property or a portion thereof. Further, that neither party was to incur obligations or indebtedness exceeding the aggregate sum of $500 without the consent of the other, and the income from the property over and above operating and living expenses would be used to pay any indebtedness owing by either party.

The plaintiff testified that the reason for the con-

tract was that the defendant was taking money from the business and spending it wrongfully and extravagantly. He also constantly threatened to have a sale and dispose of the business and all their personal property.

In 1946, the parties harvested a large crop of wheat. The exact number of bushels is not shown by the record. The defendant estimated the crop as 25,000 bushels, but the plaintiff knew of some 12,000 bushels which she claimed the defendant sold and made no accounting of the proceeds. At this point it may be well to state that in this action she requests no accounting. Differences arose between the parties with reference to this matter and on September 3, 1947, there was a public sale held by them to dispose of their cattle, equipment for farming and otherwise, and household goods. After deducting expenses of the sale and items bid in by the defendant there was a net of $23,968.25, as testified to by the plaintiff, from which there was deducted notes owing to the bank by the defendant in the amount of $7,510.83, of which the plaintiff claims to have had no knowledge, but contends that she suffered a personal loss by such notes being deducted from the net proceeds of the sale. She was unable to ascertain the indebtedness of the defendant to the bank. She contended it violated their formal agreement as to the operation and management of the business. The remaining amount was divided into two equal parts, the plaintiff receiving one-half of such proceeds and the defendant the other one-half. This constituted a property settlement of the personal property satisfactory to both parties.

The parties each own an undivided one-half interest in 320 acres of good farm land. The district court decreed that they owned such land as tenants in common, each holding an undivided one-half interest therein. The parties are satisfied with this arrangement and division of the 320 acres.

With reference to the 40 acres which has the improve-

ments on it and is involved in this cause, this was purchased from one Bessie Johnson for $2,000. The plaintiff paid $500 cash, borrowed $500 from her son Harold, and $500 from the First National Bank of Julesburg, Colorado, and the defendant paid $500. The plaintiff testified this money came from the two-thirds interest that she and her husband had in the dairy business, the other third having been given to a daughter during the absence of the son in the military service.

The defendant's testimony with reference to this 40 acres is that at the time it was purchased they had $2,400 worth of improvements on the place, and the $2,000 was paid in addition to that. The $500 which he paid was from the sale of some lots that he owned in Julesburg, Colorado.

The other 40 acres constituting the homestead was bought at a partition sale, the plaintiff paying in the amount of $750, and the defendant testified he paid one-half thereof to the plaintiff for his interest in the 40 acres.

The plaintiff, in 1945, was desirous of improving the house and asked the defendant if he was willing that it be done. Plaintiff testified that he stated his willingness. The defendant denies that he did, except that he agreed that the plaintiff might fix up the basement. However, the plaintiff spent $4,157.38 in improving the house, which was paid from her own separate funds. In addition she did some sanding, painting, and finishing in the house. This was after the divorce action was started. Before this work was done the value of the 80 acres was estimated at $3,000. There was approximately $6,500 invested in the 80 acres at the time this divorce action was started.

There is contention that the 80 acres in question is rented to the son of the parties together with other farm land, and that he lives on this land and the plaintiff does not, and it is not her home. While the plaintiff has on occasions been away from her home, principally due

to her health, the evidence discloses that it is the only home she has, and she has lived in it for a period of 28 years or more.

The evidence discloses that throughout the period of the married life of the parties this plaintiff stayed at home and continued to work, and did work on many occasions when the defendant was absent on hunting or fishing trips for some weeks at a time. She kept strict account of the income of the business and the expenditures incident to the business, did the housework, took care of the children, and performed all the duties incident to that of a farm wife. From the standpoint of finances, she had more than considerable to do with the financial success of the parties.

In determining the question of the division of the 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. See Nickerson v. Nickerson, *supra*.

While the division of the real estate as decreed by the district court is not favored in attempting to arrive at an equitable distribution of the property of the parties, we must conclude that such decree with respect thereto meets the satisfaction of the parties with the exception of the 80 acres of land which the plain-

tiff considers her home. This is especially true in view of the fact that no value is placed upon the real estate owned by the parties, except the 80 acres here involved.

From an analysis of the evidence it is clear that the parties arrived at a complete settlement of their business transactions and real property interests except the real estate involved in this appeal. From a review of the record we conclude the decree of the trial court should be modified to the extent that the plaintiff be awarded the entire interest in the 80 acres of real estate heretofore described and in controversy in this appeal, and in addition, the plaintiff be awarded the household furniture, goods, and equipment used therein. The plaintiff is also allowed an attorney's fee of $250 for services of her attorney in this court.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. GEORGE W. WIEBUSCH, RESPONDENT.

45 N. W. 2d 583

Filed January 12, 1951. No. 32936.

1. **Trial.** A motion for judgment on the pleadings admits facts well pleaded or admitted in an answer but does not admit conclusions of law contained therein.
2. ———. Where, upon statements in the pleadings, one party is entitled by law to judgment in his favor, judgment should be so rendered by the court.
3. **Attorney and Client.** The purpose of a disbarment proceeding is not so much to punish the lawyer as it is to determine in the public interest whether he should be permitted to practice.
4. ———. In admitting a lawyer, and granting him a license to practice law, it is on the implied understanding that the party receiving such license shall in all things demean himself in a proper manner and abstain from such practices as cannot fail to bring discredit upon himself, the profession, and the courts.
5. ———. The oath taken by him, as required by section 7-104, R. S. 1943, requires a lawyer to faithfully discharge his duties;

uphold and obey the Constitution and laws of this state; observe established standards and codes of professional ethics and honor; maintain the respect due to courts of justice; and abstain from all offensive practices which cast reproach on the courts and the bar.

6. ———. A lawyer owes his first duty to the court. He assumed his obligations toward it before he ever had a client. He cannot serve two masters, and the one he has undertaken to serve primarily is the court.

7. ———. The ethical standards relating to the practice of law in this state are the canons of professional ethics of the American Bar Association and those which may from time to time be approved by the Supreme Court.

8. ———. Canons of ethics and rules governing professional conduct of lawyers are recognized and applied by this court in proper cases.

9. ———. Misconduct of a lawyer acting in an official capacity such as judge, may constitute grounds for his suspension or disbarment, since his untrustworthiness and infidelity in one office shows his untrustworthiness and infidelity in the other, and a violation of his judicial oath only aggravates the offense of violating his oath as a lawyer.

10. **Judges.** By virtue of section 7-111, R. S. 1943, no person is permitted to practice as a lawyer in any of the courts of this state while holding the office of county judge in any county having a population of more than sixteen thousand, and any lawyer who holds the office of county judge is not permitted in any event to practice as a lawyer in any action, matter, or proceeding brought before himself, or to draw any paper or written instrument to be filed in his own court, except such as he is required by law to draw.

11. ———. If thus forbidden to practice law while serving as county judge, a lawyer should refrain from accepting any employment as such while in office, and in any event, even if permitted to practice elsewhere, he should never practice law in the court in which he is judge or appear therein for himself in any controversy, even if presided over by another judge, and a violation thereof is highly improper.

12. ———. As provided by Article V, section 14, Constitution of Nebraska, no county judge shall practice law in any court in any matter arising in or growing out of any proceeding in his own court, and a violation thereof is highly improper.

13. **Attorney and Client.** A duty rests on the courts to maintain the integrity of the legal profession by disbarring lawyers who indulge in practices designed to bring the courts or the profes-

sion into disrepute, or to perpetrate a fraud on the courts, or to corrupt and defeat the administration of justice.

Original proceedings by the State, on the relation of the Attorney General, to disbar the defendant. *Judgment of disbarment.*

Clarence S. Beck, Attorney General, and *Bert L. Overcash,* for relator.

George W. Wiebusch, pro se.

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

CHAPPELL, J.

This is a disciplinary proceeding initiated by relator in conformity with rules of this court against respondent, a lawyer duly admitted and licensed to practice his profession in this state.

The formal complaint filed in this court alleged in paragraph II that from January 1941 to January 1949, respondent was the duly elected, qualified, and acting county judge of Custer County, Nebraska, which at all times had a population of more than 16,000, as designated in section 7-111, R. S. 1943.

Paragraph III alleged generally that respondent had been guilty of unprofessional conduct and violation of the laws of the state and canons of ethics of the Nebraska State Bar Association governing Nebraska lawyers in the practice of their profession by acts and practices thereinafter recited and described substantially as follows:

Paragraph IV alleged that prior to December 1, 1948, while respondent was county judge as aforesaid, he prepared a petition for appointment of an administrator in the matter of the estate of Charles Hircock, deceased, and on December 1, 1948, filed said petition in his own court and accepted employment and acted as attorney for petitioner in said matter in his own court, having

theretofore written letters to petitioner recommending himself to act as such attorney.

Paragraph V alleged that on or about September 21, 1948, respondent prepared a petition for the administration of the estate of William Ward Henman, filed it on that date in his own court, acted not only as attorney for the administrator but also as county judge all through said proceedings, and collected an attorney's fee in said cause as attorney for the administrator.

Paragraph VI alleged that on or about September 15, 1948, respondent prepared and filed a petition in his own court for administration of the estate of Anna Schneringer, deceased; prepared all of the papers in the administration of said estate; and acted not only as attorney for the administrator but also as county judge during most of the proceedings, and collected a fee as attorney for the administrator.

Paragraph VII alleged that on or about December 1, 1948, respondent prepared and filed in his own court a petition seeking decree of heirship of one Charles Deal and throughout said proceedings and until decree was entered, acted therein not only as attorney for petitioner, Mary Etta Amsberry, but also as county judge, and collected a fee as attorney for such services.

Paragraph VIII alleged that on or about September 15, 1948, respondent, while the duly elected, qualified, and acting county judge of Custer County, prepared and on October 19, 1948, filed a petition in the district court for Custer County to foreclose a tax sale certificate, conducted said case to conclusion, received the proceeds of said sale as attorney for plaintiff therein, and charged and collected a fee for acting as such attorney.

Paragraph IX alleged that on October 10, 1948, respondent prepared and filed in his own court a complaint in forcible entry and detainer as attorney for plaintiff. Also, at the same time, respondent filed a disqualification, and prepared a summons which the acting county judge signed on October 19, 1948. There-

after, all of the papers involved in said cause, including the judgment entered on November 3, 1948, were prepared and filed by respondent without the acting judge being present in court or conducting a hearing and trial therein.

Other charges, alleging misconduct, were set forth in paragraphs X and XI, but as hereinafter observed, not being admitted by respondent in his answer, they need not be reiterated here.

Paragraph XII alleged that respondent practiced law generally while acting as county judge, maintained a law office downtown, and practiced law therein while he was county judge, and on August 12, 1948, entered into a division of fees contract with another lawyer.

To the foregoing complaint, respondent duly filed an unverified answer which contained no general denial. Rather, it admitted the allegations of aforesaid paragraphs II, IV, V, VI, VII, VIII, and IX; admitted, as alleged in paragraph XII that on August 12, 1948, he entered into a contract with another lawyer for the purpose of forming a law partnership, but alleged that it was to be effective only at the conclusion of his term of office as county judge, and that he had not participated in any division of fees with such attorney during his term of office. He also admitted that "during the summer of the last year of his term as County Judge respondent was in the process of building a law office which building was ready for occupancy about September 1, 1948," and that "for about four months just prior to the end of his term as County Judge he spent his time in his own office building except such times as official duties required his attendance at the Court House."

His answer also alleged as conclusions of law that "in all matters of law practice participated in by him while he held the office of County Judge, he at no time did anything which tainted of using his judicial position to further his professional success," that "at no time did

he do anything which would cause anyone having business before the County Court to feel that his matter would not be heard fairly and impartially and just disposition made" and "that notwithstanding the infractions complained of and admitted, he is a fit person to be trusted with the duties and responsibilities belonging to the office of attorney."

Relator's complaint prayed that this court take such disciplinary action as it deems just and proper, and respondent's answer prayed that this court should make such disposition of the matter as it deems just and proper. The matter was finally briefed, argued, and submitted to this court by relator and respondent, upon relator's motion for judgment of disbarment upon the aforesaid pleadings filed by the parties. We sustain the motion of relator, bearing in mind that a motion for judgment on the pleadings admits facts well pleaded or admitted in an answer but does not admit conclusions of law. Shambaugh v. Buffalo County, 137 Neb. 434, 289 N. W. 873.

This court held in State ex rel. Sorensen v. Scoville, 123 Neb. 457, 243 N. W. 269, a disbarment proceeding, that: "Where, upon statements in the pleadings, one party is entitled by law to judgment in his favor, judgment shall be so rendered by the court." See, also, Part III, section 6, Disciplinary Proceedings, Rules of the Supreme Court. Reaffirming a rule established and followed in this jurisdiction since 1886, the afore-cited case also held: " 'In granting a license to practice law it is on the implied understanding that the party receiving it shall in all things demean himself in a proper manner, and abstain from such practices as cannot fail to bring discredit upon himself, the profession, and the courts.' " Such rule has been reaffirmed and followed in cases too numerous to cite.

It is as well established that: "The purpose of a disbarment proceeding is not so much to punish the attorney as it is to determine in the public interest whether he

should be permitted to practice." State ex rel. Sorensen v. Ireland, 125 Neb. 570, 251 N. W. 119. See, also, State ex rel. Spillman v. Priest, 123 Neb. 241, 242 N. W. 433.

It is equally well established that: "An attorney, as an officer of this court, must so conduct himself as to assist in maintaining confidence in the integrity and impartiality of the courts." State ex rel. Sorensen v. Goldman, 127 Neb. 340, 255 N. W. 32.

In State ex rel. Nebraska State Bar Association v. Niklaus, 149 Neb. 859, 33 N. W. 2d 145, this court held that: "An attorney owes his first duty to the court. He assumed his obligations toward it before he ever had a client. His oath requires him to be absolutely honest even though his client's interests may seem to require a contrary course. A lawyer cannot serve two masters; and the one he has undertaken to serve primarily is the court.

"A duty rests on the courts to maintain the integrity of the legal profession by disbarring attorneys who indulge in practices designed to bring the courts or the profession into disrepute, or to perpetrate a fraud on the courts, or to corrupt and defeat the administration of justice."

In State ex rel. Hunter v. Crocker, 132 Neb. 214, 271 N. W. 444, this court held that: "Canons of ethics and rules governing professional conduct among attorneys are recognized and applied by courts in proper cases."

The foregoing holdings and statements are not without support in the texts. For example, in 7 C. J. S., Attorney and Client, § 19, p. 733, it is said: "Any conduct on the part of an attorney evidencing his unfitness for the confidence and trust which attend the relationship of attorney and client or unworthy of public confidence constitutes a ground for suspension or disbarment." In section 23, p. 741, it is said: "Violation of codes of ethics or any conduct on the part of an attorney in his professional capacity which tends to bring reproach on the legal profession constitutes ground for suspension or

disbarment." In section 23, p. 753, it is said: "Conduct on the part of an attorney tending to subvert or obstruct justice is a ground for suspension or disbarment." Again, in section 23, p. 756, we find this statement: "Misconduct of an attorney acting in an official capacity, such as judge, prosecuting attorney, or the like, has been held to constitute a ground for his suspension or disbarment." See, also, 5 Am. Jur., Attorneys at Law, § 278, p. 428; Weston v. Board of Governors, 177 Okl. 467, 61 P. 2d 229.

In conformity with the foregoing authorities, we hold that this court has the jurisdiction and authority to hear and decide charges against a lawyer of disbarable offenses rendering him unfit to be permitted to continue the practice of law, even though the offenses occurred while he held judicial office.

As provided by Part IV, Article X, Integration of the Bar, Rules of the Supreme Court: "The ethical standards relating to the practice of law in this State shall be the canons of Professional Ethics of the American Bar Association, including the additions and amendments as of January 1, 1945, thereto, and those which may from time to time be approved by the Supreme Court."

As applicable here, then, the Canons of Judicial Ethics of the American Bar Association and the Nebraska State Bar Association, provide as follows:

Section 1: "The assumption of the office of Judge casts upon the incumbent duties in respect to his personal conduct which concern his relation to the state and its inhabitants, the litigants before him, the principles of law, the practitioners of law in his Court, and the witnesses, jurors and attendants who aid him in the administration of its functions."

Section 3: "It is the duty of all Judges in the United States to support the federal Constitution and that of the state whose laws they administer; in so doing, they

should fearlessly observe and apply fundamental limitations and guarantees."

Section 4: "A Judge's official conduct should be free from impropriety and the appearance of impropriety; he should avoid infractions of law; and his personal behavior, not only upon the Bench and in the performance of judicial duties; but also in his everyday life, should be beyond reproach."

Section 13: "A Judge should not act in a controversy where a near relative is a party; he should not suffer his conduct to justify the impression that any person can improperly influence him or unduly enjoy his favor, or that he is affected by the kinship, rank, position or influence of any party or other person."

Section 24: "A Judge should not accept inconsistent duties; nor incur obligations, pecuniary or otherwise, which will in any way interfere or appear to interfere with his devotion to the expeditious and proper administration of his official functions."

Section 31: "In many states the practice of law by one holding judicial position is forbidden. In Superior Courts of general jurisdiction, it should never be permitted. In inferior Courts in some states, it is permitted because the county or municipality is not able to pay adequate living compensation for a competent Judge. In such cases one who practices law is in a position of great delicacy and must be scrupulously careful to avoid conduct in his practice whereby he utilizes or seems to utilize his judicial position to further his professional success.

"He should not practice in the Court in which he is a Judge, even when presided over by another Judge, or appear therein for himself in any controversy.

"If forbidden to practice law, he should refrain from accepting any professional employment while in office."

Insofar as important here, Article XV, section 1, Constitution of Nebraska, provides: "Executive and judicial officers and members of the legislature, before

they enter upon their official duties shall take and subscribe the following oath, or affirmation. I do solemnly swear (or affirm) that I will support the constitution of the United States, and the constitution of the State of Nebraska, and will faithfully discharge the duties of ---------- according to the best of my ability, * * *." Respondent was required, as a qualification for the office, to take and subscribe to such an oath before entering upon his official duties as county judge. Duffy v. State, 60 Neb. 812, 84 N. W. 264.

Article V, section 14, Constitution of Nebraska, specifically provides: "No judge of the supreme or district courts shall act as attorney or counsellor at law in any manner whatsoever. *No county judge shall practice law in any court in any matter arising in or growing out of any proceedings in his own court.*" (Italics supplied.)

In Tucker v. Heirs of Myers, 151 Neb. 359, 37 N. W. 2d 585, it was said, after quoting the aforesaid constitutional provision: "This provision clearly means, as it applies to a county judge, that such judge may not appear as counsel in any matter in his own court or in any matter in which he would be disqualified if he had acted as county judge. By disqualifying as county judge he may not thereby remove himself from the prohibition of this constitutional provision in any matter in which he would otherwise be prohibited from engaging. * * * When one seeks and is elected to the position of county judge, he is required to sever his relationship with all matters arising in or growing out of any proceedings in his own court." The opinion also concluded that a violation thereof would be highly improper.

Section 7-104, R. S. 1943, provides: "Every attorney upon being admitted to practice in the Supreme Court or district courts of this state, shall take and subscribe an oath substantially in the following form: 'You do solemnly swear that you will support the constitution of the United States, and the constitution of this state,

and that you will faithfully discharge the duties of an attorney and counselor, according to the best of your ability.' " Such an oath requires lawyers to faithfully discharge their duties, uphold and obey the Constitution and laws of this state, observe established standards and codes of professional ethics and honor, maintain the respect due to courts of justice, and abstain from all offensive practices which cast reproach on the courts and the bar. State ex rel. Sorensen v. Goldman, *supra;* State ex rel. Nebraska State Bar Association v. Hendrickson, 138 Neb. 846, 295 N. W. 892, 139 Neb. 522, 298 N. W. 148.

Insofar as important here, section 7-111, R. S. 1943, provides: "No person shall be permitted to practice as an attorney *in any of the courts of this state while holding the office of * * * county judge in any county having a population of more than sixteen thousand, * * *;* Provided, *where an attorney at law holds the office of county judge * * * he shall not be permitted to practice as an attorney in any action, matter, or proceeding brought before himself, * * * nor shall any county judge draw any paper or written instrument to be filed in his own court, except such as he is required by law to draw.*" (Italics supplied.) Observance of its provisions by lawyers is mandatory, and flagrant violation thereof, as in the case at bar, is to be considered a gross offense in disciplinary proceedings despite the fact that in criminal prosecutions a violation thereof is legislatively defined as a misdemeanor punishable by fine.

As will be observed, we have before us a case wherein a duly admitted and licensed lawyer, while serving in the highly important and dignified office of county judge, a court which ultimately touches the lives and fortunes of practically all the people of the county and others residing elsewhere, admits that he repetitiously violated not only the foregoing canons of judicial ethics, but also violated his oath of admission as a lawyer, his oath of office as a judge, the Constitution of the State of Nebraska, and the statutes of this state. Further, in

violation of section 28, "Canons of Professional Ethics" for lawyers, he admittedly solicited law business by writing letters to a person having a cause to be filed and which was unlawfully filed by him in his own court, where, as a lawyer, he unlawfully prosecuted the cause, and unlawfully as judge disposed of it. More grossly flagrant violations of law and ethics by a lawyer are seldom found in the authorities.

In People ex rel. Colorado Bar Association v. Lindsey, 86 Colo. 458, 283 P. 539, a case of similar import and application, the court said: "A great jurist has said that 'No man in this country is so high that he is above the law. No officer of the law may set the law in defiance with impunity, and the sole end of courts of justice is to enforce the law.' Justice Bradley of the Supreme Court of the United States used this language in describing the relation of a lawyer to the law of the land: 'Of all classes and professions the lawyer is the most sacredly bound to uphold the laws. He is their sworn servant; and for him, of all men in the world, to repudiate and override the laws, to trample them under foot, and to ignore the very bands of society argues recreancy to his position and office, and sets a pernicious example to the insubordinate and dangerous element of the body politic. It manifests a want of fidelity to the system of lawful government which he has sworn to uphold and preserve.' Ex parte Wall, 107 U. S. 265, 274, 2 Sup. Ct. 569.

"The respondent was a sworn officer of the public; he was also a sworn officer of this court. We do not differentiate between the character and the breach of fidelity of an attorney at law and that of a judicial officer who is out of office when the complaint is made. The untrustworthiness and infidelity in the one office shows the infidelity and untrustworthiness in the other. A violation of the judicial oath only aggravates the offence (offense) of violating the oath of an attorney and counselor at law. The administration of justice, here

and elsewhere, is dependent upon the strict observance of the oath of office by every member of the bar. One of the prerequisites and indispensable qualifications for admission to the office of attorney and counselor at law in this court is, that he shall be of good moral character. This is a continuing qualification. It is a qualification necessary to entitle one to admission to the bar in the first instance, and it necessarily follows that the loss of such qualification, through misconduct, requires his suspension or removal. Unless one has the moral strength of character to stand immovable in his fidelity to duty, against the allurements of money, and to resist temptation to do those things that are prohibited by law to the judge, then he no longer possesses that indispensable moral character which the good of society and the administration of justice demand of an attorney and counselor at law.

"The respondent is a member of the bar of this court. The charges preferred against him by the Attorney General challenges his moral integrity. Just as it is the duty of this court to refuse admission to an applicant for a license, upon a showing that he lacks the necessary moral qualifications, so it is the duty of this court to remove an attorney upon a showing that he no longer possesses that indispensable moral character necessary to have his name continued upon the roll." See, also, In re Peck, 88 Conn. 447, 91 A. 274, L. R. A. 1915A 663, Ann. Cas. 1917B 227; State ex rel. Dill v. Martin, 45 Wash. 76, 87 P. 1054; In re Dellenbaugh, 17 Ohio Cir. Ct. 106, 9 Ohio Cir. Dec. 325; In re Copland, 66 Ohio App. 304, 33 N. E. 2d 857; In re Burton, 67 Utah 118, 246 P. 188; In re Rempfer, 51 S. D. 393, 216 N. W. 355, 55 A. L. R. 1346; In re Stolen, 193 Wis. 602, 214 N. W. 379, 55 A. L. R..1355.

In the light of what has been heretofore said, we conclude that the admitted conduct of respondent disqualifies him for continuance as a member of the bar of the State of Nebraska. Accordingly, the motion of relator for judgment of disbarment is sustained; respondent's

order of admission to the bar of the state is annulled; his license to practice therein is canceled; and his name is ordered stricken from the roll of lawyers in this state.

JUDGMENT OF DISBARMENT.

STATE OF NEBRASKA, APPELLEE, V. JACK I. NOVAK, APPELLANT.

45 N. W. 2d 625

Filed January 19, 1951. No. 32831.

1. **Evidence: Municipal Corporations.** A municipal court will take judicial notice of the ordinances of the city, and on an appeal therefrom to the district court from a conviction under a city ordinance the latter court will on a trial de novo take notice of whatever facts the municipal court was required to notice judicially.
2. **Appeal and Error: Municipal Corporations.** On an appeal to the Supreme Court from a judgment of the district court convicting a defendant of a violation of a city ordinance, the same being a review of the proceedings and not a trial de novo, the existence of a valid ordinance creating the offense charged will be presumed where the ordinance is not properly set forth in the record.
3. **Municipal Corporations.** The constitutionality of an ordinance cannot be considered by this court unless the ordinance is admitted by the pleadings or offered in evidence.
4. **Appeal and Error: Municipal Corporations.** A complaint based on a violation of a municipal ordinance will be deemed sufficient on appeal, except in case of a complete failure to state a cause of action.

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

Alfred A. Fiedler and *M. Robert Fromkin,* for appellant.

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

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

CARTER, J.

The defendant was convicted in the district court for Douglas County of maintaining a disorderly house in violation of the ordinances of the city of Omaha. A fine of $25 and costs was imposed and the defendant appeals.

The material portion of the complaint filed in the municipal court of the city of Omaha alleged "that Jack Novak on or about the Aug 29 1949, in the County aforesaid and within the incorporate limits of the City of Omaha aforesaid, then and there being, did then and there keep and maintain a Disorderly House at the premises known as 2403 Farnam St, Omaha Douglas County, Nebraska, contrary to the ordinances of the City of Omaha in such cases made and provided, and against the peace and dignity of the State of Nebraska."

In the district court the defendant moved for a bill of particulars which motion was confessed. The bill of particulars filed states that the ordinance which the defendant is alleged to have violated is ordinance No. 14924, section 1, chapter 12, article 23, of the Omaha Municipal Code, as amended by ordinance No. 15631, section 1, paragraph 8, of such code. It further states that the basis of the charge was that defendant at the time of his arrest was operating a bookie establishment, that defendant was then engaged in taking a bet from one Alphonse Brown on a horse race, and that there was found in the establishment at the time the following evidence: Two racing forms dated August 29, 1949, twelve run-down sheets, eleven bet slips, one blue notebook containing records of bets, one scratch pad with race results, one yellow sheet containing records of bets, and the names of three witnesses who would testify for the State at the hearing.

The evidence shows that on August 29, 1949, three policemen entered the Cornhusker Cigar Store situated at 2403 Farnam Street in Omaha and found the defendant conversing with one Alphonse Brown. The

evidence is that defendant was behind the counter and Brown in front. Brown was pointing to a horse designated on a run-down sheet and the defendant was writing in a small notebook which contained records of bets made on designated horses to win, place, or show. There were also introduced in evidence certain exhibits found in the room which were identified as two racing forms bearing the date of August 29, 1949, twelve run-down sheets, eleven bet slips, and one blue notebook containing records of bets. The contents of the exhibits were explained by one of the officers familiar with the methods of bookies in taking bets on horse races. This constituted circumstantial evidence in support of the charge that gambling bets on horse races were being taken in the building described. The evidence of the defendant and Brown is a denial that they were engaged in taking or placing bets on horse races. The evidence, however, is clearly sufficient to sustain the charge.

It is contended by the defendant that the complaint was insufficient to charge an offense for the reason that it failed to set forth the specific act committed or any unlawful acts committed on the property. No objection was made to the form of the complaint in the municipal court. We point out also that the action, though criminal in form, is a civil one for the collection of a penalty. In such cases the general rule is that, unless there is a complete failure to state a cause of action, the complaint will be deemed sufficient on appeal. In the district court a bill of particulars provided the information necessary to apprise the defendant of the specific charge against him and the particular ordinance upon which it was based. It is clear that the defendant understood fully the charge made and he was given a full opportunity to meet it. Under the situation existing the complaint was sufficient to charge the offense upon which the defendant was tried. State v. Neimer, 147 Neb. 284, 23 N. W. 2d 81.

Defendant contends that the ordinance under which the complaint was filed was violative of constitutional provisions. We are unable to give consideration to this point for the reason that the ordinance is not before us. We have repeatedly held that an ordinance must be admitted by the pleadings or offered in evidence if it is to be considered by this court. This court does not take judicial notice of municipal ordinances and a failure to properly present an ordinance that is being attacked precludes our consideration of it here. The rule is properly stated in Steiner v. State, 78 Neb. 147, 110 N. W. 723, wherein we said: "It is true, in Foley v. State, supra, this court held that municipal courts will take judicial notice of the ordinances of the city, and that 'on appeal from a judgment of conviction before a police judge for the 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 cause.' But a different rule will prevail with respect to this court, where such matters are not triable de novo. This court cannot undertake to notice the ordinances of all the municipalities within its jurisdiction, nor to search the records for evidence of their passage, amendment or repeal. A party relying upon such matters must make them a part of the bill of exceptions, or in some manner present them as a part of the record." See, also, Maxwell v. Steen, 93 Neb. 29, 139 N. W. 683.

Under the foregoing holdings the district court for Douglas County could take judicial notice of an ordinance of the city of Omaha, but if it took judicial notice of an unconstitutional ordinance it was the duty of the defendant to offer evidence of that fact if the error is to be preserved. Recitals contained in objections or motions purporting to set forth portions of the ordinance do not meet the requirement. Steiner v. State, *supra*. We cannot indulge in a presumption that the district court erred in this respect; it must be shown by

the record. The presumption of regularity must prevail. Wells v. State, 152 Neb. 668, 42 N. W. 2d 363.

The facts stated in the complaint are presumed to charge an offense under the ordinance where the ordinance is not properly presented in the record. Steiner v. State, *supra;* Wells v. State, *supra.* The validity of the complaint and the ordinance under which it was filed not being subject to attack, and the evidence being sufficient to sustain the offense charged, an affirmance is required.

AFFIRMED.

RENA HALL, APPELLEE, V. MODERN WOODMEN OF AMERICA, A FRATERNAL BENEFIT SOCIETY, APPELLEE, IMPLEADED WITH LEOTA HERMAN ET AL., APPELLANTS.
45 N. W. 2d 630

Filed January 19, 1951. No. 32839.

1. **Appeal and Error.** Actions in equity are triable de novo on appeal to this court in conformity with section 25-1925, R. R. S. 1943, subject, however, to the rule that when the evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying and must have accepted one version of the facts rather than the opposite.
2. **Insurance: Equity.** Section 44-1041, R. S. 1943, does not preclude the court, under appropriate facts and circumstances, from exercising its equity power to direct the equitable distribution of the proceeds of a matured mutual benefit life insurance policy which have been deposited in court pending litigation between claimed beneficiaries.
3. ———: ———. Section 44-1029, R. S. 1943, refers to proceedings to collect general and ordinary debts of the insured or beneficiary and not to a contest of equitable cognizance and determination involving the relative rights of rival claimants as beneficiaries to the proceeds of a mutual benefit life insurance policy already matured and in the hands of the court for distribution as equity may require.

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

Jack L. Raymond and *Chauncey C. Sheldon,* for appellants.

Neighbors & Danielson, for appellee.

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

CHAPPELL, J.

Plaintiff brought this suit in equity to recover the proceeds of a fraternal benefit life insurance policy, which, by reason of alleged equities based on contract with her father, the insured, became due and payable to plaintiff after his death.

Defendant, Modern Woodmen of America, hereinafter designated as the company, interpleaded, admitting its liability upon the policy, but alleging that it was unable to determine to whom payment should be made. Thereafter, by motion, stipulation, and order of court, the company paid the proceeds, $2,000, into court. There it was to be held and distributed in conformity with final adjudication of the respective claims thereto by plaintiff and her sisters, the other two defendants, and the company was discharged and released from all further liability. Therefore, the controversy was and now is only between plaintiff and said two defendants.

Such defendants answered, traversing generally the allegations of plaintiff's petition, and cross-petitioned, alleging that as equal beneficiaries of the policy at the death of insured, they were entitled to the proceeds. Thereto respectively plaintiff filed a traversing reply and answer, whereupon the cause was tried to the court on the merits, as in equity.

In its judgment the trial court found generally against defendants and in favor of plaintiff, primarily upon the equitable basis that her performance of contractual obligations by paying premiums on the policy for in-

sured from July 1, 1935, to July 1, 1947, as a consideration for making plaintiff beneficiary, precluded a change of beneficiary by the insured without her consent. In the light thereof, the proceeds were ordered distributed and paid to plaintiff.

Defendants' motion for new trial was overruled, and they appealed, assigning as error that the judgment was not sustained by the evidence but contrary thereto, and contrary to law. We conclude that the assignments have no merit.

The first rule to be applied is that actions in equity are triable de novo on appeal to this court in conformity with section 25-1925, R. R. S. 1943, subject, however, to the rule that when the evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying and must have accepted one version of the facts rather than the opposite. Parrott v. Hofmann, 151 Neb. 249, 37 N. W. 2d 199.

In the light of that rule, we have examined the record. It was stipulated substantially as follows: The policy was procured by insured in 1898. His wife, the original beneficiary, died August 31, 1930, and on September 10, 1930, Phyllis Allegra Dyson, another daughter of insured, was made beneficiary. Thereafter, on July 14, 1939, plaintiff was made beneficiary, and remained such until June 30, 1947, when defendants were made equal beneficiaries under the policy. On December 12, 1947, the insured died and the policy, then in full force and effect, matured. The amount of the monthly premium payments respectively increased on July 1 of each year for the period of that particular year. During the annual periods from July 1, 1935, to July 1, 1947, the amount of such monthly premium payments increased from $8.45 a month the first year to $23.45 the last. Concededly, if plaintiff paid or caused to be paid such premiums as the trial court found that she did in

conformity with competent evidence sustaining the same, then the total sum so paid by her was greater than the proceeds of the policy.

The record discloses ample competent evidence to sustain the following: Plaintiff testified, and it was not denied, that prior to May or June, 1935, she had made some premium payments on the policy for her father. At that time, she had a conversation with her father in her home where he said substantially that due to the fact that she had made some of such payments and he was not in a position to do it right then, or was not interested, for her to go ahead and make the premium payments in the future and he would either reimburse her or change the policy to her. She also testified that thenceforth she kept the policy in full force and effect by making or causing to be made all of the premium payments as proposed by insured, from July 1, 1935, to July 1, 1947. There was some evidence adduced by defendants that the father advanced some of such payments to plaintiff, but such evidence was not only highly speculative and unsatisfactory but also categorically denied by plaintiff, whose testimony was supported by other competent evidence. Whether or not plaintiff paid any such premiums out of money given or allotted to her by a brother who lived with her, without payment of board or room, and who was not a party and made no claim herein or otherwise against plaintiff therefor, is of no consequence.

Another daughter, a witness for defendants, admitted that she had a conversation with her father in 1935, in which he said substantially that he had made up his mind that he could not carry the policy any more and plaintiff had told him that if he would sign it over to her, then she would make the payments, and that he had some arrangement with plaintiff whereby if she paid the premiums he would make the insurance payable to her.

One of the defendants admitted that in 1937 she had

a conversation with her father in which he said substantially that he had already abandoned the insurance and had not wanted a thing to do with it, but plaintiff had asked for the insurance and would make payment of the premiums herself if he would turn the insurance to her.

Plaintiff's daughter, a witness for plaintiff, testified that she had a conversation with her grandfather, the insured, in 1938, at which time he said substantially that he could no longer keep the premiums up and was going to put the policy in plaintiff's name because she had been keeping it up for some time and he thought she was entitled to it. In 1940 he also told such witness that he had changed the policy to plaintiff's name and she was keeping the premiums up.

As heretofore observed, plaintiff was admittedly made the beneficiary of the policy by the insured on July 14, 1939. The record also discloses without dispute that at or about that time insured took the policy to his bank where the banker saw the policy. Insured then left it there with instructions to return it to him on his demand, or in case of his death, to deliver it to plaintiff. There the policy concededly remained until in June 1947, when the insured himself removed it and had the beneficiary changed from plaintiff to defendants on June 30, 1947.

Early in July 1947, having received her school bonus check, plaintiff went to the office of the company's agent to pay him a few monthly premiums, which, by prearrangement, had already been advanced and paid by him as creditor for plaintiff. She then learned for the first time that insured had changed the policy by making defendants equal beneficiaries thereof. Admittedly, at or about that time, the father and defendants as well, were bitter against and unfriendly with plaintiff as the result of litigation with them, then concluded, which grew out of the mother's estate, of which plaintiff was administratrix.

Both defendants knew that the father was unable to pay the premiums, both of them knew that the policy was changed from plaintiff to themselves, and at least one of them knew that plaintiff was paying the premiums under the agreement aforesaid with insured. From July 1, 1947, to December 12, 1947, defendants, then equal beneficiaries, each paid one-half of the monthly premiums.

In the situation presented, we conclude that the offer of insured to reimburse plaintiff or make her beneficiary of the policy if she would make the premium payments in the future, was simply a promise for an act, which offer plaintiff accepted in conformity therewith by performance of the act. Insured, being unable to pay the premiums, much less reimburse her, elected to make plaintiff the beneficiary of the policy in conformity with his own proposal and promise, after which for eight years, plaintiff, relying thereon, continued to fully perform by making the payments, thereby keeping the policy at all times in full force and effect. There was nothing left to implication.

Contrary to defendants' contention then, we have more than a case wherein plaintiff voluntarily paid the premiums or paid them under an agreement that she would simply be reimbursed, thereby placing her in the class of a simple creditor of insured or his estate. In the final analysis, we have presented here, as established by competent evidence, clear, satisfactory, and convincing in character, a lawfully executed contract supported by a valuable consideration already performed and thus binding upon the insured, which in equity precluded him, without plaintiff's consent, from exercising the right to change beneficiaries to defendants who had no equities superior to that of plaintiff. There is ample evidence and authority, including our own, to sustain that conclusion and support the trial court's judgment.

In that connection, it is true, as argued by defendants that: "As a general rule a member of a mutual benefit

insurance society has no property interest in the benefit to be paid, but merely a power to appoint someone to receive it." 46 C. J. S., Insurance, § 1558, p. 943.

It is also true that: "The insured generally may designate a new beneficiary without the consent of the original beneficiary in the absence of a contrary provision in the statutes, or in the society's charter or laws, or in the certificate of insurance." 46 C. J. S., Insurance, § 1567, p. 950.

However, in 46 C. J. S., Insurance, § 1567, p. 951, under the headnote "Exceptions and Limitations," it is said: "Equities in favor of the beneficiary, including equities based on contract, may preclude a change of the beneficiary without his consent."

Also, as stated in 46 C. J. S., Insurance, § 1590, p. 980: "A beneficiary who survives the insured is entitled to the proceeds against all other persons, except where there are peculiar equities or independent agreements."

As stated in Columbian Circle v. Mudra, 298 Ill. 599, 132 N. E. 213, 18 A. L. R. 378, a case strikingly similar to that at bar: "The rule in this State is, that while the assured may, in the absence of intervening equities, change at will the beneficiary named in his insurance policy, equitable rights may be acquired in a beneficiary certificate of insurance which a court of equity will recognize and enforce. (Bispham's Eq. 162; Royal Arcanum v. Tracy, 169 Ill. 123; McGrew v. McGrew, 190 id. 604.) If there was an agreement between the assured and appellee that she should receive a beneficial interest in the certificate of insurance upon and by reason of payments by her of the premiums, dues or assessments, such contract was binding on the assured and deprived him of the right to change the beneficiary without appellee's consent."

As stated under "General rules" in Annotation, 18 A. L. R. 383, following the afore-cited case, and citing many others in support thereof: "Where the original beneficiary in a mutual benefit certificate is named

pursuant to an agreement, express or implied, that he shall be so named in virtue of some consideration moving from him, it is held by the weight of authority that he acquires a right that cannot be defeated, which will be recognized—at least, on principles of equity—as against a substituted beneficiary having no superior equity, notwithstanding the general rule that the beneficiary of such certificates does not acquire a vested right."

In Kernan v. Modern Woodmen of America, 120 Neb. 333, 232 N. W. 590, dated October 17, 1930, denying recovery by plaintiff, this court held in effect that the issues and facts, having a similarity in material respects with those at bar, were controlled by section 44-1217, Comp. St., 1929, which provided: "No contract between a member and his beneficiary that the beneficiary or any person for him shall pay such member's assessment and dues, or either of them, shall deprive the members of the right to change the name of the beneficiary." However, it is interesting to note that at the very next session of the Legislature such section was repealed by Laws 1931, Chapter 86, p. 225, and in lieu thereof, section 7, p. 228, now section 44-1041, R. S. 1943, was enacted. That section, after designating possible beneficiary classes, of which plaintiff was one, provides: "Within the above restrictions, each member shall have the right to designate beneficiaries, and from time to time have the same changed, in accordance with the laws, rules or regulations of the society. *No beneficiary shall have or obtain any vested interest in such benefit until the same has become due and payable upon the death of such member.*" (Italics supplied.) As hereinafter observed, that section does not preclude plaintiff's right to recover, as argued by defendants.

In that connection, we call attention to McLean v. Fidelity Life Assn., 139 Neb. 751, 298 N. W. 700, wherein this court, under circumstances comparable with those at bar, construed and applied the foregoing provisions

of the statute, and in doing so concluded that they did not preclude the court "from exercising its equity power to direct the equitable distribution of the proceeds of a benefit certificate which have been deposited in court pending litigation between claimed beneficiaries."

Likewise, under comparable facts and circumstances, this court said in Williams v. Volz, 131 Neb. 392, 268 N. W. 300: "We admit that the by-laws and rules of the organization give the right to the insured to change to a new beneficiary at any time, but this applies to a case where a beneficiary has been voluntarily and gratuitously designated, and who has acquired no interest whatever in the certificate. * * * We believe that the proceeds of this policy, having been paid into court by the insurance order, constitute a constructive trust to be applied by the court in carrying out whatever agreement the court shall find, after a new trial, was made between these sisters."

In McCleery v. Woodmen of the World, 136 Or. 407, 297 P. 345, relied upon by this court in McLean v. Fidelity Life Assn., *supra,* it was said: "In so far as it appears in the record, there is no prohibition against the member making such a contract or changing the beneficiary in his certificate. The statute providing that 'no beneficiary shall have or obtain any vested interest in the said benefit until the same has become due and payable upon the death of the said member,' does not preclude the making of the contract mentioned. The beneficiary named in the certificate, D. W. McCleery, did not have a vested interest in the benefit until the death of Young. His rights, after the contract was made and performed up to and until the death of Young, were in the nature of a potential or contingent interest. He had an expectancy or equitable interest in the benefit certificate: 8 Words and Phrases, 7303. See also Ryan v. Woman's Ben. Ass'n. of Maccabees, 209 Mo. App. 515, (237 S. W. 224); Wist v. Grand Lodge A. O. U. W., 22 Or. 271, 277, 278, (29 P. 610, 29 Am.

St. Rep. 603); United Artisans v. Cronise, 88 Or. 602, 608, (172 P. 109, L. R. A. 1918D, 1131).

"* * * Such equitable right of McCleery should be recognized and protected. The member Young was estopped from changing the beneficiaries' interest in the certificate in violation of his contract. See Bacon's Life and Accident Insurance (4th Ed.) § 403. We quote a part of that section:

" 'In these cases it is not held that, under the contract, the beneficiary has acquired a vested right, but the member has parted with a right which he otherwise might have exercised.' " See, also, Stronge v. Knights of Pythias, 189 N. Y. 346, 82 N. E. 433, 12 L. R. A. N. S. 1207, 121 Am. S. R. 902; Savage v. Modern Woodmen of America, 84 Kan. 63, 113 P. 802, 33 L. R. A. N. S. 773; Coffman v. Security Benefit Assn., 131 Kan. 328, 291 P. 753; Tivis v. Hulsey, 148 Kan. 892, 84 P. 2d 862.

Without citation of any authorities, defendants also argued that section 44-1029, R. S. 1943, precluded any recovery by plaintiff. We decide otherwise.

That section provides: "No money or other benefit, charity, relief or aid to be paid, provided or rendered by any such society shall be liable to attachment, garnishment, or other process, or be seized, taken, appropriated or applied by any legal or equitable process or operation of law to pay *any debt or liability of a member or beneficiary,* or any other person who may have a *right thereunder,* either before or after payment." (Italics supplied.)

It will be noted that the words "right thereunder" appearing in such statute refer to proceedings to collect "any debt or liability of a member or beneficiary" and not to a contest of equitable cognizance and determination involving the relative rights of rival claimants as beneficiaries to the proceeds of the policy already matured and in the hands of the court for distribution, as equity may require.

This court has not heretofore construed or applied

such statute, but other jurisdictions have done so in a manner contrary to defendants' contentions.

The Tennessee court, in construing and applying a statute identical with our own, said in Allen v. Cunningham, 143 Tenn. 11, 223 S. W. 450: "We are of the opinion that this statute has reference to general and ordinary debts of the insured or beneficiary, and not to assessments or money paid by which the benefit is created and made possible. Especially is this true where it appears that the insured assigned or had transferred to the person paying the dues or assessments the certificate for the primary and express purpose of reimbursing him for the payments made, though it turned out that the assignment was void. We think that a court of equity has the power, notwithstanding the statute referred to, to compel the complainants, who are seeking its aid, to do equity by reimbursing the defendant, who contributed his money to the creation and preservation of a fund, which, owing to the void assignment or transfer of the certificate to the defendant, inured to complainants' benefit."

In Tivis v. Hulsey, *supra,* it was argued that under a Kansas statute of like import with our own, the impounded proceeds of the policy involved were exempt from payment of claims like that made herein by plaintiff, against either the insured or the beneficiary last named in the policy. In concluding otherwise, the court said: "We are concerned here with whether plaintiff can recover against defendant in this action. In this case the insurance company had paid the amount due on the policies. No one has any controversy with it; it is not a party to this action.

"The action is between rival claimants of the proceeds of the policies. In such a case, where rights are claimed by reason of a contract made with the assured, the contest involves the relative rights of the claimants and may become one purely of equitable cognizance and determination. (Brown v. Modern Woodmen, 97 Kan.

665, 156 Pac. 767.) * * * In such a case the proceeds of the policy become a trust fund, which may be followed by the rightful claimant. (Exchange State Bank v. Poindexter, 137 Kan. 101, 19 P. 2d 705.)"

Such conclusions also conform to the rule that: "The district courts of this state, being courts of general equity jurisdiction, are not limited in the exercise of such jurisdiction by statute." Cochran v. Cochran, 42 Neb. 612, 60 N. W. 942. See, also, Burnham v. Bennison, 121 Neb. 291, 236 N. W. 745; Wassung v. Wassung, 136 Neb. 440, 286 N. W. 340.

In the light of what has already been said, we are not required to discuss or decide whether or not plaintiff had an equitable lien upon the proceeds involved.

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

AFFIRMED.

IRVING SNYDER, DOING BUSINESS UNDER THE FIRM AND STYLE OF DENVER CAR & TRUCK MARKET, APPELLANT, V. HARRY LINCOLN, DOING BUSINESS UNDER THE FIRM AND STYLE OF LIBERTY CAR COMPANY, ET AL., APPELLEES.

45 N. W. 2d 749

Filed January 19, 1951. No. 32887.

1. **Evidence.** The courts of Nebraska are authorized to take judicial notice of the common law and statutes of another state.
2. **Automobiles.** A purchaser of an automobile in Colorado may acquire title thereto without complying with the law of that state on the subject of transfer of title of a motor vehicle.
3. **Trial.** In determining the sufficiency of evidence to sustain a verdict it must be considered most favorably to the successful party, any controverted fact must be resolved in his favor, and he is entitled to the benefit of inferences reasonably deducible therefrom.
4. **Larceny.** If the owner of personal property is induced by fraud to part with its possession without intending to transfer its

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

5. **Sales.** Where the seller of personal property has a voidable title thereto, but his title has not been avoided at the time of the sale, the buyer acquires a good title to the property provided he buys in good faith, for value, and without notice of the seller's defect of title.
6. ———. The status of a bona fide purchaser from a fraudulent buyer is determined by rules applicable in any other situation where one asserts the right to protection as an innocent purchaser.
7. ———. An innocent purchaser is one who buys property for a present valuable consideration without knowledge sufficient to charge him in law with notice of any infirmity in the title of the seller.
8. **Evidence.** When part of a writing is put in evidence by one party, the whole, on the same subject, may be inquired into by the other party.
9. **Appeal and Error.** The action of the trial court in excluding testimony of a witness during his direct examination may not be reviewed on appeal in the absence of an offer to prove what it is claimed the testimony would show.
10. ———. The failure of a litigant to object to the introduction of evidence when it is offered precludes him from afterwards complaining that its reception was error.
11. **Trial: Appeal and Error.** A litigant is entitled to have his theory, when pleaded and supported by evidence, submitted to the jury, and it is error to refuse a proffered instruction warranted by evidence and correctly stating law applicable to the case, unless the matter is covered by instructions given by the court.

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

Levin & Brodkey, for appellant.

Wear & Boland, for appellees.

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

BOSLAUGH, J.

This is an action of replevin prosecuted by appellant

to recover possession of an automobile from appellees. This is a second appeal. The result of the first was a reversal of the judgment and a remand to the district court. Snyder v. Lincoln, 150 Neb. 580, 35 N. W. 2d 483. There was another trial in that court. Harry Lincoln was dismissed from the case at the close of the testimony of the appellant. There is no cross-appeal, and the judgment in his favor is final. A verdict and judgment were rendered for Chauncey Eugene Wilson, and a new trial was denied appellant. The contending parties are Irving Snyder, appellant, and Chauncey Wilson, appellee.

The record of this case recites and counsel have extensively discussed a tangled and, in many respects, unusual series of transactions and circumstances of more than slight volume and complexity, but the appeal may properly be disposed of by a consideration of a few of them.

Appellant, as Denver Car & Truck Market, operated a used automobile business in Denver, Colorado. He employed his brother, Max Snyder, as a salesman. About 2:30 p. m. on Saturday, August 30, 1947, a nice-appearing, well-dressed young man about 30 years of age, five feet nine inches tall, weight about 175 pounds, with light hair, wearing blue pants and khaki jacket, came to the place of business of appellant, which consisted of an open lot and a small building used for an office. He was a total stranger, met and talked with Max Snyder, said he wanted to buy an automobile, and that his name was R. B. or R. Bryan Owen. Snyder showed him around the lot and let him take and drive a car for a demonstration. He returned in a short time and said he did not like the car. Snyder showed him another. He took it for a demonstration, returned shortly, said he liked it, and desired to show it to his wife who was in the city at a location considerably removed from the place of negotiation. Snyder hesitated about granting his request "knowing it is far out." They went in

the office. Snyder told Owen the price of the car was $2,499.00. He knew what his brother had paid for it and the price that had been put on it. Owen wanted to give a check for the car, said he would leave a check, and if his wife liked it they would take it, but Snyder said he could not accept a check unless it was certified as the banks were closed. Owen wrote a check for $2,499.00, payable to Denver Car & Truck Market, drawn on a Colorado bank, and gave it to Snyder. Snyder then let Owen drive the car away. It had dealer's license plates on it. It was then about 3 p. m. There was a telephone in the office but Snyder made no investigation. The car was not returned.

Snyder testified at the first trial that Owen came on the lot, looked over about three or four cars, gave special attention to a 1946 Chevrolet Aerosedan, the one involved in this suit, asked if he could take it for a trial, Snyder consented, and Owen drove it away and returned in 10 or 15 minutes. They went in the office; Snyder told him the price was $2,499.00; he said he would pay that for the car; he wrote a check on a Denver bank for that amount to the Denver Car & Truck Market as payee, gave it to and left it with Snyder, who told Owen he could take the car; and when Snyder hesitated to consent to the request of Owen to take the car and show it to his wife that was when Owen said that he would leave a check for the car with Snyder.

Snyder did not testify at the first trial as to any act or conversation of Owen concerning any automobile except the one which is involved in this litigation, described as a 1946 Chevrolet Aerosedan, motor number DAM-31926. He testified at the second trial that Owen drove two cars—the first a 1946 Chevrolet Tudor, motor number EDA-17675, to which a dealer pink slip (later described) was attached, and the other the car in suit, motor number DAM-31926.

The pink slip was a form on pink paper devised by the Motor Vehicle Division of the Department of Rev-

enue of Colorado available to dealers in automobiles to be completed and used to entitle a purchaser of a motor vehicle to operate it, but "GOOD ONLY TO REACH THE NEAREST OPEN ISSUING OFFICE where License or Regular Permit can be obtained." It was in two parts divided by a perforation. The upper or smaller had blank spaces properly designated to show, when properly filled in before being used, the engine number, year, make, model, type, name of purchaser, name of seller, date of sale of the vehicle, and for the signature and place of residence of the purchaser of the car. The bottom or larger part was prepared so that it could be pasted on the outside of the rear window of the car involved. It was required that the date of sale be stamped thereon "in numerals not less than ¾ inches in HEIGHT" and there was printed thereon the statement addressed to the dealer: "This Sticker is to be used only on cars sold by you and only at the time of such sale." Printed on each part thereof was an identical number. The sticker important in this case was numbered 55816.

While they were in the office Snyder secured a pink slip, had Owen sign it, and they then went on the lot and Snyder fastened the larger part thereof on a 1946 Chevrolet car. Snyder said the motor number of the car was EDA-17675. A photostatic copy of the stub or smaller part of the slip was produced and is in evidence. There are significant facts about this. The date inserted below the designation thereon "Date of Sale" is "Sept 2." There is testimony that Snyder reported the fact that Owen had not returned the car to the auto theft division of the police department in Denver, and at that time stated, as recorded in the report, that the missing car had no license number but "May Have Pink Deal. Permit #55816." The words "Pink Deal." were explained by the person who took and recorded the report as meaning "pink dealer." The car with motor number EDA-17675 was a 1946 Chevrolet, and the car Owen

took and did not return was a 1946 Chevrolet, but its motor number was DAM-31926. Snyder only says that he had Owen sign the dealer's slip when he was there. He does not say when the stub, the part retained by the dealer, was completed. The date, September 2, given as the date of sale, and other circumstances and permissible inferences may suggest that this was done on September 2, 1947. That was the day Snyder made the report to the police station and the F.B.I.—the third day after the transaction with Owen.

There is evidence that Snyder in his report to the police on September 2 stated that the car was "Locked. No keys in ignition." On November 2, 1947, Snyder made a statement to an insurance company, against whom appellant had made claim for the loss of the car on the basis it had been stolen, in which Max Snyder gave this version of the experience with Owen: "This car was stolen from used car lot at 4400 W. Colfax, Denver, by a man who wanted to buy the car. He wanted to give a check for the car but I told him no to come back Tuesday Sept. 2, and he could have the car. While I was on the other end of the lot, This man drove off in this Chev. On Sept. 2, I notified the police as the car had not been returned." He said he also notified the F.B.I. on that date.

He testified he reported to Lawrence F. Cook, who had charge of the auto theft division of the police department, at his home during the dinner hour, about 7 p. m. on August 30, 1947, the facts about Owen taking and not returning the car. Cook testified that the information Snyder gave him was: "'* * * that the car was missing and a check was left there for a car by R. B. Owen * * *'" and that there were no license plates on the car. When Cook reported to the Automobile Protective and Information Bureau he said, as shown by evidence offered by appellant, that the Denver Car & Truck Market sold the car to Owen who gave his

personal check for it, " '* * * which was found to be rubber.' "

The Denver police station was open and police officers were always on duty. George William Athens, one of them, testified he received the information which he placed in the police report, Exhibit 23, by telephone from Max Snyder at 10:58 a. m. on September 2, 1947, and he correctly stamped the blank on which the report was made at that time to record and verify this fact. The items he did not write thereon are: "figures on the lower left-hand corner"; "penciled writing of the name Snyder"; "R. Bryan Owen"; "See Pick Up H-229"; "Transmitter Date 10-9-47 By Huber"; and "J-17." He said that "9P, 8-30-47" and "10A, 9-2-47" on the line following the words "Date Taken" in the report mean that when Snyder was asked when was the last time he had knowledge of the possession of the car he said it was 9 p. m. on the 30th (August 30, 1947), but that they did not miss it until 10 a. m. on the 2d (September 2, 1947).

The banks of Denver open for business at 10 a. m. The check given by Owen for the full amount fixed as the selling price of the car was known to and in the actual possession of appellant on September 1. He knew the car had not been returned on September 2. He presented the check to the bank on September 2 and asked it to cash the check, and was then told there was no such account in the bank.

Owen transported the car in controversy to Kansas City, Missouri, and offered to sell it to D. B. Pearson Motors, trade name of D. B. Pearson, a used car dealer. Owen represented that he had purchased it from Kellen Motor Company, 811 Broadway, Columbus, Georgia, and exhibited a bill of sale purporting to show a transfer of the car to him. Pearson bought the car for $1,850.00 and paid Owen that amount. There is evidence that he executed a bill of sale and other documents concerning the title and the transfer thereof and delivered them to

Pearson. He secured a certificate of title of the car as permitted and required by the law of Missouri. He sold the car to Harry Lincoln, a used car dealer of Omaha, Nebraska, who conducted his business in the name of Liberty Car Company, for $2,125.00, and assigned and transferred to Lincoln the Missouri certificate of title. He had before this transaction bought many cars from Pearson. Lincoln surrendered the Missouri certificate of title and secured a Nebraska certificate of title in accordance with the law of this state. He had the car from September 5, 1947, until October 14, 1947. On the last date he sold it to Chauncey Eugene Wilson for $2,200.00, and transferred and delivered the Nebraska certificate of title and the car to him, and it was from him that the car was taken by replevin.

Lincoln had known Wilson a long time and had done business with him for about four years. He sold him a 1947 half-ton Chevrolet truck and a 1947 Ford sedan earlier on the same day that he sold him the car involved in this case. Appellee negotiated for the purchase of the automobile from Harry Lincoln in the usual course of business, bought it, paid the full purchase price, received lawful evidence of title, as provided by the law of Nebraska, and actual and uncontested possession of the car. After he had bought the Chevrolet truck and the Ford sedan at the place of business of Harry Lincoln, appellee inquired if he had any Chevrolet Aerosedans. The reason he gave for doing this was that they were a type of car that was "a good seller and easy to handle." He had been selling motor vehicles for more than 30 years in and around Gothenburg, Nebraska. Lincoln informed Wilson he had one that his brother Norman had driven to his home the night before, that it was there, and he offered to take appellee and show him the car. This was done. Appellee examined and bought it. The reason the car was not at the place of business was satisfactorily explained. There is no dispute about it. Norman Lincoln was employed by his

brother Harry. The hours of his employment were from noon until 9:30 or 10 p. m. It was understood between them that Norman might drive this car home when he finished work at night. Norman Lincoln had not come to work yet that day and hence the car was at his home in his garage.

The district court was authorized and required to take judicial notice of the laws of Colorado. § 25-12,101, R. R. S. 1943. A purchaser of an automobile in that state may acquire title without complying with the law thereof on the subject of the transfer of title of motor vehicles. Noncompliance may subject the buyer to a penalty, but his title to the vehicle, the subject of the sale, is not affected by his omission or violation. In Wilson v. Mosko, 110 Colo. 127, 130 P. 2d 927, the court of that state said: "If one owning a car sells and delivers it to another without assigning and delivering the certificate of ownership therefor, and the purchaser receives it under those conditions, the sale is unlawful * * * though not void, notwithstanding both seller and buyer are guilty of a misdemeanor under the statute." See, also, Forney v. Jones, 76 Colo. 319, 231 P. 158; Cole v. Lindsey, 120 Colo. 501, 211 P. 2d 544.

The manner of testing the sufficiency of evidence to support a verdict in a law action has recently been stated: "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." Bolio v. Scholting, 152 Neb. 588, 41 N. W. 2d 913.

The challenge of appellant to the sufficiency of the evidence to justify and require the submission of this case to the jury to determine whether he had made a sale of the automobile to Owen, or whether he had come into possession of it as appellant claims by larceny, cannot be sustained.

If Owen obtained the car from appellant by a sale

induced by fraud, and as a result thereof title passed to Owen, and thereafter appellee was an innocent purchaser of and acquired the title thereto, he took it free from any right of appellant to rescind the sale and reclaim the automobile. When personal property is obtained from its owner by a sale induced by the fraud of the buyer by virtue of which title passes to the party guilty of the fraud, an innocent purchaser of the property from the fraudulent buyer or from one to whom he has surrendered it, for value and without knowledge of the fraud, takes the title thereto free from the equity of the original seller to rescind the sale and reclaim the property. In other words, if after the seller delivers possession to the buyer pursuant to a sale induced by the buyer's fraud the property has passed into the hands of a bona fide purchaser for value, the right of the original seller to recover the property is lost. Snyder v. Lincoln, *supra;* Uniform Sales Act, § 69-424, R. R. S. 1943; 46 Am. Jur., Sales, § 471, p. 635.

The status of a bona fide purchaser from a fraudulent buyer is determined by the rules applicable in any other situation where one asserts the right to protection as an innocent purchaser. Uniform Sales Act, § 69-424, R. R. S. 1943; 46 Am. Jur., Sales, § 464, p. 629. An innocent purchaser is one who buys property for a present valuable consideration without knowledge sufficient to charge him in law with notice of any infirmity of the title of the seller. Wallich v. Sandlovich, 111 Neb. 318, 196 N. W. 317; Justice v. Shaw, 103 Neb. 423, 172 N. W. 253; Annotation, 107 A. L. R. 502; 46 Am. Jur., Sales, § 465, p. 630. See, also, Mingus v. Bell, 148 Neb. 735, 29 N. W. 2d 332.

There is no evidence of any fact or circumstances known to appellee or of which he should have taken notice that could have suggested or indicated to him a defect in the title of Harry Lincoln to the automobile at the time he sold it to appellee. Appellee was an innocent purchaser of the automobile and the district court correctly instructed the jury to that effect.

Appellant claims prejudicial error because Exhibit 23 was received in evidence. It was identified in a deposition as Exhibit 1, and is in that manner sometimes referred to in the record. Appellant introduced testimony as to the source of the information stated therein, the means, manner, and purpose of the making thereof, and put a part of the contents of the exhibit in evidence. Parts of it were placed in evidence by the exhibition of the exhibit to and examination of a witness concerning things set forth therein and the meaning thereof. A similar complaint is made because of the admission in evidence of Exhibit 25 (also referred to as Exhibit 3). It is a copy of a letter produced by appellant, identified by a witness while being examined by counsel for appellant, and at his request the first paragraph thereof was read into the record by the witness. The verity of the statements made in the part of the exhibit read was established by the witness, who was the person named therein as the source of the information. The part of the exhibit thus introduced in evidence is the only portion of the writing that could have been prejudicial to appellant. Any effect of the remaining parts were favorable to him. The exhibits were properly received. The code provides that: "When part of an act, declaration, conversation or writing is given in evidence by one party, the whole on the same subject may be inquired into by the other." § 25-1215, R. R. S. 1943. See, also, Baxter v. National Mtg. Loan Co., 128 Neb. 537, 259 N. W. 630; Roeder v. State, 119 Neb. 116, 227 N. W. 446; 20 Am. Jur., Evidence, § 914, p. 770.

It is claimed that Exhibit 26 was immaterial to any issue in the case and that foundation was lacking for its receipt in evidence. The objections are not valid. It was sufficiently identified and was proper to be considered by the jury in determining whether the vehicle in question was or was not sold by appellant.

The claim of error resulting from the action of the district court sustaining objections to questions asked

the witness Alan G. Hoskins is not sustained by the record. There was no showing what the answer of the witness would have been to any question propounded to him. The action of the trial court cannot be reviewed on appeal because of the absence of an offer of what appellant expected to show by the testimony of the witness. Blondel v. Bolander, 80 Neb. 531, 114 N. W. 574.

Error is assigned because the offer of Exhibit 4 was allowed by the district court. It was a statement signed by the witness Max Snyder purporting to relate the facts of what transpired at the time the vehicle was taken from the place of business of appellant. It contains statements in conflict with the testimony of the witness given on each of the trials of this case. It was clearly shown that appellant had no insurance coverage on the automobile, the subject of this action, and that he had not received any indemnity because of its loss. The assignment is without merit.

Appellant argues that the admission of Exhibit 13 was error. This was a transcript of the record of a case in the district court of Denver County, Colorado, brought by appellant against an insurance company on a claim that the car involved in this case had been stolen from him. Statements made therein by appellant tended to impeach testimony given by him on the trial of this case. Counsel for appellant did not object to, but approved its admission as evidence. The failure of a litigant to object to the introduction of evidence when it is offered precludes him from thereafter complaining that its reception was error. Ryne v. Liebers Farm Equipment Co., 107 Neb. 454, 186 N. W. 358; In re Estate of House, 145 Neb. 866, 18 N. W. 2d 500, 159 A. L. R. 401.

The charge of the district court advised the jury that one who secures possession of property by larceny cannot convey good title even to an innocent purchaser, but that when property is sold and delivered to a fraudulent vendee an innocent purchaser of the property from

the fraudulent vendee acquires good title. Larceny was not defined. Neither was the jury given any criterion by which it could distinguish larceny from a sale induced by fraud. Appellant requested that the jury be informed: (a) That where an owner of personal property is induced by fraud to part with its possession, without intending also to part with title to the property, the transaction is larceny if the person so receiving possession without title has, at the time, a secret intention of converting it permanently to his own use and does so without consent of the owner; (b) that while it is generally true that in larceny the taking must be a trespass against the owner's possession, yet, where fraud is practiced to obtain possession, no actual violence is necessary because the fraud takes the place of violence; (c) that mere possssion of personal property, by whatever means acquired, in the absence of ownership or authority from the owner to sell, will not, in the absence of estoppel, enable the person in possession to give good title as against the true owner, even to a purchaser in good faith; and (d) that if an individual obtains possession of an automobile by fraudulent representations, and is guilty of larceny by trick because of his secret intention to convert the automobile permanently to his own use, without consent of the owner, he receives mere possession of the automobile without title, ownership, or authority to sell it and transfer title to another.

The instructions given contain the words "sale," "sell," and "sold," but do not state what constitutes a sale of property. Appellant requested an instruction to the effect that the essential thing in the passing of title to personal property is that the seller and the buyer intend that the title thereto shall pass from the former to the latter, and not what induced them to have that intention. The tendered instruction was refused.

Appellant requested the court to instruct the jury that the general rule is that where one of two innocent persons must suffer by the acts of a third, he whose con-

duct, act, or omission enables the third person to occasion the loss must sustain it if the other party acted in good faith without knowledge of the facts and altered his position to his detriment. The foregoing rule does not apply in cases where the wrong was accomplished through the instrumentality of a criminal act since the crime and not the negligent act is the proximate cause of the injury. This request was refused but an instruction given by the court did contain the substance of the first sentence of the tendered instruction but wholly omitted the last sentence thereof.

The refusal of the court to give the tendered instructions referred to in the foregoing and the omission of the court to instruct in regard to the matters specifically noted above was error prejudicial to appellant. If the statements of the charge to the jury upon material matters are general, an explanatory instruction which is pertinent and applicable to the situation should be given if requested. It is error to refuse an instruction warranted by the law and the evidence not covered by other instructions given. First National Bank v. Carson, 30 Neb. 104, 46 N. W. 276; Crosby v. Ritchey, 56 Neb. 336, 76 N. W. 895. It is error to refuse a proffered instruction warranted by the evidence and correctly stating the law applicable to the case unless the matter involved is covered by other instructions. A litigant is entitled to have his theory supported by competent evidence submitted to the jury. Dunlap v. Welch, 152 Neb. 459, 41 N. W. 2d 384; McKain v. Platte Valley Public Power & Irrigation Dist., 151 Neb. 497, 37 N. W. 2d 923.

The judgment should be and it is reversed, and the case is remanded to the district court.

REVERSED AND REMANDED.

D. J. RHOADES ET AL., APPELLEES, V. STATE REAL ESTATE COMMISSION OF THE STATE OF NEBRASKA, APPELLANT.
45 N. W. 2d 628

Filed January 19, 1951. No. 32901.

1. **Appeal and Error: Licenses.** The effect of an appeal bond and institution of an original action in the district court, as the Real Estate Commission Act permits, is to stay the order of the State Real Estate Commission involved in the proceedings until the final disposition of the case.
2. ———: ———. The time of the commencement of a period of suspension of a license, as fixed by order of the State Real Estate Commission, when enforcement of the order has been stayed in the manner provided by law pending further contest in the matter, is automatically postponed until the order of suspension becomes final and enforceable.
3. **Appeal and Error.** When a case is remanded by this court to the district court with directions for its disposition, the district court must obey and perform the mandate of this court.

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.

George Evens, for appellees.

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

BOSLAUGH, J.

This is an appeal from a judgment of the district court for Douglas County rendered because of the direction of a mandate issued by this court in a former appeal of this case.

Jurisdiction of American Mortgage Corporation, designated as an appellee herein, was not acquired because of the absence of service of notice on it and its election not to make an appearance. Rhoades v. State Real Estate Commission, 152 Neb. 701, 42 N. W. 2d 610. The

parties to this appeal are D. J. Rhoades, appellee, and State Real Estate Commission, appellant.

A decree of the district court reversing an order of appellant suspending the license of appellee to engage in business as a real estate broker in the state was reversed on the former appeal and the trial court was directed by the opinion and mandate 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." Rhoades v. State Real Estate Commission, *supra.*

The judgment on the mandate, the subject of this appeal, is "* * * that the license issued to * * * D. J. Rhoades, prior to March 27, 1947, to operate as a real estate broker in the State of Nebraska, be and hereby is suspended for a period of six months from the 28th day of March, 1947, the date of the filing of the order of the State Real Estate Commission of the State of Nebraska."

The order of appellant was that the license of appellee be suspended for a period of six months commencing with March 27, 1947, the date of the entry of the order. Appellee complied with the Real Estate Commission Act and pursued the contest in the district court. The giving of an appeal bond and the institution of an original action in the district court had the effect of staying the order of the commission until the final disposition of the case—a result not yet accomplished. § 81-884, R. R. S. 1943; Feight v. State Real Estate Commission, 151 Neb. 867, 39 N. W. 2d 823.

Appellee was assured, by the statute and the proceedings taken by him for a review and further contest of the order of the commission, the right to do business as a real estate broker, until the final determination of the case, the same as though no proceedings had been prosecuted against him. He has not yet suffered any inter-

ruption of his right to do business as a real estate broker because of the violation of the Real Estate Commission Act which has been finally adjudged against him, and the judgment of the district court now under consideration decrees that he shall not. The period of suspension of his license fixed by the commission, if it had not been stayed by the acts of appellee, would have expired on September 27, 1947, more than two years before the decision and mandate of this court concluded and directed that the district court should, after the mandate was lodged in that court, by its judgment suspend his license for six months.

If this court had intended what the trial court has done, it would have dismissed the case on the first appeal because in that situation any possible period of suspension of the license of appellee would have long since expired. It is not to be assumed that this court directed the trial court to attempt to do a vain and impossible thing.

The purpose and effect of furnishing an appeal or supersedeas bond when permitted by law is to stay proceedings and preserve the status quo pending final determination of the litigation. If the result of the first hearing in the district court had agreed with the order of the commission and if it had been affirmed by this court, the time of the commencement of the period of suspension of the license of appellee would have been automatically advanced until the judgment providing for the suspension became final and enforceable. Ruzicka v. Hotovy, 72 Neb. 589, 101 N. W. 328, 9 Ann. Cas. 1058; Carroll v. Polfus, 98 Neb. 657, 154 N. W. 213; Guaranty Fund Commission v. Teichmeier, 119 Neb. 387, 229 N. W. 121.

The direction of this court to the district court of Douglas County was that, when it received the mandate issued from this court, it should, by its judgment then to be entered, suspend the license of appellee issued to him by appellant authorizing him to do business

in Nebraska as a real estate broker for six months from the time of the rendition and entry of the judgment of the trial court. That duty of the district court was not performed. It is mandatory that the direction of this court be observed. De Lair v. De Lair, 148 Neb. 393, 27 N. W. 2d 540; Glissmann v. Bauermeister, 149 Neb. 131, 30 N. W. 2d 649.

The judgment should be, and is reversed and the district court for Douglas County should be, and is directed, upon the filing in the office of the clerk of that court of a mandate to be issued herein, to forthwith render and enter a judgment suspending the license of appellee authorizing him to do business in Nebraska as a real estate broker for six months from the time of the rendition and entry of the judgment.

REVERSED AND REMANDED WITH DIRECTIONS.

LOYAL'S AUTO EXCHANGE, INC., APPELLEE, V. ROBERT MUNCH, CHIEF OF POLICE, ET AL., APPELLEES, IMPLEADED WITH LESTER L. KORNFELD, INTERVENER AND APPELLANT.

45 N. W. 2d 913

Filed January 26, 1951. No. 32791.

1. **Automobiles: Constitutional Law.** The legislative act "Relating to Title and Transfer of Motor Vehicles," now Chapter 60, art. 1, R. S. 1943, together with the amendments made thereto, constitutes an authorized exercise of police power on the part of the Legislature and does not violate any of the provisions of our state or federal Constitution.
2. ———: ———. Insofar as Blixt v. Home Mutual Ins. Co., 145 Neb. 717, 18 N. W. 2d 78, holds to the contrary the same is overruled.
3. **Automobiles.** A purchaser who receives possession of an automobile without obtaining the certificate of title thereto, as required by our statute, acquires no title or ownership therein.
4. ———. A subsequent purchaser for value of the automobile, who obtains the certificate of title by complying with the statutory requirements relating thereto, obtains the title and owner-

ship thereof. His title and ownership are superior to any rights which the first purchaser may have.

5. **Replevin.** The plaintiff in a replevin action must recover, if at all, upon the strength of his own title to the property involved and not upon the weakness of the defendant's title to said property.
6. **Trial.** The giving of erroneous instructions is not cause for reversal, if the instructions are more favorable to the complaining party than he is entitled to under the law.
7. **Notaries.** A notary public is disqualified to act as such officer when he has a direct pecuniary interest in the matter and under such a situation cannot lawfully take the acknowledgment.
8. **Acknowledgments.** A stockholder in a corporation, who is likewise a notary, has such a direct beneficial interest in the corporation as to disqualify him from taking an acknowledgment to an instrument running to it.
9. **Trial.** A party to an action is entitled to have the jury instructed with reference to his theory of the case, when the pleadings present the theory as an issue and it is supported by competent evidence.
10. **Corporations: Evidence.** Generally the declarations and admissions of executive officers and managers as agents of a corporation, made while acting within the scope of such authority and in connection with the performance of some duty to which such declarations are pertinent, are admissible against such corporation.

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

Monsky, Grodinsky, Good & Cohen, for appellant.

Abrahams, Kaslow & Carnazzo, for appellee.

Herbert M. Fitle, for appellees Munch et al.

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

WENKE, J.

Loyal's Auto Exchange, Inc., a corporation, brought this action in the district court for Douglas County to replevin a 1947 Ford Tudor automobile. The action was brought against certain police officers and the City of Omaha. Lester L. Kornfeld intervened and claimed

to be the owner thereof. There was a verdict and judgment in favor of the plaintiff. His motion for new trial or in the alternative for a judgment notwithstanding the verdict having been overruled, intervener appealed.

At the time this suit was instituted the automobile was in the possession of the police officers of the city of Omaha who had taken it from the intervener. The police officers and the city of Omaha disclaimed any interest in the automobile and the case proceeded to trial on the issues raised by plaintiff and intervener. For the purpose of this opinion the parties will be referred to as they appeared in the trial court.

The first question raised by the appeal is the sufficiency of the evidence to sustain the verdict. To sustain its contention that it was the owner of the automobile and entitled to the immediate possession thereof plaintiff adduced evidence to the following effect: That on or about May 1, 1947, James B. Skipper, who will hereinafter be referred to as Skipper, purchased the automobile, the ownership of which is herein in question, from the Champion Motor Sales Company of Omaha; that he paid therefor the sum of $2,325 of which $1,325 was in cash and the balance by a loan financed by the Mutual Credit Company of Omaha; that on May 6, 1947, a certificate of title to the automobile was issued by the county clerk of Douglas County to Skipper which certificate had noted thereon that title had been acquired from the Champion Motor Sales Company on May 1, 1947, and that the Mutual Credit Company had a first lien thereon in the sum of $1,322.40; that the certificate of title to the automobile was turned over to the Mutual Credit Company and that it never came into the possession of Skipper; that on July 12, 1947, Skipper sold the automobile to the plaintiff for the sum of $1,800; that plaintiff is a corporation engaged in the buying and selling of automobiles with its principal place of business located in Omaha, Nebraska; that Loyal Katskee was the president, a director, and the

officer in active charge thereof at the time; that of the purchase price plaintiff paid to the Mutual Credit Company the sum of $1,261.71, being the total balance of its lien, and to Skipper the balance in cash; that Skipper did not at that time deliver a certificate of title to the automobile to the plaintiff because it was at all times held and in the possession of the Mutual Credit Company who had the lien thereon; that Skipper gave plaintiff a power of attorney authorizing Sam Moskovitz, an employee of plaintiff, to assign the certificate of title to the automobile to the plaintiff; that possession of the automobile was not delivered to the plaintiff by Skipper, his reason for not doing so was that it was then being used by one of his employees out in the state and that as soon as he returned it to Omaha he would deliver it; that the Mutual Credit Company, upon being paid in full, released its lien and turned over to plaintiff the certificate of title, which it then held; that on the same date Sam Moskovitz, pursuant to the authority given him by Skipper's power of attorney, assigned the certificate of title to plaintiff; that on the same date plaintiff filled in the application for certificate of title to the automobile which it later filed with the county clerk of Douglas County on July 25, 1947; that on July 25, 1947, a certificate of title was issued to the plaintiff; that Skipper had not then delivered the automobile to plaintiff; that on July 26, 1947, at the request of the plaintiff, the police of Omaha picked up the automobile which was in the possession of intervener; that both plaintiff and intervener made claim thereto; that the police refused to turn the automobile over to either party; and that this action was commenced on July 29, 1947.

Intervener adduced evidence to the effect that on April 29, 1947, he paid Skipper $1,455 in cash for the automobile; that shortly thereafter, about two hours, the automobile was delivered to him; that Skipper did not give him a certificate of title thereto although he

knew one was necessary; that he made request therefor; that Skipper told him he would get it from the seller and mail it to him; that Skipper never mailed or gave him a certificate of title to the automobile although he often requested and demanded he do so; that he did, sometime during the first part of July 1947, obtain a receipt from Skipper showing that he had paid for the automobile in full; and that he was at all times in possession of the automobile from the time it was delivered to him up until July 26, 1947, when the police took it from him and from whose possession it was replevied by the plaintiff.

In 1939 the Legislature passed an act "Relating to Title and Transfer of Motor Vehicles," Laws 1939, c. 81, p. 328. The purpose of the act, as disclosed by the title, includes the following: "* * * prohibiting sale or transfer of motor vehicles unless accompanied by assignment of certificate of title; * * *." This act is found in Chapter 60, art. 1, R. S. 1943. Certain sections of this act were amended by the 1945 Legislature. See Laws 1945, c. 140, p. 442.

As amended, section 60-104, R. S. Supp., 1949, so far as here material, provides: "No person * * * shall sell or otherwise dispose of a motor vehicle * * * without delivering to the purchaser or transferee thereof a certificate of title with such assignment thereon as may be necessary to show title in the purchaser, nor purchase or otherwise acquire or bring into this state a motor vehicle * * * except for temporary use."

As amended, section 60-105, R. S. Supp., 1949, so far as here material, provides: "No person * * * acquiring a motor vehicle * * * from the owner thereof * * * shall acquire any right, title, claim, or interest in or to such motor vehicle * * * until he shall have had issued to him a certificate of title to such motor vehicle * * * or delivered to him a manufacturer's or importer's certificate for the same; nor shall any waiver or estoppel operate in favor of such person against a person having

possession of such certificate of title or manufacturer's or importer's certificate for such motor vehicle * * * for a valuable consideration. No court in any case at law or in equity shall recognize the right, title, claim or interest of any person in or to any motor vehicle * * * sold or disposed of, or mortgaged or encumbered, unless evidenced by a certificate of title * * * duly issued, in accordance with the provisions of this act."

The Supreme Court of Ohio, under an act like ours, after fully considering the questions of constitutionality here raised came to the following conclusion: "After a close study of the new law, in connection with a number of authorities, the members of this court are unanimously of the opinion that it represents an authorized exercise of the police power by the General Assembly in relation to a matter of public concern, and is not violative of any part of the organic law of either the state of Ohio or the United States, especially with reference to the delegation of judicial powers and due process of law." State ex rel. The City Loan & Savings Co. v. Taggart, 134 Ohio St. 374, 17 N. E. 2d 758.

In Elder Chevrolet Co. v. Bailey County Motor Co. (Tex. Civ. App.), 151 S. W. 2d 938, section 53 of their act is quoted as follows: " 'All sales made in violation of this Act shall be void and no title shall pass until the provisions of this Act have been complied with.' " The court held, with reference thereto, as follows: "It cannot be validly asserted this was beyond its power. The decision in question makes no such holding. By such a provision freedom of contract is not impaired—it merely regulates the mode of manifestation of the intention of the parties."

As stated in Crawford Finance Co. v. Derby, 63 Ohio App. 50, 25 N. E. 2d 306:

"On the other hand, from the whole scheme of the Certificate of Title Act, especially the sections quoted above, it is apparent that the Legislature intended to set up one and only one method by which liens on or

titles to a motor vehicle could be acquired. To a purchaser, it makes a certificate of title issued by a clerk of courts (in this state county clerks) on a proper application, accompanied by the preceding certificate, either manufacturer's or owner's, the sine qua non to any right or title therein.

"The manufacturer's certificate was the key to the whole situation. As long as plaintiff held it, it knew no one could acquire a title or lien ahead of its lien, nor could 'any waiver or estoppel operate in favor' of any person against it, and it knew that 'no court in any case at law or in equity' could 'recognize the right, title, claim, or interest of any person in or to any [that] motor vehicle.' Section 6290-4, General Code.

"Mr. Derby knew that the only way he could be secure in parting with the purchase price of the automobile was to simultaneously get a proper certificate of title. Sections 6290-4 and 6290-9, General Code. When he intrusted Bedell with his used automobile and his money without such certificate, he did so at his own risk."

And in Associates Investment Co. v. LeBoutillier, 69 Ohio App. 62, 42 N. E. 2d 1011:

"It must be assumed that defendant and plaintiff knew the provisions of the title law, and that both were bound to observe it. In this respect, the opinion comments in Crawford Finance Co. v. Derby, supra, apply here and will not be repeated. The defendant, without getting title to the automobile, trusted Carder, knowing that the latter part of Sections 6290-3 and 6290-4, General Code, required him to have a certificate of title before he could 'acquire any right, title, claim or interest in or to said motor vehicle' and that neither this nor any other court could 'recognize the right, title, claim, or interest of any person [defendant] in or to any [that] motor vehicle * * * unless evidenced by a certificate of title * * *.'

"Any other result than this would only open the door to fraud and evasion which the title law was in-

tended to prevent. Neither on equitable nor legal principles can the defendant's claims be sustained."

As stated in Commercial Banking Corp. v. Active Loan Co., 135 Pa. Super. 124, 4 A. 2d 616:

"We think the pivotal point in these cases is that the cars were not ordinary chattels; they were motor vehicles, the ownership and sale of which are regulated by 'The Vehicle Code' of 1929 and its amendments. * * *

"We held in Auto Bk. Corp. v. Atlas A. Fin. Corp., supra, (at pages 508-9) that under our present vehicle code a certificate of title is a necessary incident to ownership of a used automobile. * * * As Sladkin was expressly prohibited by the statute from owning or leasing the cars without obtaining certificates of title in the manner therein provided, appellant obtained nothing by its purchase which the law will protect. If it feels aggrieved, it has no one but itself to blame."

And in Anderson v. Arnold-Strong Motor Co., 229 Mo. App. 1170, 88 S. W. 2d 419:

"Section 7774, Revised Statutes of Missouri, 1929, is so clear and unequivocal as to the question as to hardly need court interpretation. However, our courts have given interpretation as follows:

" 'It is well settled that unless the certificate is assigned and passed to the buyer of the motor vehicle at the time of its delivery, the sale is absolutely void and no title to the vehicle passes.' [State ex rel. v. Cox, 306 Mo. 537, 268 S. W. 87.]

"As it stands admitted that the defendant never did receive a certificate of title to the car in issue, it follows that the alleged sale to defendant was fraudulent and void."

Prior to our present act the Legislature had passed legislation relative to the transfer of the ownership of motor vehicles. In deciding a similar question involving this legislation in In re Estate of Wroth, 125 Neb. 832, 252 N. W. 322, the court set forth sections 60-310 and 60-325, Comp. St. 1929.

These acts are therein set forth as follows:

"Section 60-310, in part, provides: 'Upon the transfer of ownership of any motor vehicle, its registration shall expire, and the person to whom ownership of such vehicle is registered, and the person to whom ownership of such vehicle is to be transferred, shall forthwith join in a statement of said transfer, indorsed upon the reverse side of the certificate of registration of said motor vehicle, in the space provided for said purpose, which statement shall be signed by the transferer in the manner and form of his signature, contained on the face of said certificate, and which statement shall likewise be signed by the transferee, who shall also set forth, below his signature, his post office address.'

"Section 60-325 contains this proviso: 'Provided, upon the transfer of ownership of any motor vehicle the title shall not pass until the certificate of registration properly executed, shall be filed in the department of public works as required in this article.' "

The court therein held: "Title to automobile can be transferred between living persons only by compliance with sections 60-310 and 60-325, Comp. St. 1929, relative to such transfer." Then the court went on to say: "Title to motor vehicle cannot be passed between living persons by mere oral declarations. In order to pass title it is necessary to comply with the provisions of sections 60-310 and 60-325, Comp. St. 1929. The statute covers transfers of title to motor vehicles either by sale or gift inter vivos. It is incumbent on plaintiff, to establish her title to the automobile in question, to produce, or account for its nonproduction, documentary evidence, showing that the statutory requirements have been complied with."

The following quotations, taken from the foregoing decision and approved therein, are particularly applicable here:

"In the case of Endres v. Mara-Rickenbacker Co., 243 Mich. 5, it was held: * * *

" 'An automobile dealer who sold a car, loaned license plates, and delivered possession to the buyer without delivering a certificate of title as required by Act. No. 16, Pub. Acts 1923, amending Act No. 46, Pub. Acts 1921, is liable as owner, under Act No. 287, Pub. Acts 1925, sec. 11, for the negligence of the buyer in driving the car, since the sale was void.'

"In Isaacson v. Van Gundy, 48 S. W. (2d) (Mo. App.) 208, it was held: 'No title passes unless certificate is assigned buyer at time of delivering motor vehicle (Laws 1927, p. 313).' "

See, also, In re Estate of Nielsen, 135 Neb. 110, 280 N. W. 246.

In Blixt v. Home Mutual Ins. Co., 145 Neb. 717, 18 N. W. 2d 78, in considering our present act we said: "This provision is part of an act the design of which is to control within fixed limits the use and operation of motor vehicles and to establish methods and means for conveyance of title in order that the provisions for control and use may be made effective. It is a regulatory act under the police power. As such, no doubt, it is a valid exercise of the police power."

We then went on to say: "The provision goes far beyond a mere regulation under the police power. It amounts to an invasion of the right of contract, the impairment of rights of property and a restriction upon the right of the courts to weigh and consider evidence and to make determinations with regard to title and ownership of property and contractual rights and obligations."

Insofar as the last statement is concerned we think we were in error. After a further study of the law, particularly in view of the holdings of other states under like or comparable statutes together with our previous holdings, we are now of the opinion that the act represents an authorized exercise of the police power by the Legislature to regulate the transfer of title and ownership of automobiles, which is a matter of public concern. As such it is not violative of any part of the organic

law of either the State of Nebraska or the United States especially with reference to the right of contract, the delegation or restriction of judicial powers, and due process of law.

The legislative act "Relating to Title and Transfer of Motor Vehicles," now Chapter 60, art. 1, R. S. 1943, together with the amendments made thereto, constitutes an authorized exercise of police power on the part of the Legislature and does not violate any of the provisions of our state or federal Constitution. Insofar as Blixt v. Home Mutual Ins. Co., *supra,* holds to the contrary the same is overruled.

A purchaser who receives possession of an automobile without obtaining the certificate of title thereto, as required by our statute, acquires no title or ownership therein. A subsequent purchaser for value of the automobile, who obtains the certificate of title by complying with the statutory requirements relating thereto, obtains the title and ownership thereof. His title and ownership are superior to any rights the first purchaser may have.

This does not determine any of the rights which intervener may have had or now has against Skipper.

In view of the foregoing the trial court was correct when it refused to give instructions Nos. 1, 2, 4, and 5 requested by the intervener. Also the last paragraph of instruction No. 5 given by the court is not a correct statement of the law.

Intervener complains of the court's refusal to give instruction No. 3 requested by him.

"The plaintiff in a replevin action must recover, if at all, upon the strength of his own title to the property involved and not upon the weakness of the defendant's title to said property." Kavanaugh v. Brodball, 40 Neb. 875, 59 N. W. 517.

"In absence of a specific lien or other special interest, the issues in replevin were ownership, right of possession and unlawful detention of the property re-

plevied. Peterson v. Lodwick, 44 Neb. 771, 62 N. W. 1100." State ex rel. Sorensen v. Verdigre State Bank, 130 Neb. 273, 264 N. W. 765.

The plaintiff, in order to show his ownership of the automobile, was entitled to show the consideration he paid therefor. This included the first lien thereon to the Mutual Credit Company in the sum of $1,261.71. See section 60-105, R. S. Supp., 1949. We find no error in refusing to give this requested instruction.

Intervener alleged that plaintiff and Skipper had entered into a conspiracy to defraud him. However, he did not adduce sufficient evidence at the trial to raise this issue as a question of fact. Instructions Nos. 4 and 5 given by the court presented the issue here involved more favorable to the intervener than he was entitled to under the evidence adduced.

This situation is covered by the following from Kline v. Metcalfe Construction Co., 148 Neb. 357, 27 N. W. 2d 383: "As stated in In re Estate of Keup, 145 Neb. 729, 18 N. W. 2d 63: ' " 'The giving of erroneous instructions is not cause for reversal, if the instructions are more favorable to the complaining party than he is entitled to under the law.' (Webb v. Omaha & S. I. R. Co., 101 Neb. 596, 164 N. W. 564)." Holley v. Omaha & C. B. Street Ry. Co., 110 Neb. 541, 193 N. W. 710. The rule is stated in 5 C. J. S., sec. 1678, p. 824, as follows: "Any error in sending the case or an issue to the jury is not a basis for objection on appeal where it operates in favor of appellant; and so a submission of the case to the jury furnishes appellant with no ground of complaint where the evidence is such as to warrant the court in directing a verdict against him. * * * or where such submission gives the jury an opportunity to find against appellee on a question of fact that should not have been submitted to it; * * *." ' "

Intervener further contends that the court erred when it refused to give his requested instruction No. 6 which relates to the effect of the notarial acts performed by

Loyal Katskee with reference to the instruments herein involved if the jury found he was a stockholder in the plaintiff corporation at the time of the transaction.

A notary public is disqualified to act as such officer when he has a direct pecuniary interest in the matter and under such a situation cannot lawfully take the acknowledgment.

This court has often held that a stockholder in a corporation, who is likewise a notary, has such a direct beneficial interest in the corporation as to disqualify him from taking an acknowledgment to an instrument running to it. See, Horbach v. Tyrrell, 48 Neb. 514, 67 N. W. 485, 37 L. R. A. 434; Wilson v. Griess, 64 Neb. 792, 90 N. W. 866; Trevett, Mattis & Baker Co. v. Reagor, 112 Neb. 470, 200 N. W. 449; Anderson v. Cusack, 115 Neb. 643, 214 N. W. 73; Chadron Loan & Building Assn. v. O'Linn, 1 Neb. (Unoff.) 1, 95 N. W. 368; Hedbloom v. Pierson, 2 Neb. (Unoff.) 799, 90 N. W. 218.

Loyal Katskee acted as notary on all three instruments upon which plaintiff bases its rights, that is, Skipper's power of attorney to Sam Moskovitz to assign his certificate of title to plaintiff, the assignment of the certificate of title by Moskovitz pursuant thereto, and plaintiff's application for the certificate of title.

"'A party to an action is entitled to have the jury instructed with reference to his theory of the case, when the pleadings present the theory as an issue and it is supported by competent evidence.' Boice v. Palmer, 55 Neb. 389; Roh v. Opocensky, *ante*, p. 551." Swengil v. Martin, 125 Neb. 745, 252 N. W. 207.

Section 60-114, R. S. 1943, of the act relating to "Title to Motor Vehicles" provides the various forms to be used in complying with the requirements thereof. The "Assignment of Certificate of Title" is in affidavit form and must be subscribed and sworn to before a notary public to complete its execution. Likewise the "Application for Certificate of Title" is in affidavit form and to

be properly executed must be subscribed and sworn to before a notary public.

From a study of the act, particularly sections 60-104, 60-105, and 60-107, R. S. Supp., 1949, and sections 60-106, 60-108, and 60-117, R. S. 1943, it is clear that the legislation contemplates that the forms provided therein must be fully and properly executed in order to meet the requirements thereof.

The evidence shows that prior to the organization of plaintiff corporation in April 1947 the business it now operates was owned and operated by Loyal Katskee. He and his wife organized plaintiff corporation and put their money into it. He became president thereof and remained in active management of the business and handled the transaction herein involved.

In a deposition taken of him by intervener Loyal Katskee testified that he had been a stockholder in plaintiff corporation since its organization and was such on July 12, 1947. However, at the time of the trial he testified he was mistaken in regard thereto and that he did not become a stockholder until in October 1947. The books and records of the plaintiff with reference thereto were not produced.

Under this situation the plaintiff contends there is no substantive proof that Loyal Katskee was a stockholder at the time of the transaction because his statements or admissions made in the deposition could be used for impeachment only because Katskee was not a party to the suit, citing the following principle as controlling: "This contradiction of the son's testimony as to a statement made by him in regard to a long past event, he not being a party to the action, was not substantive evidence. At best, such evidence, if believed by the jury, could only go to the weight of the son's testimony. Zimmerman v. Kearney County Bank, 59 Neb. 23." Sindelar v. Hord Grain Co., 116 Neb. 776, 219 N. W. 145. See, also, Costello v. Hild, 152 Neb. 1, 40 N. W. 2d 228.

It is true that Loyal Katskee is not a party to the action as plaintiff is a corporation. However, he was the president and in active charge of the business at the time. Corporations must, of necessity and from the very nature of their being, deal through their officers and agents.

Generally the declarations and admissions of executive officers and managers as agents of a corporation, made while acting within the scope of such authority and in connection with the performance of some duty to which such declarations are pertinent, are admissible against such corporation. See, 2 Jones on Evidence (2d ed.), § 980, p. 1798; 31 C. J. S., Evidence, § 355, p. 1130; 20 Am. Jur., Evidence, § 600, p. 511; Wert v. Equitable Life Assurance Society, 135 Neb. 654, 283 N. W. 506.

There are a few jurisdictions that hold that declarations or admissions of corporate officers and agents made while they are testifying are not binding on the corporation because while testifying they are not acting for the corporation but are speaking for themselves individually. Such a rule might be logical where the corporation is not a party but certainly where, as here, it is seeking to enforce its rights and the declarations or admissions relate thereto it can have no application.

As stated in 2 Jones on Evidence (2d ed.), § 978, p. 1795: "The rule has been explicitly laid down that a corporation, municipal as well as private, is bound by the declarations of its officers, where such declarations accompany, and are explanatory of, an act done by the officer in the scope of his authority."

We think the statements made by Loyal Katskee in the deposition, as to his status as a stockholder of the plaintiff corporation at the time he acted as notary, do not sufficiently relate themselves to the transaction which plaintiff here seeks to enforce that they are admissible in evidence as substantive proof of that fact. Consequently they could be used only for impeachment purposes. There being no other competent evidence on

this issue for the jury to consider, the court was correct in not submitting it.

Intervener also complains of the court's refusal to give his requested instruction No. 7 and of its informing the jury, by instruction No. 4, that if they found for the intervener it should be in the sum of $1,850. In view of the jury's finding for the plaintiff and our holdings herein the matter becomes immaterial.

In view of the foregoing we affirm the judgment of the trial court.

AFFIRMED.

YEAGER, J., dissenting.

I respectfully dissent from the majority opinion in this case. The dissent does not go to everything that is contained in the opinion. It does go however to the proposition which is basic in the determination of the action.

My objection is that the majority opinion upholds section 60-105, R. S. Supp., 1949, as a valid exercise of the police power of the state whereas in Blixt v. Home Mutual Ins. Co., 145 Neb. 717, 18 N. W. 2d 78, this court held that it was not, which holding I submit properly construed the provision.

The statutory provision to the extent necessary to quote it here is as follows: "No person * * * acquiring a motor vehicle * * * from the owner thereof * * * shall acquire any right, title, claim, or interest in or to such motor vehicle * * * until he shall have had issued to him a certificate of title to such motor vehicle * * * or delivered to him a manufacturer's or importer's certificate for the same; nor shall any waiver or estoppel operate in favor of such person against a person having possession of such certificate of title or manufacturer's or importer's certificate for such motor vehicle * * * for a valuable consideration. No court in any case at law or in equity shall recognize the right, title, claim or interest of any person in or to any motor vehicle * * * sold or disposed of, or mortgaged or encumbered, unless evi-

denced by a certificate of title * * * duly issued, in accordance with the provisions of this act."

In Blixt v. Home Mutual Ins. Co., *supra,* it was said:

"This provision is part of an act the design of which is to control within fixed limits the use and operation of motor vehicles and to establish methods and means for conveyance of title in order that the provisions for control and use may be made effective. It is a regulatory act under the police power. As such, no doubt, it is a valid exercise of the police power.

"The provision goes far beyond a mere regulation under the police power. It amounts to an invasion of the right of contract, the impairment of rights of property and a restriction upon the right of the courts to weigh and consider evidence and to make determinations with regard to title and ownership of property and contractual rights and obligations."

While it is true that in the opinion in Blixt v. Home Mutual Ins. Co., *supra,* no case was cited to support the conclusion arrived at it occurs to me that the case at bar classically demonstrates its validity and the fallacy of the conclusions arrived at in the majority opinion herein.

In order to make my point clear I shall restate the facts as they are disclosed by the record. I do not suggest that the facts are incorrectly stated in the majority opinion. They are correctly stated but not in such manner as to present the focus which appears to me to be appropriate.

On April 29, 1947, one James B. Skipper as owner of the automobile in question here sold it to Lester L. Kornfeld, the intervener herein, for $1,455. Two hours later it was delivered to him. He retained possession of it from that time until July 26, 1947. He never received a certificate of title to the automobile although he often demanded it from Skipper. He did however early in July receive a receipt for his payment. Skipper did not himself have a title certificate until May 6, 1947. The

certificate was left with Mutual Credit Company which had a lien for $1,322.40.

On July 12, 1947, Skipper sold the automobile to the plaintiff and gave plaintiff a power of attorney authorizing one Sam Moskovitz, an employee of the plaintiff, to assign the certificate of title to the plaintiff. Possession was not at that time or later delivered to the plaintiff.

Pursuant to the authority of the power of attorney an assignment of certificate was executed and on the basis thereof plaintiff on July 25, 1947, secured a certificate of title to the automobile from the county clerk.

On July 26, 1947, at the behest of the plaintiff and without writ or process out of any court and without any other lawful authority the police department of the city of Omaha took the automobile from the possession of Lester L. Kornfeld, the intervener herein, without his consent.

Thereafter the plaintiff instituted this action in replevin against the chief of police and another police officer of the city of Omaha to recover possession of this automobile. It based its right of recovery on ownership evidenced by certificate of title. Kornfeld was not made a party to the action.

The police officers disclaimed any interest in the action and interposed no defense. Kornfeld intervened and claimed the right of possession by reason of ownership acquired by purchase of and payment for the automobile and delivery of possession to him as has been hereinbefore described.

The majority opinion effectually concludes that under the authority of the statute quoted Kornfeld was debarred from asserting any right or claim of right to title or ownership in this automobile in this action or in any action at law or equity.

The effect of this conclusion is to run afoul of well-established fundamental principles of law relating to property and rights therein and thereto.

It is well established in this jurisdiction that a person in the exclusive possession of personal property is prima facie presumed to be the owner thereof and that a stranger to the transaction by which the possession was obtained is charged with notice of the claims of the possessor. Booknau v. Clark, 58 Neb. 610, 79 N. W. 159; First Nat. Bank v. First Nat. Bank, 111 Neb. 441, 196 N. W. 691.

No wrong on the part of Kornfeld led the plaintiff into the purchase of this automobile, so therefore there is neither legal nor equitable basis upon which to base a conclusion that Kornfeld should be the victim of the fraud of Skipper rather than the plaintiff.

To the extent that section 60-105, R. S. Supp., 1949, declares that no person acquiring a motor vehicle from the owner thereof shall acquire any right, title, claim, or interest in or to such motor vehicle until he shall have had issued to him a certificate of title to such motor vehicle or delivered to him a manufacturer's or importer's certificate for the same for a valuable consideration and to the extent that it declares that no court in any case at law or in equity shall recognize the right, title, claim, or interest of any person in or to any motor vehicle sold or disposed of or mortgaged or encumbered, unless evidenced by a certificate of title duly issued, in accordance with the provisions of this act, it amounts in my opinion to an invalid, unlawful, and unconstitutional invasion of the right of contract, the impairment of rights of property, and a restriction upon the rights of the courts to weigh and consider evidence and to make determinations with regard to title and ownership of property and contractual rights and obligations.

In the majority opinion, referring to the statutory provision in question, it is said: "As such it is not violative of any part of the organic law of either the State of Nebraska or the United States especially with reference to the right of contract, the delegation or restriction of judicial powers, and due process of law."

With this statement I cannot agree. Its effect is to impair the obligation of a contract and in the case at bar under the majority opinion it has not only impaired the obligation but it has utterly destroyed the fully executed and consummated contract of Kornfeld and has denied him access to either law or equity in regard to it.

I submit that what was said in Blixt v. Home Mutual Ins. Co., *supra,* represented a proper attitude toward the statutory provision in question and that it should be adhered to here. The fact that in other jurisdictions legislative enactments like or similar to this one have been sustained as valid and constitutional should not be regarded as an obstacle in the path of proper legal and constitutional interpretation by this court.

This provision was once stricken down and it should be permitted to remain so stricken, and the intervener herein should be permitted in this replevin action to have his rights under law to this automobile determined, the effect of which, on the record, would be to say that he was entitled in the district court to a directed verdict in his favor and a judgment thereon for possession.

SIMMONS, C. J., dissenting.

I dissent.

In Blixt v. Home Mutual Ins. Co., 145 Neb. 717, 18 N. W. 2d 78, we considered the following provision found in section 60-105, R. S. Supp., 1949: "No court in any case at law or in equity shall recognize the right, title, claim or interest of any person in or to any motor vehicle, hereafter sold or disposed of, or mortgaged or encumbered, unless evidenced by a certificate of title or manufacturer's or importer's certificate duly issued, in accordance with the provisions of this Act." We held: "The provision goes far beyond a mere regulation under the police power. It amounts to an invasion of the right of contract, the impairment of rights of property and a restriction upon the right of the courts to weigh and consider evidence and to make determinations with

regard to title and ownership of property and contractual rights and obligations."

Section 60-105, R. S. Supp., 1949, also includes the following: "* * * nor shall any waiver or estoppel operate in favor of such person against a person having possession of such certificate of title or manufacturer's or importer's certificate for such motor vehicle * * * for a valuable consideration."

The court now holds that all of Chapter 60, article 1, R. S. Supp., 1949 (which includes section 60-105, R. S. Supp., 1949), does not violate any provision of our state or the federal Constitution "especially with reference to the right of contract, the delegation or restriction of judicial powers, and due process of law." The court overrules directly the above holding in the Blixt case.

Article V, section 9, of the Constitution provides: "The district courts shall have both chancery and common law jurisdiction, and such other jurisdiction as the legislature may provide * * *."

In Lacey v. Zeigler, 98 Neb. 380, 152 N. W. 792, we held with reference to this provision: "The equitable jurisdiction of the district court is therefore beyond the power of the legislature to limit or control."

We have followed this principle repeatedly down as late as the case of In re Trust Estate of Myers, 151 Neb. 255, 37 N. W. 2d 228.

In Burnham v. Bennison, 121 Neb. 291, 236 N. W. 745, we stated: "It may be said that, by the terms of the Constitution, district courts in Nebraska are vested with 'chancery jurisdiction.' Const. art. V, sec. 9. This we have construed as vesting district courts with equity jurisdiction which they may exercise without legislative enactment. Matteson v. Creighton University, 105 Neb. 219. Indeed, this court is committed to the view that, not only is equity jurisdiction conferred by the terms of the Constitution, but as thus conferred it is beyond the power of the legislature to limit or control. That, while the legislature may grant such other jurisdiction as it

may deem proper, it cannot limit or take from such courts their broad and general jurisdiction which the Constitution has conferred upon them." This was followed in State ex rel. Sorensen v. Farmers State Bank, 121 Neb. 532, 237 N. W. 857, 82 A. L. R. 7; In Hall v. Hall, 123 Neb. 280, 242 N. W. 607; in State v. Odd Fellows Hall Assn., 123 Neb. 440, 243 N. W. 616; in State ex rel. Sorensen v. Nebraska State Bank, 124 Neb. 449, 247 N. W. 31; and in John A. Creighton Home v. Waltman, 140 Neb. 3, 299 N. W. 261.

In State ex rel. Wright v. Barney, 133 Neb. 676, 276 N. W. 676, we held: "It is obvious that the exclusive and preeminent nature of the equity jurisdiction conferred on the district courts by these constitutional provisions is equally true of the common-law jurisdiction likewise vested in the same tribunals."

In Clark v. Lincoln Liberty Life Ins. Co., 139 Neb. 65, 296 N. W. 449, we held: "The district court is a creation of the Constitution as is also its common-law and equity power and jurisdiction. This power and jurisdiction are not limited by terminology and, further, the terminology does not admit of legislative limitation, but only of legislative extension."

I do not undertake to discuss the various specific applications we have made of this principle save to point out that in Tombrink v. Sarpy County, 120 Neb. 160, 231 N. W. 783, we applied laches as an equitable doctrine enforceable under constitutional powers independently of any statute of limitations.

The court now puts its approval upon a statute that limits the application of the doctrine of waiver and estoppel and that limits the jurisdiction of courts at both law and equity, and this is done although we have repeatedly declared that "It is an imperative duty of the judicial department of government to protect its jurisdiction at the boundaries of power fixed by the Constitution." State ex rel. Sorensen v. State Bank of Minatare,

123 Neb. 109, 242 N. W. 278. See, also, State ex rel. Wright v. Barney, *supra.*

The court holds: "A purchaser who receives possession of an automobile without obtaining the certificate of title thereto, as required by our statute, acquires no title or ownership therein." That is a positive statement and, as made, without exceptions. The issues of this case require no such determination.

Suppose A, who is an owner and has the requisite certificate of title, agrees to sell a specific car to B. B pays the full purchase price to A and is given possession of the car. All that remains is for A to get and deliver the certificate of title to B. A then refuses to do that one thing. We have held that "Courts of equity may grant specific performance of an oral agreement to transfer title to personal property as well as to real estate." Hackbarth v. Hackbarth, 146 Neb. 919, 22 N. W. 2d 184. A brings an action for specific performance. Would he not then, under this opinion, be met with a well based contention that "No court * * * shall recognize the *right,* title, *claim* or *interest*" of B because B does not have the requisite certificate of title; that under this holding B has acquired no title or ownership in the car; and that the act denies him the equitable rights of specific performance? Such I think is a reasonable construction of the court's opinion.

But the court does not stop there. The court holds: "A subsequent purchaser for value of the automobile, who obtains the certificate of title by complying with the statutory requirements relating thereto, obtains the title and ownership thereof. His title and ownership are superior to any rights which the first purchaser may have."

Now, suppose that C purchases for value from A subsequent to the sale to B, and C obtains a certificate of title by complying with the statutory requirements. This rule holds that C obtains rights of title and ownership superior to those of B and by that impliedly holds that

B has some rights of title and ownership. This is in conflict with the preceding rule which is that B has acquired no title or ownership, otherwise the holding announces the obvious that a purchaser from one who has a title acquires a title and ownership superior to one who has no title and ownership.

Now, suppose that subsequently C purchased for value and got the certificate of title from A with full knowledge of every part of the transaction between A and B. Under this rule C's title and ownership are superior to any rights of B and B has only an undetermined right of a personal action of some kind against A. Would not C in equity be subject to the same rule that we have repeatedly followed and last restated in Beard v. Morgan, 143 Neb. 503, 10 N. W. 2d 253, that "'A party who purchases real estate with knowledge that another has a contract of purchase for the same is not a bona fide purchaser; and if he acquires such knowledge at any time before the payment of the consideration, he will not be protected as a purchaser in good faith. * * *

"'A purchaser with notice is liable to the same equity, stands in his place, and is bound to do that which the person he represents would be bound to do by the decree. He takes the estate subject to the charge, and stands in the place of his vendor.'" We there affirmed a decree of specific performance. But here, under the court's opinion, C would not be subject to an action of specific performance and more, under the statute here approved, an equity court would not be permitted to recognize any right, claim, or interest of B, a bona fide purchaser, against C, a purchaser with notice.

If this opinion is sound and the Legislature has the power to deny equitable rights and remedies as to one kind of personal property, then I see no barrier to its doing it as to all kinds of personal property and to real property.

I cannot believe that the Legislature ever intended such results to flow from this act, nor do I believe, even

if it had that intent, that the Legislature has the constitutional power to so provide.

CLARENCE N. DAVIDSON ET AL., APPELLANTS, V. CITY OF RAVENNA, APPELLEE.

45 N. W. 2d 741

Filed January 26, 1951. No. 32842.

1. **Municipal Corporations.** Where the evidence shows that lands within the corporate limits of a city of the second class are agricultural in nature and have no unity or community of interest with the city, and that justice and equity require that they be disconnected therefrom, a court of equity is empowered by section 17-414, R. S. Supp., 1949, to disconnect such lands from the city.
2. **Appeal and Error.** An appeal from a decree of the district court in such a suit is triable de novo in the Supreme Court.

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

Blackledge & Sidner, for appellants.

C. J. Mingus, for appellee.

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

CARTER, J.

Plaintiffs brought this suit in the district court for Buffalo County to obtain a decree disconnecting their lands from the city of Ravenna. The trial court found against the plaintiffs and they appeal.

The plaintiff Davidson is the owner of an irregular tract of land lying in the northeast part of the city of Ravenna containing about 12 acres. The plaintiffs Ralph G. Hughes and Mildred L. Hughes are the owners of a rectangular tract in the northeast corner of the city containing about 27 acres. Approximately 30 feet of ground

on the east side of both tracts was previously acquired by the city for street purposes. The east line of the city is the east line of the street.

The suit was commenced in accordance with the provisions of section 17-414, R. S. Supp., 1949, which provides the method for disconnecting lands from cities of the second class of which the city of Ravenna is one. The pertinent part of this section provides: "If the court shall find in favor of the petitioners and that justice and equity require that such territory, or any part thereof, be disconnected from such city or village, it shall enter a decree accordingly." The question for determination is whether justice and equity require the disconnection of these two tracts, or either of them, from the corporate limits of the city of Ravenna. The case will be tried de novo in this court. Kuebler v. City of Kearney, 151 Neb. 698, 39 N. W. 2d 415.

The evidence shows that the Davidson lands here involved consist of two parts. One part is approximately the east one-half of Tax Lot 2 and is irregular in shape. It is used almost exclusively for pasturing livestock in connection with the use of the other part. The second part is referred to as Block 5, Motsick's Addition. The part of Block 5 belonging to Davidson consists of a rectangular tract, 1,458 feet in length and 250 feet in width, from which 380 feet had been sold off of the west end and the 30 feet heretofore mentioned from the east end. The record shows that Davidson had contracted to sell off an additional 240 feet at the time of trial. The part first sold off of the west end contained a residence fronting on Pavia Avenue, a paved street within the city of Ravenna. Immediately south of Block 5 are Blocks 1, 2, 3, and 4, numbered from east to west, which are separated from Block 5 by Syracuse Street. Block 5 is equal in length to Blocks 1, 2, 3, and 4 combined. This street is surfaced with cinders for a few hundred feet, after which it becomes a sandy, unimproved road. There are three houses, a small commercial building, and

the city pump house on Block 3. There are no houses on Block 2, and one house on Block 1. There is a frame cattle shed and a steel grain bin on the Davidson land on Block 5, in addition to corrals and feeding facilities for the handling of cattle. The evidence shows that the two tracts owned by Davidson were used mostly for holding cattle for short periods in connection with Davidson's ranching and cattle buying operations. Both tracts were used for a single general purpose. The city sewer lies 38 feet south of Davidson's land in Block 5. His property is connected to the city water system and a fire hydrant is located within 38 feet of his property. The city fire department is equipped to furnish fire protection to his property. The property is served with electric lights by the Consumers Public Power District from its distribution system in the city of Ravenna, with which it has a franchise. We think this evidence is adequate to sustain the finding of the trial court that these lands have a unity and community of interest with the city and are benefited thereby to such an extent that justice and equity do not require that they be disconnected from the city.

The evidence shows that the Hughes tract is wholly used for agricultural purposes, except that part in the southwest corner where the residence is located. The residence property is connected with the city water system and is furnished with electric lights from the Consumers Public Power District. The closest sewer line is one-half block west of the west line of the Hughes tract, the residence being about 150 feet east of the west boundary. The closest fire hydrant is one block west of the southwest corner of the property. There is no street along the west side of the Hughes property except for a very short distance at the south end. There is no demand for any part of the tract for residence lots or other city purposes. There is no evidence of the development or growth of the city in the general direction of this property. It is rural in character and its loca-

tion appears unfavorable to its development as an integral part of the city. An examination of all the evidence, including the photographs taken at various points on this acreage, convinces us that there is no community of interest between the property and the city of Ravenna. While it is true that the property is benefited by receiving the benefits of city water and electric lights, this is not necessarily a controlling factor. Other properties outside of the corporate limits receive similar benefits. But, considered as a whole, justice and equity require that the Hughes tract be disconnected from the city.

The judgment of the trial court denying the relief sought by the plaintiff Davidson is affirmed. That part of the judgment denying relief to the plaintiffs Hughes is reversed and the cause remanded to the district court with instructions to disconnect the Hughes property, as described in the petition, from the city of Ravenna in the manner provided for by section 17-414, R. S. Supp., 1949.

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

C. ELDRIDGE SCRIVEN, EXECUTOR OF THE ESTATE OF CLARENCE E. SCRIVEN, DECEASED, ET AL., APPELLEES, V. EVELYN SCRIVEN, APPELLANT, IMPLEADED WITH ANITA KENDALL ET AL., INTERVENERS AND APPELLANTS.

45 N. W. 2d 760

Filed January 26, 1951. Nos. 32865 and 32871.

1. **Banks and Banking.** By the terms of section 8-167, R. S. 1943, when a deposit in any bank in this state is made in the name of two or more persons, deliverable or payable to either or to their survivor or survivors, such deposit, or any part thereof, or increase thereof, may be delivered or paid to either of said persons or to the survivor or survivors in due course of business.
2. ———. Section 8-167, R. S. 1943, relating to the payment by

a bank of deposits entered as payable to any one of two or more persons named therein, not only is intended for the protection of the bank, but also to fix the property rights of the persons named, unless the contrary appears from the terms of the deposit.

3. ———. A deposit of money in a bank by a husband and made payable to himself or wife, whether expressly as joint tenants with right of survivorship or not, is presumed to have been made by the husband with a donative intent and for the benefit of the wife with the intention of giving to her, if she survives, the complete title to the funds.
4. Wills. "Elevator property" as used in the will in question is construed to include the physical structures, the leasehold, the merchandise on hand for use and being used in the transaction of the business, the outside equipment used in pursuit of the business, and certain cash on hand.
5. ———. In determining the intention of a testator it is the duty of the court to examine the will and give to it the true intent of the testator as it is expressed in the will.
6. ———. Parol evidence is inadmissible to determine the intent of a testator as expressed in his will, unless there is a latent ambiguity therein which makes his intention obscure or uncertain.
7. ———. A legacy which is specific but alternative as distinguished from a general one remains specific and payable ahead of general legacies unless an intent that it shall abate as a specific legacy is apparent from the will.
8. ———. An answer to a petition for probate of a will raising only the question of the statutory formality of the execution of a will which imposes no greater burden on the proponent than that imposed by statute is not in a true sense a contest of the will.

APPEAL from the district court for Scotts Bluff County: CLAIBOURNE G. PERRY, JUDGE. *Affirmed in part, reversed in part, and remanded with directions.*

F. J. Reed, for appellants.

Mothersead, Wright & Simmons, for appellees.

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

YEAGER, J.

This is an action in equity instituted by C. Eldridge

Scriven in his own behalf and as executor of the estate of Clarence E. Scriven, deceased, plaintiff and appellee, against Evelyn Scriven, defendant and appellant, wherein the plaintiff seeks a declaratory judgment declaring him to be the sole owner of a bank account in the amount of $49,691.14 and also the sole owner of bills receivable from a business operated by Clarence E. Scriven in his lifetime but which was disposed of before his death. Other matters were presented for consideration and determination in the action but for convenience and for better understanding they will be dealt with separately and later herein. Anita Kendall and Jane Ellis, legatees under the will of Clarence E. Scriven, were interveners in the action. They are appellants here.

The trial court found and decreed $15,262.18 of the bank account belonged to the plaintiff and that the balance belonged to the estate. From the decree in this respect the defendant and the interveners have separately appealed, and the appeals have been consolidated by stipulation in this court.

The plaintiff is the son of the deceased, Clarence E. Scriven, and the executor of his will. The defendant is the widow. She is not the mother of the plaintiff. Plaintiff is a son of a former marriage. The interveners are not related to any of the parties but from early childhood they were brought up in the home of Clarence E. Scriven and the defendant.

Clarence E. Scriven died on November 10, 1947. On October 13, 1945, he opened a bank account in the First National Bank of Mitchell in the name of "Mr. or Mrs. C. E. Scriven." This was a checking account. The account was opened by the use of a regular deposit slip on the heading of which he wrote "Mr. or Mrs. C. E. Scriven." The amount of the deposit was entered on the slip. This slip with the deposit was delivered to an employee of the bank and the transaction duly entered on the records of the bank.

At this time the deceased was and for many years

theretofore had been the owner of a business known as the Mitchell Elevator. Prior to the opening of the "Mr. or Mrs. C. E. Scriven" account the deceased had an account in the First National Bank of Mitchell under the name of "Mitchell Elevator." All of his banking business of every kind was handled through this account. He and his wife drew at will against the account. After the opening of the "Mr. or Mrs. C. E. Scriven" account each drew at will against it also.

On June 16, 1947, the deceased sold the elevator business. On June 30, 1947, the "Mitchell Elevator" account, then containing $46,138.79, was by direction of the deceased closed by the bank and this amount credited to the "Mr. or Mrs. C. E. Scriven" account. Thereafter the deceased had no other account in any bank.

The sale of the buildings, the lease, the machinery, and equipment, except motor vehicles, of the Mitchell Elevator was evidenced by a written contract of sale. The consideration for the sale was $30,000, payable $6,000 cash and four promissory notes for $6,000 payable one, two, three, and four years after date respectively.

At the same time that the elevator property was sold deceased sold to the same purchaser the stock of merchandise on the property, the cash on hand, and one truck for a total purchase price of $9,321.93. This transaction except for the amount of $59.85 is evidenced by an inventory which appears in the record.

The basis of the determination of the trial court was the interpretation placed upon the will of the deceased which had been duly admitted to probate, the interpretation placed upon the "Mr. or Mrs. C. E. Scriven" bank account, and the application of the terms of the will to the sale of the Mitchell Elevator.

The will contains the following provision:

"THIRD: To my son, Clarence Eldridge Scriven, I give, devise and bequeath my Grain Elevator property in Mitchell, Nebraska, and the farm that I now own, situated in the State of Iowa, to be held by him and his

heirs forever, absolutely, in fee simple, provided, however, that in the event that during my lifetime I have sold or disposed of either one or both of these properties, then, and in that event, I hereby give and bequeath to my said son the proceeds from said sale in whatever form they may appear, if distinguishable, and if not, then a sum equal to the proceeds of said sales to the use of him and his heirs absolutely."

Under this provision of the will plaintiff contends that, among other things to be discussed later, he became entitled on account of the sale of the Mitchell Elevator to the four promissory notes of $6,000 each, $6,000 representing the payment to the deceased in cash, and $9,321.93, representing the amount received for the property and money described in the inventory, the last two amounts amounting to $15,321.93. The decree gave him $15,262.18. There is obviously an error in the computation and an inadvertent failure to include the item of $59.85. On the theory adopted by the trial court the amount should have been $15,321.93.

The parties do not contend that plaintiff is not entitled to the four notes. The reason for the allowance of the $15,262.18 out of this bank account rather than out of the estate generally does not appear. We assume however that it was on the theory that the proceeds of the sale went into the account therefore this amount must come out of it.

The defendant contends that nothing could come either to plaintiff or to the estate from the bank account for the reason that it was a joint account within the meaning of law and therefore upon the death of Clarence E. Scriven it became her sole and absolute property. By the decree the court found otherwise. It found that the account belonged to Clarence E. Scriven and that on his death it became a part of his estate, hence the judgment that all of the account except $15,262.18 belonged to the estate.

The propriety of the disposition made of the bank

account therefore depends upon whether or not within the meaning of law it was joint. If it was joint then under our statutes and the interpretations and applications of them by this court the account after the death of Clarence E. Scriven became the property of the defendant.

Section 8-167, R. S. 1943, provides: "When a deposit in any bank in this state is made in the name of two or more persons, deliverable or payable to either or to their survivor or survivors, such deposit, or any part thereof, or increase thereof, may be delivered or paid to either of said persons or to the survivor or survivors in due course of business."

In the case of In re Estate of Johnson, 116 Neb. 686, 218 N. W. 739, this court said: "Section 8046, Comp. St. 1922 (section 8-167, R. S. 1943), relating to the payment by a bank of deposits entered as payable to any one of two or more persons named therein, not only is intended for the protection of the bank, but also fixed the property right of the persons named, unless the contrary appears from the terms of the deposit."

It was also said: "A deposit of money in a bank by a husband and made payable to himself or wife, whether expressly as joint tenants with survivorship or not, is presumed to have been made by the husband with a donative intent and for the benefit of the wife with the intention of giving to her, if she survives, the complete title to the funds."

These propositions were approved in Kehl v. Omaha Nat. Bank, 126 Neb. 695, 254 N. W. 397; First Trust Co. v. Hammond, 140 Neb. 330, 299 N. W. 496; McConnell v. McCook Nat. Bank, 142 Neb. 451, 6 N. W. 2d 599; Young v. McCoy, 152 Neb. 138, 40 N. W. 2d 540.

It is substantially urged by the plaintiff that the method and formality of the original opening of the account and the methods and customs of making deposits thereafter defeat the contention of the defendant that

this was or was intended to be a joint account within the meaning of the statute.

The first deposit slip was made out by Clarence E. Scriven in manner and form as indicated. Numerous deposits were made to the account thereafter. Some were headed as was the first one and some were headed "C. E. Scriven" but all were deposited in the one account which was clearly in accord with his intention. This is evidenced by the fact that he received the monthly statements which apparently he carefully examined. There is no evidence of dissatisfaction on his part. He appears never to have requested that any deposits be made other than in the "Mr. or Mrs. C. E. Scriven" account.

As to the formality this was, under the authorities, sufficient to indicate that the account was and that it was intended to be regarded as joint. The case of In re Estate of Johnson, *supra,* related to accounts represented by deposit certificates. Some of these were payable "to the order of self or Margaret E. Johnson." The case of McConnell v. McCook Nat. Bank, *supra,* related to one certificate of deposit, "Payable to the order of self or Mrs. C. T. Rader and Ernest Fowler."

As to each of these two situations it was held that the wording used was sufficient for the creation of a joint account within the meaning of the statute. There is no substantial difference between the controlling wording of the deposits in these two cases and the controlling wording in the case at bar.

It follows therefore that it must be held that the account in question was joint with right of survivorship in the defendant.

It is pointed out in In re Estate of Johnson, *supra,* that in a proper action a bank deposit coming to a party through right of survivorship may be determined to be held in trust for another. This appears to be a sound principle but it has no application here. The action here is in equity to determine the true status of the account. There is no contention that it is a trust fund. On the one

side it is contended that it is in part the property of the plaintiff by reason of a provision of a will and in part an asset of the estate of Clarence E. Scriven, deceased. On the other it is contended that it is the absolute property of the defendant.

We conclude therefore that the decree to the extent that it gives to the plaintiff and the estate the bank deposit is in error and that to that extent it should be reversed and the deposit decreed to be the property of the defendant.

The next question to be considered is what the deceased intended that plaintiff should take in case of the sale of the "elevator property." As already pointed out the parties agree that he is entitled to the four promissory notes and an amount equal to the $6,000 which was received in cash when the sale was made. The plaintiff contends that he is entitled to receive in addition $9,321.93, the amount represented by inventory, and certain other items of indebtedness which he insists represent a part of the "elevator property" and which the appellants insist were debts owing to the deceased in consequence of which they are assets of the estate.

This court held substantially in In re Estate of Zents, 148 Neb. 104, 26 N. W. 2d 793, a case wherein in a will the term "business" was employed, that it included what is ordinarily considered the business together with the merchandise on hand and the accumulated bank account. Bills receivable were not mentioned but from the context of the opinion it is apparent that if there had been they also would have been regarded as part of the business.

The provision of the will here employs the term "property" instead of "business." In Wood v. Security Mutual Life Ins. Co., 112 Neb. 66, 198 N. W. 573, 34 A. L. R. 712, in definition of property it was said: "A calling, business, or profession, chosen and followed, is property, and the term 'propery,' as ordinarily employed, includes every interest any one may have in anything

that is the subject of ownership, together with the right to freely possess, use, enjoy and dispose of it."

It appears from a reading of the will itself and an application thereto of the pronouncments of these two cases that when the deceased employed the term "elevator property" he intended the "elevator business" at the time it was sold. This would include the physical structures, the leasehold, the merchandise on hand for use and being used in the transaction of the business, the outside equipment used in pursuit of the business, and the cash on hand which was considered as a part of the sale.

Under this conclusion then the plaintiff is entitled on the record to receive in addition to what it is conceded that he is entitled the amount of $9,321.93.

The plaintiff contends that in addition to this he is entitled to receive an additional $9,742.63. His theory in this connection is that the term "elevator property" as used in the will should be construed to include accounts receivable at the time of sale and that he is entitled to the equivalent of the accounts receivable at that time.

In this connection the plaintiff testified that he was able to trace collections on accounts receivable in the amount of $9,742.63 into the "Mr. or Mrs. C. E. Scriven" account. This represents the additional amount to which he lays claim.

The determination here depends upon the intention of the testator at the time he made the will (Hill v. Hill, 90 Neb. 43, 132 N. W. 738, 38 L. R. A. N. S. 198), and in determining the intention of the testator it is the duty of the court to examine the will and give to it the true intent of the testator as expressed in the will. Lincoln Nat. Bank & Trust Co. v. Grainger, 129 Neb. 451, 262 N. W. 11; In re Estate of Schuette, 138 Neb. 568, 293 N. W. 421; In re Estate of Dimmitt, 141 Neb. 413, 3 N. W. 2d 752, 144 A. L. R. 704; Salmons v. Salmons, 142 Neb. 66, 5 N. W. 2d 123; In re Estate of Zents, *supra.*

In this instance it may well be said that the language of the will leaves the intent of the testator somewhat obscure. He used the term "elevator property" and there is nothing else in the will throwing light on his intent or meaning.

The record however discloses that for a considerable period of time before the sale and after until the "Mitchell Elevator" account was closed and the "Mr. or Mrs. C. E. Scriven" account was opened, Clarence E. Scriven carried therein not only the moneys coming from the elevator business but also all other moneys coming from his various activities outside the elevator business, and the record fails to disclose that the moneys coming into the account from the various sources had any segregation or separate identification after reaching the account. He drew upon the account apparently without regard to its source or sources as well as did the defendant herein. After the account was closed the same practice was followed with regard to the "Mr. or Mrs. C. E. Scriven" account.

Under the authorities cited it is clear that the intent of the testator must be ascertained from the will itself. However we think it not improper, under the rule that parol evidence (extrinsic documentary in part here) is inadmissible to determine the intent of a testator as expressed in his will, unless there is a latent ambiguity therein which makes his intention obscure or uncertain (Lincoln Nat. Bank & Trust Co. v. Grainger, *supra*), to consider what was included in the sale of the "elevator property" at the time the sale was made as bearing on the question of intent.

In this connection plaintiff offered in evidence exhibit 13 which was received. This exhibit is a contract which contemplates the sale of the "elevator property" described in the will. The property described in the contract was the following: "The buildings located on Chicago, Burlington & Quincy R. R. Co., Lease No. REW-823 in Mitchell, Nebraska, commonly known as

the Mitchell Elevator. The same consisting of the elevator building, the warehouses, the machinery and equipment therein contained, including the scales, feed grinders, elevator apparatus and steam roll barley plant. The intention being to include in said lease all property of every kind, nature and description used in connection with said Mitchell Elevator, save and except the motor vehicles."

No one contends that Clarence E. Scriven contemplated by the use of the words in the contract "all property of every kind, nature and description used in connection with said Mitchell Elevator" that there should be a conveyance of the accounts receivable to the purchaser. If any such contention were made it would be conclusively negatived by the fact that these accounts were not turned over as part of the property sold. This coupled with his long time practice of handling his bank accounts and collections appears to refute the contention that the testator by the use of the term "elevator property" in his will intended to include accounts receivable in the event of sale of the property.

It is concluded from this that at the time the will was drawn Clarence E. Scriven regarded the money as it came in on accounts receivable became his property and from that point on was no part of the "elevator property." This being true the plaintiff is not entitled to anything received on accounts receivable collected after the sale as part of the elevator property.

As has been pointed out Clarence E. Scriven bequeathed the Mitchell Elevator property to the plaintiff, and if that was sold the proceeds if distinguishable, and if the proceeds are not distinguishable then a sum equal to the proceeds. By another provision of the will he provided bequests of $25,000 to each of the interveners.

The interveners appear to agree that the bequest to plaintiff without sale was special and comes ahead of theirs and also in the event of sale it remains special to the extent that the proceeds are distinguishable, but to

the extent that they are not the bequest is general and has equal priority with but not ahead of their bequests. The plaintiff contends that his bequest is specific in any event with priority ahead of that of the interveners. This issue though presented to the district court was left undetermined.

The contention of the plaintiff must be sustained. It was clearly the intent of the testator that this was a specific bequest of particular property or its equivalent to be received ahead of the distribution of the general assets of his estate. He clearly did not intend its abatement in whole or in part as a specific legacy. See, In re Estate of Bush, 89 Neb. 334, 131 N. W. 602; In re Estate of Hunter, 132 Neb. 454, 272 N. W. 318; In re Estate of Lewis, 148 Neb. 592, 28 N. W. 2d 427.

The appellants contend that the plaintiff is not entitled to participate in the disposition of his father's estate for the reason he contested the will which contains a provision barring participation in the distribution by any beneficiary who should contest the will.

The contention is without merit. There was never in any true sense, at least insofar as this record discloses, a contest of the will.

The testator made a will the authenticity of which was never questioned. Later he made some changes in and modifications of this will and with the changes and modifications he purportedly re-executed and re-published it. By answer to the petition for probate of the will as changed and modified plaintiff questioned the legal efficacy of the reformed instrument as a valid will. This answer and the adjudication thereon by the county court furnish the only information before this court as regards the so-called contest. There was no issue before the county court other or different than that which must be determined in advance of the admission of any will to probate pursuant to statute. §§ 30-204 and 30-220, R. R. S. 1943. Under the statute the burden is on the proponent of a will to prove the

elements constituting the execution of the will. In re Estate of Wotke, 133 Neb. 739, 277 N. W. 45; In re Estate of Renter, 148 Neb. 776, 29 N. W. 2d 466. The answer of the plaintiff herein to the petition for probate imposed no burden other or different from the one imposed by the statute as a condition precedent to admission of the will to probate.

The remaining question requiring consideration herein is the matter of taxation of costs in the district court. The court taxed the costs to the defendant. In view of the conclusions arrived at here it appears that the costs should be taxed to the plaintiff, except the costs of the interveners which should be taxed to them.

It is therefore the conclusion of this court that the deposit of $49,691.14 in the First National Bank of Mitchell, Nebraska, in the account designated "Mr. or Mrs. C. E. Scriven" became and is the property of the defendant Evelyn Scriven by right of survivorship.

It is the further conclusion of the court that the plaintiff is entitled to have confirmed in him as his absolute property the four notes for $6,000 each or the proceeds thereof which were received in part payment for the "elevator property"; also that he is entitled to receive out of the estate of Clarence E. Scriven, deceased, $6,000 representing cash payment made at the time of the sale; and also that he is entitled to receive out of the estate $9,321.93, this being the amount of money received pursuant to the inventory of property and money which was transferred as a part of the "elevator property," and $59.85 for stock of merchandise which was not included in the inventory.

It is the further conclusion that the notes or the proceeds thereof together with the $6,000 and the $9,321.93 represent a specific bequest payable out of the estate with priority over general bequests and particularly with priority over the bequests to the interveners.

It is the further conclusion that the costs in the dis-

trict court should be taxed to the plaintiff except the costs of the interveners which should be taxed to them.

The decree of the district court is therefore affirmed in part and reversed in part, and remanded with directions to the district court to enter decree in accordance with the conclusions set forth herein.

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

CARTER, J., dissenting.

I do not concur with the interpretation of the words "elevator property" which the majority opinion announces. There being nothing within the four corners of the will from which the intent of the testator can be found, the usual and customary meaning should be given to the words used. To me the term means the building and the lease of the grounds upon which it is situated, together with the machinery and equipment in the building or on the premises which are essential to the operation of an elevator. An elevator property is not synonymous with an elevator business as the majority opinion infers. An elevator business is that which occupies the time, attention, and labor of a person for livelihood or profit in using an elevator property for the purposes for which it was constructed. In a conveyance of an elevator business as distinguished from an elevator property the inventory of grain and feeds, book accounts, and cash in the bank might well be included. I cannot agree, however, that all property used in connection with an elevator business is included in a devise of the "elevator property" only, or that its usual meaning in the business world would sustain any such definition. By the use of the term "elevator property" in the devise the testator never intended to include the additional property used in connection with the operation of the elevator as a business.

WENKE, J., concurs in this dissent.

ALFRED BROWN, APPELLEE, V. MARK T. HYSLOP, APPELLANT.
45 N. W. 2d 743

Filed January 26, 1951. No. 32895.

1. **Appeal and Error.** Error may not be predicated upon the refusal of an instruction not applicable to evidence in the case.
2. **Contracts.** A promise may be proved either by express words, or by evidence of such facts and circumstances, together with the words used by the parties at the time, from which reasonable persons in conducting the ordinary affairs of business, but with special reference to the particular matter in hand, would be justified in inferring such a promise.
3. **Trial: Appeal and Error.** 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 an instruction is reasonably clear.
4. ———: ———. When different instructions are given on the same subject, they should be considered together, and if they fairly submit the case, it will not be reversed for indefiniteness or ambiguity in one of the instructions.
5. ———: ———. In determining whether or not there was error in a sentence or clause of an instruction, it will be considered with the instruction of which it is a part and the 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.
6. **Evidence.** A declaration by a litigant against interest relevant to a matter in issue and inconsistent with what is alleged or testified to by him is properly received in evidence.
7. ———. An offer of compromise within the exclusionary rule of evidence is one made without regard to liability, the offerer denying or only hypothetically assuming liability for the purpose of the offer in an effort to effect a disposition of the matter.
8. ———. An admission of an existing liability, as distinguished from a mere offer to compromise without regard to the existence or non-existence of a liability, is admissible as evidence although it is embraced in an offer of compromise.

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

Wear & Boland, for appellant.

Gaines, Shoemaker & Crawford, for appellee.

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

BOSLAUGH, J.

The subject of this case is a claim, predicated upon an alleged implied contract, against appellant for the reasonable value of professional services performed by appellee, a physician and surgeon, for three minor children of appellant made necessary by injuries inflicted upon them by a collision of an automobile in which they were traveling and a railroad train at a grade crossing in Omaha.

The petition alleged that appellee, a physician and surgeon of Omaha, rendered medical and surgical services consisting of emergency treatment and subsequent care to three minor children of appellant after they were injured in a collision of an automobile and a train on or about August 12, 1946; that the services performed and the care and treatment furnished them were "necessaries" and were performed and furnished with the knowledge and consent of appellant; and that the reasonable value thereof was the amount stated in the prayer of the petition. The answer of appellant was a denial. Appellee had a verdict and judgment was rendered for him. Appellant was denied a new trial and he seeks relief from the judgment by this appeal.

Appellant did not at the trial test in any manner the sufficiency of the evidence to justify a verdict for his adversary, and does not on this appeal assert that the verdict is not sustained by evidence. This makes unnecessary a summary and discussion of it.

Appellant strenuously contends that the omission of the trial court to instruct the jury as to the distinction between emergency treatment and treatment after the emergency had past was prejudicial error, and that the evidence in this case limits any recovery by appellee to the amount of the reasonable compensation for emergency treatment furnished to the injured minor children.

Appellee received information by telephone from an unidentified person about mid-forenoon on Sunday, August 11, 1946, that an accident had happened and a re-

quest that he proceed at once to Clarkson Hospital. When he arrived there the first of the victims of the accident seen by him was being taken into the operating room. She was a daughter of appellant and had many serious injuries consisting of fractures, wounds, bruises, and contusions. She had a concussion, was in serious shock, unconscious, and her condition was critical. It was thought that she could not survive. Complications developed. She required immediate and continuous care and treatment. Her condition presented perplexing problems and required portentous decisions to be made. This was true while appellee was in charge as her attending physician from August 11 to August 29, at which time she was removed to another hospital. At that time it could not be told if she would live, or if she did what her physical condition would be. The other daughter and the son of appellant came to the hospital soon after appellee arrived there. The daughter had a head wound, multiple fractures, some compound, and was in a serious condition. The boy had a large lacerated wound of the right knee, bruises on the right side of his forehead, and was in moderate shock.

It is conceded that appellee performed medical and surgical services for children of appellant. He and his wife were at the Clarkson Hospital at the time the children entered it and frequently thereafter until the children were taken from it. They met appellee there, knew he had rendered and was rendering the services claimed by him for their children, and were in consultations with him and other doctors concerning the children and their care. They asked appellee to secure the assistance of other doctors and to consult with them, and he did. Among these were Dr. Bennett, a neurologist, Dr. Martin, an orthopedic surgeon, Dr. Boyne, a specialist in jaw surgery, Dr. Kelly, an X-ray specialist, and Dr. Thompson, as consultant and assistant in an operation. Appellee also consulted with Dr. Barry, family physician, and called to his assistance Dr. Best when he first got

on the case because of the emergency and the fact that he could not attend the three at once. Appellee and the parents of the children talked frequently about what was being done for them and discussed the possibilities of future developments. On one occasion the orders of appellee as to penicillin dosage had been changed. He learned that Dr. Barry, the family physician, had made the alteration in the instructions given. Appellee consulted with appellant about this. He told him someone must be in charge, and he did not like to have his orders for treatment of the patients changed without his knowledge. He asked appellant to talk with Dr. Barry so that it would not happen again, and appellant consented to do so. Appellant was told by appellee that if he was to be responsible he must be notified of any changes that were to be made in the treatment prescribed by him. Such an occurrence did not again happen. Appellant at no time communicated with appellee that his services were not wanted or that he should discontinue his care of the children. More than a month after the services of appellee were completed, he received the letter of appellant in which he said "I deeply appreciate what you did when these accident victims were brought into the hospital and subsequently * * *."

This litigation was commenced more than three years after the transaction but appellant did not present any issue as to the character, quality, or result of the services rendered by appellee. Appellant knew the facts, consented to and accepted the services of appellee, and attested his appreciation of them in writing. The contention of appellant in this regard cannot be sustained.

Appellant complains that the trial court failed to instruct the jury on his theory of the case because it refused to advise the jury that appellee could not recover from appellant for the medical services involved if they were rendered in his capacity as surgeon of the Chicago & North Western Railway Company, were part of his regular duties as such surgeon, and included in the

salary he received from the railway company. The tendered instruction was that if the jury found by a preponderance of the evidence that appellee was employed by the railway company to treat the appellant's children, he could not recover against appellant. The evidence is that at the time important to this controversy appellee was engaged by the Chicago & North Western Railway Company as division surgeon for it and its subsidiary, Chicago, St. Paul, Minneapolis & Omaha Railway, on a salary to care for, when he was available, injured employees and passengers who received injury in transit on the lines of these companies. Appellee received nothing from the companies, or either of them, or from anyone for the services rendered the children of appellant. There is no evidence that anyone in any way connected with either of the companies communicated with appellee concerning the injuries to or the services rendered the victims of the accident which resulted from a collision of the auto in which they were riding and a train of the Chicago & North Western Railway Company. The trial court properly refrained from charging the jury as requested. Error may not be predicated upon the refusal of an instruction not applicable to any evidence in the case. Muller v. Jensen, 144 Neb. 1, 12 N. W. 2d 80.

Appellant argues that instructions Nos. 4 and 5 were inadequate to cover the factual situation presented by the evidence, and the theory of appellant. It is proper to note in this connection that the answer is a denial. Instruction No. 4 is that the action against appellant was upon an implied contract that he would pay appellee for the services rendered his children and such a promise could be proven by facts and circumstances, together with the words used by the parties at the time from which reasonable persons in conducting the ordinary affairs of business, but with special reference to the particular matter in hand, would be justified in inferring such a promise, and in determining whether or

not a promise should be inferred the jury had a right to take into consideration all the acts and statements of the parties with reference to the subject of the supposed contract or promise while the alleged consideration therefor was being performed and afterwards; that there was no evidence of any words used by appellant importing a direct promise to pay for such services; and that the sole question for the jury to determine, according to the rules above stated, was whether or not from the words used and the surrounding circumstances a reasonable person would be justified in believing the appellant had made a promise and agreement to pay. If so, the jury would be justified in inferring such a promise, but otherwise not.

Appellant has not specified any definite defect in this instruction. It has substantial approval by a decision of this court. Citizens State Bank v. State Bank, 111 Neb. 571, 197 N. W. 607.

Instruction No. 5 is as follows: "You are instructed that in determining the amount due the plaintiff, if anything, the law is when a person employs another to do work for him or render him service without any agreement as to his compensation, the law implies a promise from the employer to the employee that he will pay him for his services as much as he, the employee, may deserve or merit." The specific objection of appellant is that there is no evidence that he "had employed the plaintiff to do work for him or render service." This instruction is directed to the determination of the amount of compensation, if any, which appellee should receive and is not concerned with the issue as to the obligation of appellant for compensation. The argument that the instruction raised the question of the existence of a contract of employment by insinuation is without substance in view of the language of the preceding instruction that "In this case there is no evidence of any words used by the defendant * * * importing a direct promise to pay for such services." The immediately following instruc-

tion advised the jury that the burden was on the appellee to show by a preponderance of the evidence that he had an implied contract with appellant (1) to render professional services to the appellant's children; (2) that he rendered professional service to the appellant's children which was accepted by the appellant; and (3) the reasonable value of such services, and if the appellee had done this the jury should determine the amount of his recovery, but if he had failed to establish each of these requirements by a preponderance of the evidence, then the verdict of the jury should be for the appellant.

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 the instruction is reasonably clear. If different instructions are given on the same subject they should be considered together, and if they fairly submit the case, it will not be reversed for indefiniteness or ambiguity in one of the instructions. In determining whether or not there was error in a sentence or clause of an instruction, it will be considered with the instruction of which it is a part and the 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; Bolio v. Scholting, 152 Neb. 588, 41 N. W. 2d 913.

The period during which appellee rendered services for which compensation is claimed commenced on August 11, 1946, and ended on August 29, 1946. On the last date he sent a statement therefor to appellant. Appellant's letter to appellee, more than a month later, bearing date of October 7, 1946, stated: "I am acknowledging receipt of your letter of August 29, 1946, in which you enclose your bill for professional services in connection with the four persons injured in the unfortunate accident at 76th and Dodge Streets on August 11th, 1946. While I deeply appreciate what you did when these accident victims were brought into the hospital and sub-

sequently, I was rather shocked by the amount of this bill, which I believe to be quite excessive. When the patients have made further progress toward recovery, I shall avail myself of the first opportunity to discuss the matter with you." This was at least an implied admission by appellant of liability to appellee for some amount for services furnished by him to "the four persons injured in the unfortunate accident * * * on August 11, 1946." A finding of a jury based thereon that it was an express admission of liability would not be without evidentiary support. These statements by appellant after opportunity for knowledge of all the facts, deliberation, and mature conclusion, were in direct conflict with the denial of his answer and his testimony. A declaration by a litigant against interest relevant to a matter in issue and inconsistent with what is alleged or testified to by him is proper and generally important original evidence. O'Hare v. Peterson, 150 Neb. 151, 33 N. W. 2d 566.

The objection of appellant to the acceptance of this letter as evidence on the trial of the case is that it was "clearly an offer of compromise of the doctor bill which the defendant considered excessive." The record fails to show any basis for this contention. It is not disclosed that there had been any dispute or communication between the parties in reference to the claim. Appellee sent the statement, appellant received and retained it in silence for more than a month, and then, it may justifiably be concluded, after more than usual deliberation and consideration wrote the letter containing no denial, expressing an admission of liability, projecting his thought that the amount claimed was quite excessive, but in the same sentence proclaiming his satisfaction with the services of appellee to the accident victims, his minor children, not only at the immediate time of the emergency, but subsequently thereto. There is no showing of any of the elements of an effort to induce a compromise to avoid a contest. At the time the writing was

made there was no threat of litigation. It was in the circumstances a written recognition of an indebtedness —politely protested as excessive—owing by appellant to appellee. The letter did not offer any amount in compromise or for any purpose. An offer of compromise within the exclusionary rule is one made without regard to liability, the offerer denying or only hypothetically assuming liability for the purpose of the offer in an effort to effect a disposition of the matter. O'Hare v. Peterson, *supra;* Short v. Bollen, 130 Neb. 728, 266 N. W. 635.

The doctrine is firm that an offer of compromise is immune from use as proof in a contest over the subject of the proffered compromise. It is the intendment of the law to repel any inference which may arise from a proposition not made in either design or purpose to admit the existence of a fact but merely to secure peace and avoid the incidents of a legal contest. O'Hare v. Peterson, *supra.* But, if an admission is made because it is a fact, the evidence to prove it is competent whatever motive may have prompted the declaration. The deciding fact is whether or not the party making the admission intended to concede a fact hypothetically in order to induce and effect a settlement, or to declare the existence of a fact. An admission of an existing liability as distinguished from a mere offer to compromise without regard to the existence or non-existence of a liability is admissible although it is embraced in an offer of compromise. Esser v. Brophey, 212 Minn. 194, 3 N. W. 2d 3; Langdon v. Ahrends, 166 Iowa 636, 147 N. W. 940; Stanley v. Beaty, 148 Kan. 492, 83 P. 2d 637; Annotation, 80 A. L. R. 919; Annotation, Ann. Cas. 1918E 439; 20 Am. Jur., Evidence, § 566, p. 478; 31 C. J. S., Evidence, § 287, p. 1047. The letter of appellant was properly received in evidence.

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

AFFIRMED.

FRANK A. PARKENING, AS EXECUTOR OF THE ESTATES OF BERTHA PARKENING AND CHRIS PARKENING, DECEASED, APPELLANT, V. ANNA PARKENING HAFFKE ET AL., APPELLEES.

46 N. W. 2d 117

Filed February 2, 1951. No. 32835.

1. **Deeds.** In determining the mental capacity of the grantor to execute a deed, if it clearly appears that when the instrument was executed the grantor had the capacity to understand what he was doing, knew the nature and extent of his property and what he proposed to do with it, and to decide intelligently whether or not he desired to make the conveyance, it cannot be said he was incompetent or incapable of executing the instrument.
2. ———. In order to invalidate a deed on the ground of mental incapacity on the part of the grantor it is necessary to show such a degree of mental weakness as renders the maker of the deed incapable of understanding and protecting his own interests.
3. **Gifts: Parent and Child.** The rule is well established in this jurisdiction, in a case of a gift and voluntary conveyance from a parent to his child or children, no presumption of fraud or undue influence arises as between the parties thereto by the mere fact of the relation.
4. ———: ———. The affection, confidence, and gratitude of a parent to a child which inspires the gift is a natural and lawful influence, and will not render it voidable, unless this influence has been so used as to confuse the judgment and control the will of the donor.
5. **Gifts.** It is essential to the validity of a gift that the donor shall have sufficient mental capacity to make the gift.
6. ———. The general rule is that, if the donor has sufficient mental capacity to comprehend the transaction, if he understands the extent and value of his property, what persons are the objects of his bounty, and the manner in which he is distributing his property among them, his gift will be valid.
7. ———. It is a well-settled doctrine that all of the facts necessary to constitute a valid gift inter vivos may be inferred from subsequent declarations of the donor, which are in the nature of admissions by him against interest.
8. ———. The burden of proof is on the person asserting undue influence to prove by a preponderance of the evidence (1) that the grantor, testator, or donor was a person who would be subject to such influence, (2) that there was an opportunity to exercise such influence, (3) that there was a disposition to exercise such influence, and (4) that the result was the effect of such influence.

9. **Banks and Banking: Joint Tenancy.** Under section 8-167, R. S. 1943, when a deposit is made in a bank payable to either of two or more persons, either expressly as joint tenants with right of survivorship or without those qualifying words, upon the death of one of the payees the deposit is payable to the survivor or survivors of those named in the deposit.

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

A. L. Tidd and *J. C. Travis,* for appellant.

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

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

MESSMORE, J.

This is an action in equity brought by Frank A. Parkening, executor of the estate of Chris Parkening, deceased, in the district court for Douglas County against Anna Parkening Haffke and her husband William Haffke, for an accounting in the amount of $16,415.91, alleged to be owing by the defendants to the estate. The will was admitted to probate in the county court of Douglas County on December 10, 1947.

On December 8, 1938, Chris Parkening and Bertha Parkening, husband and wife, executed a joint will. During their lifetime they held all their property as joint tenants with the right of survivorship. Bertha Parkening died November 18, 1940, and Chris Parkening became the sole owner of all the property. He departed this life September 27, 1947, leaving eight children as his heirs, as follows: Frank A. Parkening, John Parkening, and Clara Parkening Campbell of Plattsmouth, Nebraska; Otto Parkening and Margaret Parkening Baumgartner of Beverly Hills, California; Leonard Parkening and Emil G. Parkening of Los Angeles, California; and Anna Parkening Haffke of Omaha, Nebraska.

For convenience we will refer to Chris Parkening as

Chris, Bertha Parkening as Bertha, and Anna Parkening Haffke as Anna.

The record discloses that Chris was born December 18, 1856, in Germany. Later he came to this country and engaged in farming near Plattsmouth, Nebraska, for a number of years. During August 1917, he suffered a stroke of paralysis, a cerebral thrombosis, which paralyzed his left side and left him so that he was unable to talk. It was fully a year before he regained the use of his left side and was able to talk again. He and Bertha had joint accounts in the First National Bank of Omaha, and the Plattsmouth State Bank of Plattsmouth, Nebraska. Bertha accompanied him on business transactions prior to and after he suffered the stroke of paralysis, and helped him transact business, wrote checks for him, signed his name to them, and continued to do so until her death. Due to his physical condition after 1917, Chris gave up farming, and his son John farmed his parents' land as a tenant. In the latter part of 1919 or the fore part of 1920, Chris and Bertha purchased from their son Otto property located at 4809 Douglas Street, Omaha, and moved into it. For about a year prior to October 16, 1940, Bertha had been in ill health and gradually grew weaker. On that date she and Chris had a conveyance of the Douglas Street property prepared whereby they became joint tenants therein with remainder upon their deaths to Anna Parkening Haffke a twelve twenty-seconds interest, Clara Parkening Campbell a seven twenty-seconds interest, and Margaret Parkening Baumgartner a three twenty-seconds interest. Immediately after making the conveyance Chris and Bertha moved in with Anna and her husband who resided at 2515 Himebaugh Avenue. Bertha died in her daughter Anna's home on November 18, 1940. Thereafter Chris continued to live with Anna until his death on September 27, 1947. The Douglas Street property was rented for $50 a month, and Chris was to receive the rent. On December 8, 1947, the

grantees named in the deed to the Douglas Street property sold the same for $10,500, and after the expenses incident to the sale were paid, each of the grantees received her proportionate share of the cash.

After Bertha's death Anna transacted business for her father until his death and wrote and signed checks on the accounts in the First National Bank in Omaha and the Plattsmouth State Bank. On October 28, 1942, two signature cards were procured from the aforementioned banks for the purpose of creating joint accounts with the right of survivorship in Chris and Anna. These were signed and delivered to the banks. The manner of procuring these signature cards, the signing thereof, and the handling of the accounts in the banks constitute the principal controversy in this litigation.

When an equity action is appealed to this court, this court, under the statute, in determining the questions of fact is required to reach an independent conclusion without reference to the findings of the district court. If, however, the record discloses an irreconcilable conflict in the evidence on material issues, this court will, in determining the weight of the evidence of witnesses who appeared in court to testify, consider the fact that the trial court observed the witnesses and their manner of testifying. Each case of this type presents a different fact situation. While many of the cited cases are helpful in determining the issues, because of their similarity, however, the ultimate decision in this case must necessarily be based on the facts thereof. See Kucaba v. Kucaba, 146 Neb. 116, 18 N. W. 2d 645.

The trial court entered a decree to the following effect: (1) That the warranty deed executed on October 16, 1940, by Bertha Parkening and Chris Parkening of the Douglas Street property was regular in form and was the free and independent act of the grantors who were competent at the time the deed was executed and delivered, and were under no influence or duress. (2) That on October 28, 1942, the account of Chris Park-

ening in the First National Bank of Omaha became a joint account with right of survivorship of Chris Parkening and Anna Haffke, and at the time such account was created Chris Parkening was fully possessed of his mental faculties and not under any influence or duress. The account in the Plattsmouth State Bank was found to provide for the creation of two types of accounts (a) joint account payable to either or survivor, and (b) joint account, two or more signatures required. The court made a finding that by the manner and form in which this signature card was signed, only a joint account was created which did not carry with it the right of survivorship. (3) That after the death of Chris Parkening the defendant Anna Haffke illegally withdrew from the Plattsmouth State Bank the sum of $5,129.98 for which she was required to account to the estate, with interest thereon. The court also decreed that Anna Haffke paid from the funds in the Plattsmouth State Bank for the benefit of the deceased his burial expenses in a certain amount for which she should receive credit, and this amount to be deducted from the amount of $5,129.98. The court fixed this balance for which Anna Haffke should account to the estate in the amount of $4,087.09.

The executor filed a motion for new trial. Upon the overruling of same he perfected appeal to this court.

Anna Haffke filed a motion for new trial on the phase of the case dealing with the account in the Plattsmouth State Bank, alleging that the court erred in not finding and decreeing that this account was a joint account with right of survivorship. This motion for new trial was overruled and defendant Anna Haffke perfected cross-appeal from this part of the decree.

The appellant assigns as error: (1) The findings and decree of the trial court are not sustained by sufficient evidence, and (2) are contrary to law. In this connection appellant's contention is that the trial court erred in not finding and decreeing that on October 28, 1942, when the joint account cards were signed, Anna Haffke oc-

cupied a confidential and fiduciary relationship to her father Chris Parkening who at that time was at an advanced old age, enfeebled, and incompetent to transact business to the extent that he could not legally create joint bank accounts with the right of survivorship. (3) The trial court erred in not finding that the joint account card to the First National Bank of Omaha was procured by the defendant Anna Haffke by undue influence on her part over her father Chris Parkening, and was therefore invalid. This contention is also made with reference to the joint account card to the Plattsmouth State Bank. (4) The trial court erred in awarding the defendant Anna Haffke the right to set off the amount of funeral expenses against the sum of $5,129.98 which the district court found she had no legal right to withdraw from the account in the Plattsmouth State Bank after the death of her father Chris Parkening. (5) The trial court erred in not requiring the defendants to account for the rents from the Douglas Street property.

It appears from the appellant's brief that the conveyance of the Douglas Street property is not directly attacked. It is evident the appellant contends that Chris Parkening, at the time the conveyance was made, was mentally incompetent to transact business and was under the influence of Anna Haffke who stood in a confidential, fiduciary relation to him. The trial court took cognizance of this conveyance and made specific findings with reference to the mental condition of Chris Parkening at the time the conveyance was made.

The evidence as to the conveyance of the Douglas Street property is not in much dispute. The record discloses that for about a year prior to October 16, 1940, when this conveyance was made, Bertha was in ill health and Anna was required to go to the Douglas Street home and take care of her parents. Bertha gradually grew weaker and required more care and attention, so on the date heretofore mentioned, the conveyance of the Douglas Street property was made with the grantees

as heretofore specified. Clara Campbell, a daughter of Chris and Bertha, testified that it was her understanding that the person with whom her parents were going to live and make their home would get the largest share of the Douglas Street property for their care and keep. Her parents did not desire to live with her because her home lacked modern conveniences. An acquaintance of Chris and the family testified that Chris told him he was going to stay in the Haffke home and pay them for keeping him and taking care of him. A grandson of Chris and Bertha testified that Bertha was desirous of making a division of the estate. She felt that the boys had had enough of the estate and were also provided for in the will, and the girls should receive as much as the boys. However, she said Anna was the oldest and she intended to give her more of a share than the other girls for the reason that Anna had helped rear the little children, had not received much when she was married, and did not have the opportunity to take music lessons or attend high school. The counsel who prepared the conveyance testified as to the details in connection therewith, Chris' interest by asking questions as to the effect of the conveyance, and that in his opinion Chris was competent to make the conveyance and to transact business at that time.

"In order to vacate a deed on the ground of mental incapacity of the grantor, it is necessary to show such a degree of mental weakness as renders the maker of the deed incapable of understanding and protecting his own interest." Little v. Curson, 114 Neb. 752, 209 N. W. 737.

The rule is well established in this jurisdiction, in a case of voluntary conveyance from a parent to his child or children, no presumption of fraud or undue influence arises as between the parties thereto by the mere fact of the relation. See Little v. Curson, *supra*.

"The affection, confidence and gratitude of a parent to a child which inspires the gift is a natural and law-

ful influence, and will not render it voidable, unless this influence has been so used as to confuse the judgment and control the will of the donor." Hacker v. Hoover, 89 Neb. 317, 131 N. W. 734. See, also, Little v. Curson, *supra*.

In determining the mental capacity of the grantor to execute a deed, if it clearly appears that when the instrument was executed the grantor had the capacity to understand what he was doing, knew the nature and extent of his property and what he proposed to do with it, and to decide intelligently whether or not he desired to make the conveyance, it cannot be said he was incompetent or incapable of executing the instrument. See Broeker v. Day, 124 Neb. 316, 246 N. W. 490.

The decree of the district court was correct in holding the conveyance of the Douglas Street property valid.

This brings us to the proposition as to whether or not the signature cards signed and delivered to the banks constituted joint accounts with the right of survivorship. The district court found and decreed that the account in the First National Bank of Omaha was a joint account with the right of survivorship, and that the account with the Plattsmouth State Bank was a joint account but did not carry with it the right of survivorship. The latter proposition will be subsequently dealt with in the cross-appeal of Anna Haffke.

Clara Campbell testified that the day before her mother's death in 1940, she and her sister Anna were present with their mother when their mother told Anna she should go to the bank, take this witness with her, and see if she could get permission to sign her name to their father's checks for him; that she had previously done that because his physical condition was such that he did not want to do it; and that he wanted Anna to be his agent to that extent. This witness further testified that she and Anna went to the First National Bank of Omaha; that Anna told the man at the window that her mother was ill and unable to write any more checks, and her

father's condition was such that he was unable to do so; and that they wanted to give her the right to sign her name on her father's checks under his name. Anna, from the date of her mother's death, assisted her father in transacting business in the same manner in which her mother had previously.

In July or August 1941, Chris, the Haffkes, and one of their sons, took a trip to California to visit relatives. They were gone for about six weeks. Upon their return Chris requested his grandson Earl Haffke to obtain signature cards from the banks to enable him to create a joint account with Anna. Earl delayed the matter and questioned his grandfather with respect to creating the joint accounts. Finally Earl Haffke did procure a signature card from the First National Bank of Omaha, and William Haffke wrote the Plattsmouth State Bank and procured a signature card. Chris and Anna signed the cards in the presence of Earl Haffke, and they were delivered to the banks.

A niece of Chris testified that while she was visiting in the Haffke home for a period of three weeks or more in 1944, she had a conversation with Chris. He told this witness he had made a joint account with Anna, and said: "* * * I feel after I die I want her to have something, because I have not given her anything, nor she has never charged me for anything; I have given her once in awhile a little, but I never paid her for staying here. * * * When I first came up I made up my mind I would divide, * * * but, * * * I noticed the others never had the time to have me, or they were too busy, and they did not have a modern home, and I made up my mind that I wanted to keep my home there. That was the reason I made this joint account in the bank." He also stated that he had told Clara, John, and Frank. They were angry about it, especially Clara, and he told her that it was his money and he was going to do as he wanted to do with it.

A neighbor and friend of Chris and the Haffke family

who lived in close proximity to the Haffke home, on this phase of the case testified that in 1943, he had a conversation with Chris wherein they were discussing the will of the witness' mother, and Chris told this witness he had made a joint account with his daughter Anna to take care of all his expenses during the remainder of his days; that upon his death she was to have the remainder for the trouble and expense of taking care of him; and that he could draw out of the account as well as Anna could.

An attorney who had transacted legal business for Chris and Bertha in the conveyance of the Douglas Street property, and with whom Chris' grandson Earl Haffke was associated, testified that he talked to Chris in his law office either in 1943 or 1944, and visited with him with reference to making a will. Chris told this witness that he put all his money in the bank in a joint account with the right of survivorship with Anna, and was afraid that Anna would have trouble with the other children when he died. He further testified that at the time Chris was competent to transact business.

Chris also had a similar conversation with a neighbor who had taken care of the household during the absence of the Haffkes, in which Chris said he had a joint account with Anna; that if anything happened to him it went to Anna; and that if anything happened to Anna it was still his money. He told this witness the banks the accounts were in, and that he was going to stay with Anna and finish his life. She testified that at the time, in her opinion, he was mentally competent.

In July 1943, when his daughter Margaret Baumgartner was visiting the Haffke home, Chris told her: "Do you know, that I have now made out my joint bank account with my Anna?" He stated he was planning to live with Anna, and that was the reason he made the arrangement. He wanted to provide for her. He also stated that there might be some argument about this among the rest of the children, and he said: "I

really don't care; I don't owe them anything, and I feel like I do want to do the right thing with my Anna." She further testified that at the time, in her opinion, he was normal and competent.

There is no denial by any witness that at the time Chris Parkening lived with his daughter Anna Haffke and her husband he was properly and adequately taken care of and provided for in all respects as to his comfort and companionship with them.

In addition to the evidence as heretofore stated, we have examined the testimony. In determining the value thereof we have considered the relationship if any to the parties; the length of their acquaintance with Chris and the closeness thereof; their interest if any in the outcome of the litigation; the purpose, nature, and frequency of their visits; their opportunity for observation; the nature and subject matter of their conversations; the failure of Chris to recognize his relatives or friends; and all of the other facts and circumstances which they gave as the basis of their opinions. Suffice it is to say that this evidence is in great preponderance that at all times until the date of his death Chris Parkening was competent to transact business, to accomplish the ordinary affairs of life as a normal person, knew the property that he owned, the objects of his bounty, and the distribution he desired to make of his property. To further detail this evidence would unnecessarily lengthen this opinion.

The testimony of his youngest daughter, Margaret Baumgartner, who has a beneficial interest in the outcome of this litigation, and that of her doctor husband who had examined Chris physically and observed him on many occasions, is also persuasive evidence as to his mental competency to transact business to the time of his death and that in fact, for his advanced years, his condition was exceptional both mentally and physically.

It is essential to the validity of a gift that the donor shall have sufficient mental capacity to make his gift.

The general rule is that, if the donor has sufficient mental capacity to comprehend the transaction, if he understands the extent and value of his property, what persons are the objects of his bounty, and the manner in which he is distributing his property among them, his gift will be valid. See 38 C. J. S., Gifts, § 13, p. 789.

"It is a well-settled doctrine that all of the facts necessary to constitute a valid gift inter vivos may be inferred from subsequent declarations of the donor, which are in the nature of admissions by him against interest. Such statements are admissible in evidence as tending to show that he had given the property to the donee." In re Estate of Vanicek, 145 Neb. 531, 17 N. W. 2d 477. See, also, In re Estate of Dayton, 121 Neb. 402, 237 N. W. 303; Jones v. Ewart, 143 Neb. 717, 10 N. W. 2d 708; Annotation, 105 A. L. R. 398.

As heretofore stated, it is the appellant's contention that Anna Haffke, standing in a confidential, fiduciary relation to her father Chris Parkening, asserted undue influence over him by virtue of which she acquired the joint bank accounts in question.

The burden of proof is on the party asserting undue influence to prove by a preponderance of the evidence (1) that the grantor, testator, or donor was a person who would be subject to such influence, (2) that there was an opportunity to exercise such influence, (3) that there was a disposition to exercise such influence, and (4) that the result was the effect of such influence. See In re Estate of Thompson, *ante* p. 375, 44 N. W. 2d 814.

The evidence adduced by the appellant on this phase of the case is insufficient to prove undue influence on the part of Anna and William Haffke as required by the burden of proof.

While great age is an important and pertinent circumstance to be considered in connection with the other evidence going to the question of mental competence, it cannot be treated as controlling. The law recognizes the right of the aged to control and dispose of their

own property and their right to choose the persons who shall be the recipients of their bounty. See Lund v. Woodward, 137 Neb. 689, 291 N. W. 90.

There is no clear and satisfactory evidence in this case that Chris Parkening was subject to such influence. A disposition to exercise such influence is not clearly and satisfactorily shown, and the joint account cards in the banks do not appear to be the result of undue influence, but are the result of the execution of a plan by Chris for the distribution of his money in such bank accounts. The appellant's contention is without merit.

This brings us to the cross-appeal of Anna Haffke, wherein she contends the court erred in failing to find that it was the intention of Chris Parkening to create a joint account with the right of survivorship in the Plattsmouth State Bank on October 28, 1942; and that the district court erred in failing to find that the deposit in the Plattsmouth State Bank, payable to either Chris Parkening or Anna Haffke, created ownership in Anna Haffke of the account upon the death of Chris Parkening.

Exhibit 89 is a joint account payable to either or survivor, the title of the account being "Chris Parkening and Anna Parkening Haffke," to the Plattsmouth State Bank, and is as follows:

"JOINT ACCOUNT—PAYABLE TO EITHER OR SURVIVOR

"We agree and declare that all funds now, or hereafter, deposited in this account are, and shall be, our joint property and owned by us as joint tenants with right of survivorship, and not as tenants in common; and upon the death of either of us any balance in said account shall become the absolute property of the survivor. The entire account or any part thereof may be withdrawn by, or upon the order of, either of us or the survivor.

"It is especially agreed that withdrawals of funds by

the survivor shall be binding upon us and upon our heirs, next of kin, legatees, assigns and personal representatives.

Chris Parkening and
Anna Parkening Haffke

"JOINT ACCOUNT—TWO OR MORE SIGNATURES REQUIRED

"All moneys now or at any time deposited by us, with this bank to the credit of this account, are and shall be so deposited by us and received by the bank upon the following terms and conditions of repayment namely: that the amount thereof shall be paid by the bank to us, or upon the written order of any one such persons so entitled to payment; and without reference to the original ownership of the moneys deposited, all withdrawals must contain one of the following signatures.

X Chris Parkening
Chris Parkening and Anna Parkening Haffke
Chris Parkening and Anna Parkening Haffke."

The signature "Chris Parkening" written on the top line of the top half of the card was written by Anna Parkening Haffke without the consent of Chris Parkening.

At the time the exhibits 88 and 89 were made, Chris Parkening was 85 years, 10 months, and 10 days of age.

The contention of the executor, in addition to those previously determined, is that the manner and form in which exhibit 89 was signed by Anna Parkening Haffke constituted a forgery on her part and invalidates the instrument as to the right of survivorship.

The president of the Plattsmouth State Bank with which Chris Parkening had done business since 1921, and who was known by the banker since 1917, testified that prior to October 1942, Chris and Bertha Parkening had an account with the bank. On the date exhibit 89 was presented to the bank, Anna Parkening Haffke, William Haffke her husband, and Chris Parkening were present. This witness asked Chris what he wanted to do about the signature on the card, to which Chris replied

that he wanted to fix the account so that either he or his daughter could withdraw the mony at any time. The banker then took the card, went to the ledger sheet, and put Anna's name at the top of the sheet along with Chris' name. He did not see the signatures when they were written on the card. He further testified that at the time Chris was competent to transact such business.

Section 8-167, R. S. 1943, provides: "When a deposit in any bank in this state is made in the name of two or more persons, deliverable or payable to either or to their survivor or survivors, such deposit, or any part thereof, or increase thereof, may be delivered or paid to either of said persons or to the survivor or survivors in due course of business."

In the case of McConnell v. McCook Nat. Bank, 142 Neb. 451, 6 N. W. 2d 599, this court said: "It is clear from our decisions in construing this statute (section 8-164, Comp. St. 1929, now section 8-167, R. S. 1943) that we have held: (1) The act is intended for the protection of the bank; (2) it fixes the property rights of the persons named, unless the contrary appears from the terms of the deposit; (3) that, when a deposit is made in a bank payable to either of two or more persons, either expressly as joint tenants with right of survivorship or without those qualifying words, upon the death of one of the payees the deposit is payable to the survivor or survivors of those named in the deposit." The court further said: "We are now asked to modify our decisions and hold that a deposit payable to one person 'or' another without words of joint tenancy or right of survivorship is not within the provisions of the statute. To so hold would require us to overrule the Johnson case. (In re Estate of Johnson, 116 Neb. 686, 218 N. W. 739.) In that case, * * * we expressed our views of the legislative intent. We reiterated that statement in the Kehl case * * *. (Kehl v. Omaha Nat. Bank, 126 Neb. 695, 254 N. W. 397) * * * We feel that the legislature intended by this act to get away from the 'confusion, contradiction

and perplexing distinctions' and the uncertainties, resulting in such transactions, occasioned by the judicial opinions in the various states on this subject."

We believe that the foregoing opinion and the cases on the subject in this jurisdiction cited therein are conclusive in the instant case. The evidence is in preponderance that Chris Parkening on October 28, 1942, intended to create in the Plattsmouth State Bank a joint account with the right of survivorship in Anna Haffke. Without again setting out the testimony, it seems clear that on several occasions, to several different witnesses, he made declarations to that effect, and the terms of exhibit 89 are clearly within the range of section 8-167, R. S. 1943.

For the reasons given herein, the judgment of the district court is affirmed, except that part of the judgment requiring Anna Haffke, the cross-appellant, to account to the executor for the funds in the Plattsmouth State Bank.

It is hereby ordered and directed that judgment be entered in the district court in this cause for the cross-appellant on her cross-appeal, in accordance with this opinion.

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

CARTER, J., participating on briefs.

HAROLD G. HERRIN, APPELLEE, V. JOHNSON CASHWAY LUMBER COMPANY, A CORPORATION, ET AL., APPELLANTS.
46 N. W. 2d 111

Filed February 2, 1951. No. 32852.

1. **Specific Performance.** One seeking specific performance of an oral contract for the repurchase of corporate stock must prove a contract which is clear, satisfactory, and unequivocal in its terms.

2. ———. Specific performance of a contract will not be decreed unless the minds of the parties to the contract have met. In order to establish a contract capable of specific enforcement it must be shown that there was a definite offer and an unconditional acceptance.
3. ———. To entitle a party to specific performance, there must be a clear, mutual understanding and a positive assent on the part of each party. Mutuality of obligation is an essential element of the right to enforce specific performance of a contract in a court of equity.
4. **Equity.** It is the practice of courts of equity, when they once have obtained jurisdiction of a case, to administer all the relief which the nature of the case and the facts demand, and to bring such relief down to the close of the litigation between the parties.

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

Gaines, Shoemaker & Crawford, and *Wear & Boland,* for appellants.

Webb & Kelley, H. B. White, and *Eugene D. O'Sullivan, Jr.,* for appellee.

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

MESSMORE, J.

This is an action in equity brought by Harold G. Herrin as plaintiff in the district court for Douglas County, against the Johnson Cashway Lumber Company, a corporation, the Johnson Investment Company, a corporation, and the officers of the corporations consisting of Lawrence W. Johnson, president, Harold R. Johnson, vice president, George W. Bunce, secretary, and Julia E. Johnson, treasurer, to require the defendants to carry out the terms of an alleged oral contract to repurchase stock held by the plaintiff in the corporations, and to enter judgment in his favor for a balance claimed to be due for salary earned while in the employ of the corporations.

The plaintiff's second amended petition alleged an oral

contract wherein the president of defendant corporations agreed to repurchase stock at book value in the corporations in the event of plaintiff's death or termination of employment, and also a claim for unpaid salary. The defendants' answer is a general denial, and in addition a counterclaim that the plaintiff fraudulently and unlawfully did draw a check against the funds of the Johnson Cashway Lumber Company, a corporation, and caused the same to be presented to the bank and obtained the avails thereof in the amount of $2,500, for which amount judgment is prayed. Plaintiff's answer to the counterclaim is a general denial and an affirmative allegation that the plaintiff had a credit with the corporations which he is entitled to assert as against defendants' counterclaim.

The trial court entered judgment in favor of the plaintiff and against the defendant Johnson Cashway Lumber Company in the amount of $16,122.12; entered judgment in favor of the plaintiff and against the Johnson Investment Company in the amount of $3,235.56, the book value of stock of the two corporations, including interest; and also entered judgment in favor of the plaintiff and against the defendant Johnson Cashway Lumber Company for salary due the plaintiff in the amount of $3,584.58. The action was dismissed as to the defendants as individuals.

Upon the overruling of the motion for new trial filed by the Johnson Cashway Lumber Company, a corporation, and Johnson Investment Company, a corporation, the corporations appeal.

This appeal involves two separate causes of action. The first deals with an oral contract to repurchase stock in the corporations upon the death or termination of employment of the plaintiff at the book value of the stock at such time. The second cause of action is to recover an unpaid balance of salary due the plaintiff from the defendants. We relate the factual situation covering these separate causes of action in chronological order.

For convenience we will refer to the defendant Johnson Cashway Lumber Company, a corporation, as the lumber company; Johnson Investment Company, a corporation, as the investment company; Lawrence W. Johnson, president of the corporations, as Johnson; and the plaintiff Harold G. Herrin as Herrin.

It appears from the record that Herrin entered the employ of a co-partnership, composed of Lawrence W. Johnson, Harold R. Johnson, and their mother Julia E. Johnson, engaged in the lumber business on April 1, 1944. He was to manage a lumberyard in Omaha taken over by the partnership, for which he testified he would receive $300 a month salary and a minimum of 5 percent bonus on the net profits. The partnership was incorporated May 31, 1946. There was no change in the ownership of stock, all of it, with the exception of the shares purchased by Herrin, belonged to members of the Johnson family with Lawrence W. Johnson owning the major share thereof. The bonus arrangement, Herrin testified, continued until the incorporation. Several months prior thereto Herrin discussed with Johnson the purchase of stock in the corporations to be formed. In this conversation it developed that Johnson was desirous of patterning the lumber company after firms which had a policy that permitted the employees thereof, and especially the managers, to acquire stock and participate in the profits as an incentive to build business. Within a month after the corporations were formed Johnson inquired of Herrin how much stock he wanted to purchase. Herrin stated he wanted to purchase $10,000 worth of stock. After checking over the proposition Johnson stated he would not sell Herrin that much stock for the reason that he was personally carrying the financial burden of the corporations and was required to borrow large sums of money, and it would not be fair to Herrin to sell him that much stock. He informed Herrin that his credit on the corporation books amounted to $6,600. He said he would sell stock to Herrin in that amount, two-thirds

of which, amounting to 44 shares at par value of $100, would be in the lumber company, and one-third or 22 shares at par value of $100 would be in the investment company. Herrin testified that at the time he was negotiating for the purchase of the $10,000 worth of stock, Johnson stated that minority stock in a closed family corporation was undesirable, and in that connection he would agree to repurchase the stock at book value in the event something happened to Herrin, or in the event Herrin terminated his services. Herrin testified at the time the stock was purchased, Johnson said he wanted an agreement whereby Herrin would agree to first offer the stock to him, and he agreed in turn to buy the stock at the existing book value. Herrin testified: "* * * maybe he said I was to offer that stock to him first." When the checks were prepared and endorsed, the secretary of the corporations who had handled the matter stated Johnson wanted him to prepare a written agreement, which was not done. Herrin stated he asked the secretary to be sure and stipulate the book value as to the repurchase arrangement.

Herrin terminated his employment with the corporations on April 1, 1948. Before doing so he stated the terms of the oral agreement to Harold Johnson, the vice president of the corporations, and a week or so after terminating his employment he talked with Johnson and offered to sell him the stock in accordance with the oral agreement. At that time Herrin was in Hastings and contacted Harold Johnson and Lawrence Johnson. Harold Johnson requested Herrin to explain his agreement. Herrin started explaining the original bonus agreement. Johnson became suddenly angry, denied that Herrin was entitled to a bonus, and stated that he was not going to pay him anything, that he was going to penalize his stock, that he never wanted to see him again, and ordered him to get out. Herrin did not offer to deliver the stock to Johnson at that time, but did so several days later when he personally took Johnson a

letter setting forth the value of the stock and the amount due for salary. He requested him to have the auditor check it. Johnson said: "'I think your valuations on the investment company are about right.'" It was stipulated that the book value of the stock in the investment company on May 31, 1948, was in the sum of $132.32 per share. Johnson further said: "'I think your valuations on the corporation are about twenty-five dollars high.'"

The letter Herrin delivered to Johnson is in substance as follows: It is dated March 30, 1948, and is directed to L. W. Johnson, president, Johnson Cashway Lumber Company. It is stated therein that, as suggested by Mr. H. R. Johnson, he had obtained the services of a competent auditor who had arrived at the book values on stock which he held in both Johnson Cashway Lumber Company of Omaha and Johnson Investment Company. These values were: Johnson Cashway Lumber Company, 44 shares of book value $344.48 per share, total $15,157.12; 22 shares of Johnson Investment Company, $3,094.74; and unpaid salary $3,000, a total of $21,251.86. The letter concludes: "I wish to immediately dispose of this stock and in compliance with former agreement, am offering this to you before placing stock on market. I would appreciate your decision as I wish to run an ad in Sundays paper advertising this stock."

After delivering the letter to Johnson, Herrin saw him the next day. Johnson told him: "I am going to give you an ultimatum. I want this twenty-five hundred dollars surrendered on Saturday." Herrin said he did not have it and was not going to surrender it. This $2,500 item is one Herrin claims was drawn against his salary before terminating his services, and constitutes the basis of the defendants' counterclaim. Herrin testified that Johnson insisted he surrender the $2,500 or the stock, which Herrin refused to do.

On April 1, 1948, Herrin wrote to Johnson as president of the lumber company and investment company

as follows: "I am giving you and your corporations this final opportunity to purchase my stock in the above named companies for the book value thereof, which makes a total of $18251.86 for all of my shares of stock. I shall also expect to receive from you and your company at once the balance due and owing to me for salary, which is $3000.00, whether I sell my stock to you or not. As far as your demand that I return by next Saturday the $2500.00 which I drew on my accumulated salary, this is to advise you that I shall not do so. * * * If I do not hear from you by next Saturday morning I shall publicly offer my stock for sale pursuant to the enclosed advertisement and proceed to collect the balance of my salary in a legal way."

The ad was not published. The stock was turned over to brokers to sell on the open market. It was not sold but delivered to the plaintiff who still possessed it at the time of trial.

Herrin further testified that at the close of the fiscal year 1946-1947, Johnson computed the book value of the stock in the lumber company to be $238 per share, and offered $11,000 for the stock, or offered to sell Herrin stock at $238 per share; and that on various occasions Johnson stated the value of the stock. On one occasion, March 1, 1948, Herrin called Johnson at his home when Herrin was ill, and Johnson told him he had nothing to worry about, that his stock was worth $15,000.

The secretary of the corporations testified that he was present with Johnson and Herrin when the stock was sold to Herrin. On that occasion Johnson stated the manner in which Herrin could acquire the stock, then said: " 'With the understanding that I would like this in writing, for in the event you ever decide to dispose of that stock you are to offer it to me first.' " Nothing was said that Johnson agreed to repurchase the stock, and he stated Herrin never told him that Johnson so agreed.

Harold Johnson testified that when Herrin came to

Hastings he and his brother were present. Herrin said: "'I would like to straighten out my affairs with the company. * * * When I hired out to your brother, L. W. he agreed to give me a salary of three hundred dollars a month and a bonus * * *.'" Johnson said: "'* * * that is a damned lie, * * *'" and told him to get out. Later Herrin talked to this witness uptown. He said when he purchased this stock Johnson sold it to him under the condition that if he ever placed the stock for sale that it would be offered to Johnson first. This witness asked him if he had done this. He said he had not had a chance. Then he asked him why he did not. Herrin said he did not know what it was worth. This witness said: "'Why don't you find out what it is worth, or consult someone you have confidence in to determine the value and offer it?'" He said he would. This witness further testified that at no time did Herrin tell him that Johnson agreed to repurchase the stock; that Herrin called him long distance at a later date and asked if he was interested in it or if his mother was, to which the witness replied that they were not.

Johnson testified to the stock transaction, in addition to what has been stated, as follows: That the secretary of the corporations informed him that there had been some talk about Herrin purchasing stock, and the witness, the secretary, and Herrin were together, and Johnson said that the matter of the purchase of stock was for Herrin to determine. The stock was purchased on the terms previously mentioned. He further testified that after the negotiations were completed he started for the door and turned around and said to Herrin: "'* * * there is one understanding I want, and that is in case you ever sell this stock you are to offer it to me first' and Harold said, 'Fine I will do that * * *.'" The witness turned away and walked out. Before doing so, he said to Herrin: "'* * * I suggest you write up a letter and drop it in the file that you will offer it to me in case you ever want to sell it.'" This witness denied that he

ever told Herrin he would repurchase the stock; that he ever discussed the family aspect of the corporations or partnership with Herrin; and that he had told Herrin the stock in the lumber company had a book value of $248, or that he would give him $11,000 for the stock.

The defendants contend the trial court erred (1) in finding and decreeing that an oral agreement was entered into by and between Lawrence W. Johnson, as president of the corporations, and the plaintiff to repurchase the stock held by the plaintiff in the corporations for the corporations in the event of plaintiff terminating his employment with the corporations at the book value of the stock at such time, and (2) in decreeing a specific performance of the alleged contract for the repurchase of the stock.

The Supreme Court, on appeal from a decree in an equity case, is required to consider and decide the case on the evidence without regard to the conclusions of the district court, but to the extent that there is an irreconcilable conflict of proof on any question of fact, this court will give due consideration to the fact that the district court saw the witnesses and their manner of testifying, and that it accepted one version of the facts. See Noetzelmann v. Noetzelmann, *ante* p. 133, 43 N. W. 2d 515.

Has plaintiff sustained the burden of proving an oral contract the terms of which are clear, satisfactory, and unequivocal; that is, does the evidence with clarity, satisfactorily, and unequivocally, or as unequivocally is defined, not doubtfully and not ambiguously but clearly, when all of its parts and the elements of a contract are taken into consideration, indicate the existence of a contract? If it does, then the requirements of the rule in this respect have been satisfied. The rule is not one of weight but of quality and substance of evidence. It means that when he has done this, in the absence of anything to the contrary, his burden in this respect has been sustained. If, however, its weight is brought into

question then before he shall be entitled to have his position sustained he, having the affirmative, must sustain it by a preponderance of the evidence. See Riley v. Riley, 150 Neb. 176, 33 N. W. 2d 525.

"Specific performance of a contract will not be decreed unless the minds of the parties to the contract have met. In order to establish a contract capable of specific enforcement it must be shown that there was a definite offer and an unconditional acceptance." Horn v. Stuckey, 146 Neb. 625, 20 N. W. 2d 692.

"Specific performance of an alleged contract will not be enforced unless the court can clearly see upon what proposition the minds of the parties have met in a common intention." Krum v. Chamberlain, 57 Neb. 220, 77 N. W. 665.

In Mercer v. Payne & Sons Co., 115 Neb. 420, 213 N. W. 813, this court held: "To entitle a party to specific performance, there must be a clear, mutual understanding and a positive assent on the part of each party. Mutuality of obligation is an essential element of the right to enforce specific performance of a contract in a court of equity." In the body of the opinion the court said: "* * * a court of equity will not enforce a contract, unless it is complete and certain in all its essential elements, and the parties themselves must agree upon the material and necessary details of the bargain, and if any of these be omitted, or left obscure or indefinite, so as to leave the intention of the parties uncertain respecting the substantial terms, the case is not one for specific performance. It is not the function of a court of equity to make a contract for the parties, or to supply any of the material stipulations thereof. If any of the essential details are wanting a chancellor will not supply them in a decree for specific performance." See, also, Zimmerman v. Rhoads, 226 Pa. 174, 75 A. 207.

We analyze the evidence in accordance with the foregoing authorities.

The evidence discloses that prior to the time of the in-

corporation, Herrin was desirous of purchasing stock in the corporations to be formed. He first wanted to invest $10,000 in the stock. It developed that he had a credit with the corporations in the amount of $6,600, and made the purchase of stock as heretofore set out, all of which was on his own initiative. At the time he purchased the stock and the deal for the purchase was closed, it is apparent that Herrin never relied on any statement or representation made by Johnson that Johnson would repurchase the stock in behalf of the corporations or himself individually on certain conditions. It is also apparent that it was not necessary to hold out to Herrin any inducement to persuade him to agree to purchase the stock. He at no time made any mention or put forth any proposition or arrangement as to what would occur in event of his death or termination of employment with the corporations. The matter with reference to repurchase arose after the sale of the stock had been consummated. Johnson made a request to Herrin to the effect that, in the event Herrin desired to offer the stock for sale, Johnson would like to have the first opportunity to purchase it before it was placed on the market. The letters written by Herrin to Johnson, although addressed to Johnson as the president of the corporations, disclose that Herrin felt he was only obligated to offer the stock to Johnson and if Johnson did not want to purchase the stock he would be free to place it on the open market. The fact that the corporations were a close family matter did not deter Herrin's interest in purchasing the stock. He voluntarily purchased it without any suggestion, and made no requirement that Johnson, on behalf of the corporation or as an individual, repurchase the stock. The most that can be gathered from the evidence is that Johnson requested Herrin, in the event he sold the stock, to give him the first opportunity to purchase it.

We conclude that the evidence fails to disclose a meeting of the minds of the parties to the alleged oral con-

tract to repurchase the corporate stock, and the plaintiff has failed to prove that such contract was clear, satisfactory, and unequivocal in its terms as is required before specific performance of the contract can be granted, as provided for by the authorities heretofore cited.

The trial court dismissed the action as to the defendants individually. Defendants contend this dismissal, unappealed from, does not vest this court with jurisdiction to determine whether or not an oral contract was entered into between the plaintiff and Johnson whereby Johnson agreed to repurchase the stock individually. The following authorities are applicable.

It is the practice of courts of equity, when they once have obtained jurisdiction of a case, to administer all the relief which the nature of the case and the facts demand, and to bring such relief down to the close of the litigation between the parties. See, First Trust Co. v. Airedale Ranch & Cattle Co., 136 Neb. 521, 286 N. W. 766; Best & Co., Inc. v. City of Omaha, 149 Neb. 868, 33 N. W. 2d 150.

Where a court of equity has obtained jurisdiction of a cause for any purpose it will retain it for all purposes, and will proceed to a final determination, adjudicate all matters in issue, and thus avoid unnecessary litigation. See Security Investment Co. v. Golz, 151 Neb. 172, 36 N. W. 2d 862.

We conclude the evidence fails to prove an oral agreement as required by law that Lawrence W. Johnson agreed to repurchase the stock in the corporations in the event of plaintiff terminating his services with the corporations.

With reference to the claim of Herrin for unpaid balance of salary, the record shows that Herrin at all times from the date of entering the employ of the co-partnership received a salary and a bonus which continued up to the time of incorporation of the partnership. At that time he had a bonus credit with the corporations which

he used to purchase stock in them. His income tax returns show that he paid taxes on salary and bonus. At the end of the fiscal year 1947, Herrin testified Johnson told him he would pay him $12,000 a year, $1,000 a month and no bonus. Beginning June 1, 1947, Herrin drew a salary of $450 a month, and that is the manner in which his salary was set up on the books. The balance was credited on the books. From June 1, 1947, to April 1, 1948, Herrin had drawn $450 a month. He also drew $2,500 in addition. This $2,500 item is the one the defendants contend he unlawfully withdrew and had no authority to do so, and is the amount sought to be recovered in defendants' counterclaim. This amount was withdrawn for the purpose of paying a note to a bank and income taxes.

The evidence shows that Herrin made withdrawals from the corporation without objection, and the denial of his authority to withdraw the $2,500 is not supported by the evidence. This was a credit he was entitled to, and there remained owing him for salary the amount for which the trial court rendered judgment.

The judgment of the trial court in granting the plaintiff the claim for salary due, dismissing defendant corporations' counterclaim, and dismissing the defendants as individuals is hereby affirmed. The judgment of the trial court holding that an oral contract was made by and between the plaintiff and the corporations for the repurchase of the corporate stock at book value upon the termination of employment by the plaintiff with the corporations is hereby reversed, and the trial court is directed to enter judgment in accordance with this opinion.

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

MARTIN LUND, APPELLEE, V. HARVEY HOLBROOK, SR., ET AL., APPELLANTS.
46 N. W. 2d 130

Filed February 2, 1951. No. 32861.

1. **Automobiles: Damages.** In an action for damages to an automobile, where the automobile cannot be placed in substantially as good condition as it was before the injury, the measure of damages is the difference between its reasonable market value immediately before and immediately after the accident. The injured party is not permitted to recover in addition thereto damages for loss of use.
2. **Negligence: Pleading.** A recovery cannot be had for acts of negligence not alleged in the petition. The rule is the allegata and probata must agree.
3. ———: ———. 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.
4. **Trial.** Where a party has taken the necessary steps under section 25-1315.02, R. R. S. 1943, and pursuant thereto has filed a motion for judgment notwithstanding the verdict and in the alternative for a new trial, and the trial court denies the motion for a new trial and makes no ruling on the motion for judgment notwithstanding the verdict, the denial of the motion for a new trial operates as a denial of the motion for judgment notwithstanding the verdict.
5. **New Trial.** It is sufficient to assign the grounds of the motion for a new trial in the language of the statute and without further or other particularity.
6. **Automobiles.** The owner of an automobile kept for family purposes is liable for injuries inflicted upon a stranger as a result of the negligent driving of one of his children, where the car is occupied by members of the family and is being used for one of the purposes for which it is kept.
7. **Trial.** A judgment will not be reversed for error in overruling a motion for a directed verdict at the close of plaintiff's case when certain essential testimony was not then in the record, when, at the time of renewing the motion at the close of all the evidence, such testimony is in the record and its admission is not assigned as error here.
8. **Evidence.** Where the fact of whether or not a party carries liability insurance is not relevant to some issue in the case it is not admissible.
9. ———. If evidence is properly admissible for any purpose, it cannot be excluded for the reason that it tends to prejudice the

party because it shows or tends to show that the party carries liability insurance.

10. **Witnesses.** A witness may be impeached by showing that he made statements out of court contrary to those made in court in regard to a matter or matters relevant to the issue.

11. **Trial.** The trial court must submit to and instruct the jury upon all material issues raised by the pleadings and supported by the evidence, whether requested to do so or not.

APPEAL from the district court for Antelope County: LYLE E. JACKSON, JUDGE. *Reversed and remanded.*

Frederick M. Deutsch and *Daniel D. Jewell,* for appellants.

Pilcher & Haney, and *Elmer C. Rakow,* for appellee.

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

SIMMONS, C. J.

This is an action to recover damages arising out of a collision between a truck of the plaintiff and a car owned by the defendant Harvey Holbrook, Sr., which was being driven by defendant Harvey Holbrook, Jr. Issues were made on petition and answers and cross-petitions. Trial was had to a jury resulting in a verdict for plaintiff for $1,500. Defendants appeal, alleging error in instructions, the admission of evidence, and rulings made at the trial. We reverse the judgment of the trial court and remand the cause.

Plaintiff's truck was being driven by his brother. They will be referred to herein as plaintiff. The defendants will be referred to as father and son where it is necessary to identify them separately.

The accident happened on July 5, 1947, about 2 p. m., at a point between one and two miles east of Orchard on Highway No. 20, which runs east and west. The highway at the place of the collision had been improved with "black-top" about 20 feet wide. North of the black-top it sloped down for 15 to 20 feet to a level three or four feet below the black-top. The highway was being

resurfaced for several miles. There were road-under-construction and detour signs and barricades west of Orchard and east of the point of collision about five miles. The public continued to use the highway for travel. At the time of the accident gravel was being hauled from a point seven or eight miles east of Orchard and spread on the south half of the black-top to a depth fixed by the witnesses at ten inches to a foot or two. That work had progressed for some distance west of the point of collision, so that there the north half of the black-top and the slope were used for travel. There were eight gravel trucks in use. These trucks, when loaded, followed the practice of going west on the black-top and, when returning empty, the east-bound trucks, on meeting a west-bound truck, would pull off the black-top to the north and pass in that manner.

Plaintiff's testimony is that he was going west in a loaded truck on the black-top at about 35 miles an hour when, at a distance of 100 feet, he saw the car driven by the son on the black-top coming east. It was then traveling 35 miles an hour. It slowed down to ten miles an hour. Plaintiff eased on his brakes and signaled to the car to go to the south. Plaintiff turned off the black-top to the north, and the son then turned his car to the north. The vehicles collided head-on and came to rest about ten feet north of the black-top.

The son's version of the accident is that he had been at Orchard and was driving east in the Ford car on the black-top north of the gravel. His speed was 30 to 35 miles an hour. He saw the plaintiff's truck about half a mile to the east coming west on the black-top at a speed of 50 miles an hour. It might have slowed down somewhat as it approached. The son began to slow down so that when the vehicles were 100 to 250 feet apart he was going at a speed of 10 to 15 miles an hour. The plaintiff's truck changed its course slightly to the south indicating to him that the truck was going to stay on the black-top. The son then, at a speed of ten miles an

hour, turned to the north. The truck then turned to the north and the collision followed, the son's car being pushed to the northwest 45 to 50 feet before the two vehicles came to a stop.

Both vehicles were seriously damaged. The son received personal injuries.

Defendants' first assignment of error is that the court erred in failing to instruct the jury on the measure of damages. The court instructed the jury that "Before Plaintiff can recover in this case he must prove by a preponderance of the evidence that defendant Holbrook, Jr., was negligent in one or more of the respects alleged in his petition; that said negligence was the proximate cause of the collision and the resulting damage to Plaintiff; and he is further required to prove by a preponderance of the evidence the extent of damages sustained by him, not exceeding the value of the truck and towing charge." (Instruction No. 5.)

Defendants' ninth assignment is that the court erred in stating the amount of damages should be assessed "not exceeding the value of the truck and towing charge."

It is patent that the instruction gave the jury no guide as to the elements that it was to consider in arriving at the amount of plaintiff's damage, if the jury found for the plaintiff, save the limit of "not exceeding the value of the truck and towing charge."

Plaintiff's evidence was that the truck was so damaged it could not be repaired and put in as good condition as it was before the accident; that immediately before the accident the truck was worth $3,200, and immediately thereafter $625; and that he paid $110 which was the reasonable charge for having it towed to Omaha where he sold it. Plaintiff was permitted to prove that it was not until August 16, 1947, that it was determined the truck could not be repaired, and that the rental value was $22 a day.

The rule is: "In an action for damages to an automobile, where the automobile cannot be placed in sub-

stantially as good condition as it was before the injury, the measure of damages is the difference between its reasonable market value immediately before and immediately after the accident." Helin v. Egger, 121 Neb. 727, 238 N. W. 364.

It is obvious that the instruction is not in accord with that rule. The evidence does not show any relationship between the towing charge and the value after the accident. Plaintiff does not argue that the towing charge was a proper item within the rule. Plaintiff here argues that the errors are harmless inasmuch as the verdict was substantially less than the plaintiff's proof of the before and after value. He relies on the rule stated in Chicago, R. I. & P. Ry. Co. v. Archer, 46 Neb. 907, 65 N. W. 1043, that "Even where the damages are unliquidated, where the trial court has, by an instruction, submitted to the consideration of the jury an element of damages not sustained by the evidence, the error will be treated as harmless where, from an examination of the evidence and the verdict, it is reasonably certain that the jury was not misled, and that it allowed nothing on account of the element improperly submitted."

We need not discuss that rule save to point out that it has no application here. Defendants offered evidence, based on a hypothetical question, that the reasonable value of the truck immediately before the accident was $1,200 to $1,500. The jury's verdict was for $1,500. It may be that the jury determined to allow the plaintiff that which the defendants said was its value. If so, there was no deduction whatever for its admitted value after the accident. The error of the instruction was prejudicial and requires a reversal of the judgment and remanding of the cause. That being true, we deem it advisable to point out another patent error in the instruction.

In his petition as it was at the time of the trial plaintiff alleged: "That the automobile of the defendant Harvey Holbrook, Sr., was brought to a stop as plaintiff's

truck approached; when plaintiff's truck was approximately 20 feet from defendant's automobile, and as plaintiff's truck was attempting to pass said automobile by turning to his right and on to the shoulder of said highway, the driver of defendant's automobile suddenly, negligently, recklessly, unexpectedly, and without any notice or warning to the driver of plaintiff's truck, started defendant's automobile in motion and turned to the left in front of plaintiff's truck and thereby completely wrecked and damaged plaintiff's truck; *that immediately prior to said accident the plaintiff's truck was in good condition and repair; that the same could not be repaired and put in substantially the same condition it was in prior to said accident; that the reasonable value thereof was $3,200.00. That immediately after said accident and in it's (sic) damaged condition, the reasonable value of plaintiff's truck was $625.00; that plaintiff has suffered damages to his truck* in the amount of $2575.00; plaintiff was deprived of the use of said truck for a period of ninety days and was thereby further damaged in the sum of $1800.00; plaintiff was further damaged by reason of the expense of the transportation of said truck to Omaha, Nebraska, in the sum of $110.00; that the total damages suffered by the plaintiff amounted to the sum of $4485.00, no part of which has been paid by the defendants."

The transcript shows the petition to have been filed June 14, 1948, and that on November 13, 1948, the petition was amended by interlineation and the italicized portion of the above quote was inserted.

In his answer to defendants' cross-petitions, plaintiff alleged that the accident was due to the negligence of the son "* * * which negligence is more specifically set forth in plaintiff's petition * * *."

In its instruction No. 2 the court summarized the petition, including the above-quoted provision, omitting, however, the words "negligently, recklessly," and gave

no statement to the jury as to the act or acts of negligence upon which plaintiff relied.

Relating instruction No. 5 to instruction No. 2, the instructions gave the jury no information as to the act or acts of negligence alleged in his petition which had to be proved by the plaintiff as a condition of recovery. The jury was left without any guide in that respect.

Further it is noted that there was but one act of negligence alleged in the petition, and that was that defendant's car was brought to a stop and then as plaintiff was attempting to pass, the defendant's car was started in motion and turned to the left in front of plaintiff's truck. We find no evidence in this record to sustain that sole allegation of negligence.

"A recovery cannot be had for acts of negligence not alleged in the petition. The rule is the allegata and probata must agree." Elliott v. Carter White-Lead Co., 53 Neb. 458, 73 N. W. 948. The instruction permitted the jury to find for the plaintiff when there was no evidence to sustain the allegation of the petition.

Defendants' second, sixth, and seventh assignments of error may be considered together.

As above set out, plaintiff alleged that he was deprived of the use of said truck for a period of ninety days and was thereby damaged in the amount of $1,800. The trial court in its instruction setting out the claims of the parties included that allegation. This inclusion is the basis of the second assignment. The trial court over objection allowed the plaintiff to testify that the rental value of a truck, to replace the one damaged, from the date of the accident to the date he first determined it could not be repaired was $22 a day. The admission of this evidence is the basis of the sixth assignment. Plaintiff further was allowed to testify, without additional objection, as to the basis upon which the rental value was determined and the amount of use that would have been had of the truck between July 5 and August 15. The

admission of this evidence is the basis of the seventh assignment.

Defendants assign this part of the instruction and the admission of the evidence as error.

Plaintiff contends that it was necessary to have the truck towed to Omaha to be there examined by men qualified to determine whether or not it could be repaired and placed in substantially as good condition as it was before the accident, and that he is entitled to damages for loss of use while that was being determined, in addition to the difference in value under the above-stated rule. Plaintiff cites Drewes v. Miller (La.), 25 So. 2d 820.

In Helin v. Egger, *supra,* the damaged car could not be placed in as good condition as it was before the accident but could be put in condition to render some service. The jury was permitted to allow damages for loss of use while it was being repaired. That was held to be error. In accord with that opinion we hold that in an action for damages to an automobile, where the automobile cannot be placed in substantially as good condition as it was before the injury, the measure of damages is the difference between its reasonable market value immediately before and immediately after the accident. The injured party is not permitted to recover in addition thereto damages for loss of use.

Plaintiff here pleaded and offered evidence based on a recovery of the difference in value before and after the accident.

The inclusion of the allegation in the instruction and the admission of the evidence were error. In the light of the indefiniteness of the instruction on measure of damages, the error was prejudicial.

Defendants' next assignment of error is that the court failed to instruct under the comparative negligence rule.

Plaintiff answers that this was not error for the reason that contributory negligence was not pleaded and was not in issue.

Each of the defendants filed separate pleadings entitled "Answer and Cross-Petition." Each denied generally and "Further answering said petition and for his cross-petition thereto, this defendant alleges: * * *." This is followed by an allegation "That the collision and damage aforesaid were caused solely and proximately by the negligence of the said plaintiff and the said Arnold Lund (the driver), as follows: * * *." Then follow six itemized charges of negligence. In his answer to the cross-petition plaintiff denied negligence. The trial court recited these allegations in its instruction as to the claims of the parties.

The rules are:

"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.

"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., 152 Neb. 328, 41 N. W. 2d 139.

In view of the determination stated hereinbefore that the judgment must be reversed, we need do no more here than to hold that negligence and contributory negligence were issues in this case.

Defendants' fourth assignment is that the court erred in failing to direct a verdict for the father on his motion made at the close of plaintiff's case-in-chief, and on his motion made at the close of all the evidence, and for failure to grant his motion for judgment notwithstanding the verdict because of claimed insufficiency of the evidence to hold the father liable under the family purpose doctrine.

Plaintiff alleged that the car driven by the son was owned by the father and that the father "* * * owned and maintained said automobile for the use and pleasure of, and operation by himself and the members of his fam-

ily, including the defendant Harvey Holbrook, Jr., and that said automobile was being used and operated by the defendant Harvey Holbrook, Jr., at said time by the permission of the defendant Harvey Holbrook, Sr. * * *." The son in his answer and cross-petition alleged that "he had borrowed" the car for the purpose of making a trip. The father in his answer alleged that "he lent" the automobile to the son. In his answer to defendants' cross-petitions, plaintiff alleged that the son "was acting as an agent, servant and employee" of the father at the time and place of the accident.

It is apparent that plaintiff undertook to allege liability on the part of the father under the family purpose doctrine.

Before the close of plaintiff's case-in-chief it was stipulated that the son, if called as a witness, would testify that he was the driver of the car on the day in question, and that if the father were called, he would testify that he was the owner of the car but was not in the car at the time of the accident.

When plaintiff rested, the father moved for a directed verdict against the plaintiff for the reason that the evidence was wholly insufficient to show any liability against the father. The motion was overruled.

On cross-examination of the son, he testified that he was 22 years of age at the time of the accident; that he lived at home with his father; that he was working for his father at the time of the accident; and that he had driven the car whenever he wanted to ever since his father purchased it. The father purchased the car in August or September 1946.

At the close of all the evidence the father moved for a directed verdict for the same reason as above stated. That motion was overruled.

Following the verdict the father moved for judgment notwithstanding the verdict and, in the alternative, for a new trial in accordance with section 25-1315.02, R. R. S. 1943. The trial court denied the motion for a new

trial. We find no ruling in the record upon the motion for judgment notwithstanding the verdict. The parties have not pointed out the fact of that omission.

It is patent that before the trial court came to the question of the merits of the motion for a new trial, the motion for judgment notwithstanding the verdict had to be considered and denied. That was the effect of the order denying the motion for a new trial. The denial of the motion for judgment notwithstanding the verdict was implicit in the denial of the motion for a new trial. The order denying a new trial is an appealable order under section 25-1315.03, R. R. S. 1943. Under the reasoning of our decisions in Krepcik v. Interstate Transit Lines, *ante* p. 98, 43 N. W. 2d 609, and Armer v. Omaha & Council Bluffs St. Ry. Co., *ante* p. 352, 44 N. W. 2d 640, the appeal from that order brings here for determination all matters which were considered by the trial court and which were in effect determined by the trial court. Accordingly we hold that the merit of the motion for judgment notwithstanding the verdict is before us for determination.

The father based his motion for a judgment notwithstanding the verdict on "each and all of the reasons assorted (sic) by the said defendant in making his motion for a directed verdict at the close of the evidence." That motion was for a directed verdict "for the reason that the evidence is wholly insufficient to show any liability whatsoever" against him.

In their motions for a new trial defendants assigned "Errors of law occurring at the trial and duly excepted to by defendant." This is substantially the language of section 25-1142, R. R. S. 1943. Section 25-1144, R. R. S. 1943, provides that it is sufficient to assign the grounds of the motion for a new trial in the language of the statute and without further or other particularity. See McCullough v. Omaha Coliseum Corporation, 144 Neb. 92, 12 N. W. 2d 639. All three motions are here.

The family purpose doctrine was first stated by us in

Stevens v. Luther, 105 Neb. 184, 180 N. W. 87, as follows: "* * * the owner of an automobile kept for family purposes is liable for injuries inflicted upon a stranger as a result of the negligent driving of one of his children, where the car is occupied by members of the family and is being used for one of the purposes for which it is kept." See, also, Linch v. Dobson, 108 Neb. 632, 188 N. W. 227; Thoren v. Myers, 151 Neb. 453, 37 N. W. 2d 725.

It is patent that at the time plaintiff rested his case there was no evidence that the car was a family purpose car and that the trial court erred in not sustaining the motion for a directed verdict made by the father. However, at the time the parties rested, there was sufficient evidence in the record to take the issue to the jury as to the liability of the father under the family purpose doctrine. The trial court did not err in overruling the second motion.

The motion made at the close of the plaintiff's case-in-chief was "for the reason that the evidence is wholly insufficient to show any liability whatsoever" against the father. The record does not show that the family purpose doctrine was mentioned to the court as the particular basis for the motion. The record shows that during the cross-examination of the son, when he was asked as to the conditions under which he used the car, the defendants advised the court "That is what our motion went to * * *." Thereafter the trial court admitted the evidence above recited, in part over objection. The ruling on the admission of that evidence is not here assigned as error.

So we have here this situation. Neither the plaintiff nor the trial court had attention directed to the specifically claimed failure of proof at the time the first motion was made. The necessary evidence was produced and admitted before the parties rested. Its admission is not assigned here as error. The father participated in the case throughout and testified.

Newland v. McClelland & Son, 217 Iowa 568, 250 N.

W. 229, was an action against a partnership for damages arising out of an automobile accident. There it was stated as follows: "At the close of plaintiff's case, defendants moved for a directed verdict. At this time there was no evidence that the car driven by the defendant F. E. McClelland was the property of the partnership. The motion was overruled, and defendant put in its evidence. The defendant G. McClelland was called as a witness for the defendants. After some cross-examination, this witness was made plaintiff's witness, and he then testified that the car belonged to the defendant partnership, which consisted of the witness and F. E. McClelland. At the close of all the evidence, the motion for a directed verdict was renewed by the defendants and was overruled. Appellants now complain because the motion made at the close of plaintiff's evidence was overruled because there was then no evidence of the ownership of the car by the partnership. Assuming that the motion made at the close of plaintiff's evidence should have been sustained because of the want of such evidence, the judgment of the trial court cannot be reversed, for at the time the second motion was overruled such evidence was in the record. The defendants objected to the examination of the defendant G. McClelland concerning the ownership of the car. Such objections were properly overruled. The trial court has a large discretion in matters of this kind. * * * The testimony of the witness was in the record concerning the ownership of the car by the partnership when the second motion was made. In consequence of this, the plaintiff's case was not then vulnerable to attack on the ground that the record did not disclose the ownership of the car, and in this situation the judgment cannot now be reversed for error in ruling on the first motion." The above decision rests upon the decision of the same court in Cushman v. Carbondale Fuel Co., 116 Iowa 618, 88 N. W. 817, wherein the court said: "There was a motion by defendant to direct a verdict in

its favor at the close of plaintiff's case, which was overruled. It is now contended that the evidence as then introduced was deficient in some respects, and we should pass upon the merits of the motion in the light of the evidence as it then stood, even though such deficiency may have been afterwards supplied. As it is not claimed the court erred in receiving the testimony later introduced, we cannot indorse this claim. If plaintiff, by proper evidence, makes a good case, we are not going to send it back for a new trial because it was vulnerable to objection when he first submitted it." See 5 C. J. S., Appeal and Error, § 1758, p. 1077.

Following the reasoning of these cases and under the circumstances here we hold that the trial court did not err in denying the motion for a directed verdict made at the close of all the evidence and in denying the motion for judgment notwithstanding the verdict.

Defendants' next assignment goes to the refusal of the court to permit cross-examination of the plaintiff as to a statement made in a proof of loss to an insurance company.

The plaintiff testified that he had sold the truck for $625. He then was asked if he had not been paid for collision insurance loss and made a settlement for $700. This was objected to and plaintiff moved for a mistrial. The jury was excused. The court stated that he should strike the question from the record, admonish the jury to pay no attention to it, and rule that there be no further questions along that line, and that otherwise he would have to declare a mistrial. Defendants then stated that in checking upon plaintiff's credibility as to the value of the truck, they would expect to elicit on further cross-examination that the plaintiff in a proof of loss to an insurance company on this accident declared the value of his truck to be very much different from his testimony on the witness stand. Defendants did not make further offer of proof. Plaintiff treated the offer as sufficient and objected to the offer on its merits. The court sus-

tained the objection and held "There will be no further reference to insurance in any way in the case."

The plaintiff submits that the trial court was correct, basing it upon our decision in Fielding v. Publix Cars, Inc., 130 Neb. 576, 265 N. W. 726, 105 A. L. R. 1306, where we revoked a previous rule of practice and held that "In an action against a taxicab company for injuries to a passenger, it is reversible error for the trial court to permit plaintiff on his case in chief to show that defendant is indemnified from loss by an insurance company, where such proffered evidence is not relevant to any material issue in the case."

The trial court's ruling is contra to the holding in the Fielding case. We there held that when the question of whether or not a party carries liability insurance is not relevant to some issue in the case, it is not admissible and further, if the evidence is properly admissible for any purpose, it cannot be excluded for the reason that it tends to prejudice the party because it shows or tends to show that he carries liability insurance. It is apparent that the trial court rejected the evidence and prevented defendants from proceeding further because it would show or tend to show that the plaintiff carried liability insurance. However, the evidence of plaintiff as to damages rested upon his own testimony as to the value of the truck before and after the accident. A witness may be impeached by showing that he made statements out of court contrary to those made in court in regard to a matter or matters relevant to the issue. Costello v. Hild, 152 Neb. 1, 40 N. W. 2d 228. Obviously, statements made otherwise as to that value should, when properly offered, be admitted for impeachment purposes. The trial court erred in preventing defendants from developing that evidence.

The defendants assert that their theory of the case is that a bailor and bailee relationship existed as to the use of the car and that the trial court erred in failing to submit that issue to the jury.

An examination of the instructions given does not disclose that the court gave any instruction to the jury as to the liability of the father. In view of this situation and the necessity for a new trial in any event, we do not determine the sufficiency of the evidence to establish a bailor and bailee relationship. We call attention to the established rule that the trial court must submit to and instruct the jury upon all material issues raised by the pleadings and supported by the evidence, whether requested to do so or not. Roby v. Auker, 149 Neb. 734, 32 N. W. 2d 491.

The judgment is reversed and the cause is remanded.

REVERSED AND REMANDED.

YEAGER and BOSLAUGH, JJ., concur in the result.

NORA B. SNYDER, APPELLEE, V. CHARLIE L. HILL ET AL., APPELLANTS, IMPLEADED WITH J. A. MORRIS WHOSE REAL AND TRUE NAME IS JAMES ALFRED MORRIS, APPELLEE.

45 N. W. 2d 757

Filed February 2, 1951. No. 32877.

1. **Landlord and Tenant.** In the event of an occurrence which gives a lessor a right of forfeiture of a lease the lessor has an option to declare the lease at an end or to overlook the breach and allow the lease to remain in full force and effect, and if after notice of breach he accepts rent which accrues after breach such acceptance of rent constitutes a waiver of the right to forfeit the lease.
2. ———. The breach which may be waived by acceptance of rent after breach may be a breach for nonpayment of rent or of any covenant or material condition imposed upon the lessee by the terms of the lease.
3. ———. The acceptance of rent after breach waives the forfeiture whether before or after action is commenced to enforce a forfeiture.

APPEAL from the district court for Cherry County: EARL L. MEYER, JUDGE. *Motion to dismiss sustained.*

S. S. Diedrichs, W. C. Heelan, and *G. A. Farman,* for appellants.

James C. Quigley, Lynn E. Heth, William B. Quigley, and *Frederick M. Deutsch,* for appellee.

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

YEAGER, J.

This is an action in ejectment by Nora B. Snyder, plaintiff and appellee, against Charlie L. Hill and Harold E. Hill, defendants and appellants. The cause was submitted to a jury. The jury returned a verdict in favor of the plaintiff. Judgment was duly entered on the verdict. From this verdict and judgment the defendants have appealed. J. A. Morris was also a defendant in the district court but is not before this court on appeal. He will therefore not be treated in this opinion as a party to the action.

After the appeal was perfected and before hearing in this court the defendants filed a motion for dismissal of the action. The ground of the motion was that since the trial and judgment in the district court the plaintiff had by her acts waived the right which she asserted in the district court and the right to prevail in the action and to have her judgment affirmed in this court.

It therefore becomes necessary to make an adjudication upon this motion before consideration of the merits of the appeal, if such consideration becomes necessary.

The pertinent facts are that plaintiff was the owner of certain lands a portion of which was in Cherry County and a portion of which was in Brown County, Nebraska. In February 1946 plaintiff leased this land to the defendants who are her sons. The stipulated annual rental was $500 a year. The defendants were required to pay the taxes on the land. The lease contained a provision against subleasing.

By her petition plaintiff contended that the lease had

been forfeited by failure to pay the 1947 taxes and by subleasing a part of the land.

The contention of the plaintiff was sustained by the verdict and judgment. The judgment was in ejectment. The judgment was superseded. By the appeal the defendants sought a reversal of this judgment.

The annual rental period of the lease is from May 1 to May 1 of the succeeding year. The payment date is November 1 of each year. The cause was tried and the verdict returned on December 1, 1949, and judgment was entered thereon. On October 30, 1950, on behalf of defendants a check was sent to plaintiff with an accompanying letter. The letter stated that this was for $500 in payment of rent which was due November 1, 1950, under the lease. The check bore the notation "For rent for 1950." This check appears to have been endorsed and cashed by plaintiff on November 4, 1950.

The factual showing in this respect made to this court is by verified motion of defendants to dismiss the action and by admission on the part of plaintiff that she received, endorsed, and cashed the check, appearing in an affidavit filed herein.

It should be noted that no objection is made to the procedural method of calling the attention of this court to the questions involved in the motion to dismiss.

The defendants contend that by acceptance of the $500 rental for the year beginning May 1, 1950, and ending May 1, 1951, the plaintiff has waived any prior forfeiture of the lease on the part of the defendants and has waived the right to maintain this action for the purposes for which it was instituted.

The general rule applicable is that when there is an occurrence which gives a lessor a right of forfeiture the lessor has an option to declare the lease at an end or to overlook the breach and allow the lease to remain in full force and effect, and if after notice of breach he accepts rent which accrues after breach such acceptance of rent constitutes a waiver of the right to forfeit the

lease. Woollard v. Schaffer Stores Co., 272 N. Y. 304, 5 N. E. 2d 829, 109 A. L. R. 1262; Annotation, 109 A. L. R. 1269.

In the case at bar there can be no question that plaintiff had notice of the claimed forfeiture. Her action and the judgment she had obtained were predicated upon that knowledge as is clearly apparent.

In some jurisdictions, the decisions of which will not be set forth here, the rule is limited to forfeitures for nonpayment of rent, and in others it applies to any character of breach which would entitle the lessor to declare a forfeiture for breach of condition contained in the lease. This court is apparently committed to the proposition that it applies to any character of breach.

The case of Stover v. Hazelbaker, 42 Neb. 393, 60 N. W. 597, was one wherein the right to recover in an action for forcible detention on the ground that the defendant had forfeited his lease by nonpayment of rent was presented. The action was defended on the ground that the forfeiture had been waived by acceptance of rent. This court sustained the contention of the defendant in this respect.

In that case the claimed forfeiture was for nonpayment of rent and the waiver was on account of accepting it. This court however did not limit its conclusion to that narrow ground. It based its conclusion on the broad ground comprehended by the general rule as it has been stated herein. The following from the opinion makes this point clear: "Gomber v. Hackett, 6 Wis., 323, is a case very much like the one at bar. The action was forcible detainer brought before a justice of the peace. The basis of the action was that the lessee, contrary to the terms of the lease, had cut some timber on the leased premises. The case was tried before a justice of the peace, and a judgment rendered in favor of the landlord. An appeal was then taken to the county court, and on a trial there the lessee proved that since the cutting of the timber by him he had paid to the landlord a year's rent

of the leased premises, which by the terms of the lease became due subsequent to the time that he had cut the timber, which act was made the basis of the forcible detainer suit. The county court, however, decided that the acceptance of this rent by the landlord was not a defense, and a judgment of restitution was again rendered in favor of the landlord. The tenant then took the case on error to the supreme court of Wisconsin. Cole, justice, delivering the opinion of that court, said: 'By this act (the acceptance of rent by the landlord from the tenant which accrued by the terms of the lease after the cutting of timber by the tenant) the landlord recognized the lease as a subsisting, operative contract; and he ought not, therefore, to be permitted further to insist upon the forfeiture, if there had been one. It was optional with him to consider the estate forfeited for condition broken, and proceed to recover possession, or to waive the forfeiture and consider the lease valid. He has made his election and must abide by it. It would be very inequitable and unjust to permit the landlord to recover possession of the premises when he had already received from his tenant the rent for the use of the same to March, 1858;' and the judgment of the district court was reversed."

Cases from other jurisdictions adhering to the general rule are: Goldberg v. Pearl, 306 Ill. 436, 138 N. E. 141; Marshall v. Davis, 122 Ky. 413, 91 S. W. 714; Johnson v. Electric Park Amusement Co., 150 Iowa 717, 130 N. W. 807; Stoddard v. Gallagher, 133 Mich. 374, 94 N. W. 1051.

As to whether or not acceptance of rent after action to enforce a forfeiture has been commenced waives a breach there is divided opinion in different jurisdictions. In a number of jurisdictions the courts have held that rent eo nomine received after action for forfeiture for breach has been instituted waives the forfeiture just the same as if the rent had been received before commencement of action. Gomber v. Hackett, 6 Wis. 323, 70 Am. Dec. 467; Klein v. Journal Square Bank Bldg. Co., 110 N.

J. Eq. 607, 160 A. 812; Jones v. Maria, 48 Cal. App. 171, 191 P. 943.

The rule of these cases appears to be sound. The breach relied upon in the action commenced is the one existing before action. The breach gave rise to a right which right was no greater after than before commencement of action. Nothing was added by commencement of action except expressed intention in a particular form to declare a forfeiture. In such an action it appears reasonable to say that a plaintiff must recover upon the right of forfeiture that existed when the action was commenced which right could be waived by conduct inconsistent with its exercise, without regard to whether the inconsistent conduct took place before or after commencement of action.

The position of this court in relation to the converse of the proposition presented here is well established. In well-reasoned cases this court has said that a party may not accept the benefits of a judgment or decree and after doing so appeal therefrom. If he does so the appeal will be dismissed on application to this court. Harte v. Castetter, 38 Neb. 571, 57 N. W. 381; Thurston v. Travelers Ins. Co., 128 Neb. 141, 258 N. W. 66; Larabee v. Larabee, 128 Neb. 560, 259 N. W. 520.

By a parity of reasoning it appears that one who has obtained a judgment or decree favorable to him should not after appeal has been taken therefrom by the opposing party be permitted to take a position inconsistent with the judgment or decree without a waiver of the right which was the basis of the judgment or decree.

It is the conclusion of this court that the acceptance of rent by the plaintiff was inconsistent with her right to maintain this action in ejectment on appeal. The motion to dismiss is sustained and the action is dismissed.

MOTION TO DISMISS SUSTAINED.

CHAPPELL, J., participating on briefs.

ALYCE PETERSON, APPELLEE, V. CARL RUDOLPH PETERSON, APPELLANT.

46 N. W. 2d 126

Filed February 2, 1951. No. 32896.

1. **Divorce: Pleading.** The rules of pleading in civil cases are applicable to and should be observed in divorce cases.
2. ———: ———. If a decree is sought on the ground of extreme cruelty, the particular facts relied upon as constituting the cruelty should be alleged with reasonable certainty.
3. ———: ———. An allegation that the adverse party has been guilty of extreme cruelty in the language of the statute is a conclusion and is generally not sufficient.
4. **Divorce.** A decree of divorce may not be granted on the uncorroborated declarations, confessions, or admissions of the parties to the case.
5. ———. A general rule by which to measure the exact amount or degree of corroboration required in a divorce case cannot be formulated and each case must be determined upon its facts and circumstances.
6. ———. Extreme cruelty may consist of personal injury or physical violence, or it may be acts or omissions of such a character as to destroy the peace of mind or impair the bodily or mental health of the one upon whom they are inflicted or towards whom they are directed, or be such as to destroy the objects of matrimony.

APPEAL from the district court for Douglas County: HERBERT RHOADES, JUDGE. *Reversed with directions.*

Swenson, Viren & Turner, for appellant.

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

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

BOSLAUGH, J.

Appellee instituted this case to secure a limited divorce from appellant on the ground of extreme cruelty. He denied her charge of misconduct and by cross-action sought to secure an absolute divorce from her on the claim that she had by her conduct caused him great

pain and anguish and had made it impossible for them to continue as husband and wife.

The district court found that appellee was entitled to a divorce from bed and board, the custody of the minor son of the parties, the right to reside in the residence owned by them, to have the use of the contents thereof, and that she should have specific allowances for her support and the maintenance of the child and compensation for her attorney. A decree was rendered in harmony with the findings. A motion of appellant for a new trial was denied. The correctness of the findings and decree are challenged by this appeal.

The petition of appellee charges that appellant has been guilty of extreme cruelty towards her by conduct which has caused her mental and physical suffering and anguish and which has made it impossible for them to continue as husband and wife. The cross-petition alleges that the conduct of appellee towards appellant has caused him great pain and anguish and has made it impossible for the parties to live together as husband and wife. The respective pleading of the parties asserts only the conclusion of extreme cruelty. There is no specification of any act or omission violative of marital duty of either towards the other, and no fact as to time, place, or manner of any misconduct. The comment is appropriate that the pleading of each of the parties merits the condemnation by this court of a similar pleading in a divorce case when it said: "Recurring to the petition on which the case was tried in the district court, we are confronted with a violation of the general rule of pleading governing this cause of action, which is: 'Cruelty or extreme cruelty within the meaning of the statute must, of course, be alleged where a divorce is sought on this ground, but an allegation that defendant has been guilty of cruelty or extreme cruelty in the language of the statute generally is not sufficient; the particular facts relied on as constituting the cruelty should be set forth in detail, unless it is otherwise pro-

vided by statute.' 27 C. J. S. 698, sec. 108c." Dier v. Dier, 141 Neb. 685, 4 N. W. 2d 731. See, also, De Vuist v. De Vuist, 228 Mich. 454, 199 N. W. 229; Hancock v. Hancock, 55 Fla. 680, 45 So. 1020, 15 L. R. A. N. S. 670; 17 Am. Jur., Divorce and Separation, § 305, p. 306. The rules of pleading in civil cases are applicable to divorce cases in this state and should be observed. However, no challenge was made to the sufficiency or appropriateness of either of the pleadings or the evidence offered on the trial. Each of the parties invoked the power of the court in an effort to obtain affirmative relief. In this situation the evidence has been examined and will be discussed.

Appellant protests the finding and conclusion of the trial court that the proof made by him did not justify the granting of a decree of absolute divorce to him because of extreme cruelty of appellee toward him. There is no corroboration of the charges of misconduct of appellee made by appellant. There was an attempt to corroborate evidence of appellant only as to one instance of claimed improper conduct of appellee. Appellant said that shortly before this case was commenced in February 1950, appellee used unkind, profane, and impolite language in speaking of and to him. A relative of appellant was a witness for him and testified that he was at the home of appellee about two months before the trial of this case and in a conversation with her she said that Pete, appellant, and she had an argument and that she used language substantially as claimed by appellant but that she was sorry she had done so. Appellee denied she made any part of the statements attributed to her except she admitted she did call her husband a foreigner. It is undisputed that she promptly expressed regret and apologized to him for having done so. If appellee made the admissions as testified by the witness they did not constitute corroboration. The statute prevents them from having that quality or effect. § 42-335, R. S. 1943; Kroger v. Kroger, *ante* p. 265, 44 N. W. 2d 475; O'Reilly

v. O'Reilly, 120 Neb. 720, 234 N. W. 916. In the last case above cited it is said: "* * * even had this conversation occurred and had she made such admission, under the provisions of the statute above quoted, such evidence was insufficient to entitle plaintiff to the annulment of the marriage contract." A decree of divorce may not be granted on the declarations, confessions, or admissions of the parties to the case. § 42-335, R. S. 1943; Kroger v. Kroger, *supra*. The court properly denied the cross-petition of appellant.

The parties to this case were married April 4, 1923, and enjoyed a satisfactory marital relationship until about two years before the commencement of this case. Appellant was attentive and loyal to and efficient in his work as a car repairman and car inspector for a railroad for more than 27 years. He worked long hours seven days a week, and during much of the time at night. Appellee was devoted to her duties and responsibilities as a wife and mother. She made and kept a good home. She had roomers much of the time and did extra work for compensation and she responded fully to community obligations and performed helpful organizational assistance. They were thrifty, frugal, and industrious. They each contributed to their expenses, cost of living, accumulations, and savings. They acquired a location, built a comfortable home thereon, and have resided there since 1929. They took and have continued the title thereof in their joint names. They pooled their earnings and maintained a joint bank account. They had no children but adopted and cared for two orphaned boys, the youngest an infant about 13 years of age. The fact that appellant worked nights and rested during much of the daytime for many of the years had its disadvantages and may account for much of whatever estrangement and dissatisfaction that exists.

The revelations of the testimony of appellee are that appellant's attitude changed about two years ago and he thereafter frequently complained about petty things

that he charged to her, and he did not overlook an opportunity to express himself in this regard; in the spring of 1949 and frequently since he asked her to get a divorce, to leave the home, to take their minor son and go; that he stated to her that he never loved her and was a fool when he married her; that in August he said he would leave home and he did for two days, came back crying, she received him and urged him to stay; in September he suggested division of their property, a final separation, and that she get a divorce; she did not consent and he left home and stayed away for two weeks; that there were periods of considerable duration when he ignored everyone in the home and during meals refrained from any communication with them; when he and appellee were together away from home he would sometimes leave her, walk away, and refrained from accompanying her to their home; and that in January 1950, he was insistent that she get a divorce from him, and she told him repeatedly that she did not want and would not get a divorce, that she was not going to leave the home, and that all she wanted was her boy, her home, and to live in peace. This is sufficient to indicate the view appellee had of her marital relationship, the basis for her belief she was entitled to a limited divorce, and the reason why she did not desire an absolute severance of the matrimonial bonds. Further detail is not required.

A stepbrother of appellee, with whom a very friendly relationship had existed for many years, and who had lived in the home of the parties hereto for about two years before the commencement of this case, testified at the instance of his sister. His attempt to corroborate what she said in her testimony was confined to fragments of conversations between his sister and her husband which he had overheard. He said about Christmas 1949 he heard appellant say something to his sister about signing a paper, that she wouldn't do so, and appellant said, "Well, you will or else." The witness did not know the subject of their conversation. On two occasions he

said that he had heard appellant ask his sister why she did not get a divorce. On two or three other occasions he heard appellant inquire of appellee "Did you go down there today?" He did not know what the inquiry was related to. There was no other attempt to corroborate the testimony of appellee.

Personal or physical violence is not the only form of extreme cruelty. It may consist of acts or omissions of such a character as to destroy the peace of mind or impair the bodily health of the unoffending party, or be such as to destroy the legitimate ends and objects of matrimony. Beals v. Beals, 152 Neb. 364, 41 N. W. 2d 152. Or, such conduct as consistent nagging by husband or wife about conduct which is above reproach may be so unreasonable as to destroy the peace of mind, cause injury to health, ruin the legitimate objects of matrimony, and constitute a ground for divorce as extreme cruelty "by other means" within the statutory provisions, although no personal violence is threatened or inflicted. Sell v. Sell, 148 Neb. 859. 29 N. W. 2d 877.

Corroboration of the showing made in support of the appeal of appellee for relief was indispensable to her success in this case. The most indulgent view of the record is that there was very slight, if any, corroboration of the misconduct attributed to appellant by her. It is impossible to formulate a general rule by which to measure the exact amount or degree of corroboration required in a divorce case, and hence each case must be determined upon its facts and circumstances. Brown v. Brown, 146 Neb. 908, 22 N. W. 2d 148; Green v. Green, 148 Neb. 19, 26 N. W. 2d 299.

The conclusion is that appellee has not sustained the burden imposed upon her by the law; that the decree of limited divorce awarded her is not sustained by sufficient evidence; that the decree should be and is reversed with directions to the district court to dismiss the case and tax the costs, including the allowance of $300.00 as com-

pensation of the attorneys for appellee made by the district court, to appellant.

REVERSED WITH DIRECTIONS.

CHAPPELL, J., participating on briefs.

HARRY CONLEY, DOING BUSINESS UNDER THE TRADE NAME OF HARRY CONLEY COMPANY, APPELLEE, V. RUSSELL HAYS, APPELLANT.

45 N. W. 2d 900

Filed February 9, 1951. No. 32846.

1. **Contracts: Evidence.** A written contract clear and specific in its terms and without ambiguity, in the absence of fraud, accident, or mutual mistake, may not be changed, altered, or modified by parol evidence.
2. ———: ———. Parol evidence is admissible in explanation and interpretation of the terms of a written contract which are indefinite and uncertain and require extraneous information in order to ascertain the meaning of the words as they were understood by the parties at the time the contract was entered into.
3. **Appeal and Error.** On appeal in a jury case the function of the Supreme Court is not to weigh the evidence but to determine whether or not there was sufficient evidence to sustain the verdict, and if the evidence is substantial and competent but in conflict and is such that reasonable minds may draw different conclusions therefrom, the verdict will not be set aside.
4. **Evidence: Trial.** As a general rule where evidence improperly received is afterwards stricken out and expressly withdrawn from the jury, error involved in its reception is ordinarily cured.
5. **Pleading: Trial.** Where no attempt is made to prove certain allegations of a petition, and the plaintiff abandons them as a ground of recovery, the issues as to such matters should be eliminated from the charge.
6. ———: ———. It is error to set forth literally or substantially the pleadings in an action when to do so is to place before the jury issuable matters which find no support in the evidence.
7. **Evidence: Trial.** Where inadmissible evidence is allowed to be introduced on one side it is not error to refuse to admit evidence in rebuttal thereof.
8. ———: ———. The plaintiff in an action may meet by re-

buttal evidence any admissible evidence adduced by the defendant by evidence which is not a part of the evidence of the plaintiff in chief.

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

Kepler & Knicely, J. Murray Palmer, and *Cline, Williams & Wright,* for appellant.

Martin & Davis, and *Fitzgerald & Smith,* for appellee.

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

YEAGER, J.

This is an action by Harry Conley, doing business as Harry Conley Company, plaintiff and appellee, against Russell Hays, defendant and appellant, to recover $18,000 paid by plaintiff to the defendant on a written contract of purchase of 9,000 to 9,500 lambs.

By written agreement the defendant agreed to sell to plaintiff from 9,000 to 9,500 lambs at a stipulated price per hundred pounds and plaintiff agreed to and did make a down payment of $18,000 as a part of the purchase price. The defendant tendered delivery of the lambs and actually produced for delivery a portion of the lambs which delivery was refused by plaintiff on the ground that the lambs were not of the kind and quality required under the contract. The action is to recover the down payment.

The case was tried to a jury. The jury returned a verdict in favor of the plaintiff and on this verdict judgment was entered. From this judgment and the order of the court overruling a motion for new trial which motion was duly filed the defendant has appealed.

Numerous assignments of error appear in the brief as grounds for reversal. However all of them do not require separate consideration here. The first four must stand or fall with the adjudication upon those which follow. The next three deal with a single subject and

because thereof may be considered as a single proposition. Their gist is a contention that the court erred in admitting parol evidence the effect of which was to permit the written contract of sale of the lambs to be changed, modified, altered, or explained.

In order that an understanding may be had of the controversy presented by this appeal it becomes necessary to set out some of the background as it is disclosed by the record. On August 4, 1948, a written contract was entered into on behalf of the parties hereto for sale by defendant to plaintiff of from 9,000 to 9,500 lambs to be delivered f.o.b. cars at Farmington, New Mexico, between October 15 and November 1, 1948. The price was to be $24 per hundred pounds. The down payment was $18,000. The lambs to be delivered were described in the contract as follows: "These Ramboulet (Rambouillet) lambs & Cross Breed lambs to be weighed up with 3% or 12 hr sh—9000 will be delivered on this Contract & 9500 if grower has them Said lambs to bear ear marks and brands as follows: These are the McGee Bros. lambs. lambs to ave—65# or better." The abbreviation "sh" means "shrink" and "to ave" means "to average."

Pursuant to the terms of the contract, late in October the defendant offered for delivery lambs in the amount of 6,000 to 6,500. The plaintiff through his agent refused to accept the sheep. The reasons for refusal to accept them were that they were not of the kind and quality contemplated by the contract, and that they were not free from disease, that is they had "sore mouth." Whether or not "sore mouth" when referred to in connection with lambs is a specifically recognized disease is not made known by the record.

The contention of the plaintiff is that the lambs were not the Rambouillet or cross-breed lambs contemplated by the contract but were what are known as Navajo lambs which were raised by Indians on the Navajo res-

ervation and were of an inferior kind and quality to those required by the terms of the contract.

On the issues made by the pleadings on the trial of the case the plaintiff was permitted to prove by parol evidence that the lambs offered for delivery were Navajo lambs and that they were of a kind and type other and different from Rambouillet and cross-breed lambs as described in the contract.

It is this evidence that the defendant asserts by his 5th, 6th, and 7th assignments of error was erroneously admitted. He says that the contract is full, complete, clear, and unambiguous and that parol evidence may not be resorted to to change, modify, alter, or explain it.

There is and can be no difference of opinion that where a written contract is clear and specific in its terms and without ambiguity, in the absence of fraud, accident, or mutual mistake, it may not be changed, altered, or modified by parol evidence. The following are a few of the many cases from this jurisdiction and from the state of Texas, the place where the contract was entered into, making this point clear. Sturm v. Lloyd, 130 Neb. 89, 264 N. W. 150; Weidenfeld v. Olson, 132 Neb. 303, 271 N. W. 806; Martin v. Hemphill (Tex.), 237 S. W. 550; Distributors Inv. Co. v. Patton, 130 Texas 449, 110 S. W. 2d 47.

Fraud, accident, and mutual mistake have not been pleaded or relied upon by plaintiff as a basis for the rejection of the lambs, therefore these elements are not presented for consideration herein.

The contention of the plaintiff is that the parol evidence adduced by him was not admitted in violation of this rule but that it was properly admitted in explanation and interpretation of the meaning and what the parties intended to be the meaning of the descriptive term "Ramboulet (Rambouillet) lambs & Cross Breed lambs" appearing in the contract. In other words he says substantially that the true meaning and the one intended does not flow from the descriptive words themselves,

therefore it is proper and not a violation of the parol evidence rule to allow the true meaning to be exposed to the court and jury by evidence of the parol statements of the parties or their representatives at and prior to the signing of the contract explanatory thereof and other parol statements also explanatory thereof.

Factually the plaintiff was permitted to prove that the lambs tendered for delivery were Navajo lambs and that they did not fall into either the classification of Rambouillet or cross-breed lambs. He was also permitted to show that in the conversations leading up to the signing of the contract there was an expressed understanding that the description excluded Navajo lambs. He was permitted to show that Rambouillet was a recognized breed of sheep and that there were other recognized breeds, and that Navajo had no recognition as a breed.

As to cross-breed he was permitted to show that by that term was meant the offspring of a cross between two recognized breeds of sheep, and incidentally that Navajo lambs were inferior in quality to either Rambouillet or cross-breed lambs.

As against this the defendant adduced evidence substantially that there were no sheep known as Navajo sheep; that the Indians on the Navajo reservation raised sheep; that from the known beginning the sheep were not identifiable with any recognized breed; that the sheep on the reservation were inbred but for a long time the United States government and traders brought in males of the Rambouillet breed and other recognized breeds for breeding purposes; that a cross-breed lamb included the offspring of cross-breeding between two recognized breeds of sheep as well as between a recognized breed and the sheep produced on the reservation; that these were a cross between recognized breeds and such unrecognized and reservation sheep; and that the lambs produced on the reservation pursuant to this custom were as good as any other and that the lambs offered

for delivery were as good in quality as any others produced in the area and not on the reservation. There was evidence that to make effective cross-breeding between the sheep on the reservation and the imported males it was the custom to castrate the lambs produced on the reservation.

The district court obviously admitted this evidence not on the theory that it tended to change, alter, or modify the terms of a written contract but on the theory that it was in explanation and interpretation of terms which were indefinite and uncertain. Hence it became proper in explanation of the terms to resort to the conversations of the parties had at and prior to the time the contract was entered into, and the testimony of persons having peculiar knowledge the exposition of which tended to make clear the indefinite and uncertain terms contained in the contract.

Under the decisions of this court and of the courts of the state of Texas it is proper to admit parol evidence in explanation and interpretation of the terms of a written contract which are indefinite and uncertain. The rule and the reasons therefor appear in the following cases: Myers v. Persson, 94 Neb. 467, 143 N. W. 447; State v. Commercial Casualty Ins. Co., 125 Neb. 43, 248 N. W. 807, 88 A. L. R. 790; Helfrich v. Baxter, 131 Neb. 285, 267 N. W. 922; Fitzsimons v. Frey, *ante* p. 124, 43 N. W. 2d 531; Corbin v. Booker (Tex. Civ. App.), 184 S. W. 696; San Antonio Life Ins. Co. v. Griffith (Tex. Civ. App.), 185 S. W. 335. Numerous cases from other jurisdictions are to the same effect.

We conclude that the district court committed no error in the admission of the parol evidence concerning which complaint is made.

The parol evidence in this respect was substantial and it cannot be said that it did not have probative value. Therefore it is beyond the province of this court to say that it was insufficient for the purpose for which it was admitted.

In an appeal in a jury case the function of the Supreme Court is not to weigh the evidence but only to determine whether or not there was sufficient evidence to sustain the verdict, and if the evidence is substantial and competent but in conflict and is such that reasonable minds may draw different conclusions therefrom, the verdict of a jury will not be set aside. Dischner v. Loup River Public Power District, 147 Neb. 949, 25 N. W. 2d 813; Bendfeldt v. Lewis, 149 Neb. 107, 30 N. W. 2d 293; Albers v. Ziegler, 151 Neb. 408, 37 N. W. 2d 590; Sorter v. Citizens Fund Mutual Fire Ins. Co., 151 Neb. 686, 39 N. W. 2d 276.

The next assignment is that the court erred in admitting over objection testimony of Guy Forsling which was prejudicial to the defendant. This assignment is without merit. As to this witness, in appellant's brief, it is said: "Yet, he was permitted to describe in detail the alleged deficiencies and shortcomings of Navajo lambs, and with particularity, those that he said he had seen in Kimball County in 1948 or 1949. All of this was over objections, strenuously made, that 'what he saw in Kimball County is wholly immaterial to this case.'"

If the purpose of this is to say that all of the evidence as to the deficiencies and shortcomings of Navajo lambs was strenuously objected to then the assertion is contrary to the record since all that this witness said generally descriptively of Navajo lambs went into the record without objection. If the intent and purpose was to say that the portion relating to lambs seen by the witness in Kimball County was objected to then in the light of the record no valid ground for complaint appears. At the close of the trial this testimony was on motion of defendant with consent of plaintiff stricken and the jury instructed to disregard it.

The general rule in such situations, which general rule rather than any exception thereto we conclude should apply, is that where evidence improperly received is

afterwards stricken out, and expressly withdrawn from the jury, error involved in its reception is ordinarily cured. Bush v. James, 152 Neb. 189, 40 N. W. 2d 667.

The next assignment to be considered is that the trial court failed to instruct that it was not necessary for the defendant or McGee Brothers to have owned the lambs involved in the suit at the time of the execution of the contract, on August 4, 1948.

It is true that in the petition on which the case was tried the plaintiff declared that the defendant failed to make delivery of lambs called for by the contract but instead attempted to make delivery of Navajo lambs infected with serious disease and which were not grown and raised by the McGee Brothers nor owned by the McGee Brothers on August 4, 1948. However on the trial of the case the question of whether or not the lambs were grown, raised, or owned by McGee Brothers on August 4, 1948, formed no part of plaintiff's right of recovery. He sought to recover solely on the theory that the lambs offered were not such as were contemplated by the contract and that they were diseased. The case was thus submitted without objection on the part of the defendant.

The matter of ownership on August 4, 1948, not having been an issuable matter, it was not incumbent on the court without request to give any instruction in relation thereto. The appropriate rule under such circumstances is the following: In a case where no attempt is made to prove certain allegations, and the plaintiff abandons them as a ground of recovery, the issues as to such matters should be eliminated from the charge. Gray v. Chicago, St. P., M. & O. Ry. Co., 90 Neb. 795, 134 N. W. 961; Johnson v. Anoka-Butte Lumber Co., 141 Neb. 851, 5 N. W. 2d 114.

A more serious question however arises in relation to the subject of ownership of lambs on August 4, 1948, under another assignment of error. The trial court copied literally in the instructions the pleadings of the

parties, a practice which has been repeatedly condemned. McClelland v. Interstate Transit Lines, 139 Neb. 146, 296 N. W. 757; Franks v. Jirdon, 146 Neb. 585, 20 N. W. 2d 597; Melcher v. Murphy, 149 Neb. 541, 31 N. W. 2d 411; Simcho v. Omaha & C. B. St. Ry. Co., 150 Neb. 634, 35 N. W. 2d 501. The defendant assigns this as error.

As has been pointed out the plaintiff pleaded as a part of his cause of action that the lambs offered were not grown or raised by the McGee Brothers, nor owned by the McGee Brothers on August 4, 1948. Also as pointed out, on the trial of the case these matters were not presented as issuable matters, yet the trial court after hearing all of the evidence presented them as issuable. Clearly this was error and this situation presents graphically the basis for condemnation of the practice of copying the pleadings of the parties in the instructions.

It now becomes the duty of this court in the light of this obvious dereliction of the district court to attempt to ascertain whether or not the error was one which prejudiced the defendant, an ascertainment which never can depend upon certainty since it is obviously impossible to discern what in any set of instructions may have influenced or controlled the minds of the jury.

In an obvious effort to avoid the error involved in the condemned practice of copying the pleadings in the instructions, the court gave the following instruction: "The above and foregoing is merely a statement of the nature of the case and must not be considered by you as evidence of anything therein contained or as having anything to do with the law of this case, but merely for the purpose of giving you an idea of the nature of the case."

Clearly on its face this instruction failed to remove from the jury the question of production of the lambs by McGee Brothers and ownership thereof by them on August 4, 1948. In this connection it is pertinent to

note that the record discloses that none of them were produced by McGee Brothers. The evidence discloses that at some time they came to McGee Brothers by purchase from Indians but at what time or times was not made known or attempted to be made known on the trial.

This instruction left these two questions as issuable matters. The first tangible effort to remove them appears in the sixth instruction. This instruction defines the plaintiff's burden of proof. In this instruction the jury was told in accordance with the theory of the trial that the burden was on plaintiff to prove "that said lambs were to be ramboullet (Rambouillet) lambs and cross-bred lambs, said lambs to be McGee Brothers lambs, delivered to the railroad at Farmington, New Mexico."

Without any recession from the previous condemnation of the practice of copying pleadings in instructions and with a renewal of insistence that the statements of issues to juries should contain only issuable matters which find support in the evidence, we conclude in the light of the theory on which the case was tried, in the light of the instruction regarding plaintiff's burden of proof, and in the light of the failure of the defendant to request an instruction that it was not necessary to his defense that the lambs should be shown to have been produced by McGee Brothers or owned by them on August 4, 1948, that the copying of the pleadings in this action was without prejudice. This conclusion effectually disposes of an assignment charging that the court erred in failing to instruct on the issues as shown by the pleadings and evidence.

In another assignment the defendant contends that the court erred by permitting testimony on rebuttal that plaintiff purchased other lambs after October 25, 1948.

This assignment is without merit unless it may be said that the evidence that it counteracted was inadmissible.

The briefs do not and we are not prepared to so treat it.

It is a rule that where inadmissible evidence is allowed to be introduced on one side, similar evidence is not admissible in rebuttal. Dodge v. Kiene, 28 Neb. 216, 44 N. W. 191; McCartny v. The Territory of Nebraska, 1 Neb. 121.

Another rule is that the plaintiff in an action may meet by rebuttal evidence any admissible evidence adduced by the defendant by evidence which is not a part of the evidence of the plaintiff in chief. McCleneghan v. Reid, 34 Neb. 472, 51 N. W. 1037; Clarke v. Van Court, 34 Neb. 154, 51 N. W. 756; McClellan v. Hein, 56 Neb. 600, 77 N. W. 120; Campion v. Lattimer, 70 Neb. 245, 97 N. W. 290; City of McCook v. McAdams, 76 Neb. 1, 106 N. W. 988, 114 N. W. 596.

The rebuttal evidence to which this assignment refers was in rebuttal of evidence received on behalf of the defendant the effect of which is to say that the motive of the plaintiff in rejecting the lambs was not that they did not meet the requirements of the contract but that the market price of lambs had dropped between August 4, 1948, and the time of offered delivery. The effect of the rebuttal evidence was to say that no such motive existed since plaintiff actually purchased other lambs after October 25, 1948, at a price in excess of the market. Under the circumstances and within the limits for which this evidence was adduced it cannot be reasonably said that the defendant was prejudiced.

The only remaining assignment not referred to or discussed is one which asserts that the verdict was the result of passion and prejudice. The gist of the complaint is that the testimony as to the Navajo lambs was inadmissible and being so inadmissible it was inflammatory and calculated to arouse passion and prejudice in the minds of the jury.

In the consideration of other assignments it was determined that this evidence was admissible in explanation

and interpretation of the contract. The assignment here is necessarily without merit.

The judgment of the district court is affirmed.

AFFIRMED.

JOE PALOUCEK ET AL., APPELLEES, V. ARTHUR H. ADAMS, APPELLANT.

45 N. W. 2d 895

Filed February 9, 1951. No. 32858.

1. **Easements.** The nature and extent of an easement arising by prescription are determined by the use made of the land during the prescriptive period.
2. **Easements: Injunction.** A trial court may determine the extent of an easement arising by prescription in an injunction action and restrain interference with rights found to exist by virtue of the findings so made.
3. **Easements.** The servient owner of land subject to an easement may make such use of it as he sees fit, subject only to the right of the dominant owner of the easement to use it for the purposes out of which the right arose.

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

J. Cedric Conover and *W. C. Conover,* for appellant.

McGinley & Lane, for appellees.

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

CARTER, J.

This is a suit by the owners of a private irrigation ditch to enjoin the defendant, across whose lands the ditch was constructed, from interfering with the maintenance and operation of the ditch. The trial court found that the easement existed, determined its extent, and enjoined the defendant from interfering therewith. The defendant appeals.

The plaintiffs are the owners of certain lands in Keith County described in the petition. Their lands are contiguous and include irrigable lands which are irrigated from the Hollingsworth Canal. The Hollingsworth Canal is a private partnership ditch owned by the plaintiffs. It has an appropriation of water from the South Platte River with a priority dating of 1894. The water diverted under this appropriation is used solely for irrigating the lands of the plaintiffs. The point of diversion is on the south bank of the South Platte River about three miles west of plaintiffs' lands. The water is carried from the point of diversion through the Hollingsworth Canal in an easterly direction to the lands of the plaintiffs where it is applied to their lands. The canal passes through the lands of the defendant which lie to the west of plaintiffs' lands. The evidence is clear that the ditch was constructed across defendant's lands more than 20 years ago and that it has been continuously used since that time. That the plaintiffs have an easement by prescription across the lands of the defendant is established beyond a doubt. The question at issue arises because of a disagreement as to the rights of the plaintiffs on the lands of the defendant by virtue of the easement.

The defendant became the owner of his lands traversed by the Hollingsworth Canal in 1947. The dispute arises out of the construction of a fence by the defendant on the bank of the ditch, his plowing down of the ditch banks in his farming operations, and his alleged refusal to permit plaintiffs to maintain their ditch in 1949.

The evidence shows that it is necessary each year to clear the ditch of weeds by cutting and burning. It is necessary also, as the occasion demands, to clean the ditch by removing silt and debris which has settled and lodged in it. Various types of machinery have been used throughout the years in the operation and maintenance of the ditch. The horse-drawn scraper has been

succeeded in turn by the tractor-drawn plow ditcher and the dragline. A small truck is ordinarily used in connection with the operation and maintenance of the ditch.

The evidence shows that the west part of defendant's lands is in pasture. The ditch through this area is higher than the surrounding lands and requires that the ditch banks be maintained at a greater height than on the eastern portion. At one point on defendant's lands there is a flume which carries surface waters under the ditch from the south to the north that they may flow back to the river. There has been considerable maintenance in and about this flume in recent years, as well as an occasional washout. When the water is being used for irrigation it is necessary to check the water and raise its level in the ditch in order to get it out on plaintiffs' lands. The lowering of the ditch banks brings about an occasional overflow of the banks during such periods which requires immediate repair of the banks.

The evidence shows that it is necessary, for the proper operation and maintenance of the ditch, to have sufficient space to move up and down on each bank with tractors, draglines, and small trucks. The extent of the easement, however, is determinable from the use actually made of the property during the running of the prescriptive period. It in fact determines the nature of the easement acquired. See, 17 Am. Jur., Easements, § 59, p. 971; Dunbar v. O'Brien, 117 Neb. 245, 220 N. W. 278, 58 A. L. R. 1033.

The record shows that plaintiffs and their predecessors in interest used the banks of the ditch in maintaining it for the prescriptive period. In 1947 and 1949, during the period of defendant's ownership of the property, a dragline was used in cleaning portions of the ditch. Previous thereto the banks were used during the operation of a ditch plow in cleaning the ditch. The evidence sustains a finding that plaintiffs have used 25 feet of land on each side of the center line of the ditch

throughout the prescription period. An engineer called by the plaintiffs testified that the land used, as evidenced by indications on the ground testified to by him, varied from 57 to 75 feet. The plaintiffs testify to the use of a similar amount of ground during the prescriptive period. A tenant on defendant's land before he acquired ownership or possession testifies that more than 50 feet of ground was used in the operation and maintenance of the ditch. The trial judge made a personal inspection of the ditch and the lands adjacent thereto. From this evidence we find that the use made of defendant's land, which had ripened into an easement for the operation and maintenance of the canal, extended a distance of 25 feet on each side of the center line of the canal. While there is evidence offered by the defendant to the contrary, the findings in this respect are clearly supported by the record.

An easement is usually defined as a right in the owner of one parcel of land, by reason of such ownership, to use the land of another for a special purpose not inconsistent with the general property right of the owner. Frye v. Sibbitt, 145 Neb. 600, 17 N. W. 2d 617. The owner of the easement may make use of it only for the special purpose that gave rise to the easement itself. The servient owner may make any use of it that he cares to make so long as he does not interfere with the rights of the dominant owner of the easement. Consequently, the defendant may farm or pasture the land subject to the easement, but such use is necessarily subject to the right of plaintiffs to operate and maintain the ditch. He cannot deny the right of the plaintiffs to enter and use the land found to be within the scope of the easement in operating and maintaining the ditch. The defendant may not fence the land so as to interfere with or defeat the easement. We think the evidence sustains a finding that an easement by prescription for an irrigation canal across defendant's land existed in favor of the plaintiffs; that the extent of the easement

on the ground is 25 feet on each side of the center line of the canal; that the trial court correctly ordered the removal of the fence from the land covered by the easement, which interferes with the use of the dominant owner in operating and maintaining the ditch; and that defendant was properly enjoined from interfering with the use, operation, and maintenance of the canal on any of defendant's lands within the scope of the easement, in any manner whatsoever.

AFFIRMED.

DAYTON L. PHIFER, APPELLEE, V. IRVIN D. MILLER ET AL., APPELLANTS.
45 N. W. 2d 907

Filed February 9, 1951. No. 32864.

1. **Homesteads.** Under the statutes of this state the homestead of a married person cannot be conveyed or encumbered unless the instrument by which it is conveyed or encumbered is executed and acknowledged by both the husband and the wife. A contract to convey a homestead which is not so executed is void.
2. ———. The burden of establishing an abandonment of a homestead rests upon the one asserting such an abandonment.
3. ———. An intention to abandon and an actual abandonment must concur to establish the abandonment of a homestead interest.
4. ———. Where the evidence shows that the parties left the premises claimed as a homestead, without any intention of returning to it for homestead purposes, an abandonment of the homestead right will be deemed to have been established.
5. ———. In determining whether there has been an abandonment of a homestead interest the court will consider the real intention of the parties viewed in the light of all the surrounding circumstances.
6. **Homesteads: Specific Performance.** Where the evidence shows an intent to abandon a homestead right in property, coupled with an actual leaving of the premises, the failure to have the instrument, by which the property is conveyed, executed, and acknowledged by both the husband and the wife is not a defense to a suit for specific performance.

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

Baskins & Baskins, for appellants.

Donald V. Lowe and *Edward E. Carr,* for appellee.

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

CARTER, J.

This is an action for specific performance of a contract for the sale of real estate. The trial court decreed specific performance and the defendants appeal.

On November 7, 1949, the defendants executed and delivered a written receipt and option for the conveyance of Lot 1 of Dorothy's Subdivision of Lot 9, more particularly described in the petition, for the sum of $600. Plaintiff paid down $60 and agreed to pay the balance on December 7, 1949. Defendants agreed to give a warranty deed and abstract of title on receipt of the balance of $540. Plaintiff went into immediate possession of the property. On December 6, 1949, plaintiff tendered the $540 and demanded a deed and abstract. The tender was refused, and this action resulted.

It is the contention of the defendants that the property involved was a part of the homestead of the defendants; and that the written receipt and option, not being acknowledged, are void. Defendants also assert it was orally agreed between the parties on or before November 7, 1949, that the property was to be subject to certain restrictive covenants which appear as Exhibit B to plaintiff's petition. Defendants allege that plaintiff violated that portion of the restrictive agreement providing: "All dwellings must have a sanitary sewage disposal system. No imitation brick, or stone siding to be used on any building."

The plaintiff's reply is to the effect that defendants are estopped to assert the homestead character of the premises and, if the property was a part of defendants'

homestead prior to the time of the sale, that such interest had been abandoned on November 7, 1949.

The record shows that immediately after taking possession of the tract in question, plaintiff commenced the construction of a house. An outside toilet was immediately installed for the convenience of workmen. On November 22, 1949, defendant Irvin D. Miller, hereafter referred to as Miller, came to the premises while brick-veneer siding was being applied. He advised the plaintiff that the use of brick-veneer siding was not objectionable to him but that the purchasers of adjoining lots would not stand for it. The restrictive covenants were thereafter filed on November 28, 1949.

The evidence shows that in 1948 defendants purchased Lot 9, a tract of land outside the city of North Platte containing 12.28 acres. On the west central portion of the tract was the home of the defendants. This residence and the lands appurtenant thereto was their homestead. In 1949 defendants decided to sell off residence sites from this tract and in pursuance of this project caused the acreage to be platted into lots. Defendants retained the residence in which they lived and 3.78 acres appurtenant thereto. The balance of the tract was divided into nine lots numbered 1 to 9, each containing about one acre. All of the lots had been sold except No. 1 and No. 6 when plaintiff purchased Lot 1 on November 7, 1949. The residence of defendants was approximately 900 feet from the house constructed by plaintiff.

The building of the house was observed by defendants during the course of its construction. Miller observed the rolls of brick-veneer siding on the premises four days prior to the time he saw it being applied. Miller contends that plaintiff was orally advised that the sale of the lot was subject to restrictive covenants before the receipt and option were executed and delivered. The evidence indicates, however, that the conversation regarding restrictions went only to those against owner-

ship or occupancy by others than persons of the Caucasian race and those prohibiting the moving in of old or temporary buildings. It is evident that valid restrictions were not of record nor mentioned in the written sale agreement.

The appeal is submitted to this court on the theory that the property was a part of the homestead of the defendants, that the contract of sale was not acknowledged and therefore void, and that there was no abandonment of the homestead or an estoppel that could operate against the asserted invalidity of the sale agreement.

We think that defendants abandoned their homestead interest in the property. When they platted the acreage, sold all but two of the lots, gave immediate possession to the plaintiff, permitted him to commence construction of a house, stood by while he expended a large sum of money shown by the evidence to be in excess of $1,400 for materials alone, and redefined by plat and by a staking out on the ground of the new boundaries of the lands they considered appurtenant to their residence, they evidenced a conclusive intent to abandon the lots sold as a part of the homestead.

A homestead is defined by our statute as consisting of the dwelling house in which the claimant resides and the land on which it is situated, not exceeding 160 acres, to be selected by the owner when it is outside of an incorporated city or village. § 40-101, R. S., 1943. It is fundamental, also, that the homestead of a married person cannot be conveyed or encumbered unless the instrument by which it is conveyed or encumbered is executed and acknowledged by both the husband and wife. § 40-104, R. S. Supp., 1949. A contract to convey a homestead which is not so executed and acknowledged is void. Karls v. Nichols, 148 Neb. 712, 28 N. W. 2d 595; Trowbridge v. Bisson, *ante* p. 389, 44 N. W. 2d 810. The burden rests upon one asserting an abandonment of a homestead to establish an abandonment by a

preponderance of the evidence. Karls v. Nichols, *supra*. An intention to abandon and an actual abandonment must concur to establish the abandonment of a homestead interest. National Bank of Commerce v. Chamberlain, 72 Neb. 469, 100 N. W. 943. Where the evidence shows that the parties left the premises claimed as a homestead, without any intention of returning to it for the purpose of occupying it as a homestead, an abandonment of the homestead is established. Edwards v. Reid, 39 Neb. 645, 58 N. W. 202, 42 Am. S. R. 607; Mallard v. First Nat. Bank, 40 Neb. 784, 59 N. W. 511.

"Where the circumstances attending removal from the property indicate that there is no intent to return, the conclusion is that the claim of homestead is not sustainable as against the claims of creditors or persons who have dealt with the property." 26 Am. Jur., Homestead, § 197, p. 122.

In Bovine v. Selden, 155 Mich. 556, 119 N. W. 1090, 130 Am. S. R. 579, the court in dealing with the abandonment of a homestead right said: "'* * * Was there an abandonment of the homestead by the complainant and her husband and the family? That the assignment of the contract without the joining of the complainant was void there can be no question. If the husband and family may in good faith abandon the homestead, without making any deed or conveyance, is it any the less an abandonment when they, in good faith, move from one home to another, without the intention of returning, under a deed or conveyance which is void because the wife has, through her own or another's ignorance, failed to join in the same? It seems to me not. In determining whether or not there was an abandonment of the homestead, the court ought to consider the real intention of the parties and all of the surrounding circumstances.'"

In holding that a portion of a homestead had been abandoned as such, the Supreme Court of Alabama said: "When, as the evidence without conflict shows, the Griffins, husband and wife, determined to convert a por-

tion of their homestead into city rental property, and, to carry into effect their determination, erected four separate residences on the property, separating these lots from the lots on which they continued to reside, this act on their part was tantamount to an abandonment as a homestead of the lots upon which they had erected the residences designed to be used not for homestead purposes, but as sources of revenue." Griffin v. Ayres, 231 Ala. 493, 165 So. 593.

We think the evidence clearly shows an intent to abandon the homestead rights in the property in question prior to the date of the contract of sale here involved. The defendants not only gave up the possession of the property but they gave it up with the intention never to return to it and make use of it for homestead purposes. Under such circumstances the defendants cannot successfully defend the suit for specific performance.

AFFIRMED.

ROSA MANGIAMELI, APPELLANT, V. CARMELO MANGIAMELI, APPELLEE.

45 N. W. 2d 910

Filed February 9, 1951. No. 32869.

Divorce. In determining the question of alimony or division of property as between the parties the court will consider the respective ages of the parties to the marriage; their earning ability; the duration of the marriage; the conduct of each party 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 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. From these elements and all other relevant facts and circumstances, the court will determine the

rights of the parties and make an award that is equitable and just.

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

Samuel P. Caniglia, for appellant.

Joseph A. Troia, for appellee.

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

YEAGER, J.

This is an action by Rosa Mangiameli, plaintiff, as originally instituted for divorce from bed and board from Carmelo Mangiameli, the defendant. On the trial of the case she declared a willingness to accept a decree of absolute divorce. The defendant filed an answer and cross-petition and prayed for an absolute divorce from the plaintiff.

The cause was tried to the court and a divorce was granted to defendant. By the decree the defendant was awarded title to all of the real estate belonging to the parties. He was also awarded all household goods and furniture except such as was personal to plaintiff. He however was required to pay plaintiff the amount of $3,000 in monthly installments of $50 each.

From the decree the plaintiff has appealed. The substance of the errors assigned as grounds for reversal is that the court erred in granting a divorce to the defendant and not to the plaintiff; that the court erred in awarding title to the real estate and the household goods to the defendant; and that the alimony allowance was inadequate and insufficient. The defendant cross-appealed on the ground that the alimony allowed was excessive. This subject will receive a sufficient answer in the consideration of plaintiff's assignments of error.

The basis of plaintiff's claimed right to a divorce was cruelty. The cruelty claimed consisted of efforts of the

defendant to engage with plaintiff in the sexual relation which she repulsed or tried to repulse on account of pain resulting from her physical condition and physical violence inflicted upon her in connection with his efforts and her refusals.

The substance of defendant's claimed right to a divorce in the light of a fair analysis of his evidence is that the plaintiff without cause or justification and capriciously refused indulgence in the sexual relationship.

The background of this case shows that these parties were married in 1909. They raised a family of seven children. The youngest of these was 21 years of age at the time the case was tried. At the time of trial the plaintiff was 61 years of age and the defendant 65. A few years before the incidents which are the basis of this action occurred a hysterectomy operation was performed upon the plaintiff. In February or March 1949 a "hernioectomy" for the repair of an entrocele, that is the repair of a hernia which occurs in the posterior portion of the pelvis and herniates through the vagina, was performed upon her.

It was after this operation that the difficulties between the parties came about. The plaintiff said that the relationship was too painful and damaging for her to endure.

The testimony of the defendant that plaintiff acted without cause or justification and with caprice is nothing more than a conclusion on his part obviously not based on knowledge which he possessed. The only evidence in the record to give the conclusion a shade of credence was medical testimony that there had been complete healing and there was nothing objective for some time before the trial to indicate that the relationship would be painful to the plaintiff. As a part of the same medical testimony it was made clear that the statements made to the medical witness by plaintiff with regard to pain were accepted by him as true.

It must be said therefore that there has been a total

failure of proof of the grounds relied upon by the defendant for a divorce in his behalf. Accordingly the trial court was in error in granting a divorce to him.

On the other hand plaintiff gave testimony to the acts of which she complained and their consequences in considerable detail. She complained to the operating surgeon who in connection with her complaints made physical examinations with reference to her condition and advised the defendant in relation thereto and as to what should be his conduct under the circumstances. It is sufficiently clear that the defendant ignored this advice and persisted in his efforts and attentions.

The conclusion reached in this connection is that the evidence of plaintiff is worthy of belief and that it received sufficient corroboration within the meaning of law. § 42-335, R. S. 1943; O'Reilly v. O'Reilly, 120 Neb. 720, 234 N. W. 916; Green v. Green, 148 Neb. 19, 26 N. W. 2d 299; Kroger v. Kroger, *ante* p. 265, 44 N. W. 2d 475.

The trial court erred in refusing to grant her an absolute divorce from the defendant.

The remaining question for consideration is that of alimony and division of property. The determination in this respect is to be made in the light of the following rule which has been often repeated: "In determining the question of alimony or division of property as between the parties the court will consider the respective ages of the parties to the marriage; their earning ability; the duration of the marriage; the conduct of each party 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 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. From these

elements and all other relevant facts and circumstances, the court will determine the rights of the parties and make an award that is equitable and just." Strasser v. Strasser, *ante* p. 288, 44 N. W. 2d 508.

The defendant is a cement worker and plasterer. This type of work is seasonal and the amount of time he is enabled to work depends upon weather conditions. After the start of heavy freezing there is little of this kind of work to be done. The rate of pay for such work at the time of trial was $2 an hour for an eight hour day. The plaintiff was never employed during the married life of the parties except in her duties as a housewife. There is nothing to indicate that she has any training or capacity for the performance of any other kind of work.

Over the years the parties acquired real estate described in the cross-petition as the North 44 feet of the West 140 feet of Lot 9, in Kountze's Second Addition to the City of Omaha, Douglas County, Nebraska. It is otherwise known as 1709 South Tenth Street. In the record it was agreed that this real estate with the buildings thereon was of a value of from $6,500 to $7,500. There are two buildings on the land, one a residence and the other a business building. There is no evidence as to the rental value of the business building although it was being rented to a son of the parties for $30 a month. There is no other property except the household goods. The household goods are not accurately described but it is inferred that the value is not great.

The title to the real estate appears to stand in the name of both parties, but whether it is a joint tenancy or tenancy in common does not appear.

Taking into consideration all of the elements necessary to be considered in the fixation of alimony and the division of property in a case where a decree of divorce is granted, with particular reference to the age and physical condition of plaintiff and her income-producing capacity, or rather lack of it, we conclude that

the trial court was in error in divesting her of her interest in and use of the real estate and of the household goods and allowing her instead $3,000 payable as indicated. We conclude that title to the real estate should remain as it now stands but that the plaintiff should have the full, complete, and undisturbed use and occupancy thereof including both buildings for life with remainder to such interest as now stands in defendant's name to him on her death. We conclude that this should be in lieu of alimony in favor of plaintiff.

By interim order the district court taxed an attorney's fee of $200 against plaintiff in favor of her attorney and a like fee against defendant in favor of his attorney. The order, in the following words, made the allowances a lien against the real estate jointly owned by the parties: "* * * the same shall be taxed as a lien against any real estate now owned jointly by the parties hereto until the same is paid."

No error is assigned in the briefs in relation to this, hence the propriety of the procedure will not be discussed beyond the statement that we have found no statute authorizing it.

Attention is called to this for the purpose of exercising the power of this court in an action in equity where the trial is de novo to do that which in equity and good conscience should be done. § 25-1925, R. R. S. 1943; Trowbridge v. Donner, 152 Neb. 206, 40 N. W. 2d 655.

These liens as fixed by the order antedate the final decree of the district court and of course antedate this decision. The fruits flowing to plaintiff from the decision here ought not to be endangered by this apparent lien against the real estate, that is she ought not to stand in danger of having her right to the use and occupancy thereof endangered by the possibility of foreclosure of these apparent liens by the failure of defendant to pay the fee assessed against him and by the possibility of her inability to pay the fee assessed against her. To the extent that the interim order fixed the assess-

ments of attorneys' fees as liens against the real estate it should be vacated and set aside.

The decree of the district court is reversed. The plaintiff is hereby granted an absolute divorce from the defendant. The plaintiff is granted the full, complete, and undisturbed use and occupancy of the real estate described herein including the buildings thereon during her lifetime with remainder to such interest as now stands in his name to the defendant on plaintiff's death. The household goods except personal effects of defendant are awarded to plaintiff. This is in lieu of all alimony and division of property. The lien of the interim order as to attorneys' fees is vacated and set aside. The plaintiff's attorney is allowed an attorney's fee of $100 for services in the district court which is in addition to the $200 contemplated by the interim order which has been discussed and an additional $100 for services in this court. The costs in the district court and in this court are taxed to the defendant.

REVERSED.

EVA PASKO, APPELLANT, V. JOHN TRELA, APPELLEE.
46 N. W. 2d 139

Filed February 9, 1951. No. 32894.

1. **Judgments: Divorce.** In appropriate and timely proceedings, the district court has jurisdiction and authority to vacate and modify any part or all of its own judgment or orders in a divorce action after the term at which they were made for fraud practiced by the successful party in obtaining the same.
2. **Fraud.** Fraud may consist in words, acts, or the suppression of material facts with intent to mislead and deceive.
3. ———. Where fraud or misrepresentation is material with reference to a transaction subsequently entered into by a person deceived thereby, it is assumed, in the absence of facts showing the contrary, that it was induced by the fraud or misrepresentations.
4. ———. The fact that plaintiff made inquiries elsewhere which did not disclose the falsity of the representations is ordinarily

no defense. The plaintiff is entitled to relief if the representations were a material inducement to the contract, although he may have made efforts to discover the truth thereof, and did not rely wholly on the veracity of the defendant.

5. ———. The fact that the recipient of a fraudulent misrepresentation relies in part upon his own investigation does not relieve the maker from liability if he by false statements or otherwise intentionally prevents the investigation from being effective, and no right is ordinarily affected by an investigation which confirms the representations.
6. ———. The truth or falsity of representations must be determined as of the time they were acted on.
7. **Divorce.** 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.
8. **Divorce: Attorney and Client.** In cases where the divorced wife seeks modification of a decree of alimony, alleging that the decree was obtained by fraud of the husband, or his agents, the district court has authority to require the husband to pay into court a reasonable sum of money, including an attorney's fee, to enable her to prosecute or defend her action.
9. ———: ———. Such an action is a proceeding ancillary to the original divorce proceeding and deemed a part thereof, giving the court authority to exercise a judicial discretion and grant the same relief, including an allowance for suit money or attorneys' fees, as it had in the original suit, and such allowance may be made at any stage of the litigation or included in the final decree.

APPEAL from the district court for Douglas County: JAMES M. FITZGERALD, JUDGE. *Affirmed in part, and in part reversed, with judgment for plaintiff entered in this court.*

Theodore L. Kowalski and *Norman H. Denenberg*, for appellant.

Wear & Boland, and *John R. McCormack,* for appellee.

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

CHAPPELL, J.

On January 12, 1949, Eva Trela, as plaintiff, was granted an absolute divorce by the district court for Douglas County, from John Trela, defendant, on the ground of extreme cruelty. Plaintiff's former name of Eva Pasko was restored. On that date the parties also executed a property settlement in writing which was approved by the court, whereby plaintiff was paid $2,000 by John Trela in lieu of alimony or any interest she may have had in and to any of his property, and in full for any claim she might have had by reason of her loss of a widow's pension from the police department of New York City.

Thereafter, on April 15, 1950, within the time required by section 25-2008, R. R. S. 1943, Eva Pasko as plaintiff filed, in conformity with section 25-2002, R. R. S. 1943, a petition wherein John Trela was defendant, seeking thereby to vacate and modify that part of the divorce decree approving the property settlement, and set aside the property settlement upon the ground, as provided in section 25-2001, R. R. S. 1943, that such settlement and judgment of approval thereof were obtained by fraud practiced by defendant in that he was guilty of misrepresentation, concealment, conspiracy, and perjury with regard to his then money and property, which induced plaintiff to make the settlement. She also prayed that the court should enter a decree adjudging the true and just property rights between the parties, and for general equitable relief. Defendant answered, denying generally that he was guilty of any fraud, and alleged that plaintiff, who was represented by counsel at all times, had voluntarily accepted the settlement and approval with full knowledge of her rights and was estopped to assert that it was invalid.

Upon trial of the issues plaintiff adduced ample competent evidence to sustain the aforesaid allegations of fraud by defendant, who offered no evidence whatever to refute the same. Nevertheless, the trial court entered a decree finding and adjudging generally for defendant and against plaintiff, primarily upon the ground that prior to the execution of the property settlement and approval thereof, she had full knowledge of the facts and was fully advised of her rights by competent counsel. The judgment dismissed plaintiff's petition and taxed all costs generally to her, but allowed her an attorney's fee of $500, to be paid by defendant. Plaintiff's motion for new trial and defendant's motion to set aside that portion of the judgment allowing plaintiff an attorney's fee, were both overruled. Therefrom, plaintiff appealed, assigning substantially that the judgment finding generally for defendant and dismissing her petition was not sustained by the evidence but contrary thereto and contrary to law. We sustain the assignments.

Defendant cross-appealed, assigning substantially that the trial court was without statutory authority to allow plaintiff an attorney's fee. We conclude that the assignment has no merit.

It is generally the rule that in an appropriate and timely proceeding prosecuted under the aforesaid statutes, the district court has jurisdiction and authority to vacate or modify any part or all of its own judgment or orders in a divorce action after the term at which they were made for fraud practiced by the successful party in obtaining the same. Wisdom v. Wisdom, 24 Neb. 551, 39 N. W. 594, 8 Am. S. R. 215; Schafer v. Schafer, 71 Neb. 708, 99 N. W. 482; Williams v. Williams, 119 Neb. 8, 226 N. W. 798.

In Faulkner v. Klamp, 16 Neb. 174, 20 N. W. 220, this court held that: "Fraud may consist in words, acts, or the suppression of material facts with the intent to mislead and deceive." See, also, 37 C. J. S., Fraud, § 9, p. 225, § 15, p. 242; 23 Am. Jur., Fraud and Deceit, § 24,

p. 776, § 76, p. 850; Restatement, Contracts, § 471, p. 891.

As said in Restatement, Contracts, § 470, p. 890: "(1) 'Misrepresentation' in the Restatement of this Subject means any manifestation by words or other conduct by one person to another that, under the circumstances, amounts to an assertion not in accordance with the facts.

"(2) Where a misrepresentation would be likely to affect the conduct of a reasonable man with reference to a transaction with another person, the misrepresentation is material, except as this definition is qualified by the rules stated in § 474." The qualification has no application here.

As stated in section 479, p. 915: "Where fraud or misrepresentation is material with reference to a transaction subsequently entered into by a person deceived thereby, it is assumed in the absence of facts showing the contrary that it was induced by the fraud or misrepresentation." See, also, George v. Guarantee Mutual Life Co., 144 Neb. 285, 13 N. W. 2d 176.

Also, as stated in 37 C. J. S., Fraud, § 22, p. 259: "It is generally held that a fraudulent intent or the equivalent thereof is an essential element of fraud, and that such intent may be established by appropriate inference or presumption from the facts proved."

This court held in Foley v. Holtry, 43 Neb. 133, 61 N. W. 120: "The fact that the plaintiff made inquiries elsewhere which did not disclose the falsity of the representations is no defense. The plaintiff is entitled to relief if the representations were a material inducement to the contract, although he may have made efforts to discover the truth thereof, and did not rely wholly upon the veracity of defendant."

As stated in 23 Am. Jur., Fraud and Deceit, § 144, p. 945: "The mere fact that one makes an independent investigation or examination, or consults with others, does not necessarily show that he relies on his own judgment or on the information so gained, rather than on the representations of the other party, nor does it give rise to a

presumption of law to that effect. If, under the circumstances, he is unable to learn the truth from such examination or investigation or, without fault on his part, does not learn it and in fact relies on the representations, he is entitled to relief, all other ingredients of liability being present. It is well settled that where the representee makes only a partial investigation, relies in part upon the representations, and is deceived by such representations to his injury, he may maintain an action for such deceit or secure appropriate equitable relief. Furthermore, no right is affected by an investigation which confirms the representations." See, also, 23 Am. Jur., Fraud and Deceit, § 147, p. 951.

As stated in Restatement, Torts, § 547, p. 107: "The fact that the recipient of a fraudulent misrepresentation is relying upon his own investigation does not relieve the maker from liability if he by false statements or otherwise intentionally prevents the investigation from being effective."

In 37 C. J. S., Fraud, § 34, p. 278, it is said: "Generally a party dealing on equal terms with another is not justified in relying on representations where the means of knowledge are readily within his reach; but the mere presence of opportunities for investigation will not preclude the right of reliance where the circumstances are such as not to put one on inquiry, where there has been intentional fraud, where the hearer lacks equal facilities for ascertaining the truth, or where the nature of the transaction is such as to compel the hearer to rely on the speaker's statement."

As stated in 37 C. J. S., Fraud, § 34, p. 281: "That a party fails to avail himself of means of knowledge does not bar redress for fraud where the speaker uses artifice or misrepresentation to prevent him from investigating and learning the truth."

Finally, "According to the weight of authority, the truth or falsity of representations must be determined as

of the time they were acted on." 37 C. J. S., Fraud, § 17, p. 251.

In the light of the foregoing rules, we have examined the record, which discloses competent evidence to sustain the following: Plaintiff married defendant on July 1, 1948. They were then respectively 42 and 56 years of age. Prior thereto, plaintiff was a resident of New York City, where she was employed as an assistant buyer for Wanamaker's Department Store. She had been previously married to a New York City police officer, upon whose death she became eligible to receive and did thereafter receive a widow's pension of $50 a month for several years, which legally terminated upon her marriage to defendant. In the light of her expectancy, she then forfeited more than $16,000 by virtue of her marriage to defendant.

Plaintiff met defendant, who owned a combined grocery store and butcher shop in Omaha, sometime in October 1947, while she was visiting an aunt. They then went together for a short time until plaintiff returned to New York City, after which they corresponded.

In February 1948, the aunt died, and plaintiff returned to Omaha, where she again met defendant upon several occasions. Upon her return to New York City they corresponded again, and in April defendant proposed marriage. Upon her agreement, she returned to Omaha where the marriage occurred.

Prior thereto, plaintiff knew but little about defendant's property, but defendant knew that she was leaving her position in New York, and that she was receiving a widow's pension with which she was educating her son, then 19 years of age. He also knew that the pension would terminate upon her marriage to him, but assured her that he could and would make adequate provision for plaintiff and her son. On November 27, 1948, plaintiff brought a suit against defendant for separate maintenance, and he filed a cross-petition, seeking an absolute divorce. Later plaintiff amended her

petition to ask for an absolute divorce, whereupon defendant dismissed his cross-petition, and on January 12, 1949, plaintiff was granted the decree, a part of which is here involved.

By the time her suit was instituted, plaintiff knew that defendant had owned four pieces of real property, including the grocery store where they lived in a combination dwelling. She learned also that he did have four separate bank accounts and had owned some war bonds and postal savings. She so informed her attorney, who examined the records of the register of deeds where he found that the four pieces of real property had all been deeded to defendant's daughters, or to them and their husbands, by deeds dated sometime prior to the marriage, although not recorded until just prior to or after plaintiff's suit was filed.

On December 30, 1948, in the presence of plaintiff, her counsel took defendant's deposition. Likewise, on January 7, 1949, the depositions of one John Gaspar, defendant's real estate, insurance, and mortgage loan agent, and the two daughters of defendant, were taken. The defendant's deposition was offered and received in evidence in this proceeding, but the other three, although offered in evidence by plaintiff, were excluded by the court. The question of their exclusion was not raised here, but there is affirmative competent evidence in the record establishing that the testimony of John Gaspar and defendant's two daughters appearing in their depositions generally corroborated in every material respect the deposition testimony given by defendant.

In his deposition defendant testified substantially as follows: That he owned the grocery store, having a stock valued at about $500, and that there were $600 or $700 of bills receivable therefrom, but that he did not then own the property in which the store was located, having sold it to his daughter and son-in-law sometime before the marriage, at which time a deed was delivered to them therefor, to be recorded at their own pleasure.

The consideration for such property was a small amount of cash plus what he owed them for helping in the store over the years, and their share of their mother's estate. However, defendant was to operate his business and live there by paying rent, but they were to help him with money or otherwise if he ever needed anything. At the same time, under similar circumstances, he deeded two residence properties to another daughter and her husband as a gift, and then delivered the deeds, because they had assisted in the store for many years and had asked for their share of the estate. The agreement was, however, that they were to help him if he ever needed anything. Likewise, under similar circumstances, prior to the marriage, he deeded to a daughter and son-in-law 189 acres of farm land, by operation of which he had lost money for two years, most of which he still then owed. He testified that he gave it to them as their share of the estate and as trouble and expense which he was unable longer to want or assume.

He testified that prior to the marriage he took most of his money out of the banks and used substantially all of it to pay bills, personal, business, and otherwise, and to buy a new car. However, he testified that a part of such money did not belong to him but to his daughters, so he transferred it to them in equal shares, since it was their share of their mother's estate. He took out $2,500 from a postal savings account, and still had the money at home. He did have $18,000 in government bonds payable to himself and a daughter. However, they were cashed and he still had part of it which he was using to live on, but his daughter got most of it. He testified that he had a few mortgages with John Gaspar; very little; a very small amount, a record of which was kept by John Gaspar over in his office. He testified that his net worth was then about $8,000 or $10,000, not even that much, while before the marriage and before he made the aforesaid transfers his net worth was only some $20,000 to $30,000. Because his business had lost

heavily in recent years he then had but little left. John Gaspar, his agent, handled most of the transactions for him.

In the light of the foregoing, plaintiff's counsel advised her that she would herself be required to decide what to do and it was a reliance upon those acts and representations of defendant, his daughters and his agent, which then induced plaintiff on January 12, 1949, to agree upon the property settlement here involved, and permit the court to approve it. As hereinafter observed, such material acts and representations were intentionally and palpably false. Thus the true facts then exising were intentionally misrepresented, concealed, and suppressed by defendant and those who conspired with him, who knew the truth but nevertheless assisted defendant in perpetrating the fraud upon plaintiff.

Plaintiff discovered the truth only after the decree had been entered approving the property settlement, when subsequent acts and conduct of defendant disclosed it, and defendant's agent, John Gaspar, commendably admitted the falsity of the testimony given in his deposition.

In that connection, the record now before us discloses that defendant's bank and savings and loan balances during the marriage totalled $23,877.26. However, when his deposition was taken, his bank balances totalled but $35, and there were no savings and loan balances in his name. It was found, however, that within a short time after the divorce decree was entered, such balances were restored to a total of $15,883.18. The price of a new car, a loan made by defendant to John Gaspar, and payment of current bills would account for the difference. During the marriage defendant owned real estate mortgages totalling $29,241.16, allegedly sold to John Gaspar, which assignments thereof predating the marriage, all being false and part of the plan to defraud plaintiff, were reassigned to defendant after the divorce decree had been entered.

At the trial of this proceeding, John Gaspar testified that about December 15, 1948, he took assignments of all the mortgages owned by defendant, and, as directed, then dated them long before the marriage. He repudiated his testimony given by deposition, and admitted its falsity. He testified in substance that before Christmas, 1948, defendant came to his office, told him that his wife had sued him, and because thereof he was in trouble and wanted John Gaspar to help him out. Defendant then had upon his person his money drawn from the banks, some $15,000 or $16,000, plus $5,000 which John Gaspar then borrowed from him. Although so requested by defendant, John Gaspar then refused to take possession of the rest of the money. Defendant also then urged John Gaspar to make the predated deeds aforesaid to his real property, then worth much more than stated by defendant in his deposition, and to personally take assignments of all his mortgages and date them back to a time before the marriage. Thereupon, John Gaspar admitted that he then complied with defendant's requests and prepared the instruments aforesaid, which were all falsely predated, signed, witnessed, and acknowledged. He admitted that some time after decree of divorce was rendered, all of the mortgages were, according to plan, reassigned back to defendant. John Gaspar also admitted that in the meantime he had falsified his own book records with regard to defendant's mortgages to conform to such a plan.

The record discloses beyond any doubt that defendant's representations with regard to his net worth at the time of the marriage, or the filing of plaintiff's action and entry of the decree, were entirely false in that at all times his net worth was in fact more than $100,000.

We conclude that the portion of the divorce decree approving the property settlement here involved should be and hereby is vacated and set aside for the reasons alleged by plaintiff in her petition.

Further, we apply the general rule 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 an award as appears to be fair and equitable." Peterson v. Peterson, 152 Neb. 571, 41 N. W. 2d 847.

In doing so, we conclude that the plaintiff was entitled to recover as alimony the sum of $25,000, which includes the $2,000 already received by her, and that she thus should be and hereby is awarded a judgment against defendant for a total of $25,000 as alimony, together with all costs, both in the district court and in this court, including $2,500 taxed as costs for services rendered by plaintiff's attorney in this court. As will hereinafter be observed, such adjudged sums and costs will be in addition to the $500 attorney's fee already allowed plaintiff in the district court, which should be and is hereby ordered taxed to defendant as a part of such costs in the district court, all of which sums, except the $2,000 already received by plaintiff, shall be a lien upon and payable out of all the property and moneys owned by defendant.

The cross-appeal contended that the allowance to plaintiff of an attorney's fee of $500 for services rendered by her attorney in the district court was without statutory authority. We conclude otherwise.

Section 42-308, R. S. 1943, provides: "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, and award execution for the same; or it may direct such costs to be paid out of any property sequestered, or in the power of the court, or in the hands of a receiver."

In O'Brien v. O'Brien, 19 Neb. 584, 27 N. W. 640, this court held: "In such case, where the divorced wife seeks a modification of the decree for alimony, alleging that the decree was obtained by the fraud of the husband and his agents, the district court has authority to require the husband to pay into court a reasonable sum of money, to enable her to prosecute her action."

The basis of such conclusion was, as a matter of course, that an action to set aside a property settlement and modify a decree for alimony procured by fraud is a proceeding ancillary to the original divorce proceeding and deemed a part thereof, thereby giving the court authority to grant the same relief, including an allowance for attorneys' fees as it had in the original suit. See, also, Knaack v. Knaack, 245 Ill. App. 1; Moran v. Moran, 281 Ky. 739, 137 S. W. 2d 418; Asher v. Asher, 249 Ky. 215, 60 S. W. 2d 592; Logsdon v. Logsdon, 204 Ky. 104, 263 S. W. 728; Lippincott v. Lippincott, 152 Neb. 374, 41 N. W. 2d 232.

This court has also concluded that suit money or attorneys' fees may be allowed or awarded a wife in the exercise of judicial discretion at any stage in divorce litigation, and may be included in the final decree. Willits v. Willits, 76 Neb. 228, 107 N. W. 379, 5 L. R. A. N. S. 767; Brasch v. Brasch, 50 Neb. 73, 69 N. W. 392. In the latter case, citing O'Brien v. O'Brien, *supra,* and other cases, it was said: "The argument is made that the court having dismissed the wife's action, was without authority to render a judgment against the husband for the 'costs and expenses' incurred by the wife in the prosecution of the suit." After quoting from what is now section 42-308, R. S. 1943, the opinion then went on to say: "The theory of appellant's counsel seems to be

that this judgment of the district court awarding the wife 'costs and expenses' incurred in the prosecution of the suit could have been made only by the court before the final decree was pronounced; or, in other words, that the decree appealed from was not rendered during the 'pendency' of the action within the meaning of the statute quoted above. We do not think this contention is tenable."

We conclude that the trial court did not abuse its judicial discretion in allowing plaintiff a $500 attorney's fee, taxable to defendant as costs. Therefore, we affirm only that part of the judgment, but reverse the rest of it, and enter judgment for plaintiff in the manner and for the amounts heretofore set forth.

AFFIRMED IN PART, AND IN PART REVERSED, WITH JUDGMENT FOR PLAINTIFF ENTERED IN THIS COURT.

WALTER F. CLUTE, APPELLEE, V. CHARLES J. MACH, APPELLANT.

45 N. W. 2d 897

Filed February 9, 1951. No. 32911.

1. **Trial: Appeal and Error.** In a law action tried to a jury on substantially conflicting evidence and under proper instructions, the verdict of the jury will not be disturbed.
2. **Appeal and Error.** To justify a reversal of the judgment of the district court, error must affirmatively appear.

APPEAL from the district court for Grant County: ERNEST G. KROGER, JUDGE. *Affirmed.*

C. M. Skiles and *Ralph S. Moseley,* for appellant.

L. C. Hungerford, for appellee.

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

SIMMONS, C. J.

This is an action to recover the reasonable and agreed

price for the drilling of a well and the erection of a windmill on defendant's ranch, and for labor, supplies, and materials, all in the sum of $120 and interest.

Defendant answered that the agreement was that plaintiff was to put down two wells at $60 each and had put down only one. Defendant cross-petitioned and asked $20 for hauling plaintiff's machinery to town on two occasions for repairs, for furnishing board and room to plaintiff of the reasonable value of $25, and for failure to put down the second well he alleged $215 damage. Defendant prayed for a $260 judgment. The reply was a denial. Trial was had. The jury found for plaintiff on his petition for $120 and against defendant on his cross-petition. Defendant appeals. We affirm the judgment of the trial court.

Plaintiff's evidence is that he agreed to put down two wells for the defendant at the agreed price of $60 for drilling, $20 for erecting the windmill tower, and that the defendant was to pay for all materials used, and also was to furnish board and room at a restaurant and hotel in Mullen because of inadequate accommodations at the defendant's ranch. Plaintiff's evidence is that the first well was drilled and the windmill erected. During that time plaintiff, an employee, and defendant stayed at a hotel in Mullen and ate at a restaurant, defendant paying these expenses. On the evening of the second day defendant had a dispute with the manager of the hotel and was ordered out. Defendant the next day insisted that plaintiff and his helper stay at the ranch, which plaintiff said involved sleeping on the floor. Plaintiff refused, a discussion followed, and plaintiff asked for his pay for the one well. Defendant refused to pay. Plaintiff stopped the work and this suit followed.

Defendant's first assignment is that the court committed prejudicial error in permitting the hotel manager to testify over objection as to her version of the dispute with the defendant. The record shows that before this evidence was admitted plaintiff had testified to sub-

stantially the same thing. A motion to strike the plaintiff's testimony was overruled. That ruling is not assigned as error here.

Later, and before the questioned evidence was admitted, plaintiff testified that they completed the drilling of the first well and erected the windmill the second day; that he and defendant then talked about the drilling of the second well; that defendant said plaintiff would have to stay at the ranch because " 'she run me out and I can't stay there' "; and that he, plaintiff, refused to do that and packed up his equipment and left. The evidence went to the question of the reason for plaintiff's failure to drill the second well.

We see no prejudicial error in the admission of the evidence.

At the close of all the evidence defendant moved for a directed verdict on the ground that the evidence was insufficient to sustain a verdict in favor of the plaintiff. Defendant assigns the denial of this motion as error. Plaintiff testified as to the agreement and as to the items that went to make up the total of $120. An itemized statement showing a total of $130 was offered in evidence. Defendant objected to one $10 item and announced that "there is no dispute about the others." Clearly under these circumstances defendant was not entitled to a directed verdict in his favor.

Defendant assigns as error that the amount of the recovery is excessive. This is based upon three contentions. The first is that defendant was entitled to recover $20 on his cross-petition for two trips to town with plaintiff's machinery for repairs. Defendant testified that plaintiff asked him to render this service; that he did so; and that the reasonable value of this service was $20. Plaintiff testified that when he needed to go to town with some of his machinery, he had his own truck available, but that defendant offered to take it to town for repairs, and that on the way in defendant's truck stalled

and someone else completed the hauling. The evidence is indefinite.

The next contention is that defendant should have been allowed $25 for meals and lodging furnished plaintiff. Plaintiff testified that it was a part of their agreement for defendant to provide those items. The defendant testified that he paid for meals and lodging as an advance to plaintiff.

Defendant's next contention is that he was entitled to damages for plaintiff's failure to complete the two-well contract and that plaintiff was not entitled to recover until both wells were dug. Plaintiff testified that he agreed to dig the two wells and in effect that defendant breached the contract by refusing to furnish room and board in Mullen; that plaintiff then refused to go ahead; that he asked defendant to pay him for the one well; that defendant said he didn't know whether he had any money in the bank; and that plaintiff then said he was sure he did not want to put the other well down. On this last feature of the evidence, defendant's testimony on cross-examination is: "Q And didn't you tell him you didn't think you had enough money in the bank to pay him? A I already said I did, but I could change it the other way, to have it both ways to be sure. Q You could have it both ways, did you tell him you didn't have enough money in the bank then? A Not right then."

As to damages, defendant testified that he hauled out material for the second well at the reasonable value of $15, and that he "estimated" $200 for loss of use of the second well. That is the extent of the evidence.

These issues were submitted to the jury under instructions that are not questioned here.

The rule is: "In a law action tried to a jury on substantially conflicting evidence and under proper instructions, the verdict of the jury will not be disturbed." Coryell v. Robinson Outdoor Advertising Co., 140 Neb. 855, 2 N. W. 2d 106.

Defendant testified that he paid $25.10 for room and meals for plaintiff and his employee and that the receipts showing the payment had been turned over to his then trial lawyer, who forgot to bring them to court. Defendant contends that he is entitled to a new trial because of that situation. There is no dispute in the record that defendant paid for the room and meals of plaintiff. Plaintiff so testified. The receipts, if produced, would have been merely cumulative evidence of a fact not in dispute. Defendant knew of these receipts before trial. The failure to produce them was defendant's. He shows no diligence. Obviously he is not entitled to a new trial on that ground.

The rule is: "To justify a reversal of the judgment of the district court, error must affirmatively appear." Wilson v. Dallas, 84 Neb. 605, 121 N. W. 1128.

We find no merit in this appeal.

The judgment of the trial court is affirmed.

AFFIRMED.

ARCHER-DANIELS-MIDLAND COMPANY, APPELLANT, V. BOARD OF EQUALIZATION OF DOUGLAS COUNTY, NEBRASKA, APPELLEE.

46 N. W. 2d 171

Filed February 13, 1951. No. 32847.

1. **Statutes: Taxation.** Grain brokers are required, in the taxing district where the principal office or place of business is located, to list and return the average amount of capital invested in such business in excess of real estate and other tangible property separately assessed for the preceding year.
2. ———: ———. The average amount of capital invested in the business of a grain broker in excess of real estate and other tangible property separately assessed bears the same rate as tangible property.
3. ———: ———. The classification of grain brokers for purposes of assessment and the provision for assessment of them on the basis of the average investment in grain in the State of Ne-

braska under sections 77-1222, 77-1223, and 77-1224, R. R. S. 1943, is a valid and constitutional exercise of legislative power.

4. ———: ———. An investment in grain which grain never entered the State of Nebraska is not taxable under sections 77-1222, 77-1223, and 77-1224, R. R. S. 1943.

5. ———: ———. Neither tangible personal property nor the investment of a grain broker in grain which has not acquired a situs in this state is subject to an ad valorem tax under sections 77-1222, 77-1223, and 77-1224, R. R. S. 1943.

6. **Commerce: Taxation.** Property in transit in interstate commerce through this state only as an incident to its transfer to some other state acquires no situs for taxation and is not taxable in this state.

7. ———: ———. Property purchased in transit within this state which does not thereafter lose its character as property in transit in interstate commerce until it reaches its destination outside the state is not taxable under sections 77-1222, 77-1223, and 77-1224, R. R. S. 1943.

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

Abrahams, Kaslow & Carnazzo, for appellant.

James J. Fitzgerald and *Henry C. Winters,* for appellee.

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

YEAGER, J.

This is an appeal by Archer-Daniels-Midland Company, plaintiff and appellant, from a decree of the district court affirming a valuation fixed by the board of equalization of Douglas County, Nebraska, upon the tangible property of the plaintiff. The board of equalization is defendant and appellee.

The factual background is that the plaintiff is a Delaware corporation with a place of business in the city of Omaha, Nebraska. It is engaged in the business of a grain broker. For the year 1949 it filed a personal property tax schedule wherein is listed certain intangible property, and tangible property consisting of office fixtures valued at $550. The county assessor increased

the valuation of tangible property to $28,330. The plaintiff filed a complaint with the board of equalization protesting the increase and requesting that the valuation be fixed by the board at $550. The board fixed the valuation at $14,480.

From the action of the board plaintiff appealed to the district court where, after trial, the district court affirmed the action of the board. From this action of the court the plaintiff has appealed.

The assignments of error are that the findings and judgment are contrary to law and contrary to and not sustained by the evidence, and that the court erred in overruling the motion for new trial.

From the face of the transcript it appears simply that the increase in valuation made by the county assessor and also the increase by the board of equalization contemplated a value of tangible personal property in the county above the valuation of $550 contained in the return of the plaintiff. However, from an examination of the pleadings and proceedings in the district court together with the transcript from the board of equalization it is apparent that neither before the board of equalization nor in the district court was it so considered but on the contrary it represented the average amount of the total investment in the business of the plaintiff as a grain broker. The parties tried the matter in the district court on this theory without objection on behalf of either party. While the defendant adduced no evidence the stipulations of the parties entered into coupled with the evidence adduced by the plaintiff make it clear that this is the theory on which the matter was considered by the parties from beginning to end.

Section 77-1222, R. R. S. 1943, separately classifies grain brokers for taxation. There is no question but that the plaintiff is a grain broker. Hence there is no necessity for the definition of a grain broker here.

The method for assessment of the class is provided by section 77-1223, R. R. S. 1943, as follows: "Every per-

son engaged in any business defined in section 77-1222 shall, in the taxing district where the principal office or place of business is located, list and return the average amount of capital invested in such business in excess of real estate and other tangible property separately assessed, for the preceding year."

Section 77-1224 provides: "The assessor shall determine the average amount of the total investment in the business, and the amount, if any, by which the average total investment exceeds the value of the real estate and tangible property separately assessed. * * * The excess, if any, of the average total investment shall be separately listed and shall be taxed at the same rate as the tangible property and this tax shall be in lieu of all other taxes thereon."

The substantial contention of the plaintiff is that it is not subject to taxation on the difference between the $550 reported in the return and $14,480 for the reason that it had no capital invested in its business within the meaning of sections 77-1223 and 77-1224, R. R. S. 1943.

It did however by stipulation agree in substance that through its office in Omaha, Nebraska, it had invested capital the fair average of which was $14,480. The stipulation is as follows: "It is stipulated that, subject to the ruling of the Court on the matters of law involving the situs and related matters, that the valuation placed by the Board of Equalization on the overall capital invested at $14,480 is a fair and just assessment."

The theory of its contention is that it had no capital invested within and subject to the taxing jurisdiction of the state, that is that no grain in which it had capital invested ever had a situs for taxing purposes within the state, and therefore the action of the board of equalization was unconstitutional and void.

Plaintiff urges in its brief that all grain purchased in the state was in transit to a point beyond the state, that other grain was purchased through the Omaha

office which never at any time entered the state, and hence none of its invested capital was subject to taxation under the statute mentioned.

As we interpret the pleadings, the briefs, and the decree of the district court the issues considered and determined were: First, whether or not the classification and method of assessment for taxing purposes provided in sections 77-1222, 77-1223, and 77-1224, R. R. S. 1943, were a valid and constitutional exercise of legislative power; and second, if this is a valid and constitutional exercise of legislative power then whether or not the assessment against the investment contemplated by the board of equalization was a valid exercise of power under this classification and method of assessment.

The question of whether or not the record contains sufficient facts upon which to base a determination of these issues is in doubt. However since there is some evidence to support a determination, and the briefs have presented these issues, and the district court made its determination thereon we will assume the sufficiency of the facts and make a determination accordingly.

The constitutionality of these provisions of the statute within the purview indicated will be considered first. One of the phases within this purview has already received the attention of this court. It has been held that this statute which empowers the taxing authorities to assess for taxing purposes the average investment of a grain broker in grain where the investment was in the State of Nebraska is a valid and constitutional exercise of legislative power.

This court in Central Granaries Co. v. Lancaster County, 77 Neb. 319, 113 N. W. 199, after pointing out factually that it was investment in grain in the State of Nebraska that was involved in this case, in upholding the constitutionality of this legislation said: "If the legislature has power to 'require the assessment of average capital' instead of the assessment of the property owned at some specified time, and if there is a special

and sufficient reason for using this method in assessing those engaged in buying and selling grain for profit, a reason that does not apply to assessment in general, then there can be no doubt of the power of the legislature to so classify such interests for assessment."

In the syllabus it was said: "The classification (laws 1903, ch. 73, sec. 66) of 'every person, company or corporation engaged in the business of buying and selling grain for profit' as a 'grain broker,' for purposes of assessment, and providing for the assessment of the average capital of grain brokers, is not unconstitutional."

This case was before this court on hearing and twice on motion for rehearing. On the first appearance the legislation was held unconstitutional. On the second it was held constitutional as above indicated. On the third a rehearing was denied. The first opinion is reported as 77 Neb. 311, 109 N. W. 385, and the third as 77 Neb. 327, 113 N. W. 543.

The determination made at that time has not been disturbed by any later decision of this court. We think the reasons set forth therein are sound and that the conclusions therein should be adhered to in this case.

In this case a part of the investment was in grain purchased in Nebraska and a part in grain which never at any time came into the state. Apparently about 70 percent was used for purchase of grain in Nebraska and about 30 percent outside.

The appellee contends and the district court held effectually that the statute was constitutional and that under it the assessing authorities could properly assess on the basis of investment in grain through the Omaha office of the appellant whether the investment be in grain in the State of Nebraska or without.

Whether or not the Legislature intended this statute to apply to investment in grain outside the state as well as within is not ascertainable from the language of the statute itself. If that was the intention we are of the opinion that to the extent that it seeks to permit the

assessment of investment outside the state it is unconstitutional and void.

The parties agree that the tax contemplated by the statute is an ad valorem property tax. The statute and the interpretation of it contained in Central Granaries Co. v. Lancaster County, *supra,* make clear that the design of it is to provide a particular method for assessing tangible property having a taxable situs in the State of Nebraska.

The grain in which investment was made outside the state and which thereafter never came into the state of course never had a taxable situs within the state. It appears reasonable therefore to say that the investment which was the representative and substitute for the grain could not be said to have a taxable situs in the state. The investment was no more in the state than was the grain in which it was invested. The investment insofar as the State of Nebraska is concerned was nothing more nor less than a bookkeeping entry on the books of the appellant.

The reasoning of the following cases supports this conclusion: Bank of Commerce v. New York City, 2 Black 620, 17 L. Ed. 451; Bank Tax Case, 2 Wall. 200, 17 L. Ed. 793; Farmers & Mechanics Sav. Bank v. Minnesota, 232 U. S. 516, 34 S. Ct. 354, 58 L. Ed. 706; New Jersey R. T. Ins. Co. v. Division of Tax Appeals, 338 U. S. 665, 70 S. Ct. 413, 94 L. Ed. 439; Delaware, L., & W. R. R. Co. v. Pennsylvania, 198 U. S. 341, 25 S. Ct. 669, 49 L. Ed. 1077.

The authorities hold that tangible personal property is not subject to an ad valorem tax in a taxing jurisdiction unless such property has acquired a situs in such jurisdiction. Hays v. The Pacific Mail Steamship Co., 17 How. 596, 15 L. Ed. 254; Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 26 S. Ct. 36, 50 L. Ed. 150; Wheeling Steel Corp. v. Fox, 298 U. S. 193, 56 S. Ct. 773, 80 L. Ed. 1143; 51 Am. Jur., Taxation, § 453, p. 468, and § 860, p. 767; Annotation, 110 A. L. R. 707.

The plaintiff on another theory contends that the investment in grain purchased in Nebraska was not subject to taxation under this statute, or in fact under any other statute or recognized principle of law. The theory is that all grain purchased in Nebraska was in transit in interstate commerce at the time of purchase and it so continued after purchase until it arrived in Council Bluffs, Iowa, and thus being at all times in transit in interstate commerce while in Nebraska it could not have and did not acquire a taxable situs in this state.

The evidence is none too clear on the question of whether or not this grain was at all times in transit in interstate commerce but because of the theory on which the case was apparently presented and clearly considered by the district court and because of the character of the presentation by the briefs here we will assume that it was sufficient to show that it was so in transit.

So assuming, it becomes necessary to say that this portion of the investment was not subject to taxation in this state.

It is well settled that property in interstate commerce through a state and which comes into a state only as an incident to its transfer to some other state acquires no situs for taxation and is not taxable in such state. This rule applies as well to property purchased in transit within the state which does not thereafter lose its character as property in transit in interstate commerce until it reaches a destination outside the state. Kelley v. Rhoads, 188 U. S. 1, 23 S. Ct. 259, 47 Ed. 359; Champlain Realty Co. v. Brattleboro, 260 U. S. 366, 43 S. Ct. 146, 67 L. Ed. 309, 25 A. L. R. 1195; Annotation, 25 A. L. R. 1201; 51 Am. Jur., Taxation, § 455, p. 469; 2 Cooley, Taxation (4th ed.), § 452, p. 982.

We conclude therefore, it appearing that the investment in grain purchased in Nebraska was grain in transit in interstate commerce, that the assessment thereon by the appellee was void.

The contention that the cause was presented to the

district court on issues different from those presented to the board of equalization may not be considered here. The record does not disclose that any such objection was made to the district court and exception thereto preserved. Stitcher v. Cox, 52 Neb. 532, 72 N. W. 848.

The decree of the district court is reversed and remanded with directions to enter a decree in favor of the appellant in accordance with the conclusions arrived at herein.

REVERSED AND REMANDED WITH DIRECTIONS.

KENNETH KITTS, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.
46 N. W. 2d 158

Filed February 13, 1951. No. 32860.

1. **Burglary: Evidence.** The material elements of the crime of breaking and entering with felonious intent, as defined by section 28-532, R. R. S. 1943, may be proved by direct or circumstantial evidence.
2. ———: ———. Likewise, the material elements of the crime of possession, custody, or control of instruments or tools, with intent feloniously to break and enter, as defined by section 28-534, R. R. S. 1943, may be proved by direct or circumstantial evidence.
3. **Evidence: Criminal Law.** The test by which to determine the sufficiency of circumstantial evidence in a criminal prosecution is whether the facts and circumstances tending to connect accused with the crime charged are of such conclusive nature as to exclude every reasonable hypothesis except that of his guilt.
4. ———: ———. It is the province of the jury to determine the circumstances surrounding and which shed light upon the alleged crime; and if, assuming as proved the facts which the evidence tends to establish, they cannot be accounted for upon any rational theory which does not include the guilt of the accused, the proof cannot, as a matter of law, be said to have failed.
5. **Trial: Criminal Law.** The unsupported testimony of the accused in a criminal case, which the jury does not believe, cannot be said to furnish a hypothesis consistent with the innocence of the accused.
6. ———: ———. The court in a criminal action will not inter-

fere with a verdict of guilty based upon conflicting evidence, unless it is so lacking in probative force that we can say, as a matter of law, that it is insufficient to support a finding of guilt beyond a reasonable doubt.

7. **Juries.** If the voir dire examination of a juror, considered as a whole, does not show incompetency, a challenge upon that ground is properly overruled, although during the examination statements are made which, if unexplained, might be ground for challenge.

8. ———. The qualifications of a juror, when challenged for cause, are to be determined by the trial court from a consideration of his entire examination and such other evidence and circumstances as tend to throw light upon the subject. The appearance and general demeanor of the juror while being examined may be taken into consideration in determining his competency to serve.

9. ———. The finding of the trial court in deciding a challenge for cause, will not be set aside by the appellate court, unless it is clearly wrong.

10. ———. An opinion formed by a juror does not ordinarily affect his competency, or afford cause for challenge, unless it is unqualified as to the guilt or innocence of the accused as to the offense charged.

11. **Trial: Witnesses.** Where a deceased witness testified upon a former trial of the same party for the same offense, being brought face to face with the accused and cross-examined by him, it is competent, upon a subsequent trial, to prove the testimony of such deceased witness, and such proof does not violate the provisions of the Constitution of the state which gives to the accused the right to meet the witnesses against him face to face.

12. ———: ———. In that connection, when the State offers the testimony of such a deceased witness, it is analogous to the situation presented if the witness were living and had been offered to testify for the State.

13. ———: ———. In other words, counsel for the State may in such a case offer and read such testimony as he desires, to which no objection is made or which is competent, relevant, and material, under the issues presented, and is not required to offer or read all of the testimony.

14. ———: ———. On the other hand, counsel for defendant may offer and read, if he so desires, not only the cross-examination but also any omitted portions of the direct evidence, as evidence introduced by him who first offered it. Both situations are, however, subject to the test of competency, relevancy, and materiality.

15. **Trial: Juries.** The publication of newspaper articles prior to the trial is not ground for a continuance where defendant has been given ample opportunity to determine on voir dire examination whether any of the prospective jurors have formed or expressed an opinion as to the guilt or innocence of the defendant, as a result of having read such articles.
16. ———: ———. Where the jury has been clearly admonished not to read newspaper accounts of the trial, the granting or denying of defendant's request that the jurors be interrogated during the trial as to whether they have read newspaper accounts rests in the sound discretion of the trial court.
17. ———: ———. When a jury has been clearly admonished not to do a certain act, the mere opportunity to violate that admonition without any proof of its violation provides no basis on which this court can find that the trial court has abused its discretion in refusing to investigate the jury for such possible misconduct.

ERROR to the district court for Douglas County: JAMES T. ENGLISH, JUDGE. *Affirmed.*

Bernard J. Boyle and *Hugh J. Boyle,* for plaintiff in error.

Clarence S. Beck, Attorney General, and *William T. Gleeson,* for defendant in error.

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

CHAPPELL, J.

In a three-count information, defendant was respectively charged with: (1) Breaking and entering; (2) unlawful possession of instruments or tools with intent feloniously to break and enter; and (3) that he was an habitual criminal.

After a plea of not guilty he was tried to a jury upon the first two counts and found guilty upon each as charged. His motion for new trial was overruled, and a hearing was had by the court upon count three, in conformity with sections 29-2221 and 29-2222, R. R. S. 1943. In view of the record and undisputed fact that defendant had been convicted of felonies upon four previous

occasions, two of which were for breaking and entering, the trial court sentenced him to serve 12 years in the Nebraska State Penitentiary under count one, and for a like period under count two, such sentences to run concurrently and not consecutively.

Therefrom defendant prosecuted error to this court: (1) Challenging sufficiency of the evidence to sustain his conviction upon either count one or two; (2) contending that the trial court erred prejudicially in overruling his challenge for cause of a juror required to serve because defendant's peremptory challenges had all been exhausted; (3) erred prejudicially in overruling defendant's objection to the reading of only a portion of the testimony given by a witness at a former trial of the same case, who was since deceased; and (4) that the publication of alleged false and prejudicial newspaper articles prior to and during the trial prevented defendant from having a fair trial. We conclude that defendant's contentions have no merit.

Upon the conclusion of the State's case-in-chief, and again at conclusion of all the evidence, defendant moved to instruct the jury to return a verdict of not guilty, or in the alternative to discharge the jury and exonerate defendant upon both counts, because the evidence as a matter of law was insufficient to sustain the material allegations of the information. Such motions were properly overruled by the trial court.

The sufficiency of the evidence must be determined in the light of well-established rules of law. In that regard, the material elements of the crime of breaking and entering with felonious intent, as defined by section 28-532, R. R. S. 1943, may be proved by direct or circumstantial evidence. Young v. State, 133 Neb. 644, 276 N. W. 387; Ayres v. State, 138 Neb. 604, 294 N. W. 392.

Likewise, the material elements of the crime of possession, custody, or control of instruments or tools with intent feloniously to break and enter, as defined by

section 28-534, R. R. S. 1943, may be proved by direct or circumstantial evidence. O'Neill v. State, 105 Neb. 824, 182 N. W. 503; State v. Furlong, 216 Iowa 428, 249 N. W. 132.

Concededly, as held in Morgan v. State, 51 Neb. 672, 71 N. W. 788: "The test by which to determine the sufficiency of circumstantial evidence in a criminal prosecution, is whether the facts and circumstances tending to connect the accused with the crime charged are of such conclusive nature as to exclude to a moral certainty every rational hypothesis except that of his guilt.

"It is the province of the jury to determine the circumstances surrounding, and which shed light upon, the alleged crime; and if, assuming as proved the facts which the evidence tends to establish, they can be accounted for upon no rational theory which does not include the guilt of the accused, the proof cannot, as a matter of law, be said to have failed. (Casey v. State, 20 Neb., 138.)" See, also, Maher v. State, 144 Neb. 463, 13 N. W. 2d 641, 323 U. S. 757, 89 L. Ed. 606, 65 S. Ct. 91.

It should be borne in mind, however, that: "The unsupported testimony of the accused in a criminal case, which the jury do not believe, cannot be said to furnish an hypothesis consistent with the innocence of the accused." Binfield v. State, 15 Neb. 484, 19 N. W. 607. See, also, Carleton v. State, 43 Neb. 373, 61 N. W. 699.

Referring to other cited cases, it is stated in Watson v. State, 141 Neb. 23, 2 N. W. 2d 589: "They do not, however, change the rule, long followed and stated by this court in Vinciquerra v. State, 127 Neb. 541, 256 N. W. 78, as follows: 'To justify conviction on circumstantial evidence, it is necessary that the facts and circumstances essential to the conclusion sought must be proved by competent evidence beyond a reasonable doubt, and, when taken together or as a whole, must be of such a character as to be consistent with each other, and with the hypothesis sought to be established thereby,

and inconsistent with any reasonable hypothesis of innocence.'

" 'Where in a criminal case the evidence is circumstantial, the circumstances established, must, to warrant a conviction, be such as to exclude every reasonable hypothesis except that of the defendant's guilt. But this rule merely requires the exclusion of such hypotheses as are based on circumstances established by the evidence. It does not require the jury to acquit because of evidence which, if believed, would establish facts consistent with innocence, but which evidence the jury is justified in disbelieving.' Carleton v. State, 43 Neb. 373, 61 N. W. 699.

"The jury had for its consideration the evidence found at the scene of the crime * * *. This evidence, together with other facts not now summarized, was clearly sufficient, if believed, as it apparently was, to sustain the conviction. Defendant's evidence was either in denial or explanation of the state's evidence and an alibi. His principal alibi witness admitted that he had pleaded guilty to a felony. The defendant's evidence, if true, would be inconsistent with his guilt. But the jury had the right to reject and disregard, as it evidently did, the testimony as improbable and untrue. Smith v. State, 61 Neb. 296, 85 N. W. 49."

The ultimately applicable rule in the case at bar is that: "This court, in a criminal action, will not interfere with a verdict of guilty, based upon conflicting evidence, unless it is so lacking in probative force that we can say, as a matter of law, that it is insufficient to support a finding of guilt beyond a reasonable doubt." Williams v. State, 115 Neb. 277, 212 N. W. 606.

The material evidence adduced by the State may be summarized as follows: At approximately 12:30 a. m., December 22, 1947, a bartender employed at the Eagles Lodge in South Omaha closed down the bar, located adjacent to the clubroom in the basement of the lodge hall. He checked to see that all windows, except those

located in a small kitchen and storage room, were closed in the basement, and then turned off the lights. He closed and locked all barroom doors and received from an employee in the Omaha office of the American District Telegraph Company, which furnished automatic burglar alarm and fire protection, an oral confirmation by telephone that the barroom burglar alarm system was in proper order, thus affirming that all necessary electrical devices which were connected with it had been put into operation by closing and locking the doors leading into the barroom where all cash receipts were left in a cabinet over night. He then left the building by the front door, locking the doors leading into the clubroom in the basement, and the outer door leading into the building.

At 1:20 a. m. the barroom burglar alarm was set off, and the police were immediately notified by the telegraph company from its Omaha office. Police in several cars drove almost immediately to the Eagles Lodge and two detectives, while checking the exterior of the building, exchanged several pistol shots with an unidentified man who fled from the scene and was pursued but not apprehended. A basement window on the east side at the northeast corner of the building, not theretofore observed to have been opened, was found open and two crowbars were found lying on the window sill. At another basement window on the west side of the building, another officer saw a shadow. He remained at that window, sawed-off shotgun in hand, to watch while other officers and a telegraph company employee first unlocked the building's outer door, then the inner doors, and entered the clubroom in the basement, and until "somebody hollered that they had the man."

The defendant Kitts, four times previously convicted as a felon, wearing gloves, armed with a fully-loaded Colt 38 special pistol protruding from his right pants pocket, was found concealed behind some tables stacked

in the clubroom, adjacent to the barroom in the basement. On the floor near the defendant was found an unzipped kit, containing 76 loaded shells which fit defendant's pistol, paraphernalia, and various kinds of tools which the testimony of a police expert disclosed were suitable and generally used by burglars for breaking and entering buildings and safes. The nature of each, and the use to which each tool in the kit could be put by a burglar, was explained by an expert, who said: "They are the most complete and finest set of burglary tools that I have ever seen in one collection."

Examination of a door leading from the clubroom into the barroom disclosed that the door had been forced or pried open at a point near the lock and that traces of the application of force were there manifest by impressions in the wood caused by use of some of the burglar tools heretofore discussed and described, which tools were fitted by police into the marks that appeared on the door around not only the lock on the door, but also on the window through which the other unidentified person had evidently entered and escaped.

Defendant testified in substance, without corroboration from any other witness, that he walked into the lodge hall at an hour which he could not fix, by following other persons through the open door, a bingo game being the thing that attracted him to the building; that he sat down in the basement clubroom, somewhat intoxicated, and groggy from protracted excessive consumption of alcoholic liquor; that becoming sick to his stomach, he started for the men's toilet, but inadvertently entered a room immediately adjacent to the ladies' rest room; that discovering where he was, he sat down and remained there an indeterminable length of time, until he heard shots fired and persons moving about outside the building, when he came out and, confused, concealed himself behind the tables. He denied that he broke and entered the place in any manner, and denied that he

had ever seen or had any custody or possession of the burglar tools found near him.

Officers who had an opportunity to observe defendant in the basement where he was arrested and in jail where he was booked for investigation testified substantially that defendant did not, by speech, action, behavior, or odor, manifest any of the signs which would ordinarily indicate that he had been under the influence of or had recently consumed any alcoholic liquor.

In the light of the rules heretofore stated, we conclude that the evidence was amply sufficient to sustain the verdict and sentence.

In connection with defendant's second contention, this court has held that: "If the voir dire examination of a juror considered as a whole does not show incompetency, a challenge upon that ground is properly overruled, although during his examination statements are made which, if unexplained, might be ground for challenge." Keeler v. State, 73 Neb. 441, 103 N. W. 64. See, also, Whitcomb v. State, 102 Neb. 236, 166 N. W. 553.

In Basye v. State, 45 Neb. 261, 63 N. W. 811, this court held: "The fact of qualifications of a juror, when challenged for cause, is to be determined by the trial court from a consideration of his entire examination and such other evidence and circumstances as tend to throw light upon the subject. The appearance and general demeanor of the juror while being examined may be taken into consideration in determining his competency to serve.

"The finding of the trial court, in deciding a challenge for cause, will not be set aside by the appellate court, unless it is clearly wrong.

"An opinion formed by a juror does not affect his competency, or afford cause for challenge, unless it is unqualified as to the guilt or innocence of the accused of the offense charged."

The record does disclose answers to questions propounded by defendant's counsel upon voir dire, which

standing alone and unexplained, would seemingly disqualify the juror. Such answers were, however, simply hypothetical answers given in answer to hypothetical questions, qualified by assumed implications, without full disclosure of their factual significance or proper legal application. After proper disclosure and explanation thereof and further proper inquiry by the court, it was disclosed that she was qualified to serve. An examination of all the questions and answers discloses that she had never formed or expressed an opinion with regard to the guilt or innocence of accused, and that she could and would try the case fairly and impartially upon the evidence and in conformity with the law as set forth in the court's instructions. From a consideration of the whole examination, the trial court could and did reasonably and fairly conclude that the juror was competent. We are therefore unable to conclude that denial of defendant's challenge for cause was clearly wrong.

Defendant concedes the rule to be that: "Where a deceased witness testified upon a former trial of the same party for the same offense, being brought 'face to face' with the accused and cross-examined by him, it is competent, upon a subsequent trial, to prove the testimony of such deceased witness, and such proof does not violate the provisions of the constitution of the state which gives to the accused the right to 'meet the witnesses against him face to face.'" Hair v. State, 16 Neb. 601, 21 N. W. 464.

In the case at bar, however, only a part of the testimony given at a former trial by a police officer thereafter deceased, was offered and read by the State. In that connection, defendant argued that the State should have been required to offer and read all of such witness' testimony. During the trial defendant objected to counsel for the State reading such testimony, "unless the STATE reads all of the testimony." The objection was overruled and the court stated: "He may read what he cares to read and you may read whatever you care

to read that is material to the present case * * * the present trial."

After the State had offered part of such evidence, defendant was given permission by the court to take all of the evidence for examination and study over adjournment. Thereafter, without objection, defendant offered and read such competent, relevant, and material portions of the evidence adduced as he desired, including both direct and cross-examination of such witness.

This court has never passed directly upon the question, but other courts have done so, and the logical rule seems to be that when the State offered the testimony of such a deceased witness, it was analogous to the situation presented if the witness were living and had been offered to testify for the State. In other words, counsel for the State may in such a case offer and read such testimony as he desires, to which no objection is made or which is competent, relevant, and material under the issues presented, and is not required to offer or read all of the testimony.

On the other hand, counsel for defendant may offer and read, if he so desires, not only the cross-examination but also any omitted portions of the direct evidence, as evidence introduced by him who first offered it. Both situations are, however, subject to the test of competency, relevancy, and materiality. Waller v. State, 102 Ga. 684, 28 S. E. 284; Annotation, 159 A. L. R. 119.

Defendant cites no authority, and we find none requiring the State to offer and read all of such evidence. We conclude that defendant's third contention has no merit.

The case at bar was set for trial on March 20, 1950, in conformity with section 29-1821, R. R. S. 1943. On that date, defendant was not present in court, so the trial court adjourned the case until March 21, 1950, and overruled defendant's application for a continuance until May 1, 1950. On March 21, 1950, defendant moved for a rescinding of the court's order of the previous day and

for a continuance until May 1, 1950, contending that because of the previous publication of newspaper articles, defendant's right to a fair trial was prejudiced. The motion was overruled, and we conclude properly so..

The ten published articles offered in support of such motion, appeared during the period from January 23, 1950, to March 17, 1950. The jury was not selected until March 22, 1950. Therefore, defendant had ample opportunity to have determined on voir dire examination whether any of the prospective jurors had formed or expressed an opinion as to the guilt or innocence of the defendant as a result of having read such articles. He took advantage of that opportunity with reference thereto, and cannot now complain that such articles prejudiced his right to a fair trial. The provisions of sections 25-1623 and 29-2006, R. R. S. 1943, clearly manifest that voir dire furnishes a defendant ample opportunity to establish whether or not prospective jurors have been prejudiced by such articles.

Likewise, seven such articles in the same category were offered in connection with defendant's motion for a new trial. All of them were published during the period from January 28, 1950, to the morning edition of March 22, 1950, prior to selection of the jury. All other articles so offered were published during the period of the trial from March 22, 1950, to March 30, 1950. An examination of them discloses that they contained simply a factual report of the proceedings without falsification, unfair or inflammatory elaboration, or distortion. In that connection, we find no reason for granting a new trial.

Further, the record discloses that once the jurors were sworn, and thereafter from adjournment to adjournment of the trial, the court continuously, meticulously, and at great length, with unusual clarity and emphasis, admonished the jury to keep an open and impartial mind, and not talk with each other or with any other person about the case, and not to read anything published in the newspapers or listen to anything that might be broad-

cast over the radio concerning the trial during its progress.

Nevertheless, on March 24, 1950, during the trial, defendant moved that the court interrogate the jury as to whether any member thereof had read an article published on March 24, 1950, and if so, to instruct the juror or jurors to disregard the article as false and untrue. There was no showing of any kind that any juror had violated in any manner the admonitions of the court, and the court overruled the motion. In the light of the record, and an examination of the article, we conclude that the ruling thereon was without prejudice to defendant.

In that regard, a recent case, State v. DeZeler, 230 Minn. 39, 41 N. W. 2d 313, sustains such conclusion. Therein it was said: "It was not error to deny defendant's repeated requests that the jury be polled to determine if they had read certain newspaper articles pertaining to the crime and the conduct of the trial. On several occasions the trial court cautioned the jurors not to read the newspapers. Where the jury has been clearly admonished not to read newspaper accounts of the trial, the granting or denial of a defendant's request that the jurors be interrogated during the trial as to whether they have read newspaper accounts or headlines rests in the sound discretion of the trial court. People v. Phillips, 120 Cal. App. 644, 8 P. (2d) 228; 23 C. J. S., Criminal Law, § 1449. When a jury has been clearly admonished not to do a certain act, the mere opportunity to violate that admonition, without a vestige of proof of its violation, provides no basis upon which a court of review can find that the trial court has abused its discretion in refusing to investigate the jury for such possible misconduct. As an essential of a fair and impartial trial, there is no presumption that the jury is likely to take advantage of every opportunity to disregard the cautionary instructions of the court. It is also to be noted that the newspaper articles which were sub-

mitted to the trial court as special exhibits were not so inflammatory, distorted, or misleading that the trial court, in the light of its cautionary instructions, could not have found in the exercise of a sound discretion that a reading thereof by any juror would be nonprejudicial. State v. Soltau, 212 Minn. 20, 2 N. W. (2d) 155; State v. Briggs, 122 Minn. 493, 142 N. W. 823; State v. Williams, 96 Minn. 351, 363, 105 N. W. 265, 270; see, Annotation, 86 A. L. R. 928."

Finding no error in the record prejudicial to defendant, we conclude that the judgment of the trial court should be and hereby is affirmed.

AFFIRMED.

FRED D. BELTNER, APPELLANT, v. CARL H. CARLSON, APPELLEE.

46 N. W. 2d 153

Filed February 13, 1951. No. 32862.

1. **Fraud.** One suffers no damage where he is fraudulently induced to do something which he is under legal obligation to do.
2. **Landlord and Tenant.** By merely assigning a lease the lessee only places his assignee in the same relationship with the lessor as was occupied by the lessee and nothing else is implied as against the assignor. If the assignee desires further assurances from the lessee he must exact express provisions for that purpose.
3. **Fraud.** As a general rule, a misrepresentation which involves a statement of matters of law is one upon which a party cannot rely, as all parties are bound to know the law.
4. ———. To maintain an action for fraudulent representations it is not only necessary to establish the telling of the untruth, knowing it to be such, or that it was told without knowledge of the facts, but also to prove that the plaintiff had a right to rely upon it, and did so rely, and altered his condition because thereof, and suffered damages thereby.
5. ———. It is a general rule that fraud must relate to a present or preexisting fact, and cannot ordinarily be predicated on unfulfilled promises or statements as to future events.

6. ———. However, if an advantage is obtained by fraudulent promises in the nature of the assertion of facts which there was no intention to perform, that is, when the representation is that of a fact in the future and not a mere promise, and it is relied upon and turns out to be false, the remedies of the injured party are the same as where fraudulent misrepresentations are made in regard to existing facts.
7. ———. One of the essential elements of fraud practiced by means of false representations is that the representation must be concerning a matter material to the contract.

APPEAL from the district court for Scotts Bluff County: CLAIBOURNE G. PERRY and HENRY J. BEAL, JUDGES. *Affirmed.*

Neighbors & Danielson, for appellant.

Mothersead, Wright & Simmons, for appellee.

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

WENKE, J.

Fred D. Beltner brought this action in the district court for Scotts Bluff County against Carl H. Carlson. The purpose of the action is to recover damages based on fraud. Judgment was rendered dismissing the action with prejudice. Plaintiff filed a motion for new trial and has appealed from the overruling thereof.

For convenience we shall herein refer to the appellant as Beltner and to the appellee as Carlson.

On November 18, 1943, Beltner owned a ranch in Morrill County, Nebraska. As of that date he entered into an agreement with Carlson whereby he leased these premises to Carlson for the period January 1, 1944, to October 31, 1948. This agreement also contained a provision granting to Carlson the right to purchase the premises at any time during the term of the lease. This option Carlson exercised on June 16, 1948.

The agreement, so far as here material, provided that upon Carlson's exercising the right to purchase Beltner would assign to him the school land leases he then

held upon some 440 acres in Section 36, Township 21 North, Range 50 West, of the 6th P. M., in Morrill County, Nebraska, which lands are fully described in the agreement. When, on November 29, 1948, Beltner and Carlson made settlement, pursuant to Carlson's exercise of this option, there were delinquent and unpaid irrigation taxes assessed against these school land leases. The office of county treasurer of Morrill County, as of November 29, 1948, showed these taxes, together with interest and penalties, to be in the total of $13,491.68. In making settlement of the purchase price Beltner allowed Carlson a credit of $6,745.84, or one-half the amount of these delinquent taxes.

On June 7, 1948, Carlson sold the ranch to Clyde A. Linch who will hereafter be referred to as Linch. The terms of their agreement expressly provided that Carlson was not bound to pay these delinquent irrigation assessments.

Carlson admits, or the evidence establishes, that on or about November 29, 1948, he represented to Beltner that as of June 7, 1948, he had entered into a written agreement with Linch whereby he sold the lands and school land leases to Linch and agreed to convey and assign to him the land and school land leases but that Linch refused to perform and disclaimed any obligation to do so until the delinquent irrigation taxes on the school land leases were fully paid; that unless these taxes were paid Carlson would lose the benefit of his bargain with Linch or would be subject to liability for nonpayment thereof; and that Carlson would attempt, by suit, to recover from Beltner any loss sustained by reason of Linch's failure to perform or for any recovery Linch might have against Carlson because of the nonpayment thereof.

Carlson admits these representations were false and, at the time, known by him to be such. This is self-evident from the terms of Carlson's agreement with Linch. Beltner claims he believed these representations and

relied thereon and pursuant to such belief and reliance acted thereon by allowing Carlson a credit of $6,745.84 on the balance due on the purchase price.

The first question presented is, was Beltner legally obligated to pay these delinquent irrigation taxes under the terms of his agreement with Carlson wherein he agreed to assign to Carlson the school land leases? If he was legally obligated to pay them he could not have been defrauded for it has often been stated: "One suffers no damage where he is fraudulently induced to do something which he is under legal obligation to do * * *." 23 Am. Jur., Fraud and Deceit, § 177, p. 996. See, also, 37 C. J. S., Fraud, § 41, p. 292; Kuper v. Snethen, 96 Neb. 34, 146 N. W. 991; Musconetcong Iron Works v. Delaware, L. & W. R. R. Co., 78 N. J. Law 717, 76 A. 971, 20 Ann. Cas. 178; Record v. Rochester Trust Co., 89 N. H. 1, 192 A. 177, 110 A. L. R. 1218; Field v. National City Bank, 343 Mo. 419, 121 S. W. 2d 769; Plews v. Burrage, 19 F. 2d 412.

Section 76-201, R. R. S. 1943, provides: "The term 'real estate,' as used in sections 76-201 to 76-281, shall be construed as coextensive in meaning with 'lands, tenements and hereditaments,' and as embracing all chattels real, except leases for a term not exceeding one year."

We said in Fawn Lake Ranch Co. v. Cumbow, 102 Neb. 288, 167 N. W. 75: "Defendant insists that his lease is a chattel real, and that such instruments or the rights given thereby are personal property, and hence do not constitute a lease of the land or a sale of any part of it. A number of decisions are cited in support of this proposition. In a number of states chattels real are personal property, but in this state the statute has settled the law in that respect. Rev. St. 1913, sec. 6187 (now section 76-201, R. R. S. 1943). Under section 6187 in the chapter of the statute relating to real property, the term 'real estate' is construed 'as coextensive in meaning with lands, tenements and hereditaments and as embracing all chattels real, except leases for a

term not exceeding one year.' * * * Whatever view may be taken in some states with reference to the nature and character of such an instrument * * * the legislative definition prevails, and the property must be considered as real estate."

Consequently the agreement to assign and the subsequent assignment of these school land leases did not subject Beltner to any implied warranties created by statute in the sale or contract to sell personal property. Nor would the authorities cited from other jurisdictions here apply wherein, on the assignment of a lease, warranties are implied that the title is perfect and free from liens and encumbrances on the theory that a lease is personal property.

After a careful study of the authorities we think the following statement taken from 19 A. L. R. 608 correctly reflects our view: "The authorities on the question whether implied covenants of title or possession result from the assignment of a lease are conflicting. The sounder doctrine would seem to be that no such covenants are implied in the assignment of a lease."

As stated in Miles v. United Oil Co., 192 Ky. 542, 234 S. W. 209, 19 A. L. R. 602: "By merely transferring his lease the lessee only places his assignee in the same relationship toward the lessor as was occupied by the lessee, and all warranties and covenants by the lessor (by implication of law or otherwise) are transferred to the assignee by the assignment. Nothing else is implied as against the assignor and if the assignee desires further assurance from the lessee, his assignor, he should exact express covenants for that purpose."

"The assignment transferring the leasehold from Adams to Howard and thence through mesne assignments to the corporation, was no more than a quitclaim." Arnett v. Stephens, 199 Ky. 730, 251 S. W. 947.

See, also, Rawle's on Covenants for Title (5th ed.), § 272, p. 437; 16 R. C. L., Landlord and Tenant, § 342, p. 843; 32 Am. Jur., Landlord and Tenant, § 355, p.

310; Sanborn v. Cree, 3 Colo. 149; Shannon v. Mastin, 135 Mo. App. 50, 114 S. W. 1127; White v. Murphy (Tex. Civ. App.), 229 S. W. 641; Annotation, 19 A. L. R. 608; Schmidt v. St. Lewis, 174 Okl. 1, 49 P. 2d 521; Alford v. Cobb (N. Y.), 35 Hun. 651; Freeport Sulphur Co. v. American Sulphur Royalty Co., 117 Tex. 439, 6 S. W. 2d 1039, 60 A. L. R. 890; Blair & Gantt v. Rankin, 11 Mo. 440; Waldo v. Hall, 14 Mass. 486.

Under the law applicable thereto we find that the assignment of these school land leases by Beltner to Carlson, in the manner as provided by the lease agreement, did not obligate Beltner to pay these taxes and an examination of the lease agreement as a whole does not disclose that the parties intended otherwise. See section 76-205, R. R. S. 1943.

Any claim or contention that Beltner was or was not obligated to pay these irrigation taxes, under his agreement to assign these school land leases, was not actionable for such were representations relating solely to matters of law.

"The general rule is well settled that fraud cannot be predicated upon misrepresentations of law or misrepresentations as to matters of law. * * * The reasons generally advanced as the basis of the rule that fraud cannot be predicated upon misrepresentations as to matters of law are that everyone is presumed to know the law, both civil and criminal, and is bound to take notice of it. Hence, one has no right to rely on such representations or opinions and will not be permitted to say that he was misled by them." 23 Am. Jur., Fraud and Deceit, § 45, p. 809.

"As a general rule, a misrepresentation which involves a statement of matters of law is one upon which a party cannot rely, as all parties are bound to know the law." Wood v. Roeder, 50 Neb. 476, 70 N. W. 21.

See, also, Upton v. Tribilcock, 91 U. S. 45, 23 L. Ed. 203; 37 C. J. S., Fraud, § 55, p. 323.

The more serious question relates itself to the admit-

tedly false representations made by Carlson to Beltner in regard to Carlson's sale of the land and school land leases to a third person who Carlson represented refused to perform and disclaimed any obligation to perform until the delinquent irrigation taxes on the school land leases were fully paid and that, unless the delinquent irrigation taxes were paid, he (Carlson) would lose the benefit of such agreement or would be subject to liability for nonpayment thereof.

We have said: "To maintain an action for fraudulent representations, it is not only necessary to establish the telling of the untruth, knowing it to be such, or that it was told without knowledge of the facts, but also to prove that the plaintiff had a right to rely upon it, and did so rely, and altered his condition because thereof, and suffered damages thereby." Dyck v. Snygg, 138 Neb. 121, 292 N. W. 119.

Assuming these misrepresentations, which were admittedly made, were material, it is evident from Beltner's testimony that he did not rely and act thereon.

On November 29, 1948, Beltner and Carlson met in the office of Beltner's counsel to attempt to make a settlement. At that time Carlson, in addition to what has already been set forth, told Beltner he would attempt to recover from him either any loss he might sustain by reason of the failure of his purchaser to perform because these taxes were not paid or for any amount he might have to pay as a result of their nonpayment and would bring suit against him for that purpose if settlement could not be made between them to pay these taxes on a fifty-fifty basis. Admittedly Carlson had no intention of bringing such a suit as he had no basis therefor. Relying thereon Beltner made settlement and allowed a credit on the purchase price of an amount equal to one-half of the total of the delinquent taxes, or $6,745.84, in order to prevent being sued and tying himself up so he could not go south for the winter, his doctor having advised it was best for his health to do so.

"It is a general rule that fraud must relate to a present or preexisting fact, and cannot ordinarily be predicated on unfulfilled promises, or statements as to future events. See Palmetto Bank & Trust Co. v. Grimsley, 134 S. Car. 493, 133 S. E. 437, 51 A. L. R. 42, and notes." Theno v. National Assurance Corporation, 133 Neb. 618, 276 N. W. 375.

"One of the essential elements of fraud practiced by means of false representations is that the representation, must be concerning a matter material to the contract." McNeny v. Campbell, 81 Neb. 754, 116 N. W. 671.

"It is elementary law that actionable fraud must in some manner pertain to matters material to the transaction involved. The representations relied upon at most relate to matters of collateral inducement only, and which of themselves afford no ground for the rescission of the contracts of subscription." American Building & Loan Assn. v. Bear, 48 Neb. 455, 67 N. W. 500.

However, this court has held that if the advantage was obtained by fraudulent promises in the nature of the assertion of facts which there was no intention to perform, that is, where the representation is that of a fact in the future and not a mere promise, and it is relied upon and turns out to be false, the remedies of the original party are the same as where fraudulent misrepresentations are made in regard to existing facts.

We have held actionable: Where there was a promise to convey a house and lot and furnish money as needed, Abbott v. Abbott, 18 Neb. 503, 26 N. W. 361; where a party bought property on credit with the intention at the time of not paying therefor, McCready v. Phillips, 56 Neb. 446, 76 N. W. 885; where the wife obtained the legal title to property of her husband on her promise to carry out his intentions with respect thereto, Pollard v. McKenney, 69 Neb. 742, 96 N. W. 679; where the mortgagee obtained his chattel mortgage by agreeing to bid a certain amount at the subsequent sale thereof for the property upon which he obtained his security, Cerny

v. Paxton & Gallagher, 78 Neb. 134, 110 N. W. 882, 10 L. R. A. N. S. 640; and where a loan was obtained on the promise that the proceeds would be used for a definite purpose, Federal Finance Co. v. Cass, 120 Neb. 834, 235 N. W. 579.

We think the representations by Carlson that he was obligated to pay these taxes under his agreement with Linch, or of the possibility of his losing the benefit of the contract if he failed to do so, are in no way material to the question of Beltner's liability for these taxes under his contract with Carlson. Nor do we find his threat to sue Beltner to be such an assertion of fact in the future as to be actionable under our holdings. No cases are cited that so hold.

In view of the foregoing we affirm the judgment of the trial court.

AFFIRMED.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, A CORPORATION, APPELLANT, V. COUNTY OF GOSPER, A BODY POLITIC AND CORPORATE, APPELLEE.

46 N. W. 2d 147

Filed February 13, 1951. No. 32923.

1. **Constitutional Law.** Article VIII, section 5, of the Constitution permits a levy of taxes by a county in excess of fifty cents per one hundred dollars actual valuation as determined by the assessment rolls in only two classes of cases: First, "for the payment of indebtedness existing at the adoption hereof," and when "authorized by a vote of the people of the county."
2. ———. Article VIII, section 5, of the Constitution is a limitation upon the power of county authorities.
3. **Counties: Taxation.** Counties have no inherent power in matters relating to taxation.
4. **Constitutional Law: Counties.** Mere authority to levy a special or additional tax does not authorize the county board to levy a tax above the limitation fixed by the statute or the Constitution.
5. ———: ———. A special or additional tax authorized by the voters of the county may or may not be in excess of the statutory

or constitutional limitation, depending on whether the full tax which the county board is authorized to levy has been levied for other purposes.

6. ———: ———. It cannot be assumed that the voters by merely authorizing a special or additional tax are authorizing one in excess of the limitations fixed by Article VIII, section 5, of the Constitution.
7. ———: ———. Before such excess tax may be legally levied there must be a favorable vote of the people of the county authorizing the levy of the additional tax and a favorable vote on the proposition to levy the tax in excess of what is otherwise the constitutional limit.
8. ———: ———. When taxes levied by a county exceed the maximum permitted by the Constitution, the excess is levied for an illegal and unauthorized purpose.

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

Cloyd E. Clark, Wilber S. Aten, J. W. Weingarten, and *W. P. Loomis,* for appellant.

Clarence S. Beck, Attorney General, *Walter E. Nolte, Homer L. Kyle,* and *Ted R. Frogge,* for appellee.

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

SIMMONS, C. J.

In this action plaintiff sought to recover taxes paid under protest. The basis of the suit is that the taxes were levied in excess of the constitutional limitation of Article VIII, section 5. An answer and a reply were filed. Plaintiff moved for judgment on the pleadings. The trial court denied the motion and dismissed plaintiff's petition. Plaintiff appeals. We reverse the judgment and remand the cause.

Article VIII, section 5, of our Constitution provides: "County authorities shall never assess taxes the aggregate of which shall exceed fifty cents per one hundred dollars actual valuation as determined by the assessment rolls, except for the payment of indebtedness existing at

the adoption hereof, unless authorized by a vote of the people of the county."

Prior to 1920, the constitutional provision was: "County authorities shall never assess taxes the aggregate of which shall exceed one and a half dollars per one hundred dollars valuation, except for the payment of indebtedness existing at the adoption of this constitution, unless authorized by a vote of the people of the county." Constitution, Art. IX, § 5.

The 1947 Legislature adopted an act relating to improvement of rural mail route roads. Laws 1947, c. 144, p. 393. Among other provisions, that act provided: "Whenever the rural mail route and the star mail route roads of any county of this state need improving by the application of gravel or other suitable surfacing, the county board may, by order entered of record, and upon petition of not less than ten per cent of the legal voters of said county, as shown by the poll books of the last general election, shall submit to the people of said county to be voted upon at a general or a special election called by the county board for that purpose, a proposition to vote a special annual tax for that purpose of one mill on the dollar valuation of all tangible property in said county until all of said rural mail route and star mail route roads of the county have been improved by application of gravel or other suitable surfacing." Laws 1947, c. 144, § 2, p. 394, now § 39-1002, R. S. Supp., 1949.

"The manner of submitting such proposition shall be governed by section 23-126." Laws 1947, c. 144, § 3, p. 394, now § 39-1003, R. S. Supp., 1949.

"The funds to carry out the improvement and maintenance of the rural mail route and star mail route roads shall be raised as follows:

"(1) The money received under subdivision (3) of section 66-424.01, as amended by this act; and

"(2) a special assessment of one mill when approved as provided in section 2 of this act.

"All such money shall be placed by the county treas-

urer in a separate fund to be known as 'special mail route road fund' and shall be used for no other purpose than provided for in this act. * * *" Laws 1947, c. 144, § 8, p. 396, now § 39-1008, R. S. Supp., 1949.

Section 23-126, R. S. 1943, provides: "The mode of submitting questions to the people for any purpose authorized by law shall be as follows: The whole question, including the sum desired to be raised, or the amount of tax desired to be levied, or the rate per annum, and the whole regulation, including the time of its taking effect, if it be of a nature to be set forth, and the penalty of its violation, if there be one, is to be published for four weeks in some newspaper published in the county. If there be no such newspaper, the publication is to be made by being posted in at least one of the most public places in each election precinct in the county, and in all cases the notices shall name the time when such question will be voted upon, and the form in which the question shall be taken, and a copy of the question submitted shall be posted at each place of voting during the day of election."

Section 23-129, R. S. Supp., 1949, provides: "If it appears that two-thirds of the total number of votes cast upon the proposition at the election in which the proposition is submitted are in favor of the proposition, and the requirements of the law have been fully complied with, the same shall be entered at large by the county board upon the book containing the record of its proceedings, and it shall then have power to levy and collect the special tax in the same manner that the other county taxes are collected. Propositions thus acted upon cannot be rescinded by the county board."

Thereafter on February 2, 1948, a petition was filed with the county clerk directed to the board of county commissioners of Gosper County requesting that there be submitted to the people of the county at a general or special election "'* * * a proposition to vote a special annual tax of one mill on the dollar valuation of all

tangible property in said county, for the purpose of improving the rural mail routes of said county by the application of gravel or other suitable surfacing, such levy to be continued until all of said rural mail routes in said county shall have been so improved.' "

Thereafter the county board provided by resolution for an election at which the following proposition was submitted to the electors: " 'Shall the Board of County Commissioners of Gosper County, Nebraska, levy a special annual tax of one mill on the Dollar valuation of all tangible property in said county of Gosper, Nebraska, for the purpose of improving the rural mail routes of said county by the application of gravel or other suitable surfacing, such levy to be continued until all of the rural mail routes of said county shall have been so improved. * * *' "

The required notice was given and the election was held on April 13, 1948, resulting in a vote of 580 for and 150 against the proposition.

Thereafter the county levied taxes as follows:

"General Fund	2.25 mills
Bridge Fund	1.50 mills
Road Fund	.70 mills
Relief Fund	.10 mills
County Agriculture Fund	.20 mills
Gosper County Extension Fund	.25 mills
	5.00 mills
Special Mail Route Road Fund	1.00 mills
	6.00 mills"

The levy was applied to plaintiff's property in Gosper County.

Plaintiff contended that the levy and assessment in excess of five mills was illegal and void and resulted in an illegal tax against it in the amount of $396.80. Plaintiff paid the tax under protest and demanded a refund. The refund was refused. Plaintiff sued to recover.

The county answered alleging the procedures followed under the statute above quoted, admitting that the assessment above five mills was not authorized by a vote of the people except that above set out, and contending that the levy was not prohibited by the constitutional provision and was valid.

Plaintiff by reply contended that the authority to make the levy of one mill for the special mail route road fund did not authorize the county to assess in excess of five mills and that it was subject to the constitutional limitation. Plaintiff then moved for judgment on the pleadings. The motion was overruled. Plaintiff elected not to plead further and declined to offer evidence. The trial court thereupon found for the defendant and dismissed plaintiff's petition. Plaintiff appeals.

The question submitted here is this: Did the above proposition approved by the voters constitute an authorization by a vote of the people to the county to assess taxes, the aggregate of which exceeds five mills, so as to bring it within the provisions of Article VIII, section 5, of the Constitution?

The constitutional provision is clear. As we said in Chase County v. Chicago, B. & Q. R. R. Co., 58 Neb. 274, 78 N. W. 502, there is no room for construction. The aggregate of taxes to be imposed can exceed the limitation stated only in two cases: First, "for the payment of indebtedness existing at the adoption hereof," and when "authorized by a vote of the people of the county." "In all other cases the limitation applies, and no statute and no general equitable considerations can permit it to be disregarded."

With reference to the constitutional provision prior to the 1920 amendment we held: "It is plain that this provision is not a grant of power to county authorities to levy a tax of fifteen mills on the dollar valuation; it is simply a limitation upon the power, operative alike upon the county and the legislature. The principle of the law is firmly established that counties or other municipal

corporations have no inherent power in matters relating to taxation, and they can exercise only such power as is delegated to them by the constitution or by the legislature." Grand Island & W. C. R. R. Co. v. Dawes County, 62 Neb. 44, 86 N. W. 934.

The parties do not dispute these two propositions here.

The county contends here that it followed the provisions of sections 23-126, R. S. 1943, and 23-129, R. S. Supp., 1949; that those two provisions constitute a legislative construction of the contitutional provision; and that the voters, knowing their tax levies, of necessity must be held to have known when they voted on the proposition that they were voting to authorize an annual tax in excess of the constitutional limitation. That position is erroneous for this patent reason.

Section 23-126, R. S. 1943, provides for the mode of submitting questions to the people for any purpose authorized by law. It provides that the "whole question" shall be published.

These two sections must be read in connection with section 23-125, R. S. 1943, which is as follows: "Whenever the county board shall deem it necessary to assess taxes, the aggregate of which shall exceed the rate of one dollar and fifty cents per one hundred dollars' valuation of the property of the county, the county board may, by an order entered of record, set forth substantially the amount of such excess required and the purpose for which the same will be required, and if for the payment of interest or principal, or both, upon bonds, shall in a general way designate the bonds and specify the number of years such excess must be levied, and provide for the submission of the question of assessing the additional rate required to a vote of the people of the county at the next election for county officers after the adoption of the resolution, or at a special election ordered by said county board for that purpose. If the proposition for such additional tax be carried, the same shall be paid in money and in no other manner."

This provision was adopted under the constitutional provision prior to the 1920 amendment. It sets out a procedure to be followed whenever the county board shall deem it necessary to assess taxes, the aggregate of which exceeds the constitutional limit. It sets out the steps to be taken preliminary to the submission of the question to the voters. It outlines the material elements of the "whole question" which the county board must determine shall be submitted. It clearly provides that there shall be a finding of the "excess required" and its purpose and that the "question of assessing the additional rate" shall be submitted.

It is clear from these provisions that the Legislature required a determination by the county board of the necessity of exceeding the constitutional limit as to the aggregate taxes to be assessed; that that determination be shown by an order entered of record; and that the voters be so advised by proper notice that they were voting to authorize a tax, the aggregate of which exceeds the constitutional limit that may be assessed in the absence of such a vote of authorization.

The petition, the resolution of the county board, the notice of election, and the proposition submitted go no further than authorizing an annual tax for the special purpose of improving the rural mail routes. At no place is there found any determination by the board of the necessity of assessing a tax, the aggregate of which would exceed the constitutional limit where not authorized by a vote of the people, nor was any notice given to the people that they were being asked to authorize such an excess assessment.

Section 39-1002, R. S. Supp., 1949, when read in connection with section 39-1008(2), R. S. Supp., 1949, clearly requires that the special assessment of one mill cannot be made until an election is had resulting in an approval of that annual tax. That election and approval was had. The county board then was authorized to include that special tax within the aggregate five

mill limit tax.

The constitutional provision does not relate to the various taxes that may be included within the aggregate five mill limit. It relates to taxes, the aggregate of which is in excess of that amount. There, so far as concerned here, the authorizing vote is required. It is clear that that vote was not had.

We have reached these conclusions from an analysis of our own Constitution, statutes, and decisions.

There is impressive authority in accord therewith.

In Chicago, B. & Q. R. R. Co. v. Klein, 52 Neb. 258, 71 N. W. 1069, we stated that this provision of our Constitution was taken from the Illinois Constitution of 1870, and "* * * if we were governed entirely in this case by precedent we should cheerfully follow the construction placed on the constitution by the supreme court of Illinois."

In 1874, the Legislature of Illinois adopted an act to revise the laws in relation to counties. Revised Statutes of Illinois 1874, c. 34, p. 302. Section 27 of the Illinois act (p. 308) is now, as amended, section 27, chapter 34, of the Illinois act dealing with counties. (See Smith-Hurd Illinois Anno. St., c. 34, § 27, p. 138.)

In 1879, our Legislature adopted an act concerning counties and county officers. Section 23-125, R. S. 1943, hereinbefore discussed, is section 26 of the 1879 act (Laws 1879, § 26, p. 363) as amended.

It is obvious that our statute either was taken from that of Illinois or stems from the same source. In any event, we have a situation where the constitutional provision and the statutes are the same in the respects material here.

The courts of Illinois have been presented with substantially the identical questions we have here and they in a series of opinions have been decided by the Supreme Court of that state construing, so far as material here, the same constitutional provision as our

Article VIII, section 5, and the same statutory provision as our section 23-125, R. S. 1943.

"Mere authority to levy a special or additional tax does not authorize the county board to levy a tax above the limitation fixed by the statute or the constitution. * * * A special or additional tax authorized by the voters of the county may or may not be in excess of the statutory or constitutional limitation, depending on whether the full tax which the county board is authorized to levy has been levied for other purposes. So it cannot be assumed that the voters by merely authorizing a special or additional tax are authorizing one in excess of the limitations fixed. * * * In the case at bar there is no notice to the voter, either in the notice or the ballot, that the special tax to be levied to pay the principal and interest of the bonds is to be in excess of any limitation, and there is not even a suggestion that when the special tax is added to other taxes for county purposes the aggregate will exceed the limitation fixed by the constitution." People ex rel. Roche v. Cairo & T. R. R. Co., 319 Ill. 118, 149 N. E. 824.

"The form of the ballot used, as set out in the proceedings of the board, submitted to the voters only the question of an additional tax levy to pay interest and principal of bonds. The substance of the notice of the election is set out in the proceedings of the board, and it nowhere informs the voters that the question of levying a tax in addition to that authorized by the constitution was to be voted on. Throughout the proceedings of the board the reference is to the election as one to authorize the levying of an additional tax, and not a tax in addition to the rate fixed by the constitution. This question has received the consideration of this court heretofore, and it has been held that authority to levy an additional tax is not authority to levy a tax above the limitation fixed by the constitution." People ex rel. Forsythe v. Cleveland, C., C. & St. L. Ry. Co., 327 Ill. 611, 159 N. E. 228.

"Before such excess tax may be legally levied there must not only be a favorable vote of the people of the county authorizing the levy of the additional tax for the purpose of building the jail, but there must also be a favorable vote of the people of the county on the proposition to levy the tax in excess of the constitutional limit." People ex rel. Hileman v. Missouri P. R. R. Co., 319 Ill. 433, 150 N. E. 288.

When taxes levied by a county exceed the maximum permitted by the Constitution, the excess is levied for an illegal and unauthorized purpose. Chase County v. Chicago, B. &. Q. R. R. Co., *supra.*

It follows that the trial court erred in not sustaining plaintiff's motion for judgment on the pleadings. The judgment is reversed and the cause remanded with directions to enter judgment for the plaintiff as prayed.

REVERSED AND REMANDED WITH DIRECTIONS.

ALVIN A. PETERSEN, APPELLANT, V. JOHN SCHNEIDER ET AL., APPELLEES.

46 N. W. 2d 355

Filed February 16, 1951. No. 32859.

1. **Automobiles: Negligence.** When the driver of a motor vehicle turning across a highway between intersections fails to look to the front and rear for oncoming traffic at a time and place when to look would be effective, or looks and negligently fails to see that which is in plain sight, or is in a position where he cannot see, a question for the court is usually presented.
2. ———: ———. Where such a driver looks but does not see an approaching motor vehicle because of unusual conditions or circumstances, or sees the approaching vehicle and erroneously misjudges its speed or distance, or for some other reason assumes he could safely complete the movement, the question of negligence is usually for the jury.
3. ———: ———. A left-hand turn across a public highway between intersections is fraught with danger, and one making such a movement is required to exercise a degree of care commensurate with the danger.

4. ———: ———. The giving of the statutory signal for a left turn under such circumstances will not absolve the driver from negligence where he fails to exercise care for his own safety, and that of others, by looking to the front and rear for the approach of other vehicles using the highway.
5. ———: ———. The failure to look before turning left across a public highway between intersections is negligence as a matter of law.

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

Otto H. Wellensiek, and *Olsen & Holtorf,* for appellant.

Neighbors & Danielson, for appellees.

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

CARTER, J.

This is an action for damages resulting from an automobile accident. The jury returned a verdict for the defendants and plaintiff appeals.

The evidence shows that on November 8, 1948, at approximately 11 a. m., Paul H. Wellensiek, Glenn Heng, and the plaintiff, Alvin A. Petersen, were traveling east on U. S. Highway No. 26N about eight miles east of the village of Northport in Morrill County. The automobile belonged to the plaintiff and was being driven by Wellensiek. The day was clear and the pavement was dry. The highway was oiled, the oiled portion being about 28 feet in width. It was straight and level at the place where the accident occurred.

The evidence offered on behalf of the plaintiff shows that the three men were riding in the front seat of plaintiff's car and that they first observed defendants' truck approximately a quarter of a mile ahead of them, traveling east on the right-hand side of the highway. They were traveling at a speed of 45 to 50 miles an hour and the highway was free of traffic except for defendants' truck. Wellensiek, the driver of the car, testified that he turned to the left side of the highway about 100 yards

back of the truck for the purpose of passing it. He says that he sounded his horn until he was within 10 feet of the rear end of the truck. This evidence is corroborated by the other two men, except that one of them says the horn was first sounded 50 yards back of the truck. When the car was even with the rear end of the truck and four or five feet to the north of it the truck turned to the left across the highway to enter a private driveway. Wellensiek immediately turned his car to the left until the left wheels were off the oiled portion of the road. The truck struck the car about 18 inches in from the north edge of the oiled portion of the road. The front bumper and fender of the truck struck the automobile on its right side at some point at or near the right rear fender.

The private driveway runs north from the highway and it is approximately 18 feet in width. The collision occurred on the east edge of the private driveway, where it enters the main highway. There is an irrigation ditch which parallels the east side of the private drive about 25 feet east of it. East of the irrigation ditch is a borrow pit along the highway which is 2 feet lower than the highway and 12 to 15 feet wide. The automobile struck the irrigation ditch and rolled down the borrow pit. It came to a stop 191 feet east of the private drive. The automobile was almost completely destroyed. Wellensiek was unconscious and was unable to testify to anything that occurred after the collision. The plaintiff suffered serious injuries, the extent of which is not important on this appeal. The three men riding in the car testify that the driver of the truck did not signal an intention to turn across the highway into the private drive. Plaintiff testifies that he asked the defendant John Schneider, the driver of the truck, the question: "Man, why didn't you signal when you made a left hand turn?" And Schneider answered: "Well, I didn't think I would have to; that I was far enough ahead."

The defendant John Schneider was the only witness for the defendants, the owners of the truck. His testimony is that he was driving his truck down the right-hand side of the highway at a speed of 35 to 40 miles an hour. He says that there was a beet box on the truck which was 7 feet 4 inches in width and with a depth of 32 inches. It extended 16 inches beyond the cab of the truck on each side. He says that he observed plaintiff's automobile coming behind him through his rear vision mirror and estimates that it was .6 of a mile back when he first saw it. He gave the speed at which the automobile was being driven as 70 miles an hour. He says that when he was within .1 of a mile from the entrance to the private drive, he slowed down to 20 miles an hour. When he was 300 feet from the private drive he rolled his left window down and then gave a left-hand signal of his intention to turn across the highway to the left, and continued to give such signal until he was 20 feet from the entrance to the private drive. The left window of the cab was down when the sheriff arrived at the scene of the accident shortly after its occurrence. On cross-examination Schneider was asked: "You didn't look to see where it (plaintiff's car) was before you made the turn, did you?" He answered: "I didn't figure it was necessary from the distance it was when I looked." Defendant Schneider further states on cross-examination that he turned into the private drive at "pretty much" of a right angle at about 20 miles an hour.

The statute regulating the turning of motor vehicles on a highway provides: "(a) No person shall turn a vehicle from the direct course upon a highway unless such movement can be made with reasonable safety, and then only after giving * * * an appropriate signal in the manner hereinafter provided in the event any other vehicle may be affected by such movement. (b) A signal of intention to turn right or left shall be given continuously during not less than the last fifty feet traveled by the vehicle before turning." § 39-7,115, R. S.

1943. A violation of this statute constitutes evidence of negligence under our holdings. In this respect we point out that the defendant failed to signal a left turn in compliance with this statute for the reason that he failed to signal his intention to turn left for a minimum distance of 50 feet before making the turn as the statute requires. The evidence of defendant that he did signal an intent to turn to the left from some point within 200 feet to within 20 feet of the point of turning, even though not a full compliance with the statute, is ordinarily competent as bearing on the degree of negligence or contributory negligence of the parties. Mann v. Standard Oil Co., 129 Neb. 226, 261 N. W. 168.

The most dangerous movement on public streets or highways is the left-hand turn. While the left-hand turn at intersections is within the purview of this statement, the left-hand turn across a favored public highway between intersections is a particularly dangerous one. Legislatures have seen fit to regulate such movements and courts have required a degree of care commensurate with the danger. The language of our statute states that no person shall turn a vehicle from the direct course upon a highway unless such movement can be made with reasonable safety, and then only after giving the statutory signal. In other words, the giving of the statutory signal is not enough, one must exercise reasonable care under all the circumstances. He cannot rely on holding out his arm and trust that all may see it. He must take reasonable precautions for his own safety and the safety of others before he undertakes a left turn between intersections where such movements are not anticipated. As was stated in Brown v. Perkins, (La. App.) 144 So. 176: "It cannot be said that the holding out of the left hand without seeing the condition of traffic in the rear will absolve the driver from negligence any more than it could be said that such a signal would absolve him from negligence even though he saw it was either unseen or unheeded by the traffic in front."

In the case before us the defendant, when some 500 feet from the private drive, saw the plaintiff's car through the rear vision mirror, coming about one-half mile behind him. He therefore knew that plaintiff's automobile was coming along behind him. He did not look to the rear within 200 feet before turning, according to his own testimony, either through his rear vision mirror or otherwise. He drove to the point of the accident and, without looking at all for plaintiff's car or other traffic, turned his car onto the north side of the highway and into the car of the plaintiff. This is negligence as a matter of law and indicates a reckless disregard for his own safety and for that of others lawfully using the highway.

The requirement that one must look to the front and rear before making a left turn between intersections is not met by looking at a point 200 feet distant from the place of the intended left turn. One must look at a time when possible danger could be observed. The observations must be made immediately before the impending movement; otherwise, as in this case, the observation would be completely ineffective for the accomplishment of the purpose intended. It is entirely proper, of course, for one vehicle to pass another which is traveling in the same direction. It is not negligence for the passing car to turn to the left side of the highway for such purpose when the left lane is free of traffic. Nor is it negligence to drive at a reasonable speed, usually defined by law, additionally limited by the care required by existing conditions which are apparent to the driver. In the case before us there is no evidence of speed at the time of the passing, except that of the plaintiff and his witnesses who say they were traveling 45 to 50 miles an hour. This was not a negligent rate of speed under the circumstances shown.

The truck body was one constructed for the hauling of sugar beets. It extended 16 inches out from the cab and was 32 inches high. This, of course, interfered with

the vision of the driver of the automobile in seeing a turn signal by the driver of the truck. The driver of the truck says he signaled the left turn in the manner heretofore stated; the occupants of the automobile say he did not. There is evidence that the driver of the truck told the plaintiff immediately following the accident that he did not signal, as he did not think it was necessary because of the distance the automobile was back of him when he last saw it. This statement is denied and the defendant John Schneider testifies that he gave a left-turn signal from some point within 200 feet to within 20 feet of the point where he commenced to turn. But even so, after considering the obstructions on the truck itself, the failure of the driver of the truck to signal in the manner the statute prescribes, and the utter failure of the defendant John Schneider to look for automobiles in the lane he was about to enter in making his turn to the left into the private drive, we are convinced that the proximate cause of this accident was the failure of the driver to look before making the turn to the left. The Supreme Court of California in discussing the same question said: "Some states hold the driver of an automobile can be held responsible only for what occurs in front of him, but an examination of section 130 (a) of the California Vehicle Act, cited above, clearly places a duty upon the driver who contemplates turning upon the highway to first ascertain if such movement can be safely made, with reference to both front and rear, and if not to wait until it can be made in safety, and then shall indicate by a signal his intention so to do. We cannot see where the negligence of plaintiff was a proximate cause of the injury and therefore we cannot hold him to have been guilty of contributory negligence. One driving in the rear of another car has the right to assume that a motorist will obey the law of the road and is not bound to anticipate that a car will leave its proper side and cross the highway, at least where there is no intersection of public highways,

and nothing to lead one in the exercise of reasonable care to foresee such action." Young v. Cerrato, 2 Cal. App. 2d 421, 37 P. 2d 1063. It is true that in the foregoing case there was no signal given while in the instant case the signal alleged to have been given did not meet statutory requirements and, in any event, was difficult to see because of obstructions on the truck itself. There may have been some negligence involved in not seeing such a signal but certainly not sufficient to defeat the action. As we have stated, the proximate cause of this accident, under the record made, was the failure on the part of the driver of the truck to look to the rear at a time when looking would have been an effective means of averting the accident. Under the particular facts of this case the verdict of the jury was clearly wrong. It is not sustained by the evidence.

We think the correct rule to be applied in cases of this kind is: Where the driver of a vehicle turning across a street or highway between intersections fails to look at all at a time and place where to look would be effective, or looks and negligently fails to see that which is plainly in sight, or is in a position where he cannot see, a question for the court is usually presented. Where he looks but does not see an approaching automobile because of unusual conditions or circumstances, or sees the approaching vehicle and erroneously misjudges its speed or distance, or for some reason assumes he could safely complete the movement, the question is usually one for the jury.

The rule is in line with the holdings of this court where persons failed to look in situations where similar dangers are involved. Doan v. Hoppe, 133 Neb. 767, 277 N. W. 64; Trumbley v. Moore, 151 Neb. 780, 39 N. W. 2d 613; Kubo v. Fish, 152 Neb. 74, 40 N. W. 2d 270.

We hold under the undisputed facts of this case that the verdict of the jury was clearly wrong and that plaintiff's motion for a new trial should have been sus-

tained. The judgment is reversed and the cause remanded for a new trial.

REVERSED.

WENKE, J., dissenting.

I dissent from the majority opinion for in my judgment it determines certain issues that should be submitted to a jury.

I am fully in accord with the majority view that the truck driver's failure to look, at the time and under the circumstances as in the opinion set forth, constitutes negligence on his part as a matter of law, but I am unwilling to agree that such negligence was necessarily the proximate cause of the accident that followed.

The driver of the truck testified, as set out in the majority opinion, that: "When he was 300 feet from the private drive he rolled his left window down and then gave a left-hand signal of his intention to turn across the highway to the left, and continued to give such signal until he was 20 feet from the entrance to the private drive." While there is evidence, as set out in the majority opinion, that discredits this testimony and also evidence, as therein set forth, that indicates it possibly would have been difficult for the driver of the car to have seen the signal, however, whether it was actually given and, if it was, whether it could and should have been seen by the driver of the car when he turned left to pass the truck, which he testifies was at a point some 100 yards back of it, are factual questions for a jury to decide.

If a jury should come to the conclusion, which under this evidence I think it would have a right to do, that the signal was given and that the driver of the car could and should have seen it if he had looked, then, in my opinion, a jury could properly come to the conclusion that it was the car driver's failure to look and see the warning signal or, if he looked, his failure to see it that was the proximate cause of the accident rather than the truck driver's failure to look.

IN RE ESTATE OF ETTA BENSON, DECEASED. GRADY CORBITT, EXECUTOR, ET AL., APPELLEES, V. MARY HAFER ET AL., APPELLANTS.

46 N. W. 2d 176

Filed February 16, 1951. No. 32882.

1. **Wills.** The mental capacity of a testator is tested by the state of his mind at the time he executed his will. If a testator knows the extent and character of his property, the natural objects of his bounty, and the purposes of his devises and bequests, he is mentally competent to make a will.
2. ———. In a will contest based on objection that the testator was mentally incompetent to make a will the burden devolves on the proponent to make a prima facie case that the testator was mentally competent. The burden then devolves on the contestant to produce sufficient evidence to support a contrary finding by a jury.
3. ———. In order that a will may be rejected on the ground of incompetency of the testator the evidence of the contestant must be sufficient to sustain a reasonable inference that the testator was incompetent to make a will.
4. ———. A testator may dispose of his property as he pleases. The law does not require that he recognize his relatives therein, nor does it put any obstacle in the way of the aged or infirm in making disposition of their property by will; provided, only, that their mentality conforms to the accepted tests at the time of the execution of such testamentary instrument.
5. ———. The elements necessary to be established to warrant the rejection of a will on the ground of undue influence are: (1) That the testator was subject to such influence; (2) that the opportunity to exercise it existed; (3) that there was a disposition to exercise it; and (4) that the result appears to be the effect of such influence.
6. ———. Undue influence, in order to invalidate a will, must be of such character as to destroy the free agency of the testator and substitute another person's will for his own.
7. **Wills: Trial.** It is the duty of trial courts to determine the issues upon which there is competent evidence and submit them, and them only, to the jury. In a will contest on the ground of mental incompetency and undue influence, if the evidence is insufficient to sustain a verdict upon either of such issues in favor of the contestants, then the trial court should withdraw both issues from the jury and direct a verdict.
8. **Attorney and Client: Witnesses.** Where one partner of a law

partnership over a period of years represented a client of the firm and drafted a will which is subsequently contested, requiring him to testify as a witness as to the testamentary capacity of the testator at the time the will was executed, and he participated no further in the case, under the rules of professional ethics recognized by this court another member of the law firm is not barred from trying the case.

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

William L. Walker, Roy A. Sheaff, and *Earl Ludlam,* for appellants.

Thomas J. Keenan, for appellees.

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

MESSMORE, J.

This is a will contest in which the validity of an instrument purporting to be the last will and testament of Etta Benson, deceased, is involved. The will was admitted to probate in the county court over the objections of the contestant Mary Hafer. The objections to the probate of the will were: (1) That the will was not executed and attested as required by law; (2) that at the time of the making and executing of the will the testatrix was not possessed of sufficient mental and physical capacity to so make and execute the will, by reason of old age, mental illness, being under the influence of drugs and medicine and suffering excruciating pain due to a fatal heart disease; and (3) that the execution of the will was procured by the assertion of undue influence on the part of Mabel Hourigan, sister of the deceased, who by the terms of the will receives the largest share of the estate, and her husband, which deprived the contestants of an equitable distribution of the estate. From the admission of the will to probate in the county court, the case was appealed to the district court. In the district court Mary Hafer and Ella F. Stanley, sisters of the testatrix, DeVee Hourigan and Nadyne Marshall,

nieces of the testatrix, appear as contestants. A jury was impaneled and the case proceeded to trial. At the close of the evidence consisting of proponents' prima facie case and the contestants' case, the proponents moved for a directed verdict which was sustained. The district court entered judgment for the proponents and decreed the will to be the last will of Etta Benson, deceased. Upon the overruling of the motion for new trial filed by the contestants, contestants appeal.

The contestants predicate error in that the district court did not submit the case to the jury on the issues presented in the objections to probate. Under this assignment of error the question to determine is the sufficiency of the evidence to warrant submission of the case to the jury on the issue of testamentary capacity or undue influence.

In considering this question it is necessary to have in mind certain legal principles governing testamentary capacity, as follows: The mental capacity of a testator is tested by the state of his mind at the time he executed the will. If the testator knows the extent and character of his property, the natural objects of his bounty, and the purposes of his devises and bequests, he is mentally competent to make a will. In re Estate of Inda, 146 Neb. 179, 19 N. W. 2d 37; In re Estate of Scoville, 149 Neb. 415, 31 N. W. 2d 284.

In the instant case, the proponents made a prima facie case in substance as follows: At the time of the drafting of the will Etta Benson was 72 years of age. The attorney who drafted the will testified that he had transacted business for the decedent at different times and had been acquainted with her for a period of 25 years preceding her death. On April 26, 1946, he drafted a will for her. On August 18, 1949, his law office was closed at noon due to the county fair in progress. He went to his residence, and about 3 p. m. Mabel Hourigan, a sister of the decedent, stopped at his home and informed him that Etta wanted to see him, but she did

not know when. Later Mabel called him by telephone that Etta wanted to see him. In response to the call he waited until Mabel could come and take him to her home where Etta lived. When he arrived at the house Mrs. Frank Hafer, a sister of Etta, as well as Mrs. Will Hourigan and Mrs. DeVee Hafer Hourigan, nieces of Etta, and Mabel Hourigan were present. He went into the bedroom where Etta was lying in bed. He and she were alone, and he inquired of her what she wanted. She said she wanted to change her will. They went over the property she owned and in what respect she desired to change her will. He was without pencil and paper, went into another room, procured the same, and made notes as to the manner in which she wanted the will drawn. She discussed her relatives and said that in her previous will she had bequeathed $500 to a deceased brother's wife, and that they had an adopted son. She wanted to know if she was legally bound to give her property to anybody. She was advised in this matter. She wanted her sister Mabel Hourigan to have the entire half section of land she owned for the reason that she did not know how sick she was, and she wanted Mabel to take care of her, therefore she favored her in the will. When the will was prepared he called Mabel Hourigan to come and get him and his secretary. When he arrived at the Hourigan home he went into the bedroom to see Etta and told her he had prepared the will. She asked that it be read, and he read it aloud to her. She then said that was the way she wanted it and asked that a neighbor, Mrs. Pangle, be called as a witness to the will. He held the will in his hand and asked Etta what it was. She said it was her will. He then asked her if she wanted Mrs. Pangle, his secretary, and himself to sign as witnesses. She replied that she did. She said she could not sign without her glasses, reached for them, put them on, and signed each page of the will and noted her signature properly on the last page of the instrument. All three witnesses were present, saw

her sign, and then each signed as a witness to the will. Etta said at that time that it was her last will.

Mrs. Pangle testified that she had been acquainted with Etta Benson for 20 years, and that Etta lived with Stub and Mabel Hourigan and had so lived with them when they purchased the house across the street from this witness five or six years previously. She knew Etta was ill on August 18, 1949, because Dr. Hinrichs had been there about 2:30 p. m. She went over to find out Etta's condition. Mabel told her Etta was "pretty sick." It was about 6 p. m. when Mabel called her to come over and witness Etta's will. In all other respects she corroborated the testimony of the attorney, and gave as her opinion that Etta was fully conscious, talked normally, knew the witness, and that she stayed and visited with her a little while and asked her how she felt. She said she "would be all right if it wasn't for this pain in her chest," and asked this witness to call again.

The secretary corroborated the testimony of the other witnesses to the will, and testified that in her opinion Etta Benson was competent at the time she executed the will.

If the proponent makes a prima facie case as to testamentary capacity, it then devolves upon the contestant to overcome the presumption arising therefrom, after which the burden of going ahead and proving testamentary capacity by a preponderance of the evidence devolves upon the proponent. See In re Estate of Witte, 145 Neb. 295, 16 N. W. 2d 203, and cases hereinbefore cited in this opinion.

It is well established in this jurisdiction that upon a motion for a directed verdict at the conclusion of all of the evidence, the motion must be treated as an admission of the truth of all of the material and relevant evidence admitted and all proper inferences to be drawn therefrom. See In re Estate of Scoville, *supra*.

We set forth the relevant and material evidence, not

in detail but sufficiently to discern the contestants' view thereof to sustain their contention with reference to the errors complained of.

Prior to 1903, Etta Benson married a Mr. Timmerman. They had one daughter, Georgia, who predeceased her. Etta obtained a divorce from Timmerman and her maiden name was restored to her. After she obtained her divorce she lived with her parents for a number of years. She kept house for her brother Charles before he moved to Iowa, then she returned to live with her parents for a short time. Later she went to live with her sister Mabel and her husband Stub Hourigan, worked for them as a cook in their restaurant most of the time except when she was in Omaha for a short time in 1927, and later lived with her daughter Georgia for about a year when Georgia was attending school in Lincoln.

Had Etta Benson died intestate, her heirs at law would be her sisters, Agnes Query, Ella Stanley, Mary Hafer, and Mabel Hourigan, and her nephew, the adopted son of her deceased brother Charles Benson.

The testatrix made two wills. One is dated April 26, 1946. This will, so far as material here, made the following devises and bequests: She bequeathed to her sister Agnes Query $1,000; to her sister Ella Stanley, $1,000; to her sister-in-law Stella Benson, $500; to her grandnieces, Shirley Hourigan and LeAnn Stratman, $500 each; to her niece Nadyne Marshall, $500; to her niece Constance Hourigan certain real estate in Geneva; to her sister Mary Hafer 80 acres of land; and to her sister Mabel Hourigan and her niece DeVee Hourigan one-half section of land.

In the second will, dated August 18, 1949, she eliminated the bequests to Stella Benson and Nadyne Marshall. She devised to Mary Hafer a life estate in the 80 acres of land, and the remainder to her daughter DeVee Hourigan; and devised to Mabel Hourigan the entire half section of land, and in the event the devisee

predeceased the testator, the land was devised to Constance Hourigan Ford.

It appears from the record that all of the witnesses agreed that during her lifetime the testatrix was an amiable person and desired to get along with her relatives, and her relations with them were at all times friendly.

Frank Hafer, brother-in-law of testatrix, testified that Etta purchased 80 acres of land that belonged to his father's estate and was adjacent to 80 acres of his. He farmed this 80 acres as a tenant, was permitted to farm it as he chose, and no question was raised between him and Etta on any business transactions that he had with her. He had occasion to see her and visit with her while she was in the restaurant whenever he had come to town. About two months prior to her death he talked with her and she told him she did not feel good. He saw her on August 14, 1949, about a week before she died, when she was in his home. He had a conversation with her wherein she said she was feeling bad. He also saw her on the morning of August 18, 1949, on the street. She told him she had had a bad spell in the "A. A. A." office. He later saw her that evening at the Hourigan home when she was in bed, and she was a "sick woman." He expressed no opinion as to her mental capacity to transact business.

He further testified that Charles Hourigan had priced a house to Etta. When she decided to take it and it came to making the deed Mabel wanted it, so she let Mabel have it. At the time Etta purchased a half section of land she talked to this witness about it, and he told her do do as she pleased, the money was hers. She intimated in another conversation that Mabel Hourigan objected to her purchasing this land, stating that she might be cheated in the deal. The evidence also shows that her attorney told her she was 72 years of age and not a farmer, and he did not believe it would be good business to purchase the land. Regardless of what any person or

relative told her, she did purchase the land for $21,500, which was estimated to be worth from $33,000 to $35,000 at the time of her death.

There is also some evidence that when the Hafers moved into a house Etta helped them, and on one occasion when she returned to help them she told them that she could not stand it much longer, that Mabel objected to her washing windows and working for the Hafers, and that if she continued to do so, Mabel would not put her foot in Mary's door any more. The Hafers told her that if she desired she might live with them. She thought she might and then later told them that in order to keep peace she would remain with Mabel.

Nadyne Marshall testified that in 1941, she and Etta discussed a will. Just what this discussion developed into is not clear. In 1947, when Etta was visiting Nadyne's home in Holdrege, Etta mentioned a will, saying: " 'Nadyne, you know that Mabel and "Stub" have just kept after me and kept after me until I finally made a will.' " She also told Nadyne that she had loaned $600 to Bill and DeVee Hourigan as a down payment on a house, and further stated: " '* * * in due course of time you will get the same amount of money.' "

DeVee Hafer Hourigan testified with reference to the $600 loan that she obtained from Etta to build a house, and also to another transaction when they desired to return to Geneva to live. They went to look at a house that was for sale but did not make up their minds to purchase it until they had seen it again. When they went the second time to see it they returned to Mabel and Stub Hourigan's home, and Mabel said that they had a proposition to make, that they would buy the house and DeVee and her husband could rent it from them on the basis of 10 percent of the investment. Shortly thereafter Etta came over to see DeVee and told her not to get mixed up in any deal of that kind, that she would let her have the money, because that wasn't right. She did loan $4,000 to DeVee and her

husband. This witness further testified that she was present on August 18, 1949, when the attorney was there with reference to the will; and that from her observation of her aunt Etta, she was in no mental condition to transact that kind of business. She further testified that her aunt had considerable pain when she was there at 9:30 p. m., and the doctor and nurse were trying to relieve it. She was very still and her eyes were closed.

Mary Hafer testified that Etta had been sick four or five months prior to her death; that Mabel seemed rather anxious to get in touch with the attorney to draw the will, and she heard nothing from Etta that would indicate that Etta was desirous of having the attorney come to see her or to transact business; that Etta's condition was bad; her eyes were shut; and Etta told her that she felt "terrible." From her observation she testified that Etta was in no mental condition to transact business such as executing the will at that time. When she saw Etta at 8 o'clock in the evening, her eyes were shut, she did not hear, and did not talk. Etta told Mary that Mabel had wanted her to make a will for so long, and she said she had made it.

Dr. Hinrichs testified that he treated Etta in his office on August 15, 1949. She complained of a pain in the precardial region. At that time the pain was of short duration and she had a tingling sensation in her fingers. He treated her for it. He saw her on August 18, 1949, about 2 p. m., at her home, after Mabel had called and said that Etta was having severe pain. His examination disclosed marked evidence of coronary difficulty. She had an ashen, gray pallor and marked evidence of pain in the chest region radiating down the left arm. He then described the treatment and the medicine that he recommended for her condition. She was given one-quarter grain of morphine by hypodermic. He testified to the effects of morphine on the system, and stated that the amount that he had given her would not affect her

mental capacity at any time. He saw her again at 7 p. m. that day when her pain was increasing in intensity. She was given three-eighths of a grain of morphine at that time. She complained that her pain was more severe than before. He next saw her between 8:30 and 9:30, shortly before she was taken to the hospital. Her conversation showed to him that she was aware of what she was doing and what was going on about her. They discussed the question of taking her to the hospital, and her reaction indicated that she was completely competent. Throughout the trip to the hospital her mental condition was good.

The financial circumstances of the relatives of the testatrix were admitted in evidence. It appears that the contestants made no particular complaint about their financial condition, and in the main did not discuss their financial condition at any time to any extent with the testatrix. While some complaint is made that the trial court excluded the financial condition of Mabel Hourigan, it was pretty well known to the testatrix as the record reflects. The testatrix made certain loans to some of her relatives for which they gave her their notes, and she was rather lenient in her requirements as to when the same should be paid. This evidence principally relates to her nieces. The sisters contesting the will, Mary Hafer and Ella F. Stanley, did not discuss their financial condition with the testatrix, and in fact there is evidence disclosing that they were rather independent.

In order that a will may be rejected on the ground of incompetency of the testator the evidence of the contestant must be sufficient to sustain a reasonable inference that the testator was incompetent to make a will. It is the duty of trial courts to determine the issues upon which there is competent evidence and submit them, and them only, to the jury. In a will contest on the ground of mental incompetency and undue influence, if the evidence is insufficient to sustain a verdict upon either of such issues in favor of the contest-

ant, then the trial court should withdraw both issues from the jury and direct a verdict. See, In re Estate of Inda, *supra;* In re Estate of Scoville, *supra.*

To justify the direction of a verdict, it is not necessary that there should be literally no evidence to go to the jury; it being sufficient that there is none that ought reasonably to satisfy the jury that the fact sought to be proved is established. See, In re Estate of Frazier, 131 Neb. 61, 267 N. W. 181; In re Estate of Scoville, *supra.*

"A testator may dispose of his property as he pleases. The law does not require that he recognize his relatives therein, nor does it put any obstacle in the way of the aged or infirm in making disposition of their property by will; provided, only, that their mentality conforms to the accepted tests at the time of the execution of such testamentary instrument." In re Estate of Bose, 136 Neb. 156, 285 N. W. 319. See, also, In re Estate of Goist, 146 Neb. 1, 18 N. W. 2d 513.

We conclude, in the light of the foregoing authorities and the evidence adduced in this will contest, that the trial court did not err in not submitting the issue of testamentary capacity to the jury.

The next question to determine is whether or not the trial court erred in not submitting to the jury the issue of undue influence alleged to have been practiced on the testatrix by Mabel Hourigan, sister of the testatrix, and her husband.

"The elements necessary to be established to warrant the rejection of a will on the ground of undue influence are (1) that the testator was subject to such influence; (2) that the opportunity to exercise it existed; (3) that there was a disposition to exercise it; and (4) that the result appears to be the effect of such influence." In re Estate of Inda, *supra.* See, also, In re Estate of Scoville, *supra;* In re Estate of Bainbridge, 151 Neb. 142, 36 N. W. 2d 625; In re Estate of Thompson, *ante* p. 375, 44 N. W. 2d 814.

The burden is on contestants to produce evidence

tending to prove each of the four elements stated above, as a prerequisite of their right to have the issue submitted to a jury for determination. See In re Estate of George, 144 Neb. 887, 15 N. W. 2d 80. If any one of the essential elements enumerated is not supported by evidence or reasonable inference drawn from a fact or facts otherwise established, the contention of undue influence must be rejected. The evidence must tend to show undue influence directly in reference to the will in question, and be of such a nature as to control the will of the testator and cause him to do something that he did not intend. Suspicion or supposition of undue influence is not sufficient to require the submission of the question to a jury or to sustain a verdict. In re Estate of Bayer, 119 Neb. 191, 227 N. W. 928; In re Estate of George, *supra;* In re Estate of Bainbridge, *supra.*

It is true that the testatrix lived with her sister Mabel and Stub Hourigan, worked in their restaurant as a cook for a number of years, and after they sold the restaurant she continued to live with them. This covered a period of nearly 30 years. The fact that Mabel and Stub Hourigan endeavored to persuade Etta to make a will, without any evidence disclosing in what form they desired it to be made or any evidence as to what she should do with her property or any persuasion on their part in that respect, is clearly indicative of the insufficiency of the evidence to make a case sufficient to go to the jury on undue influence. The fact that Etta gave in to Mabel on an occasion involving the purchase of a house, or that she and Mabel might have had some difficulty with the work she did for her sister Mary Hafer, does not constitute evidence of undue influence. The fact that she contacted a lawyer, at Etta's request, to come and see Etta for the purpose of making a will, and went to this lawyer's home, then to his office, and furnished an automobile for such purpose when the lawyer had none and did not drive one, is no evidence of undue influence. We can arrive at no other conclusion than to say

the trial court was correct in not submitting the issue of undue influence to the jury.

The contestants objected to Thomas Keenan, a law partner of Grady Corbitt who drafted the will in question and was a material witness to the execution of the will and the mental competency of the testatrix to execute it and its proper attestation, participating in and trying the case for the proponents. The objection was overruled, and contestants predicate error on this ruling.

Grady Corbitt did not participate in any manner in the trial of the case. He testified for the proponents in the prima facie case as to the legal formality of the will, the competency of the testatrix to make it, and lack of influence.

By Article X of the Rules Creating, Controlling and Regulating Nebraska State Bar Association, the ethical standards relating to the practice of law in this state shall be the Canons of Professional Ethics of the American Bar Association, including the additions and amendments as of January 1, 1945, thereto, and those which may from time to time be approved by the Supreme Court. Canon 19 thereof provides in part as follows: "When a lawyer is a witness for his client, except as to merely formal matters, such as the attestation or custody of an instrument and the like, he should leave the trial of the case to other counsel."

Contestants cite opinion 33, American Bar Association Canons of Professional and Judicial Ethics, 1936, p. 100, filed March 2, 1931, wherein it is said: "The relations of partners in a law firm are so close that the firm, and all the members thereof, are barred from accepting any employment, that any one member of the firm is prohibited from taking."

Opinion 220, American Bar Association Canons of Professional and Judicial Ethics, 1947, p. 436, written July 12, 1941, modified opinion 33 cited by the contestants. This latter opinion states: "It is not always improper for an attorney to appear in a case in which his

partner is a material witness—Dicta in Opinions 33, 50, and 185 modified." We deem it unnecessary here to engage in the distinction of opinions 33, 50, and 185.

In opinion 220 it appears that a member of a law firm had represented a decedent in connection with a gift subject to federal gift tax, having drawn all the papers, calculated and paid the tax, and given an opinion to his client that the gift was proper and not made in contemplation of death. The lawyer also represented the decedent in connection with the drafting of his will, and was expected by the decedent to represent his estate, which the executor and the family of the decedent also desired.

We make reference to certain parts of opinion 220 for the reasoning contained therein which we deem applicable to the situation that confronts us here.

We are unable to agree with the reasoning which attaches any impropriety to the participation of a lawyer as a witness and his partner as trial counsel in a matter where the partners have represented the client from the outset and where they are not engaged upon opposing or conflicting sides of the controversy. A distinction may often properly be drawn in cases where a partner's testimony relates to matters occurring in the course of his professional duties, and also in cases where the lawyer has long and intimate familiarity with the details of the matter in litigation, so that his withdrawal will necessarily deprive his client of knowledge and experience of peculiar and irreplaceable value.

The question frequently arises in connection with cases like that here propounded. In such cases the lawyer for the decedent has prepared all the papers, knew the decedent, and knew exactly why he did what he did. His firm, however, naturally represents the decedent's estate, which properly relies on them to sustain the gift (in the instant case the will). By reason of their knowledge of the decedent's affairs they are peculiarly qualified to do so, and unless they can do so

the estate will be deprived of their valuable services.

In such cases there does not appear to be any impropriety in the lawyer who drew the papers and knew the testator testifying to the facts surrounding the execution of the deed of gift (in this case the will), and in his partner representing the estate to sustain it. The possibility of the witness moulding his testimony in order to secure a higher fee for his firm is more than balanced by the injustice to the client of depriving the latter either of a necessary witness or of a specially qualified lawyer. The possible interest of the witness would merely affect his credibility. While it is true that such a situation might require the lawyer for the estate to argue the veracity of his partner, this would be equally the case where the witness was his friend or his near relation. Actually, if the partner of the witness withdrew from the case and asked one of his colleagues at the bar to take his place, the latter would be no less assiduous in standing up for the witness' reputation as would the latter's partner.

We do not construe the words "other counsel" in Canon 19 as necessarily excluding a partner of the lawyer who must become a witness. In our opinion, therefore, it cannot properly be said in every case that a lawyer may not properly appear in a case where his partner could not; but that each case should depend on its own facts.

The attorney trying the case, not being a witness, is not placed in the position of arguing his own credibility, so that no question of ethics or propriety arises. The testimony of the witness attorney in the instant case is not denied or questioned by any witness for the contestants. We hold that under the circumstances as presented in this case, it was not a violation of the Canons of Professional Ethics of the American Bar Association, which have been approved by this court together with the additions and amendments as of January 1, 1945, thereto, and the trial court did not err in permitting

Thomas Keenan to proceed with the trial of this will contest.

For the reasons given in this opinion, the judgment of the trial court in directing a verdict for the proponents should be and is hereby affirmed.

AFFIRMED.

WILL FEIGHT, APPELLEE, V. RICHARD MATHERS ET AL., APPELLANTS.

46 N. W. 2d 492

Filed February 16, 1951. No. 32888.

1. **Dismissal and Nonsuit.** Before the final submission of a case to the jury or court a dismissal by plaintiff without prejudice to a future action is not a matter of judicial grace or discretion but is a statutory right.
2. **Set-Off and Counterclaim: Dismissal and Nonsuit.** A plaintiff has the right, before final submission of his cause of action, to dismiss the same, but this right does not control the right of the defendant to proceed to the trial of a set-off or counterclaim properly pleaded by him in his answer.

APPEAL from the district court for Dixon County: LYLE E. JACKSON, JUDGE. *Reversed with directions.*

F. B. Hurley and *D. Van Donselaar,* for appellants.

Fraser, Connolly, Crofoot & Wenstrand, and *Free, Berry & Free,* for appellee.

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

WENKE, J.

The action out of which this appeal arises was originally instituted by Will Feight in the district court for Dixon County against Richard Mathers and Evalyn Mathers. The purpose of the action was to foreclose a real estate contract on certain lands in Dixon County and to decree that the defendants have no interest

therein. On October 29, 1948, the court rendered its decree quieting and confirming title to said premises in the plaintiff.

However, prior to the entering of said decree the defendants had filed an answer and counterclaims. These counterclaims, as far as here material, sought to recover $2,000 which had been paid on the contract, $1,300 as damages for loss of the benefits of the contract, and $445 for improvements.

With reference to these counterclaims the decree of the trial court rendered on October 29, 1948, provides: "* * * nothing in this decree contained shall in any wise prejudice the claims of the defendants set forth in their counterclaim for recovery of money judgment against the plaintiff, nor shall this decree in any wise prejudice the plaintiff in his defense of said counterclaim, but that said counterclaims * * * and whatever defense plaintiff may have thereto shall be tried to a jury in this court * * *." The court thereupon continued the cause "as to the issues presented by said counterclaims and the defense thereto until the further order of this Court."

On May 9, 1949, plaintiff filed an "Amended Answer to Defendants' Counter-Claims." Therein he set up he was entitled to a set-off against the claims of the defendants for the reasonable rental value of the premises for the crop year 1947-1948 when the premises were occupied by the defendants. This reasonable rental value is alleged to be in the sum of $2,700.

On February 20, 1950, the trial court, after finding "that the pleadings are in such a state of confusion as to be in violation of the rules of pleading set forth in the statutes of the State of Nebraska," made the following order:

"1. That plaintiff's motion to require the defendants to elect their remedy (whether to proceed on the ground of fraud or for rescission of the contract by breach thereof) be and hereby is sustained.

"2. That the defendants be and hereby are given

ten days from February 20, 1950, within which to file a new answer or other pleadings which shall supplement and be in lieu of all of their other pleadings heretofore filed herein which set up counter or other claims for damages, and they are further ordered that such answer or other pleadings be worded in ordinary and concise manner and without repetition and in conformance with the statutory requirements for pleadings." (Insertion ours.)

Thereafter, on March 1, 1950, the defendants filed a dismissal of their counterclaims in the following language: "* * * dismiss without prejudice all of their counterclaims and the allegations in support thereof contained in their answer and counterclaims, same commencing on page 8 of their said Answer and counterclaims with the word 'COUNTERCLAIMS' and ending on page 10." The defendants, on the same day, filed what is denominated a "Second Amended and Substituted Reply of Defendants to Amended Answer of Plaintiff" but which is in fact an answer to the plaintiff's claim that he is entitled to the reasonable rental value of the lands for the crop year of 1947-1948.

On March 7, 1950, plaintiff filed a motion to dismiss with prejudice the answer and counterclaims of the defendants and to strike the defendants' pleading entitled "Dismissal by Defendants of Their Counterclaims Without Prejudice."

On March 13, 1950, the defendants filed a motion asking the court to dismiss without prejudice the counterclaims of defendants in accordance with the written dismissal which had been filed or, in the alternative, permit the defendants to withdraw without prejudice their counterclaims. The record shows that on March 14, 1950, the defendants paid all court costs that had accrued since the filing, on November 18, 1948, of the original decree rendered herein October 29, 1948.

These motions came on for hearing on May 29, 1950, and the court overruled the motion of defendants seeking

to dismiss their counterclaims without prejudice but sustained plaintiff's motion to dismiss the defendants' answer and counterclaims with prejudice and to strike defendants' dismissal of their counterclaims without prejudice. The trial court thereupon dismissed, with prejudice, the counterclaims of the defendants and struck from the files the dismissal filed by defendants dismissing their counterclaims without prejudice.

It is from this last order that the defendants have appealed.

In view of the then condition of the pleadings we think the order of February 20, 1950, was proper but it did not result in any final submission of the case. See sections 25-804, 25-811, 25-820, R. R. S. 1943.

It is true that: "'A court of general jurisdiction has inherent power to protect itself, litigants and the public from vexatious proceedings by dismissing with prejudice suits instituted by plaintiffs who repeatedly violate the rules of pleading and the orders relating thereto, after having had a full opportunity to present litigable controversies in proper form.' (Ferson v. Armour & Co., 109 Neb. 648, 192 N. W. 125)." Hoffman v. Geiger, 134 Neb. 643, 279 N. W. 350. See, also, Northport Irrigation Dist. v. Farmers Irrigation Dist., 125 Neb. 607, 251 N. W. 174; Bushnell v. Thompson, 133 Neb. 115, 274 N. W. 453.

But in the foregoing cases either the litigant elected to stand on the pleadings at which the order was directed, continued to file pleadings that were subject to the same criticism, or filed pleadings which sought to circumvent the effect of the court's order. None of these cases involved the question of the litigant's right to dismiss without prejudice before final submission. Consequently they do not control the question here presented.

When the trial court entered its decree of October 29, 1948, completely disposing of appellee's cause of action therein set forth but continuing the issues presented by

the appellants' counterclaims together with any defense the appellee might have thereto, the appellants became the plaintiffs insofar as their counterclaims asked for affirmative relief against the appellee.

As stated in Fox v. Pinson, 182 Ark. 936, 34 S. W. 2d 459, 74 A. L. R. 583: "She set up, however, matters which gave her a right to affirmative relief, and asked for all damages against the breach of the covenant which embraces all which she might have asserted in an independent action. This made her cross-complaint something more than merely defensive. She sought affirmative relief as an independent action, and we think this made her a plaintiff within the meaning of our statute providing for a voluntary dismissal of an action before the final submission of a case to the court by the plaintiff."

"A defendant who files a cross complaint in the nature of an independent suit demanding affirmative relief is a plaintiff with regard to the relief demanded in that cross action, within the meaning of a statute providing for the voluntary dismissal by the plaintiff of an action, and he may dismiss his cross complaint or cross action subject to the same rules and conditions governing the right of a plaintiff to dismiss. A defendant mortgagor who interposes a cross complaint to recover a covenant of warranty becomes a plaintiff and has an absolute right to dismiss the cross complaint without prejudice. A like rule applies with reference to a counterclaim filed by the defendant in an action; generally it is held that the defendant may withdraw such counterclaim provided he does so within the proper time." 17 Am. Jur., Dismissal and Discontinuance, § 12, p. 63.

Section 25-601, R. R. S. 1943, provides, so far as here material: "An action may be dismissed without prejudice to a future action (1) by the plaintiff, before the final submission of the case to the jury, or to the court where the trial is by the court; * * *."

"Before the final submission of a case to the jury or

court, a dismissal by plaintiff without prejudice to a future action is not a matter of judicial grace or discretion, but is a statutory right. Comp. St. 1929, sec. 20-601 (now section 25-601, R. R. S. 1943)." Duffy v. Cody, 129 Neb. 737, 262 N. W. 828.

"But the court may, when justice requires it, impose reasonable terms, or refuse dismissal. Horton v. State, 63 Neb. 34." Blue River Power Co. v. Hronik, 116 Neb. 405, 217 N. W. 604.

In Horton v. State, 63 Neb. 34, 88 N. W. 146, the court, in seeking to clarify when such refusal might be proper, stated: "This discretion has been exercised to require payment of costs. Sheedy v. McMurtry, supra; to protect rights of attorneys under agreements as to fees, Bryon v. Durrie, 6 Abb. New Cas. (N. Y.), 135; to protect a defendant in his plea of estoppel from the danger of possible transfer of a lien, Stevens v. Railroads, 4 Fed. Rep., 97; and to enable a defendant to obtain restitution, Lane v. Morton, 81 N. C., 38. Of course, there must be some real and substantial right which has accrued to the adverse party in the very cause sought to be dismissed."

The court in Horton v. State, *supra,* then goes on to state: "Collateral consequences, such as subjection of the defendant to further litigation, or purposes not connected with the action in question, will not be allowed to interfere with the right given to plaintiffs by statute. Banks v. Uhl, 6 Nebr., 145. Hence, ordinarily, the dismissal will be allowed as of course. Beals v. Western Union Telegraph Co., 53 Nebr., 602 (601)."

In Blue River Power Co. v. Hronik, *supra,* wherein these questions are again fully discussed, the court held: "The injury occasioned by the dismissal must be such as to deprive defendant of some substantial right not available in a second suit, or that may be endangered by the dismissal. Young v. Georgia Home Ins. Co., 131 Ga. 54; Stevens v. Railroads, 4 Fed. 97; Kemper v. Calhoun, 111 Va. 428. The ordinary inconvenience of double liti-

gation is not a legal prejudice, and can be compensated by costs. Gilmore v. Bort, 134 Fed. 658; Penn Phonograph Co. v. Columbia Phonograph Co., 132 Fed. 808; Southern Cotton Oil Co. v. Shore, 171 N. Car. 51; Pullman's Palace Car Co. v. Central Transportation Co., 171 U. S. 138. * * * We are of the opinion that the only discretion which may be exercised in the matter is the protection of any rights which have accrued to defendant as a result of the bringing of the action, such as the preservation of a counterclaim, the restitution of property of which he has been deprived, the recovery of his costs, and the like; that in the absence of such considerations the right to dismiss is absolute; that the expense of employing attorneys in defending the action, or the liability to further litigation over the same matter, are not subjects calling for the exercise of discretion by the court as constituting legal prejudice to defendant."

In view of the foregoing principles, which are here applicable to appellants' counterclaims, we find nothing in the record to justify the court's overruling appellants' motion to dismiss their counterclaims without prejudice and its sustaining of appellee's motion to dismiss appellants' counterclaims with prejudice and to strike appellants' dismissal of their counterclaim without prejudice. Its order of May 29, 1950, to that effect is reversed with directions that it sustain appellants' motion asking to dismiss their counterclaims without prejudice.

As to the appellee's claimed set-off against appellants' counterclaims, which is based on the reasonable rental values of the premises for the crop year 1947-1948, section 25-603, R. R. S. 1943, provides as follows: "In any case where a set-off or counter-claim has been presented, the defendant shall have the right of proceeding to the trial of his claim, although the plaintiff may have dismissed the action or failed to appear."

"A plaintiff has the right, before final submission of his cause of action, to dismiss the same, but this right does not control the right of the defendant to proceed to

the trial of a set-off or counter-claim properly pleaded by him in his answer." Adams v. Osgood, 55 Neb. 766, 76 N. W. 446. See, also, Winters v. Means, 33 Neb. 635, 50 N. W. 955; Plattsmouth Loan & Bldg. Assn. v. Sedlak, 128 Neb. 509, 259 N. W. 367.

Reference is made to section 25-834, R. R. S. 1943. In view of our holding this statute is not applicable to the situation here.

The cause is reversed with directions to the trial court to sustain appellants' motion asking permission of the court to dismiss their counterclaims without prejudice.

REVERSED WITH DIRECTIONS.

WILLIAM C. BORAH, JR., APPELLANT, V. LINCOLN HOSPITAL ASSOCIATION ET AL., APPELLEES.

46 N. W. 2d 166

Filed February 16, 1951. No. 32889.

1. **Wills: Evidence.** Extrinsic evidence is not admissible for the purpose of changing a will or in the making of a new one which was intended by the testator but which was not in fact made by him.
2. ———: ———. In construing a will the whole thereof will be considered and from its four corners the court will determine the intent of the testator and give effect thereto, and extrinsic evidence is not admissible to determine the intent of the testator as expressed in his will unless there is a latent ambiguity.
3. ———: ———. In case of a latent ambiguity which consists of an erroneous description of a beneficiary, sufficient language must remain in the will, which, together with extrinsic evidence, will identify the intended beneficiary with reasonable certainty, otherwise the legacy is void.
4. ———: ———. Extrinsic evidence is admissible to prove that a will contains a latent ambiguity and to explain the ambiguity for the purpose of arriving at the true intent of the testator.
5. ———: ———. The intent which may be shown must be the intent which the testator had when he employed the words which appear in the will.
6. ———: ———. Where a latent ambiguity consists of an erroneous description of a beneficiary, such erroneous description

will not avoid the legacy if it can be struck out and from the remaining portion, together with proof dehors the instrument, the intended beneficiary clearly appears.

7. ———: ———. When a description is found in a will which does not accurately apply to anybody and the alternatives are either that it means nothing and the bequest fails, or that an effort may be made to ascertain the identity of the person intended, extrinsic evidence should be admitted to aid in ascertaining such identity.

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

Frederick J. Patz, for appellant.

Cline, Williams & Wright, John Jacobson, and *C. Russell Mattson,* for appellees.

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

YEAGER, J.

This is a declaratory judgment action by William C. Borah, Jr., plaintiff and appellant, against the Lincoln Hospital Association and William H. H. Moore, successor trustee under the last will and testament of Robert E. Moore, deceased, defendants and appellees.

The purpose of the action is to have interpreted and construed the will and codicils of Robert E. Moore, deceased, for the purpose of having determined whether the plaintiff is the vested remainderman of two trusts set up by a codicil or whether the Lincoln Hospital Association as residuary legatee is vested with this remainder.

The cause was tried to the district court where it was decreed that the Lincoln Hospital Association was vested with the remainder. From this decree the plaintiff has appealed.

The determination here must rest upon legal principles involved in the interpretation of wills rather than

upon disputed questions of fact since there is no substantial dispute as to the pertinent facts.

The pertinent facts are that in July 1912 Robert E. Moore made a will. In this will he bequeathed to Gertrude Byerly and to Julia Byerly each $10,000. These two were sisters, and nieces of the testator. Byerly was their maiden name. This was not, however, their name at that time. Gertrude's name was Johnson. She had been married. Her husband died in 1908 as did a child, the only child ever born to her. Julia's name was Borah. In 1916 Gertrude and Julia were living in Springfield, Illinois. Julia and her husband maintained a home there and Gertrude was employed and lived in the home with them. Julia at that time had a son, the plaintiff in this action. In June 1916 the testator visited in Springfield, Illinois, where he saw the sisters and the plaintiff. The plaintiff was then just under four years of age. He was an only child and Julia never thereafter had any other children. In December of 1916 the testator added a codicil to his will reducing the bequests of the sisters to life estates with remainder over as follows: "In case of the death of Gertrude Byerly or Julia Byerly, or either of them, the legacy bequeathed to them in said will shall descend to and vest in the child of Gertrude Byerly."

In June of 1919 the testator by codicil increased the bequests to the sisters from $10,000 to $15,000 each and attached to them the previous conditions that they were to be life estates with the vested remainder in the child of Gertrude Byerly.

Factually Gertrude Byerly had no child either in 1916 or 1919. Her only child, as has been pointed out, died in 1908. The plaintiff was the only child of either of the sisters in being in 1916 or which came into being thereafter. These sisters were daughters of testator's sister whose married name was Byerly.

The theory of plaintiff is that it was the intention of the testator that these bequests should vest in remainder in the plaintiff, the child of Julia, although the codicil

stated "the child of Gertrude Byerly"; that this is a latent ambiguity which is subject to explanation by extrinsic evidence.

The defendant Lincoln Hospital Association by its brief indicates agreement that here is a latent ambiguity but its theory is, briefly stated, that Gertrude Byerly may be shown not to have a child at the time but that it is improper to show that Julia Byerly had a child and that this was the child intended by the testator, since to do so would have the effect in this respect of rewriting the will, a power which may not be exercised by the courts under the latent ambiguity rule. It contends that since the designee named in the will did not exist the remainder vests in the Lincoln Hospital Association, the residuary legatee named in the will.

The other defendant has presented no theory of interpretation. He has asked only that interpretation be made by the court and that he be advised thereof. Therefore for the further purposes of this opinion the Lincoln Hospital Association will be referred to as the appellee.

The principle is well settled that extrinsic evidence is not admissible for the purpose of changing a will or in the making of a new one which was intended by the testator but which was not in fact made by him. In re Estate of Robinson, 139 Neb. 707, 298 N. W. 559.

It is likewise well settled that in construing a will, the whole thereof will be considered and from its four corners the court will determine the intent of the testator and give effect thereto, and that extrinsic evidence is not admissible to determine the intent of a testator as expressed in his will unless there is a latent ambiguity. Lincoln Nat. Bank & Trust Co. v. Grainger, 129 Neb. 451, 262 N. W. 11; Woelk v. Luckhardt, 134 Neb. 55, 277 N. W. 836, 115 A. L. R. 437; In re Estate of Robinson, *supra.*

Also in case of a latent ambiguity which consists of an erroneous description of a beneficiary, sufficient language must remain in the will, which, together with ex-

trinsic evidence, will identify the intended beneficiary with reasonable certainty, otherwise the legacy is void. Seebrock v. Fedawa, 33 Neb. 413, 50 N. W. 270, 29 Am. S. R. 488; Second United Presbyterian Church v. First United Presbyterian Church, 71 Neb. 563, 99 N. W. 252; St. James Orphan Asylum v. Shelby, 75 Neb. 591, 106 N. W. 604; Heywood v. Heywood, 92 Neb. 72, 137 N. W. 984; Mohr v. Harder, 103 Neb. 545, 172 N. W. 753; Burnham v. Bennison, 126 Neb. 312, 253 N. W. 88.

Extrinsic evidence is admissible to prove that a will contains a latent ambiguity and to explain the ambiguity for the purpose of arriving at the true intent of the testator. Mohr v. Harder, *supra;* Elliott v. Quinn, 109 Neb. 5, 189 N. W. 173; In re Estate of Schuette, 138 Neb. 568, 293 N. W. 421; Brandeis v. Brandeis, 150 Neb. 222, 34 N. W. 2d 159.

The intent which may be shown must be the intent which the testator had when he employed the words which appear in the will. If he named or described a person in the will and it became apparent that this was a misdescription or that two or more persons bore the same description not only could the ambiguity be shown by extrinsic evidence but also the true intent in that connection could be shown if it did no violence otherwise to the language of the will. Seebrock v. Fedawa, *supra;* St. James Orphan Asylum v. Shelby, *supra;* Heywood v. Heywood, *supra;* Herter v. Herter, 97 Neb. 260, 149 N. W. 795; Mohr v. Harder, *supra;* Elliott v. Quinn, *supra;* Burnham v. Bennison, *supra;* 69 C. J., Wills, § 1187, p. 161; In re Estate of Peterson, 202 Minn. 31, 277 N. W. 529.

As pointed out hereinbefore there was no such person as "the child of Gertrude Byerly." The appellee effectually conceded that this presented a latent ambiguity subject to proof by extrinsic evidence. It contends however that the plaintiff may not go beyond this and also prove extrinsicly that the plaintiff, the child

of Julia Byerly, was the person intended to be described by the testator.

It appears that reliance for support of this contention rests upon the language contained in Burnham v. Bennison, *supra,* and Patch v. White, 117 U. S. 210, 6 S. Ct. 617, 29 L. Ed. 860.

In Patch v. White, *supra,* it was said: "Where it (a latent ambiguity) consists of a misdescription, as before stated, if the misdescription can be struck out, and enough remain in the will to identify the person or thing, the court will deal with it in that way; or, if it is an obvious mistake, will read it as if corrected."

In Burnham v. Bennison, *supra,* it was said: "Where a latent ambiguity consists of an erroneous description of a beneficiary, such erroneous description will not avoid the legacy if it can be struck out and from the remaining portion, together with proof dehors the instrument, the intended beneficiary clearly appears."

The appellee substantially urges that under the authority of these statements the misdescription must be regarded as stricken out and with it thus stricken no description remains and thus the legacy fails for want of description of a taker.

The quoted language of Patch v. White, *supra,* may be subject to such an interpretation but clearly the same is not true of the quotation from Burnham v. Bennison, *supra.* The language of this case specifically contemplates the striking of the misdescription and the supplying of the intended description by proof dehors the instrument, in this case the codicil. This case therefore contains the rule obtaining in this jurisdiction.

Other pronouncements of this court which demonstrate that this is the rule in this jurisdiction are the following:

"When a testator has named in his will as a beneficiary a child who died before the will was written, and without heirs, and it clearly appears that he intended to name another child, then living, as such beneficiary, but by inadvertence or mistake the name of the deceased child

was inserted instead of that of such living child, the district court has power in a proper case to construe the will to express the real intent of the testator in that regard as shown by the evidence." Mohr v. Harder, *supra.*

"Where the intention of the testator is to be gathered from the will itself and from the extrinsic evidence of facts surrounding its execution, such extrinsic evidence is admissible for the purpose of ascertaining whether a state of facts existed at the time the will was written which corresponded with the words used and the aim of the testator. Such evidence may not be admitted to vary the terms of the will or to add anything to it so as to arrive at an intention not expressed in it, but to harmonize the language used by the testator with the facts referred to, and thus to arrive at the testator's intention as expressed in the will, and a ruling which makes the will and the facts inconsistent is not to be adopted." Heywood v. Heywood, *supra.*

We conclude therefore that it was proper for the plaintiff to show by extrinsic evidence that the use of the words "the child of Gertrude Byerly" was erroneous and that the testator's true intention was to say instead "the child of Julia Byerly."

The remaining question is that of whether or not the extrinsic evidence adduced and offered was sufficient to so show. This calls for a review of the evidence in this respect.

The record discloses that the testator had little contact with the sisters at any time. He did know that Gertrude had been married and that her husband had died. He knew this soon after the husband's death which was in 1908. Soon after the death he talked with her about a plan on her part to become employed. Whether or not he knew that she had a child who died about the same time as her husband does not appear. About eight years later which was the occasion of the visit in June 1916, already mentioned, it may be reasonably said that he knew that Gertrude was a widow with-

out children and lived in the home of Julia. At that time he became informed of the fact that Julia had an only child, the plaintiff herein. He met the child and appeared to be favorably impressed with him. A few months later he made and published the codicil which is the subject of this controversy.

At the time he made this codicil the testator must have intended the legacy to go to some one in being rather than some one not in being, and reasonably it must be said that extrinsic evidence was admissible to identify the person in being and intended.

The proper rule we think is that when a description is found in a will which does not accurately apply to anybody and the alternatives are either that it means nothing and the bequest fails, or that an effort may be made to ascertain the identity of the person intended, extrinsic evidence should be admitted to aid in ascertaining such identity. Parsons v. Parsons, 30 Eng. Reprints 335; In re Halston (1912), 1 Chan. 435; Re Walker (1924), 1 D. L. R. 719; Theobald on Wills (7th ed.) (1908), p. 265.

On the evidence and under the principles referred to herein the conclusion of this court is that the district court erred in decreeing that plaintiff is not the beneficiary of the clause of the codicil under consideration herein and also erred in decreeing that, as between the plaintiff and the appellee, the appellee as residuary legatee is entitled to the legacy.

The decree of the district court is accordingly reversed and the cause remanded with direction to enter a declaratory decree declaring the plaintiff to be the person described in the codicil as "the child of Gertrude Byerly" and that as such he is vested with the remainder of the estates bequeathed to Gertrude Byerly and Julia Byerly by the will of Robert E. Moore, deceased.

REVERSED AND REMANDED WITH DIRECTIONS.

NATIONAL FIRE INSURANCE COMPANY, APPELLEE, V. LYLE EVERTSON ET AL., APPELLANTS.
46 N. W. 2d 489

Filed February 22, 1951. No. 32891.

1. **Pleading.** A party may not allege one cause of action in his petition and prove another upon the trial.
2. **Trial.** The action of a trial court in making findings of fact not pleaded and basing a judgment thereon is prejudicially erroneous.
3. **Evidence.** The receiving in evidence of a copy of a written agreement as secondary evidence is erroneous in the absence of proof that the original was in fact executed, that the original is not available, and that the offered instrument is a true copy thereof.
4. ———. Evidence may not properly be supplied after the trial to correct the error of the trial court in admitting secondary evidence without the proper foundation being laid for its admission.

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

Ivan Van Steenberg, and *Davis, Stubbs & Healey,* for appellants.

Pilcher & Haney, and *Torgeson, Halcomb & O'Brien,* for appellee.

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

CARTER, J.

This action involves an accident between a bus of plaintiff's insured, Burlington Transportation Company, and an automobile operated by the defendant Lyle Evertson and owned by the defendant Frank Evertson. Plaintiff paid the Burlington Transportation Company the sum of $5,083.74 to cover the cost of the repair of the bus under the terms of the collision insurance policy. This action is brought by the plaintiff against the defendants under the subrogation provisions of the policy to recover the amount paid. It also appears from the

record that defendants' insurer paid $5,000 to the Burlington Transportation Company in settling certain claims against the defendants. Plaintiff contends that it is entitled to a judgment for this amount as a matter of law. The trial court sustained plaintiff's position and directed a verdict for the plaintiff for $5,000 and accrued interest. Defendants appeal.

The record shows that on June 2, 1946, at about 11:30 p. m., a bus owned and operated by the Burlington Transportation Company and an automobile owned by the defendant Frank Evertson and operated by the defendant Lyle Evertson, the son of Frank Evertson, were involved in a collision on U. S. Highway No. 30 about one mile west of Dix, Nebraska. The evidence indicates that the automobile sideswiped the rear of the bus, causing it to leave the highway and overturn. The bus was seriously damaged and many of the passengers injured.

There is evidence in the record that the cost of repairing the bus was $6,083.74. The Burlington Transportation Company carried collision insurance with the plaintiff who paid $5,083.74 on the claim, the policy being a $1,000 deductible policy. This action was commenced by the plaintiff under the subrogation provisions of the policy to recover the amount from the defendants. The petition alleged that the collision was the result of the negligence of Lyle Evertson, the operator of the automobile. The answer was a general denial and a further allegation that the collision was occasioned by the negligence of the operator of the bus. Evidence upon these issues was presented to a jury. At the close of the evidence the trial court sustained plaintiff's motion for a directed verdict for $5,000 and entered judgment thereon.

The basis of the judgment in this amount was a purported agreement and release given by the Burlington Transportation Company to the State Farm Mutual Automobile Insurance Company, defendants' insurer, which purported to release defendants from all liability except

the item of damage to the bus in the amount of $5,083.74. In this connection we point out that the purported settlement between the Burlington Transportation Company and the State Farm Mutual Automobile Insurance Company, defendants' insurer, was neither pleaded nor any issue raised with reference thereto by the pleadings. Consequently, the pleadings do not sustain a judgment based on any payment made by defendants' insurer, or any right of the plaintiff to be subrogated to the rights of the Burlington Transportation Company because of such payment. This court has repeatedly held that a judgment must be supported by the pleadings and that no recovery can be had where there is a material variance between the pleadings and the proof. Luce v. Foster, 42 Neb. 818, 60 N. W. 1027; Kulhanek v. Kulhanek, 106 Neb. 595, 184 N. W. 139. In Drieth v. Dormer, 148 Neb. 422, 27 N. W. 2d 843, we stated the rule in the following language: " 'It is also a general principle of law that a court cannot set itself in motion, nor has it power to decide questions except as presented by the parties in the pleadings. Anything that is decided beyond them is coram non judice and void. Therefore where a court enters a judgment or awards relief beyond the prayer of the complaint or the scope of its allegations the excessive relief is not merely irregular but is void for want of jurisdiction, and is open to collateral attack.' "

The situation here existing is aptly expressed in a concurring opinion in the case of Pennock v. Newhouse Realty Co., 97 Utah 408, 93 P. 2d 482, wherein it was said: "The best pleading, the most definite and concise of which the facts reasonably admit, is none too good. Counsel is not responsible for and has no control over the facts, but the pleadings are his offspring, sired by his knowledge and damed by his ingenuity, and they should be his pride and joy. It is far better that such offspring die aborning than to live until charged with the duty of supporting a judgment, and then die an ignominious death upon the gallows of the appellate court."

There is a further reason why the judgment cannot be sustained. It is not supported by any competent evidence. The only evidence in the record of the settlement between the Burlington Transportation Company and defendants' insurer is an unsigned, undated carbon copy of such a claimed settlement and release. No foundation for its admission was laid, no one testifying to what it was or to facts which would render it competent as secondary evidence. It was erroneously admitted. The applicable rule is stated in Powell v. Anderson, 147 Neb. 872, 25 N. W. 2d 401: "An unsigned and unauthenticated copy of an order, produced from the files of a governmental agency, is secondary evidence which, of itself, raises no presumption that the original was in fact executed. The original order in this case was not accounted for, nor was there any proof of its actual issuance or execution. We conclude that the admission of exhibit 8 was error, prejudicial to the defendant."

The plaintiff attempted to cure the error in admitting the copy of the settlement and release by supplying the required evidence at the hearing on the motion for a new trial. This, of course, cannot be done. The correctness of the judgment must be determined on the evidence presented by the record at the time it was given. Facts not known, or facts known but not offered, are immaterial to the issues when the trial is completed. The remedy is to apply for a new trial. The judgment cannot be propped up by supporting evidence on the hearing of the motion for a new trial.

The judgment is not supported by the pleadings or the evidence. The judgment is therefore reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

R. K. ARMSTRONG ET AL., APPELLEES, V. THE BOARD OF SUPERVISORS OF COUNTY OF KEARNEY, NEBRASKA, APPELLANT.

46 N. W. 2d 602

Filed February 22, 1951. No. 32969.

1. **Judgments.** Proceedings for a declaratory judgment are appropriate and authorized to determine the validity, construction, or interpretation of a statute when there is a justiciable controversy between parties in respect to their rights under the statute.
2. **Evidence.** The courts of a state may take judicial notice of the population of a county created by it and of the counties therein in which a statute of the state is effective if its operation depends upon the existence of a specified population.
3. **Statutes.** The court in considering the meaning of a statute should if possible discover the legislative intent from the language of the act and give it effect.
4. **Counties: Bonds.** Section 23-343, R. S. Supp., 1949, permits a county board of a county with the required population, when authorized by the voters of the county in the manner specified, to issue and sell bonds of the county in an amount fixed by the board and to use the proceeds thereof for the construction or acquisition of a county community hospital and the purchase of suitable equipment therefor.
5. **Hospitals: Counties.** The fact that the county board has once complied with the statute, established, equipped, and is operating such a hospital, does not prevent it from acquiring or constructing, equipping, and operating another hospital on the same or a different site.
6. ———: ———. Section 23-343.07, R. S. Supp., 1949, provides the methods by which the cost of improvements or additions to and equipment for a county community hospital may be provided after it has been established.
7. ———: ———. Section 23-343.07, R. S. Supp., 1949, does not limit or affect section 23-343, R. S. Supp., 1949.
8. **Statutes.** If the language of a statute is clear and unambiguous, courts will not by interpretation or construction usurp the function of the lawmaking body and give it a meaning not intended or expressed by the Legislature.

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

Charles A. Chappell, for appellant.

Bracken & Tucker, and *Fred S. Martin,* for appellees.

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

BOSLAUGH, J.

Appellees seek, by authority of the Uniform Declaratory Judgments Act, to secure an interpretation of statutory provisions authorizing county boards in counties having not less than a designated population, when authorized by a vote of the electors, to issue and sell bonds of the county and use the proceeds for the acquisition or construction of a county community hospital.

Appellees are resident taxpayers of Kearney County and prosecute the action for themselves and all other interested persons. Appellant is the board of supervisors and the governing body of the county.

An election was held therein during the month of August 1947, at which the voters authorized appellant to issue and sell bonds of the county to provide funds for the construction or acquisition of a county community hospital and the purchase of suitable equipment for it. In March 1948, appellant purchased the Seeley Hospital in the city of Minden, appointed a board of hospital trustees, and has since operated it as a county community hospital.

When the election was held and the hospital was acquired it was contemplated that it would be enlarged, improved, and modernized to adequately accommodate the hospital needs of the county. The hospital requirements of the county exceeded its capacity and facilities. Appellant, the board of hospital trustees, and many other residents of the county considered it was not feasible or practical to make it an adequate or suitable county hospital by alterations and additions, that its location is not suitable, that a new hospital should be constructed on a different and desirable site, and the existing one should be sold. This requires the issuance and sale of additional bonds of the county. Appellees contend this

may be done by compliance with the provisions of section 23-343, R. S. Supp., 1949. Appellant denies this. It has been advised, believes, and maintains that because the electors of the county authorized one bond issue for this purpose and a hospital was acquired and is owned and operated as a county community hospital as the relevant statute permits, it is not now authorized by the law of this state to issue bonds although approved by a favorable vote of the people of the county for the purpose of acquiring or constructing another county hospital. It asserts it now can only make additions and improvements to the existing hospital and its equipment, that it is thus limited by section 23-343.07, R. S. Supp., 1949, but, if authorized by law, it is willing to provide for an election and, if empowered by the voters of the county, to issue and sell bonds and to proceed with the construction of a new county hospital, but it will not incur the cost and expense thereof or initiate proceedings to that end until it is finally determined that such procedure is legal.

The district court decided that appellant may issue and sell bonds of the county, when authorized by the voters at a proper election for that purpose, and use the proceeds thereof to purchase a site and to acquire or construct a new county community hospital thereon and to purchase equipment for it, and that it is not limited to making additions or improvements to the hospital now owned and operated by the county. Appellant insists that the judgment is contrary to law.

The problem is whether appellant may, in view of the facts stated, if approved by a vote of the people at a proper election, issue and sell bonds of the county for the purpose of constructing another county community hospital on a site different from the location of the existing hospital, or is it now restricted, while the present hospital exists, to the making of additions and improvements to it. It is a matter of public importance and of particular concern to the parties hereto and the

residents of the county that the question involved in the controversy be judicially determined.

Proceedings for a declaratory judgment are appropriate and authorized to determine the validity, construction, or interpretation of a statute when there is a justiciable determinable controversy between parties in respect to rights thereunder. §§ 25-21,149, R. S. Supp., 1949, and 25-21,150 to 25-21,164, R. R. S. 1943; State ex rel. State Railway Commission v. Ramsey, 151 Neb. 333, 37 N. W. 2d 502; Thorin v. Burke, 146 Neb. 94, 18 N. W. 2d 664.

The provisions of the statute are applicable to counties having thirty-six hundred inhabitants or more. The record is silent as to the population of Kearney County, but the courts of a state may take judicial notice of the population of a county created by it and of the counties wherein a statute of the state is operative, if its operation depends upon the existence of a specified population. In re Will of Pittock, 102 Or. 159, 199 P. 633, 17 A. L. R. 218; State ex rel. Welsh v. Darling, 216 Iowa 553, 246 N. W. 390, 88 A. L. R. 218; 20 Am. Jur., Evidence, § 52, p. 76; 31 C. J. S., Evidence, § 98, p. 696. See, also, Standard Oil Co. v. City of Kearney, 106 Neb. 558, 184 N. W. 109, 18 A. L. R. 95. This court may, and does, take judicial notice of the fact that the population of Kearney County is more than six thousand.

The conclusion in this case is controlled by sections 23-343 and 23-343.07, R. S. Supp., 1949. In considering the meaning and effect of these, the legislative intent must be discovered if possible from the language used considered in its plain, ordinary, and popular sense. Van Auker v. Steckley's Hybrid Seed Corn Co., 143 Neb. 24, 8 N. W. 2d 451; Anderson v. Robbins Incubator Co., 143 Neb. 40, 8 N. W. 2d 446.

The language of section 23-343, R. S. Supp., 1949, applicable to this case, is: "The county board, in any county in this state having thirty-six hundred inhabitants or more, may issue and sell bonds of such county

in such an amount as the county board may deem advisable for the construction or acquisition of * * * a county community hospital and to purchase suitable equipment for the same, which bonds shall bear interest at a rate not to exceed five per cent per annum; Provided, no bonds shall be issued until the question of the issuance of said bonds shall have been submitted to the voters of such county at a general election, or a special election called for such purpose, and approved by a majority vote of the electors voting on such proposition at any such election."

The part of section 23-343.07, R. S. Supp., 1949, relevant to the questions involved herein, provides: "(1) The county board, in counties in this state in which a county community hospital has been established as provided in section 23-343, may, by a majority vote of the board, issue and sell bonds of the county in such sums as the county board may deem advisable to defray the cost of improvements or additions thereto and equipment. Such bonds shall not exceed the amount authorized for improvements, additions, or equipment in section 23-343.03." The limitation of section 23-343.03, R. S. Supp., 1949, is not "more than fifty per cent of the cost of the original community hospital building or building and equipment." Section 23-343.07, R. S. Supp., 1949, then provides: "(2) The county board may also, either on its own initiative or upon the recommendation of the board of hospital trustees, from time to time submit to the electors of such county at a general election or at a special election called for that purpose, the question of the issuance of the bonds of such county to defray the cost of improvements or additions to such hospital or equipment therefor in an amount either within or exceeding the limitation of fifty per cent of the cost of the original county community hospital building, or building and equipment. If approved by the vote of a majority of the electors voting on such proposition, the county board shall issue and sell such bonds."

The meaning of the first section quoted is, and the district court found and adjudged, that a county board of a county with the required population may, when authorized by the voters of the county in the manner specified, issue and sell bonds of the county in the amount fixed by the board bearing interest not to exceed five per cent per annum, and use the proceeds thereof for the construction or acquisition of a county hospital and the purchase of suitable equipment for it. This is a general statute applicable to all counties in the state that have the population requirement. There is no limitation that any county may have only one county community hospital. Any county within the operation of this statute may have one or more hospitals, and equip and operate it or them if the county board and the voters of the county cooperate to that end. The fact that the county board of a county and the voters thereof have once complied with the statute and thereby acquired, selected a site for, equipped, and is operating such a hospital is no bar or obstacle to the county again taking advantage of the statute and acquiring, equipping, and operating another county community hospital on a different site by authority of this legislation. This statute does not limit the number of hospitals a county may acquire or construct and equip and operate.

Section 23-343.07, R. S. Supp., 1949, provides the manner of defraying the cost of improvements or additions to and equipment of a county community hospital after it "* * * has been established as provided in section 23-343." Two methods are designated. The county board may, by a majority vote of that body, without a vote of the electors of the county, issue and sell bonds of the county not to exceed one-half of the cost of the hospital building or the building and equipment and use the proceeds for the expense of improvements, additions, and equipment. The alternative method is that the county board may, with or without the recommendation of the board of hospital trustees, with the approval of a

majority of the voters expressing themselves on the subject at an election, issue and sell bonds of the county in an amount either within or exceeding the limitation of fifty per cent of the cost of the hospital building, or building and equipment, to be improved, enlarged, or added to, and use the proceeds to defray the cost of improvements, additions, and equipment of the hospital.

The authority granted by section 23-343, R. S. Supp., 1949, is separate and distinct from the powers bestowed by section 23-343.07, R. S. Supp., 1949. The latter does not in any way or to any degree affect what may be done by virtue of the former. The language of each of these sections is clear, definite, and unambiguous, and construction or interpretation is neither required nor permitted. If the language of a statute is clear and unambiguous, courts will not by interpretation or construction usurp the function of the lawmaking body and give it a meaning not intended or expressed by the Legislature. State ex rel. Nebraska Beer Wholesalers Assn. v. Young, *ante* p. 395, 44 N. W. 2d 806; In re Estate of Robinson, 138 Neb. 101, 292 N. W. 48; Shamp v. Landy Clark Co., 134 Neb. 73, 277 N. W. 802.

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

AFFIRMED.

MESSMORE, J., participating on briefs.

RUTH W. DENNIS ET AL., APPELLEES, V. THE OMAHA NATIONAL BANK, SUCCESSOR TRUSTEE OF THE TRUST ESTATE OF WILLIAM P. MYERS, DECEASED, ET AL., APPELLANTS.

46 N. W. 2d 606

Filed March 2, 1951. No. 32870.

1. **Descent and Distribution.** Although no county court decree has ever been entered determining the heirs at law of a deceased person, the district court has original jurisdiction to make such determination where the question becomes material in a proceeding of which such court has original jurisdiction.
2. **Equity.** Where an equity court has obtained jurisdiction of a cause for any purpose it will retain it for all, and proceed to a final determination of the case, adjudicate all matters in issue, and thus avoid unnecessary litigation.
3. **Wills.** In interpreting a will containing no ambiguity the court must ascertain the intent and purpose of the testator as disclosed by the language of the will and then give effect thereto if not contrary to law.
4. ———. Where provisions in a will are couched in correct grammatical language, they will be given the ordinary and natural meaning which that language imports, unless it clearly appears from the whole instrument that a different meaning was intended.
5. ———. Where particular words in a will are followed by general, the general words are ordinarily restricted in meaning to provisions of like kind.
6. ———. In the interpretation of language used in a will, where a word or words are used in a definite and clearly stated sense, and again used in the same paragraph, it is presumed to be meant in the same sense unless there is a clear indication to the contrary.
7. **Trusts.** Regardless of the nominal duration of the trust it will not continue in equity longer than the thing sought to be secured by the trust demands. Consequently the trust will terminate as soon as it has been fully performed or executed, or where the object and purposes of the trust fail or its execution, performance, or accomplishment becomes impossible.
8. **Wills.** A testator will be presumed to have executed his will with knowledge of applicable rules of law, and in interpreting his will such knowledge will be imputed to him.
9. **Wills: Trusts.** Where a testator by his will gives, bequeaths,

wills, and devises absolutely all of his estate and income therefrom to a trustee in trust to pay a part of the income therefrom monthly to his children, their issue or descendants, so long as any of his children survive and twenty years after the death of the last surviving child, the property then to vest in uncertain and unascertained remaindermen, then the whole estate or full title in fee simple, including the title of the then uncertain and unascertained remaindermen vests in the trustee, until they are certain and ascertained at termination of the trust.

10. **Trusts.** Generally, where the legal and equitable estates in trust property unite in the same person, there is a merger of such estates and the trust is terminated. However, a merger does not take place until the legal and equitable titles vest in the same person, and even then equity may refuse to recognize a merger, as where such result would be contrary to the intention of the trustor and would destroy a valid trust.
11. **Wills: Trusts.** Where complete disposition of an estate has been made by a will, which by language and necessity vested the whole of the fee in the trustee, defeasible only at termination of the trust, when it was to vest in a class, none of whom then or ever will exist, and the trust is terminated by operation of law for failure of purpose or accomplishment, then the trustee holds the trust estate upon a resulting trust implied by intention, for the heirs of the testator who are such as of the date of the failure of the trust.
12. **Descent and Distribution.** If, at that time, the deceased shall leave no wife, nor issue, nor father, nor mother, nor sister, nor brother, then the estate shall descend and be distributed to his next kin in equal degree, except that where there are two or more collateral kindred in equal degree but claiming through different ancestors, those who claim through the nearest ancestor shall be preferred to those claiming through an ancestor more remote.
13. **Wills: Descent and Distribution.** Where all claiming as heirs of the testator on the date of the failure of the trust claim through the same ancestors, and are not collateral kindred in equal degree, the exception has no application.
14. **Descent and Distribution.** The word "children" appearing in section 30-102(3), R. R. S., 1943, does not include "grandchildren."

APPEAL from the district court for Richardson County: VIRGIL FALLOON, STANLEY BARTOS, and EDMUND P. NUSS, JUDGES. *Affirmed in part, reversed in part, and remanded with directions.*

Brown, Crossman, West, Barton & Quinlan, Wiltse & Wiltse, and *Joseph C. Reavis,* for appellants.

Archibald J. Weaver and *Paul P. Chaney,* for appellees.

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

CHAPPELL, J.

Plaintiffs brought this suit in equity, making all necessary parties defendants, to interpret or construe a will, terminate an express testamentary trust concededly created thereby, and obtain an order for distribution of the corpus of the estate to them per stirpes, as allegedly provided in the will or under the law of this jurisdiction governing resulting trusts. Issues were framed thereon by appropriate pleadings, and the case proceeded to trial on December 20, 1949.

On May 8, 1950, at the February 1950 term of court, a decree was entered, substantially finding and adjudging that for failure of purpose and performance or accomplishment, the trust terminated on August 31, 1947, whereupon the successor trustee held all of the corpus of the trust estate for plaintiff's named heirs of the testator as of that date, designated as the surviving children and grandchildren of a deceased brother and sister of testator. It directed the trustee to account for distribution accordingly in the county court of Richardson County, Nebraska, where the trust was being administered.

Timely motions for new trial were filed during the February 1950 term by defendants, Omaha National Bank, successor trustee, hereinafter designated as the bank; John H. Wiltse, administrator of the estate of Miranda S. Myers Bennett, hereinafter designated as the administrator; T. Porter Bennett, the husband of Miranda S. Myers Bennett, hereinafter designated as Bennett; and Joseph C. Reavis, as guardian ad litem for unknown defendants and as attorney for unknown de-

fendants, if any, who were in the armed services. The February 1950 term adjourned sine die May 22, 1950.

Believing that their motions for new trial had been overruled on May 20, 1950, the parties aforesaid each separately and timely filed notices of appeal, not only from the decree of May 8, 1950, but also from the overruling of their motions for new trial.

However, the motions for new trial were not in fact disposed of until June 2, 1950, when an order was entered not only overruling their motions for new trial, but also modifying the decree of May 8, 1950, in such manner as to include only the surviving children of testator's brother and sister, deceased, and to exclude their grandchildren.

On June 6, 1950, plaintiffs or some of them filed a motion to vacate and set aside the order of June 2, 1950, insofar as it purported to modify the decree of May 8, 1950, for want of jurisdiction to do so at a subsequent term. On June 8, 1950, Bennett and the administrator filed a like motion, including an application for rehearing upon their motions for new trial theretofore overruled. Also, on June 8, 1950, the bank timely filed a first supplementary notice of appeal not only from the decree entered May 8, 1950, but also from the order of June 2, 1950, overruling their motion for new trial and modifying the decree of May 8, 1950.

On June 22, 1950, an order was entered vacating and setting aside the order of June 2, 1950, and sustaining all motions for new trial. On the same day, a second trial was had whereat the evidence adduced at the former trial, and some additional evidence not important here, was adduced, whereupon a decree was then entered, identical in all material respects with the decree of May 8, 1950, as modified by the order of June 2, 1950, which eliminated the grandchildren.

Thereupon, the bank filed a supplemental motion for new trial, and plaintiffs, Bennett, the administrator, and guardian ad litem, filed motions for new trial, all of which

were then and there overruled, whereupon the guardian ad litem filed a supplemental notice of appeal from the decree entered June 22, 1950, and the order therein overruling his motion for new trial. Likewise, Bennett and the administrator filed a supplementary notice of appeal from the decree of May 8, 1950, from the order of June 2, 1950, overruling the motions for new trial and modifying the decree of May 8, 1950, from the decree entered June 22, 1950, and the subsequent overruling of their motions for new trial.

On June 2, 1950, a stipulation entered into by all of the parties as of May 26, 1950, was filed in this court, reciting substantially that whereas all the issues to be determined in this court upon appeal from the decree of May 8, 1950, and the overruling of defendants' motions for new trial could be fully and completely determined from a single transcript and single bill of exceptions, then all notices of appeal could be filed as in one cause, and that a single transcript and bill of exceptions filed therein with all further proceedings should be as in a single cause.

During the pendency of the cause in this court, plaintiff Fred M. Myers died in Luzerne County, Pennsylvania, and by stipulation the cause was revived as to him in this court, in the names of The Miners National Bank of Wilkes-Barre, Pennsylvania, and Charles E. Myers, as executors of the last will and testament of Fred M. Myers, deceased.

We are confronted at the outset with two alleged jurisdictional questions. In that connection, this is an equity action for trial de novo, with all parties before us upon the whole record, which contains substantially the same evidence adduced at both trials, about which there is no dispute, and in the light of which there could be but one conclusion. In fact, here the cause was finally argued and submitted upon an agreed statement of facts and issues. In view of the fact that in any event there was a timely appeal perfected in every respect

from the decree of May 8, 1950, and the overruling of defendants' motions for new trial, the contention of plaintiff grandchildren and guardian ad litem for one of them, in their cross-appeal, to the effect that the trial court had no authority or jurisdiction to modify said decree at a subsequent term or set aside its former order overruling defendants' motions for new trial and sustaining the same, is of little importance and becomes purely academic, requiring no further discussion.

On the other hand, the bank contended that the district court and this court on appeal, were without jurisdiction or authority to find and specifically determine, except as a class, who the heirs of the testator were, if it should be decided that the trust was terminated. We conclude otherwise.

As we view it, the very issues in this case formerly before this court in In re Trust Estate of Myers, 151 Neb. 255, 37 N. W. 2d 228, wherein it was decided that the county court had no original jurisdiction of the issues here presented but that the district court did have such jurisdiction, is controlling. Further, Article V, section 16, Constitution of Nebraska, provides: "County courts shall be courts of record, and shall have original jurisdiction in all matters of probate, settlement of estates of deceased persons, and in such proceedings to find and determine heirship * * *." Such provision does not purport to say that such jurisdiction shall be exclusive except in matters of probate and settlement of the estates of deceased persons. The case at bar is neither the one nor the other, but rather one in which the district court had exclusive original jurisdiction of the issues presented. This court has held, and the 1920 Constitution has not changed the rule, that even though no county court decree has ever been entered determining the heirs at law of a deceased person, the district court has original jurisdiction to make such determination where the question becomes material in a proceeding of which such court has original jurisdiction. Lewon v. Heath, 53

Neb. 707, 74 N. W. 274; Jetter v. Lyon, 70 Neb. 429, 97 N. W. 596; Fischer v. Sklenar, 101 Neb. 553, 163 N. W. 861; Gillespie v. Truka, 104 Neb. 115, 175 N. W. 883.

The foregoing rule exists because: "Where a court of equity has obtained jurisdiction of a cause for any purpose it will retain it for all, and will proceed to a final determination of the case, adjudicate all matters in issue, and thus avoid unnecessary litigation." Security Investment Co. v. Golz, 151 Neb. 172, 36 N. W. 2d 862. See, also, Leis v. Beckmark, 133 Neb. 467, 275 N. W. 679; In re Trust Estate of Myers, *supra*. The bank's jurisdictional contention has no merit.

There are concededly remaining then but two questions for determination: (1) Should the testamentary trust be terminated as of August 31, 1947, for failure of purpose, performance, or accomplishment? We conclude that it should. (2) To whom should the entire corpus of the estate be ordered distributed? We conclude that it should be ordered distributed to testator's "next kin in equal degree," determinable as of August 31, 1947, the date of the death of Miranda S. Myers Bennett, hereinafter designated as Miranda, on which date the testamentary trust failed and a resulting trust arose.

The bank and Joseph C. Reavis, guardian ad litem aforesaid, argued that the trust should not be terminated until August 31, 1967, or 20 years after the date of the death of Miranda. All other parties argued that failure of its purpose, performance, and accomplishment, terminated the trust as of August 31, 1947, the date of her death. We sustain the latter contention.

The administrator and Bennett argued that the corpus of the estate should be distributed to testator's heirs at law as of the date of his death, which would include Miranda, her heirs at law, and Bennett her husband as well, or that the trust was destroyed by merger before her death in any event, so that at that time she was sole owner of the property. We conclude that their contentions have no merit.

Plaintiffs and the guardian ad litem for one of them, who were included as grandchildren in the decree of May 8, 1950, but excluded in the decree of June 22, 1950, argued that the first decree was correct, primarily because the corpus of the estate should be distributed to the issue and descendants of the deceased, brother and sister of the testator per stirpes, as allegedly provided in the seventeenth paragraph of the will. We conclude that their contention should not be sustained.

On the other hand, other plaintiffs argued that the estate should be distributed to the children of a deceased brother and sister as testator's next kin in equal degree surviving on August 31, 1947, the date of the termination of the testamentary trust, at which time a resulting trust arose. We sustain that contention.

The facts are simple: William P. Myers died testate, a resident of Richardson County, Nebraska, on January 17, 1905. He was survived by his widow, Helen E. Myers, then 48 years old, and three children, Miranda S. Myers, then 20 years old, Martha W. Myers, then 18 years old, and Lawrence W. Myers, then 15 years old. The widow, Helen E. Myers, survived her husband but a short time, and died intestate during the year 1906, without having been married again or having other children.

Martha W. Myers and Lawrence W. Myers both died intestate without issue or decendants, and without ever having married, Martha having died in 1925, and Lawrence in 1942.

Miranda S. Myers married T. Porter Bennett in the year 1931 and died August 31, 1947, intestate, and without issue or descendants, leaving only her husband surviving.

The will of William P. Myers was admitted to probate in Richardson County on February 18, 1905. It nominated A. J. Weaver as executor and trustee. He was so appointed by the court on October 4, 1906, and continued to act as such trustee until his death October

18, 1945. In the meantime, on December 22, 1927, Miranda S. Myers and Lawrence W. Myers were appointed and qualified to jointly act as trustees along with A. J. Weaver. Lawrence W. Myers subsequently died as above stated, and in 1944 Miranda S. Myers, having in the meantime married T. Porter Bennett, filed her resignation as trustee and asked the court to accept it. Objections were filed, but they are unimportant here, and no final order was entered with respect to the resignation of Miranda S. Myers Bennett until November 27, 1945, at which time her resignation was accepted and the Omaha National Bank was appointed as sole successor trustee of the estate.

In the light of the foregoing facts, decision depends upon an interpretation of testator's will and the application of rules of law well established in this jurisdiction.

Substantially, testator's unusual will provided as in paragraphs hereinafter enumerated:

Paragraph First directed payment of just debts and expenses of administration out of testator's personal estate.

Paragraph Second provided that if such personal estate was insufficient or it was inadvisable to pay such debts and expenses therefrom, then the executor thereafter named was directed and authorized to make temporary loans to pay debts and continue them until enough money was derived to pay the same in full from testator's various properties under management of the executor as provided in the will.

Paragraph Third provided: "I give, bequeath, will and devise unto my executor named in this will, who is to be trustee of my estate, and to his successors, in trust for the use and benefit of my beloved wife, Helen E. Myers, and my beloved children, Miranda S., Martha W. and Lawrence W. Myers, as provided and directed in this will, all the property of which I die seized whether personal, real or mixed."

Paragraph Fourth directed the executor to take im-

mediate possession of all testator's estate upon his death, and directed and authorized the executor to manage and care for the same as in his judgment seemed best for the interest of the estate. It authorized the executor to receive and collect all moneys then due testator from all sources as well as to receive and collect during the period of the trust all revenue accruing from his different properties as well as other revenues and sums which should become due to the estate. The executor was given full authority to sell at public or private sale any articles of personal property of which testator died seized, with certain prescribed exceptions thereto given absolutely to others.

Paragraph Fifth provided and directed that during administration of the estate and continuance of the trust, the executor and trustee should, out of receipts derived from the estate, pay testator's wife $60 a month as long as she lived, and to each of his children $40 a month, and gave authoritative discretion to increase such monthly allowances for suitable maintenance of the wife or the maintenance and education of his children with ultimate equalization thereof to be maintained between his children.

Paragraph Sixth devised use of the family homestead to his wife during her lifetime and gave the executor or trustee, should the wife desire it, direction and authority to purchase or build for her another suitable home within a limited price or cost field, title thereto, however, to be taken in the name of the executor or trustee as representing the estate, in which event her life estate in the old home was to lapse and in lieu thereof a life estate should attach to the new home. He directed and authorized the executor or trustee, when requested by the wife, to sell the homestead then occupied by her, she joining in the deed, and convert funds arising therefrom into interest bearing securities, or purchase then or subsequently a proper and suitable home for her during her life, upon the same terms and conditions as

above provided. The funds arising from the sale of such home and invested at the request of the wife in interest bearing securities, first mortgage loans as provided for the investment of other funds of the estate, were directed to be considered as a separate fund with all income therefrom paid to the wife as it accrued.

Paragraph Seventh gave the executor and trustee power and authority to sell any of testator's real estate at such times and in such manner as in his judgment seemed best, with the exception of certain described real estate in Michigan, and coal leases in Pennsylvania. It directed that all deeds of all lands sold by the executor or trustee as authorized, should reserve to his estate all minerals, oils, gases, and salts, either solid or liquid, lying under the surface of said lands. The executor or trustee was authorized to lease or sell, if he should deem best upon approval of the district court and those of his family then living, any such minerals, oils, gases, and salts, subsequently found under any of said land. The proceeds arising from such lease or sale were directed to be used as other funds held in trust under the instrument. The Pennsylvania coal property, meaning the minerals under the surface, was not to be sold by the executor or trustee, unless the then leases or either of them should have for some unforeseen cause lapsed or become inoperative before all the merchantable coal was exhausted, in which event the questions of releasing or selling said coal was left to the judgment and discretion of the executor or trustee, provided that any releasing or sale thereof should be approved in writing by his wife, if living, and those children named in the will who were living at such time. If none such were then living, then the matter was left with the trustee upon approval of the district court.

Since the Michigan property, in testator's judgment, was suitable in the near future for business property, such as store building sites, etc., the executor or trustee at such time was given authority as in his judgment

seemed proper to improve such property by erecting business buildings thereon for rental purposes, with authority to use for that purpose any moneys accruing to the estate from coal leases, land rentals, or land sales, as well as to convert into money for such improvement any mortgages in his hands belonging to the estate.

All tracts of land owned by him, or in which he had ownership, each comprising several acres adjoining and situated in Edwardsville and Kingston, Pennsylvania, and Falls City, Nebraska, were directed to be sold by the executor or trustee in small tracts or subdivisions in such manner as in his judgment would bring the most money for the estate. In all contracts made by testator during his lifetime, as well as all sales made by the executor or trustee, of any land belonging to the estate and authorized to be sold by the terms of the will, the executor was fully authorized and empowered to make all necessary deeds, same to be binding as if made by the testator himself while living.

Paragraph Eighth directed and authorized the executor and also the trustee, after payment of all debts, expenses of administration, monthly allowances to wife and children, taxes, repairs, and other expenditures authorized by the will, to invest all moneys accruing to the estate from coal leases, rentals, land sales, or other sources, in United States government bonds or first mortgage real estate loans upon farm lands in prescribed areas, made for not more than 50 percent of the value thereof, at not less than 5 percent annual interest, the funds so invested to constitute a fund to remain intact unless withdrawn for improvement of the Michigan property. As such mortgages and bonds belonging to such fund matured and were repaid, they, with resulting interest, were ordered reinvested as theretofore specifically provided, and after the net income from such fund equalled the aggregate monthly allowances to the wife and children, then such fund income should be substituted for such monthly allowances, payable one-third

to the wife, and the other two-thirds to the children, share and share alike.

Paragraph Ninth appointed his nephew, A. J. Weaver, executor, and revoked all former wills. It also constituted said nephew trustee of all of his estate not therein bequeathed absolutely to others, giving such trustee the sole control, management, and disposition of his property as provided in the will, after the ordinary administration of said estate was closed and the executor discharged. In other words, during administration all business was ordered transacted in the name of his representative as executor, and thereafter in the name of his representative as trustee. During administration, the executor was given all of the powers conferred upon the trustee, and thereafter the trustee was given all the powers conferred upon him by the will, and in addition thereto all of the powers given to the executor by the will.

Paragraph Tenth, after providing for the amount of the executor's bond and renewal thereof, recited that after discharge as executor, he should continue in charge of the estate as trustee, and that: "All my said estate, real, personal or mixed shall then vest in him as said trustee for the purposes provided for herein * * *" with like bond as provided for the executor. Itemized reports of the condition of the estate were required at stated intervals, or upon request by any beneficiary.

Paragraph Eleventh provided for the removal of the trustee for cause, and appointment of a successor, but testator expressed himself as "having the utmost confidence in the business ability and integrity of my said nephew, I desire him, if possible to execute the trust herein confided during his lifetime."

The foregoing has been summarized as important to illustrate the all-inclusive estate, power, and authority given the executor and trustee by the testator in his will, as a basis for interpretation and application of

legal principles to the following parts of the will, which provided:

"Fifteenth. If the death of my wife occurs before the termination of this trust, then the share of the income provided for her herein shall go in equal shares to my children then living or the issue or descendants of any such as are dead, by the right of representation.

"If any of my children named herein die without issue before the termination of the trust created herein, their share of income provided for such child shall go in equal shares to my other children then living or the issue or descendants of any such as are dead, by right of representation.

"If any of my children named herein die during the continuance of this trust, leaving issue or descendants, then the share of the income provided for my said child shall go to such issue or descendants.

"Sixteenth. The income from the trust estate provided for herein shall be for the sole use and benefit of my beloved wife and children or the issue and descendants of any of my children that may die during the period of said trust, during their lifetime and shall not be subject to any control or debts of the husband or wife or any of them.

"Seventeenth. The trust herein created shall continue for twenty years after the death of the last surviving member of my family enumerated herein. At the expiration of said time said trust shall cease and be at an end and all of the property then held in trust by the trustee of my estate at that time shall vest absolutely as follows: one third in the issue or descendants of my beloved daughter, Miranda S. Myers, one third in the issue or descendants of my beloved daughter Martha W. Myers, and one third in the issue or descendants of my beloved son Lawrence W. Myers. In case any of my three children should die without issue, then said trust estate, upon the termination of said trust, shall go in equal proportions to the issue or descendants of

such child or children of mine who leave issue or descendants. It is my intention that said trust estate shall remain in the line of my blood and that the issue or descendants of my three children shall take said estate per stirpes. If, at the time of the termination of said trust, any of the three branches of my family as represented by my three children, should have become extinct, then the branches of my family represented by issue or descendants shall take the said estate in equal proportions. If only one branch at such time is represented by issue or descendants then living, such branch shall take the whole of said estate. The rule fixed herein that said property shall descend per stirpes shall extend to and include the descendants of any branch."

In that connection it will be observed that the will contained no ambiguity. In such a situation, the law is that the court in construing a will must first ascertain the intent and purpose of the testator as disclosed by the language of the will and then give effect thereto if not contrary to law. Prudential Ins. Co. v. Nuernberger, 135 Neb. 743, 284 N. W. 266; In re Estate of Hunter, 132 Neb. 454, 272 N. W. 318; In re Estate of Mooney, 131 Neb. 52, 267 N. W. 196.

As stated in In re Estate of Robinson, 139 Neb. 707, 298 N. W. 559: "Where the language of a will is clear and unambiguous, the intention of the testator must be determined from the language thereof and extrinsic evidence is not admissible." In other words, where provisions in a will are couched in correct grammatical language, they will be given the ordinary and natural meaning which that language imports, unless it clearly appears from the whole instrument that a different meaning was intended. Lincoln Nat. Bank & Trust Co. v. Grainger, 129 Neb. 451, 262 N. W. 11; In re Estate of Schuette, 138 Neb. 568, 293 N. W. 421.

Also, it is the rule that where particular words in a will are followed by general, the general words are

ordinarily restricted in meaning to provisions of like kind. Pyne v. Payne, 152 Neb. 242, 40 N. W. 2d 682. In other words, in the interpretation of language used in a will, where a word or words are used in a definite and clearly stated sense, and again used in the same paragraph, it is presumed to be meant in the same sense unless there is a clear indication to the contrary. 57 Am. Jur., Wills, § 1152, p. 750; 69 C. J., Wills, § 1142, p. 84, § 1131, p. 77.

It is equally as well established that where the purposes of a trust fail or become illegal or impossible of performance or accomplishment, the trust will be terminated. Restatement, Trusts, § 335, p. 1016; In re Estate of Mooney, *supra.*

As stated in 65 C. J., Trusts, § 124, p. 351: "Regardless of the nominal duration of the trust it will not continue in equity any longer than the thing sought to be secured by the trust demands. Consequently the trust will terminate as soon as it has been fully performed or executed, or where the object of the trust fails or its execution becomes impossible."

It is also true that a knowledge of such rules as well as other rules of applicable law must be imputed to the testator in the making of his will creating a trust and disposing of his estate. Hill v. Hill, 90 Neb. 43, 132 N. W. 738, 38 L. R. A. N. S. 198.

The purpose of the trust here involved was to provide a monthly allowance for testator's wife and his three children while living, or the issue or descendants of any such children whose death occurred before termination of the trust, which income should not be subject to any control or debts of the husband or wife or any of them, and to create and preserve the entire corpus of the estate for distribution to a class, the surviving issue or descendants of his children, 20 years after the death of the last surviving member of his family, that is, his children enumerated in the will.

On August 31, 1947, when Miranda died, there was

not then and could never be any issue or descendants of his children or any of them. There was thus within the plain purview of the will no person left surviving after the death of Miranda to whom the provisions for income or distribution had or could have any application. It follows that the trust became impossible of performance or accomplishment and terminated as of August 31, 1947. We therefore conclude that the trial court properly disposed of that issue.

It will be noted that testator, in establishing the trust, gave, bequeathed, willed, and devised all of his estate and the income therefrom as well to the trustee, which, under the estate power and authority granted and directed by the will, of necessity vested in the trustee the whole estate or full title in fee simple, including the title of the then uncertain and unascertained remaindermen, until they were ascertained at termination of the trust. 65 C. J., Trusts, § 289, p. 542; Cushman v. Coleman, 92 Ga. 772, 19 S. E. 46; Clark v. Baker, 186 Ga. 65, 196 S. E. 750; Smith v. Rizzuto, 133 Neb. 655, 276 N. W. 406; Restatement, Trusts, § 88, p. 251.

Under the plain purview and intent of the will, none of testator's three children ever had or could have had any vested legal estate in the corpus, or was capable of ever taking any part of the body of the corpus, but each had only the equitable right to require payment of a provided allowance out of the income therefrom. Miranda, the last survivor entitled to such income, received the same for 42 years under the will, which never gave or intended to give her any other interest during her lifetime or thereafter. At her death, all interest that she ever had or could have was extinguished. In re Trust Estate of Myers, *supra;* Weller v. Noffsinger, 57 Neb. 455, 77 N. W. 1075; Hulse v. Tanner, 142 Neb. 406, 6 N. W. 2d 618. Her husband, T. Porter Bennett, was specifically excluded from any interest even in the income, much less any interest in the corpus of the estate.

To hold otherwise would give the will no force and

effect and vest a legal estate in Miranda, which the testator never intended should be done. As a matter of fact, the will provided that Bennett, her husband, should never have any estate, either legal or equitable. We conclude also that the testamentary trust was not destroyed by merger before Miranda's death, although she was for a short time a joint trustee with her brother and the original trustee. The rule is that in order to bring about destruction of a trust through a merger, it is necessary that the entire equitable title be united with the entire legal title in the same person.

As stated in 65 C. J., Trusts, § 325, p. 567: "As a general rule, where the legal and equitable estates in trust property unite in the same person, there is a merger of such estates and the trust is terminated. But a merger does not take place until the legal and equitable titles vest in the same person, and even then equity will often refuse to recognize a merger which might well exist in law, as where such result would be contrary to the intention of the trustor and would destroy a valid trust."

The intention of paragraph Seventeenth was not to ever vest any legal estate in testator's children but after their death and at termination of the trust to vest the corpus absolutely in the issue or descendants of the testator's three children per stirpes. In case any of his three children should die without issue, then it was to vest in equal proportions in the issue or descendants of such child or children of his who left issue or descendants, that is, remain in the line of his blood by vesting in such issue or descendants, meaning their children or grandchildren, ad infinitum, per stirpes. The effect of the remaining sentences was simply to amplify and reaffirm that intention by providing in effect that if at termination of the trust any of his three children should die without issue or with issue or descendants who were dead, that is, did not survive at that time, so that any branch of his family was thus extinct, then in such

situation also the issue or descendants of any branch or branches of his children who were not extinct but did survive at that time should respectively take the corpus in equal proportions, or the whole thereof. In other words, when testator spoke of "any of the three branches of my family as represented by my three children" he defined what he meant by the word "branch" or "branches" and thereafter in succeeding sentences of the same paragraph, in using the word "branch" or "branches" he intended to mean the direct branches thereof, that is, the surviving issue or descendants of his three children or any of them who would survive, rather than collateral branches who were not mentioned in the will. To omit the words "any of" immediately preceding the words "the three branches of my family as represented by my three children" or make them read "all" would void the stated general intention of the testator and rewrite his will, which under the plain language used, we have no authority to do.

At termination of the trust under a will or by operation of law, the beneficiaries ordinarily take the property as provided in the will. However, as here, where complete disposition of the estate was made by the will which by language and necessity vested the whole of the fee in the trustee, defeasible only at termination of the trust, when it was to vest in a class, none of whom then or ever will exist, and the trust is terminated by operation of law for failure of purpose or accomplishment, then the trustee holds the trust estate upon a resulting trust implied by intention for the heirs of the testator who are such as of the date of the failure of the trust. To hold otherwise would give the will and the law of this jurisdiction, which testator was presumed to know when he executed the will, no force or effect whatever.

This court so held under comparable circumstances in In re Estate of Mooney, *supra,* which specifically distinguished the cases generally relied upon by the admin-

istrator and Bennett. There are cases from other jurisdictions seeming to hold otherwise, but they are generally distinguishable upon the particular facts and provisions of the wills involved, or the law of the particular jurisdiction. In re Estate of Mooney, *supra*, has been a rule of property in this state for many years, and we find no good reason for changing it at this time under such similar circumstances as appear in the case at bar. It is controlling. See, also, Blount v. Walker, 31 S. C. 13, 9 S. E. 804; Polsky v. Continental Nat. Bank (a Nebraska case), 110 F. 2d 50; Annotation, 92 A. L. R. 366.

The question then is, who were the heirs of testator on August 31, 1947, the date of the death of Miranda, the date of the termination of the express testamentary trust and establishment of a resulting trust by operation of law. Concededly, on August 31, 1947, no wife, nor issue, nor father, nor mother, nor sister, nor brother, survived the testator. Section 30-102, R. R. S. 1943, which is controlling, provides in part: "(4) if the deceased shall leave no issue, nor father nor mother, nor sister nor brother, the estate shall descend to his next kin in equal degree, excepting that where there are two or more collateral kindred in equal degree, but claiming through different ancestors, those who claim through the nearest ancestor shall be preferred to those claiming through an ancestor more remote * * *."

Obviously the exception has no application here, since all claiming as heirs of the testator on the date of the failure of the trust, claimed through the same ancestors, and are not collateral kindred in equal degree. Testator's surviving "next kin in equal degree" who take the corpus of the estate, are Ruth W. Dennis, Lawrence M. Weaver, Fred M. Myers, since deceased and here represented by the executors of his estate, Harriet E. Macomber, and Jessie Myers Newhart, who each respectively take one-fifth of the corpus. They are kindred in the third degree, and plaintiff grandchildren of a deceased brother and sister of testator, are kindred in the fourth

degree. Section 30-102(3), R. R. S. 1943, can give them no relief, because this court has held that the word "children" appearing therein does not include "grandchildren." Noteware v. Colton, 95 Neb. 541, 145 N. W. 993. The decree of May 8, 1950, erroneously included such grandchildren as entitled to share in the trust estate. Of course, from what has been heretofore stated, neither the administrator nor Bennett is entitled to any part of the estate, and the trial court correctly so held.

For the reasons heretofore stated, we conclude that the decree of May 8, 1950, was erroneous insofar as it permitted plaintiff grandchildren to take any part of the estate. Therefore, such judgment is affirmed in part and reversed in part with directions to enter judgment in conformity with this opinion, which will be generally in the manner attempted in the decree of June 22, 1950.

Costs in this court, and in the district court as well, are taxed to the successor trustee, to be paid by it out of the estate, which, as estimated by the trustee at time of trial had a fair conservative gross value of $175,000. Included in such costs are the guardian ad litem fees heretofore allowed by the district court, to wit: Archibald J. Weaver, $150, and Joseph C. Reavis, $650, together with an allowance therefor in this court to Archibald J. Weaver, $1,500, and Joseph C. Reavis, $1,000.

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

HERMAN STRATBUCKER, APPELLANT, V. HERMAN JUNGE ET AL., APPELLEES.

46 N. W. 2d 486

Filed March 2, 1951. No. 32917.

1. **Waters.** Land, to be riparian, must have the stream flowing over it or along its border.

2. ———. The basis of the riparian doctrine, and an indispensable requisite of it, is actual contact of the land with the water.
3. ———. The right to acquisition through an accession or reliction is one of the riparian rights.
4. **Quieting Title.** Plaintiff in an action to quiet title has the burden of proof and he must recover upon the strength of his title and not because of any weakness in the title of his adversary.

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

Frost, Peasinger & Meyers, for appellant.

Paul J. Garrotto and *James A. Nanfito,* for appellees.

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

BOSLAUGH, J.

This is an action by appellant against appellees to quiet title in the former to land alleged to have been formed by accretion or reliction or both to his riparian land that was previously non-riparian but became riparian by changes caused by the Missouri River.

Appellant averred that he was the owner in fee of the south 411 feet of the north 444 feet of the northeast quarter of the southwest quarter of Section 36, Township 16 North, Range 13 East of the 6th P. M., in Douglas County, Nebraska, and the accretions thereto, except the right-of-way of the East Omaha Drainage District across the premises; that the Missouri River gradually eroded all land including that owned by appellant north and east of and on the river side of the levee; that since 1934 there has been added to the land of appellant by gradual and imperceptible accretion considerable alluvial deposits; that a correct and specific description of the accretions is: Commencing at a point where the north line of the Missouri River levee intersects the east and west line of Section 36, 438.8 feet east of the northwest corner of the northeast quarter of the southwest quarter of said section, running thence along the

northerly side of the said levee in a southeasterly direction to a point on the north and south center line of the section, 439 feet, more or less, south of the center of the section, thence north on the north and south center line of the section to the southerly bank of the Missouri River, a distance of about 3,500 feet, more or less, thence along the south bank of the river to a point due north of the point of beginning, and thence south to the point of beginning; and that appellees claim some right or title to, interest in, or lien upon the accretion land specifically described, but any title, interest, or lien they have is junior to the title of appellant. He asked that the title to the premises be quieted in him.

Appellees by answer denied all the claims of appellant and stated that the east half of the northwest quarter of Section 36, Township 16 North, Range 13 East of the 6th P. M., in Douglas County, Nebraska, was acquired by the father of Herman Junge on September 14, 1914; that he owned it until his death on August 6, 1917; that by his will he devised it to Herman Junge, and he has since claimed, owned, occupied, and tilled it; and that there has been no gradual and imperceptible accretion of alluvial deposit as claimed by appellant, but any movement of the river or any change thereof was violent, sudden, and perceptible. He asked that the petition of appellant be denied and his action dismissed. The reply was a denial.

The court found generally for appellees and that the premises, the subject of the litigation, was not the result of accretion or reliction, but avulsion, and rendered judgment of dismissal. Motion of appellant for a new trial was denied. This appeal resulted.

The description in the deed to Charles Junge, the father of Herman Junge, is: "The E½ of the N. W. ¼ of Section Thirty Six (36), Township Sixteen (16) North of Range Thirteen (13), Ten (10) acres more or less, the balance in river." The part of the land not eroded or submerged by the river while Charles Junge owned it

and when Herman Junge became the owner of it was estimated as approximately 10 or 15 acres, and the dimensions and location were given as about 600 feet wide north from the south line on the west boundary to the river, and 150 or 200 feet from the south line on the east boundary. The river moved southwesterly or towards the levee and gradually destroyed the 10 acres or what remained of the 80 acres, except about one acre, a triangle in the extreme southwest corner thereof south of the right-of-way of the drainage district. When the river improvement work was commenced, all the land at this location on the north side of the dike or levee had been destroyed or submerged and the channel of the river had moved to and was on the north or river side of the levee or dike of the drainage district. The work was commenced in 1933 or 1934. The river shifted northward or away from the levee or dike about 1935 after the river work was done by the government. There are now 60 or 70 acres of land from the levee or dike northward to the south bank of the river. The process of restoring this area was substantially completed by 1943.

There was conveyed to appellant by deed dated October 31, 1944, the south 411 feet of the north 444 feet of the northeast quarter of the southwest quarter of Section 36, Township 16 North, Range 13 East of the 6th P. M., in Douglas County, Nebraska, and all accretions thereto, except the right-of-way of the East Omaha Drainage District. The north line of the land conveyed by this deed was 33 feet south of the north line of the northeast quarter of the southwest quarter of said Section 36, and 66 feet south of the south line of the east half of the northwest quarter of said Section 36, described in the deed to Charles Junge. The 66 feet was a highway.

The right-of-way of the East Omaha Drainage District was a strip of land 125 feet wide extending from the northwest to the southeast across the Junge premises near the southwest corner thereof and across the Stratbucker premises from about 438.8 feet east of the north-

west corner thereof to about 439 feet south of the center of the section, with 37½ feet on the southerly side of and 87½ feet on the northerly side of the center line of the levee located and constructed on the right-of-way.

All of the land conveyed to appellant north of or on the river side of the levee or dike was destroyed or submerged by the Missouri River, and the channel of the river from 1925 to 1935 was along and adjacent to the north or river side of the levee, and was not in contact with or adjacent to the land of appellant or any part of it. While the south boundary of the river was the north side of the levee, the northerly boundary of the part of the land of appellant opposite the area involved herein was the southerly line of the right-of-way of the East Omaha Drainage District. That is, the northerly boundary of the land of appellant was 37½ feet plus the distance from the center line of the dike to the north line thereof from the most southerly part of the water of the river. The evidence, and in fact the entire record, is in substantial agreement that the land of appellant or any part of it was never riparian land. His petition directly and definitely alleges that the southerly boundary of the accretion land, the title to which he seeks to have quieted in him, is "along the Northerly side of said Missouri River Levee." The evidence strongly preponderates in support of this allegation. This deficiency is disastrous to the case of appellant. The basis of the riparian doctrine, and an indispensable requisite of it, is actual contact of the land and the water. Proximity or closeness short of contact is unavailing. The right to acquisition through an accession or reliction is one of the riparian rights.

In Crawford Co. v. Hathaway, 67 Neb. 325, 93 N. W. 781, 60 L. R. A. 889, 108 Am. S. R. 647, it is said: "Land, to be riparian, must have the stream flowing over it or along its borders." See, also, McGinley v. Platte Valley Public Power & Irrigation Dist., 132 Neb. 292, 271 N. W. 864, on rehearing, 133 Neb. 420, 275 N. W.

593. Restatement, Torts, § 843, p. 327, comment d, is as follows: "Land is riparian by virtue of the fact that it is so located in respect to a watercourse or lake that the possessor of it has lawful access to the water for his private use. The mere fact that a parcel of land is close by or adjacent to the water does not make that land riparian when the water itself is on another's land, for in such case there is no access to the water, for private use at least, without intruding on the land on which the water lies. * * *" See, also, Hilt v. Weber, 252 Mich. 198, 233 N. W. 159, 71 A. L. R. 1238; Mobile Dry Docks Co. v. City of Mobile, 146 Ala. 198, 40 So. 205, 3 L. R. A. N. S. 822; Illinois Central Railroad v. Illinois, 146 U. S. 387, 36 L. Ed. 1018, 13 S. Ct. 110; Kingsley v. Jacobs, 174 Or. 514, 149 P. 2d 950; Annotation, Ann. Cas. 1913E 709; 56 Am. Jur., Waters, § 277, p. 731.

The burden of proof was on appellant. He has failed to sustain it. He could recover only upon the strength of the title asserted by him and not because of any defect or weakness in the status of appellees in relation to the subject of the litigation. Stull v. Goold, 96 Neb. 263, 147 N. W. 468. A wrong reason for a correct conclusion does not militate against the decision.

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

AFFIRMED.

MESSMORE, J., participating on briefs.

JAY C. MILLER, APPELLANT, V. EDNA MILLER, APPELLEE.
46 N. W. 2d 618

Filed March 2, 1951. No. 32921.

1. **Divorce.** The decree of a district court in a divorce action insofar as a minor child is concerned is never final in the sense that it cannot be changed but is subject to review at any time in the light of changing conditions.
2. ———. The district court has a continuing power, after a

decree of divorce, alimony, and child support has been granted, to review or revise the provisions for child support at its subsequent terms on petition of either of the parties.

3. **Courts.** Ordinarily, the jurisdiction of a court over both subject matter and parties, once fully attached in a cause, continues until all issues, both of fact and of law, have been fully determined.

4. **Constitutional Law.** Due process of law, within the meaning of the constitutional provisions, is not intended to control the power of the state to determine by what process or on what manner of service rights may be asserted or determined, provided such procedure will afford reasonable notice and a fair opportunity to be heard before the courts, at some stage of the proceedings, prior to final determination.

5. **Divorce.** In a proceeding to modify a divorce decree under statutory provision authorizing subsequent changes in such decree, due process of law requires only that the method of service be reasonably calculated to give the person served knowledge of the proceedings and opportunity to be heard.

6. ———. A decree for child support in a divorce action is not a judgment within the meaning of sections 25-1420 and 25-1515, R. R. S. 1943.

7. ———. It is clear that section 42-312, R. S. 1943, specifically provides that the court, in a divorce action, retains jurisdiction of the subject matter and of the parties for the enforcement or modification of a judgment for the maintenance of children.

8. **Limitations of Actions: Divorce.** The statute of limitations is not a defense to an application to compel the adverse party to pay arrearages in child support nor as against an application to modify a divorce decree with reference to child support.

9. ———: ———. As a judgment for child support is a continuing judgment always subject to modification by the court, the statute of limitations does not apply.

10. **Equity.** The defense of laches prevails only when it has become inequitable to enforce the claimant's right, and is not available to one who has caused or contributed to the cause of delay or to one who has had it within his power to terminate the action.

11. ———. Where the obligation is clear, and its essential character has not been affected by the lapse of time, equity will enforce a claim of long standing as readily as one of recent origin; certainly, as between the immediate parties to the transaction.

12. **Process.** The question whether process may be served on a nonresident party may be determined by the nature of the proceeding in which process was issued and its relation to the suit which the party or witness had been attending.

13. ———. The rule that suitors from a foreign jurisdiction are exempt from service of civil process while attending court and for such reasonable time before and after as may enable them to come from and return to their homes does not extend to process in an action or proceeding involving or connected with the subject matter of the litigation during attendance upon which the nonresident suitor is served.
14. **Divorce: Judgments.** An application to modify the terms of a decree of divorce is not an independent proceeding and is not the commencement of an action.
15. **Divorce: Attorney and Client.** Where a decree for child support is entered in a divorce action and the wife, having been awarded the custody of a minor child, files an application against the husband for an order to show cause why he should not pay arrearages due for child support, and the husband files an application to modify the decree with reference to the child support, such proceeding is simply a continuation of the divorce suit and one of its incidents, and the authority of the court to allow counsel fees under section 42-312, R. S. 1943, continues until the subject matter of the divorce suit is finally settled and determined.

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

Kirkpatrick & Dougherty, for appellant.

Littrell & Patz, for appellee.

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

MESSMORE, J.

The issues in this case arise out of a divorce action wherein Edna Miller, defendant and cross-petitioner, was granted an absolute divorce, the custody of the minor child of the parties, and an award for child support, and involve defendant's right to collect an unpaid amount claimed due for child support. To better comprehend the issues, we summarize the pleadings as they appear material to a determination of this appeal.

The plaintiff, Jay C. Miller, brought suit for divorce in the district court for York County on July 28, 1932, against the defendant Edna Miller. The defendant filed

an answer and cross-petition praying for a divorce, custody of the minor child, alimony, child support, and costs of the action. On May 13, 1933, the court entered a decree granting the defendant, cross-petitioner, an absolute divorce, and custody of the minor child of the parties. It further decreed that the plaintiff pay into the court for the use and benefit of the defendant and for the support of their minor child on the first day of June 1933, and on the first day of each month thereafter, the sum of $50 until the further order of the court; awarded the defendant $150 alimony in addition to real estate which had been deeded to her; and allowed attorney's fees to be taxed as costs, and costs of the action.

On May 15, 1939, the defendant Edna Miller filed an application in the district court in the same proceeding, setting forth the proceedings in the divorce action and more specifically the decree with reference to child support rendered on May 13, 1933. Defendant further alleged that the plaintiff paid $35 for the month of February 1939, and there remained due and unpaid for that month $15; that defendant wholly failed to pay the sums due on March 1, April 1, and May 1, 1939, leaving the amount due for such months, as provided for by the decree, of $165; that the decree had never been vacated or set aside, and was in full force and effect; and prayed that the plaintiff be cited for contempt in failing to abide by the decree, and that a date be fixed for hearing.

On May 15, 1939, the court entered an order fixing the date May 20, 1939, for hearing on the defendant's application to show cause why plaintiff should not abide by the court's decree.

On May 19, 1939, the plaintiff filed answer and application for modification of the decree, wherein he admitted the decree of May 13, 1933, had not been vacated, was in full force and effect, and that there was due the defendant the sum of $59. He further alleged that more

than six years had elapsed since the entry of the decree in the divorce action; that since that time there had been a change in the circumstances of the parties, and the plaintiff was no longer able to pay $50 a month for the support of the minor child for the reason of a business depression, continued drouth, and crop failure which affected his income as a practitioner of medicine; in addition, he was the head of a family and had a wife and minor child two years of age dependent upon him; and asked that the court find that $20 a month, on account of the conditions as pleaded, be decreed instead of the amount of $50 a month as provided for in the original decree.

On May 25, 1939, the defendant filed reply to the answer and application of the plaintiff for the modification of the decree, setting forth in addition to what has been stated with reference to the pleadings, her condition of health, the requirements of the minor daughter of the parties as a high school student and increased expenditures in her behalf; and prayed that the amount to be paid by the plaintiff be $75 a month.

On June 2, 1939, the court entered an order that hearing on the applications to modify decree be set for June 8, 1939, at 9 a. m., and that the plaintiff pay to the clerk of the court for support money awarded for the daughter the sum of $50 on or before June 6, 1939, or said application to modify would be denied.

On June 8, 1939, it appears from an order of the court that by stipulation of the parties plaintiff was not to make payment of $50 due on June 1, 1939, and to pay on installments due July 1 and August 1, 1939, the sum of $30 for each of said months; plaintiff to pay costs to date, and hearing to be continued to September 1, 1939, at 9 a. m.

On March 9, 1949, notice of hearing was filed by the defendant in the district court accompanied by an affidavit of service. The notice, so far as necessary to relate, is as follows: "You are hereby notified that

your application for modification of the divorce decree in the above entitled case will be called for hearing on the 21st day of April, 1949, at the hour of 2:00 P. M. before one of the judges of said court or as soon thereafter as the same can be heard. * * * Upon this hearing the court will be requested to determine the amount due from you under this decree and to enter a supplemental order therefor. Dated this 26th day of February, 1949. Edna Miller * * *." The notice was signed by her attorneys.

The plaintiff, on February 28, 1949, was served personally with a copy of the notice in El Paso County, Texas. Affidavit and return of service were made thereon under date of March 1, 1949, and signed by an officer authorized by law to serve process in El Paso County, Texas.

On April 19, 1949, the plaintiff filed a special appearance for the purpose of objecting to the jurisdiction of the court over his person. In all pleadings thereafter filed by the plaintiff he reserved his special appearance objecting to the jurisdiction of the court over his person and property, so in a resumé of the pleadings we consider the matter as pleaded.

To avoid confusion in the following summary of the pleadings we refer to the parties as originally designated in the district court.

On April 25, 1949, plaintiff filed objections to any further recovery on behalf of the defendant for the reason that the decrees and orders of the court with respect to the proceedings had become final and had in all things been fully performed by the plaintiff; that the order of June 8, 1939, modified the decree and reduced the payments for the support of the minor daughter of the parties to $30 a month, which order was entered upon the stipulation of parties, was never thereafter modified or changed, but the stipulation and order were permitted by tacit consent of all the parties to remain unchanged; the matter was never called up in

court for further hearing by the defendant, plaintiff continued to pay the sum of $30 a month to the clerk of the district court for the support of the minor child during all her minority, and defendant acquiesced therein and received payment from the clerk of the district court since the date of the order in the total sum of $1,590; that by reason of the premises, the defendant was estopped to claim and demand any further sums from the plaintiff, and was barred from further recovery by the statute of limitations and laches; that plaintiff had paid all allowances, fees, and costs decreed to be paid by him in full in the sum total of $5,611, and conveyed to the defendant his real estate as appears by the record in the case; and prayed for relief in accordance with the defenses pleaded.

On May 20, 1949, the defendant filed answer to the plaintiff's objections to further hearing, denying generally the allegations therein contained, and denied that she ever made or entered into any stipulation or agreement with the plaintiff for a modification of the divorce decree except that shown by the memorandum of June 8, 1939. She further denied she ever accepted or received any one or more of the $30 a month payments made by the plaintiff to the clerk of the district court in full satisfaction or payment of the child support judgment in the amount of $50 a month. Defendant set forth the amounts claimed to be due, and prayed for an order determining the amount which had become due the defendant and the amount of credits to which the plaintiff was entitled, and for attorney's fees and court costs.

On May 20, 1949, there appears a journal entry in the district court to the following effect: "Positions of parties stated and argued relative to application on file. * * * Defendant submits evidence as to time daughter of parties arrived at age of 21 years." The time the daughter became 21 years of age was November 8, 1943.

It appears from a part of the journal entry of May 20, 1949, that an execution was issued and plaintiff's Ford

automobile was levied on. The car was ordered to be delivered back to the plaintiff upon his posting a bond in the amount of $2,000, which was done.

On June 24, 1949, the following appears from a journal entry: "* * * it having been stated in open court by both parties through their attorneys that no modification of the divorce decree is asked in so far as it may apply from this date forward, and the court being without power to amend the decree to effect (affect) any payments which may have accrued prior to this date, both applications for modification of the decree are hereby denied. * * * no payments shall accrue from this date forward."

There are numerous pleadings with reference to the issuance of the execution and the levy made pursuant thereto on the Ford automobile. It would unnecessarily lengthen this opinion to summarize these pleadings, the proceedings had by the court with respect thereto, and the dates thereof. The facts stipulated show that the plaintiff was domiciled and a resident of El Paso County, Texas, and had been since 1947; that he was the owner of the Ford automobile levied upon; that it was registered and licensed in the State of Texas; and that he drove it from El Paso, Texas, to York, Nebraska, for the sole purpose of having a means of transportation to enable him to attend the hearing of May 20, 1949, which facts are sufficient to determine the validity of the levy made upon the automobile, and will be analyzed subsequently in the opinion.

On June 23, 1950, the court entered judgment decreeing it had jurisdiction of the person of the plaintiff and the subject matter of the action, and finding generally in favor of the defendant and cross-petitioner and against the plaintiff. This judgment provided that the original child support judgment continued in full force and effect during the minority of the child and the installments of $50 a month thereunder accrued from July 1, 1939, to November 8, 1943, when the child reached

her majority; that no installments for child support could or did accrue after that date; that plaintiff was entitled to credit for any and all payments made by him on the child support judgment after July 1, 1939; and that the defendant was entitled to interest at the legal rate upon the unpaid balance of each installment from the time it became due until it was paid. The court found the issuance of the execution and the levy made upon the plaintiff's automobile to be valid, and further decreed that the plaintiff pay into the office of the clerk of the district court $350 as attorney's fees taxed as costs for the defendant.

Upon the overruling of the plaintiff's motion for new trial, plaintiff appeals.

The plaintiff's assignments of error pertinent to a determination of this appeal will be taken up in the following manner.

The plaintiff's contention that the district court was without jurisdiction over the person of the plaintiff on the theory that the proceedings herein were commenced without pleadings or process had upon the plaintiff cannot be sustained for the following reasons.

An application to modify the terms of a decree of divorce is not an independent proceeding. It is not the commencement of an action. It is simply a proceeding supplementary or auxiliary to an action in which certain matters theretofore determined are by the very terms of the statute subject to modification. See, Wilde v. Wilde, 36 Iowa 319; Droste v. Droste, 231 Iowa 216, 1 N. W. 2d 107.

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

The decree of the trial court in a divorce action inso-

far as minor children are concerned is never final in the sense that it cannot be changed but is subject to review at any time in the light of changing conditions. See, Carlson v. Carlson, 135 Neb. 569, 283 N. W. 214; Koser v. Koser, 148 Neb. 277, 27 N. W. 2d 162; Dunlap v. Dunlap, 145 Neb. 735, 18 N. W. 2d 51; Gibson v. Gibson, 147 Neb. 991, 26 N. W. 2d 6; Saum v. Saum, 144 Neb. 842, 14 N. W. 2d 844.

"Ordinarily, the jurisdiction of a court over both subject matter and parties, once fully attached in a cause, continues until all issues, both of fact and of law, have been finally determined, in other words, until complete relief is afforded within the general scope of the subject matter of the action." 14 Am. Jur., Courts, § 170, p. 370. See, also, Gulf, C. & S. F. Ry. Co. v. Muse, 109 Tex. 352, 207 S. W. 897, 4 A. L. R. 613; 21 C. J. S., Courts, § 93, p. 143; Bolich v. Robinson, 106 Neb. 449, 184 N. W. 218.

With reference to whether or not the notice served upon the plaintiff was sufficient within the concept of the due process of law clause, we believe the following authorities apply.

First, it will be noted that section 42-312, R. S. 1943, does not provide the nature or kind of notice required.

Due process of law, within the meaning of the constitutional provisions, is not intended to control the power of the state to determine by what process or on what manner of service rights may be asserted or determined, provided such procedure will afford reasonable notice and a fair opportunity to be heard before the courts, at some stage of the proceedings, prior to final determination. See, Leininger v. North American Nat. Life Ins. Co., 115 Neb. 801, 215 N. W. 167; Hacker v. Howe, 72 Neb. 385, 101 N. W. 255; Chicago, B. & Q. R. R. Co. v. State ex rel. City of Omaha, 47 Neb. 549, 66 N. W. 624, 53 Am. S. R. 557, 41 L. R. A. 481; Pearson v. Yewdall, 95 U. S. 294, 24 L. Ed. 436; Ballard v. Hunter, 204 U. S. 241, 51 L. Ed. 461, 27 S. Ct. 261; Campbell v. State, 171 Ind. 702, 87 N. E. 212.

Wherever actual notice is impracticable and the court has jurisdiction, the requirement of due process is satisfied by substituted or constructive notice, as, for example, notice given by publication, or by mail, or by leaving a copy with a competent person at defendant's domicile, or posting the same in designated places. See 16 C. J. S., Constitutional Law, § 619, p. 1256.

In a proceeding to modify a divorce decree under statutory provision authorizing subsequent changes in the divorce decree, "due process of law" requires only that the method of service be reasonably calculated to give the person served knowledge of the proceedings and opportunity to be heard. See Droste v. Droste, *supra*.

It is apparent under the cited authorities that the notice served on the plaintiff in the instant case met the requirements of due process of law.

The plaintiff contends the statute of limitations is a defense to the case at bar; and that the statute of limitations began to run against the judgment in the instant case when the child became of age, November 8, 1943. We deem the following authorities applicable.

A decree for alimony or child support in a divorce action is not a judgment within the meaning of sections 25-1420 and 25-1515, R. R. S. 1943. See In re Application of Miller, 139 Neb. 242, 297 N. W. 91. That case involved a decree for child support, but the conclusion therein that the statute of limitations could not be interposed as a defense was premised on like holdings in Lemert v. Lemert, 72 Ohio St. 364, 74 N. E. 194, 106 Am. S. R. 621, and Peeke v. Fitzpatrick, 74 Ohio St. 396, 78 N. E. 519, each of which involved a judgment for alimony under similar statutes. We conclude that the statute of limitations would not run in the present proceeding. See Lippincott v. Lippincott, 152 Neb. 374, 41 N. W. 2d 232.

In the instant case the defendant is attempting to collect child support under the original decree. The

plaintiff sought modification of the decree by appropriate pleadings. He proceeded no further. No adjudication was had on the child support issue until the order entered by the court under date of June 23, 1950. The question of whether the statute of limitations runs upon a child support judgment after the child reaches its majority is not here involved.

In the light of the authorities heretofore cited in the opinion, we conclude the statute of limitations did not run in the present proceedings.

The plaintiff contends the defense of laches should prevail in the instant case. This contention is based upon holdings such as McKee v. McKee, 154 Kan. 340, 118 P. 2d 544, 137 A. L. R. 880. In Kansas the general statute of limitations applies and begins to run against each installment of child support as any other judgment. In addition, in that case the plaintiff had accepted $50 a month for 19 years without any attempt on her part during such period of time to apply to the court for adjustment. Her acquiescence in accepting such amount until after the daughter had arrived at her majority constituted laches on her part, and by her acts she was estopped.

The plaintiff asserts that in the instant case he paid $30 a month which was accepted by the defendant, and by accepting such payments until the child became 21 years of age she acquiesced and treated this sum for child support as final, therefore she is guilty of laches and is estopped from any further recovery.

The defendant cited the plaintiff to show cause why he should not pay certain balances due for child support. The plaintiff, in response to the citation, filed an application to modify the decree with reference to child support, seeking affirmative relief against the defendant. Thereafter he left the state and entered the military service as a commissioned officer, and while he was in the service the defendant endeavored to collect the installments due for child support in 1946 by a letter. The

plaintiff investigated this matter and concluded that no liability could attach to him. As a consequence his application to modify the decree was never called up for hearing by him, and it is apparent that his rank in the Medical Corps of the Army paid him a substantial amount which changed his financial condition from what he claimed in his application to modify the child support. There is no evidence to disclose that the defendant accepted the amounts paid by the plaintiff in full payment and satisfaction of the decree. There was no accord and satisfaction on her part. See, Bliss v. Backemeyer, 122 Neb. 537, 240 N. W. 556; Treat v. Price, 47 Neb. 875, 66 N. W. 834; McIntosh v. Johnson, 51 Neb. 33, 70 N. W. 522; Wilson v. Wilson, 186 Ark. 415, 53 S. W. 2d 990.

In applying the doctrine of laches the true inquiry should be whether the adverse party has been prejudiced by the delay. See, Hawley v. Von Lanken, 75 Neb. 597, 106 N. W. 456, reaffirmed in Hawley v. Pound, 76 Neb. 130, 106 N. W. 458, and Hawley v. Barry, 76 Neb. 131, 106 N. W. 459.

Laches does not, like limitation, grow out of the mere passage of time; but it is founded upon the inequity of permitting the claim to be enforced—an inequity founded upon some change in the condition or relation of the parties. See, Geiss v. Trinity Lutheran Church Congregation, 119 Neb. 745, 230 N. W. 658; Galliher v. Cadwell, 145 U. S. 368, 36 L. Ed. 738, 12 S. Ct. 873.

The defense of laches prevails only when it has become inequitable to enforce the claimant's right, and is not available to one who has caused or contributed to the cause of delay or to one who has had it within his power to terminate the action. See Richards v. Hatfield, 40 Neb. 879, 59 N. W. 777.

Where the obligation is clear, and its essential character has not been affected by the lapse of time, equity will enforce a claim of long standing as readily as one of recent origin; certainly, as between the immedi-

ate parties to the transaction. See Schurman v. Pegau, 136 Neb. 628, 286 N. W. 921.

We conclude the defense of laches should not prevail in this case.

The plaintiff contends that the defendant is not entitled to recover arrearages in child support from him without pleading and proving what she was required to expend and did expend for that purpose. In addition to the pleadings of the defendant this contention is also based on the language appearing in the divorce decree as follows: "that the plaintiff herein should pay into Court for the use and benefit of the defendant and for the support of their minor child * * *."

It is apparent that the only proper and sensible construction to be given the order is that the money required of the plaintiff was to be paid to the clerk of the court for the purpose of being turned over by the clerk to the custodian of the child. See State ex rel. Casey v. Casey, 175 Or. 328, 153 P. 2d 700, 172 A. L. R. 862. In the cited case the court said, however, the plaintiff was not seeking to recover judgment against the defendant for money expended by her for the support of the children, but to compel him to obey the order of the court. That is the situation as it appears in the instant case. It is obvious that the amount of $50 a month as appears in the divorce decree was intended as child support money, and so recognized by the parties as the pleadings and the proceedings in the instant case reflect.

Courts of general jurisdiction have the inherent power to do all things necessary for the proper administration of justice and equity within the scope of their jurisdiction. See, Wassung v. Wassung, 136 Neb. 440, 286 N. W. 340; Lippincott v. Lippincott, *supra*.

We turn to the question as to whether or not the plaintiff was immune from process while in attendance at the hearing in this case held May 20, 1949. This proposition has to do with the issuance of execution

and the levy made on the plaintiff's automobile. We have previously set forth the relevant undisputed facts on this phase of the case.

In the first instance the plaintiff instituted the action for divorce. Thereafter he was cited by the defendant to show cause why he should not make back payments for child support in accordance with the decree. To this citation he filed an application to modify the decree. It will be observed that the proceedings affecting the issue here involved grew out of the original divorce action and decree entered therein. The plaintiff was in court by his voluntary act, and this proceeding is to determine his liability, if any, under the pleadings as presented for child support.

The question whether process may be served on a nonresident party may be determined by the nature of the proceeding in which process was issued and its relation to the suit which the party or witness had been attending. See Lamb v. Schmitt, 285 U. S. 222, 76 L. Ed. 720, 52 S. Ct. 317.

The rule that suitors from a foreign jurisdiction are exempt from service of civil process while attending court and for such reasonable time before and after as may enable them to come from and return to their homes does not extend to process in an action or proceeding involving or connected with the subject matter of the litigation during attendance upon which the nonresident suitor is served. Sanders v. Smith, 197 Miss. 304, 20 So. 2d 663; Arnett v. Smith, Inc., 165 Miss. 53, 145 So. 638; Brooks v. State ex rel. Richards, 26 Del. 1, 79 A. 790, 51 L. R. A. N. S. 1126, Ann. Cas. 1915A 1133; Lamb v. Schmitt, *supra;* Long v. Ansell, 293 U. S. 76, 79 L. Ed. 208, 55 S. Ct. 21; Page Co. v. MacDonald, 261 U. S. 446, 67 L. Ed. 737, 43 S. Ct. 416; Rizo v. Burruel, 23 Ariz. 137, 202 P. 234, 19 A. L. R. 823; Sofge v. Lowe, 131 Tenn. 626, 176 S. W. 106, L. R. A. 1916A 734; Stewart v. Ramsay, 242 U. S. 128, 37 S. Ct. 44, 61 L. Ed. 192; Tiedemann v. Tiedemann, 35 Nev. 259, 129 P. 313; VonKesler v.

Superior Court, 109 Cal. App. 89, 292 P. 544; 42 Am. Jur., Process, § 150, p. 130; Annotation, 19 A. L. R. 828.

Section 42-319, R. S. 1943, provides: "All judgments and orders for payment of alimony or of maintenance in actions of divorce or maintenance shall be liens upon property in like manner as in other actions, and may in the same manner be enforced and collected by executions and proceedings in aid thereof, or other action or process as other judgments."

Section 42-323, R. S. 1943, provides for sale by execution of real or personal estate to pay alimony allowances.

Section 25-1503, R. R. S. 1943, provides: "Lands, tenements, goods and chattels, not exempt by law, shall be subject to the payment of debts, and shall be liable to be taken on execution and sold as hereinafter provided."

We conclude that the plaintiff was not immune from the service of process as contended for by him.

The plaintiff contends that the allowance for attorney's fees made by the trial court for the benefit of the defendant to be taxed as costs is erroneous on the ground that this case is not a continuation of the original divorce action between the parties.

This proceeding, as before stated, is a continuation of the divorce suit and one of its incidents. We believe the court had authority under section 42-312, R. S. 1943, to allow attorney's fees until the subject matter of the divorce is finally settled and determined. See, Lippincott v. Lippincott, *supra;* Cizek v. Cizek, 76 Neb. 797, 107 N. W. 1012; Chambers v. Chambers, 75 Neb. 850, 106 N. W. 993.

The defendant cross-appeals contending the court erred in not requiring computation of the amount due from the plaintiff to include the total of all orders for the payment of money and credit for payments made by the plaintiff on said orders.

As we view the record, the court's judgment entered June 23, 1950, with reference to the payments to be made by the plaintiff and credits to be allowed him,

and the manner in which the interest was to be computed was correct. The cross-appeal is without merit.

Other assignments of error need not be discussed.

The judgment herein is for child support. The district court has jurisdiction to render such orders necessary to fully carry out its decree of June 23, 1950, including exact computation of the amount due. Defendant's attorneys are allowed the sum of $250 for services rendered in this court, to be taxed as part of the costs.

AFFIRMED.

DOROTHEA SCOTT, APPELLANT, V. LEWIS E. SCOTT ET AL., APPELLEES.

46 N. W. 2d 627

Filed March 2, 1951. No. 32924.

1. **Divorce.** Without seeking a divorce, a wife, who has not violated any duty growing out of the marriage relation, may maintain a suit in equity against her husband for separate maintenance, where he has violated his legal duty to support her.
2. **Pleading: Evidence.** In the absence of the common law or statutes of any other jurisdiction in the United States being pleaded and presented we will presume the common law or statutes of such other jurisdiction to be the same as ours.
3. **Divorce.** When a decree of divorce is rendered it does not become operative until six months thereafter. During the period of time from the rendition of the decree until it becomes final, as provided by the law, the bonds of matrimony which previously existed between the parties are not dissolved.
4. **Marriage.** A marriage contract between a man and woman, one of whom is married, is contrary to public policy, illegal, and void.
5. ———. Since the enactment by the 1923 Legislature of Chapter 40, section 2, page 154, Laws 1923, now section 42-104, R. S. 1943, common law marriages are no longer recognized in Nebraska.

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

Max Marshall and *J. Leo Connolly,* for appellant.

Samuel L. Winters, for appellees.

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

WENKE, J.

Dorothea Scott brought this action in the district court for Douglas County against Lewis E. Scott and Lucille Linville. The trial court sustained the demurrer of defendant Lucille Linville and, after trial, dismissed the action as to the defendant Lewis E. Scott. Her motion for new trial having been overruled, the plaintiff appealed.

While appellant's petition is none to clear as to the nature of the cause of action she intended to bring, however, it is apparent, considering the record made at the trial, it is for the purpose of securing separate maintenance. While such actions are proper, however, by their very nature they require a marriage relationship to exist between the parties for it is on that relationship that the right thereto must be based.

"Without seeking a divorce, a wife, who has not violated any duty growing out of the marriage relation, may maintain a suit in equity against her husband for separate maintenance, where he has violated his legal duty to support her." Sinn v. Sinn, 138 Neb. 621, 294 N. W. 381. See, also, Brewer v. Brewer, 79 Neb. 726, 113 N. W. 161, 13 L. R. A. N. S. 222; Rhoades v. Rhoades, 78 Neb. 495, 111 N. W. 122, 126 Am. S. R. 611; Cochran v. Cochran, 42 Neb. 612, 60 N. W. 942; Earle v. Earle, 27 Neb. 277, 43 N. W. 118, 20 Am. S. R. 667; Alvernes v. Alvernes, 75 R. I. 325, 66 A. 2d 373.

Appellee Lucille Linville was made a party to this action but the rights claimed against her are conditioned upon a recovery being had against appellee Lewis E. Scott. Consequently we will not discuss her relationship to this litigation until we have determined if appellant has any rights against appellee Scott. For convenience we will refer to appellee Lewis E. Scott as appellee.

The facts are very simple. Three weeks after appel-

lant obtained a decree of divorce in Nebraska she and appellee went to Elk Point, South Dakota, and there, on May 24, 1948, went through a marriage ceremony. After the ceremony they went to Council Bluffs, Iowa, where they lived together until December 17, 1949.

Appellant invokes the following principle as here controlling: "The general rule is that the validity of a marriage is determined by the law of the place where it was contracted; if valid there it will be held valid everywhere, and conversely if invalid by the lex loci contractus, it will be invalid wherever the question may arise." Forshay v. Johnston, 144 Neb. 525, 13 N. W. 2d 873. See, also, Riddle v. Peters Trust Co., 147 Neb. 578, 24 N. W. 2d 434; State v. Hand, 87 Neb. 189, 126 N. W. 1002, 28 L. R. A. N. S. 753.

Section 42-117, R. S. 1943, provides: "All marriages contracted without this state, which would be valid by the laws of the country in which the same were contracted, shall be valid in all courts and places in this state."

This presents two questions: First, what was the effect of the marriage ceremony performed in South Dakota just three weeks after appellant obtained a divorce decree in Nebraska; and second, what was the effect of their living together at Council Bluffs, Iowa, after the decree in Nebraska became final?

Appellant did not plead the law of either South Dakota or Iowa. We have long followed the rule that: "In the absence of pleading and proof to the contrary, the statutes of a sister state are presumed to be the same as those of this state." First State Bank of Herrick v. Conant, 117 Neb. 562, 221 N. W. 691. And, as stated in Stark v. Olsen, 44 Neb. 646, 63 N. W. 37: "Such presumption applies not alone to the written but as well to the unwritten laws of other states." See, also, In re Application of Blackwell, 145 Neb. 256, 16 N. W. 2d 158; Forshay v. Johnston, *supra;* Scroggin v. McClelland, 37 Neb. 644, 56 N. W. 208, 40 Am. S. R. 520, 22 L. R. A. 110.

However, the 1947 Legislature passed the "Uniform Judicial Notice of Foreign Law Act," being Laws 1947, c. 93, p. 272, and now sections 25-12,101 to 25-12,107, inclusive, R. R. S. 1943.

This act, so far as here material provides:

"Every court of this state shall take judicial notice of the common law and statutes of every state, territory and other jurisdiction of the United States." § 25-12,101, R. R. S. 1943.

"The court may inform itself of such laws in such manner as it may deem proper, and the court may call upon counsel to aid it in obtaining such information." § 25-12,102, R. R. S. 1943.

"Any party may also present to the trial court any admissible evidence of such laws, but, to enable a party to offer evidence of the law in another jurisdiction or to ask that judicial notice be taken thereof, reasonable notice shall be given to the adverse parties either in the pleadings or otherwise." § 25-12,104, R. R. S. 1943.

"The law of a jurisdiction other than those referred to in section 25-12,101 shall be an issue for the court, but shall not be subject to the foregoing provisions concerning judicial notice." § 25-12,105, R. R. S. 1943.

We said in Snyder v. Lincoln, *ante* p. 611, 45 N. W. 2d 749, wherein we considered section 25-12,101, R. R. S. 1943, that: "The courts of Nebraska are authorized to take judicial notice of the common law and statutes of another state."

The foregoing statutes were not intended to remove the necessity of pleading and presenting the common law or statutes of another jurisdiction of the United States when recovery based thereon is sought in an action brought in this state to enforce a cause of action arising thereunder. It only removes the requirement of proving it. A court may require that it be pleaded and presented. See sections 25-12,102 and 25-12,104, R. R. S. 1943.

While under this act we are authorized to take judicial

notice of the common law and statutes of every other jurisdiction of the United States we will do so only when error is assigned that the trial court, in rendering its decision, failed to take judicial notice of and follow the common law or statutes of any other jurisdiction of the United States wherein the cause of action arose which were pleaded and presented to it and such common law or statutes are presented and discussed in the brief.

In the absence of the common law or statutes of any other jurisdiction in the United States being pleaded and presented we will presume the common law or statutes of such other jurisdiction to be the same as ours.

Section 42-340, R. S. 1943, provides in part: "A decree of divorce shall not become final or operative until six months after trial and decision, except for the purpose of review by appeal, and for such purpose only the decree shall be treated as a final order as soon as rendered * * *."

"When a decree of divorce is rendered it does not become operative until six months thereafter. During the period of time from the rendition of the decree until it becomes final, as provided by law, the bonds of matrimony which previously existed between the parties are not dissolved." Shinn v. Shinn, 148 Neb. 832, 29 N. W. 2d 629. See, also, Sovereign Camp, W. O. W. v. Billings, 107 Neb. 218, 185 N. W. 426; Holmberg v. Holmberg, 106 Neb. 717, 184 N. W. 134; In re Estate of Troemper, 160 Kans. 464, 163 P. 2d 379; Eaton v. Eaton, 66 Neb. 676, 92 N. W. 995, 60 L. R. A. 605.

Section 42-103, R. S. 1943, provides, as far as here material, as follows: "Marriages are void * * * (2) when either party has a husband or wife living at the time of the marriage * * *."

It is well settled that a marriage contract between a man and woman, one of whom is married, is contrary to public policy, illegal, and void. See, Drummond v. Irish, 52 Iowa 41, 2 N. W. 622; Barnett v. Barnett, 191 Ga. 501, 13 S. E. 2d 19; State v. Grengs, 253 Wis. 248, 33

N. W. 2d 248; Oliver v. Oliver, 185 F. 2d 429; Ex parte Soucek, 101 F. 2d 405; Stuart v. Schoonover, 104 Okl. 28, 229 P. 812.

Appellant being a married woman on May 24, 1948, the marriage she entered into with appellee on that date at Elk Point, South Dakota, was void.

Since the enactment by the 1923 Legislature of Chapter 40, section 2, page 154, Laws 1923, now section 42-104, R. S. 1943, common law marriages are no longer recognized in Nebraska.

Section 42-104, R. S. 1943, provides: "Previous to the solemnization of any marriage in this state, a license for that purpose must be obtained from the county judge of the county wherein the marriage is to take place, and no marriage hereafter contracted shall be recognized as valid unless such license has been previously obtained, and unless such marriage is solemnized by a person authorized by law to solemnize marriages."

As stated in Collins v. Hoag & Rollins, 122 Neb. 805, 241 N. W. 766: "A valid marriage can be contracted in this state only when the parties have previously obtained a license to marry, and when the marriage has been solemnized by a person authorized by law to solemnize marriages." See, also, Christensen v. Christensen, 144 Neb. 763, 14 N. W. 2d 613.

Appellee pleaded: "* * * the law of Iowa specifically provides that it shall be illegal for any person to contract a marriage in Iowa without obtaining a license, * * *." However, neither party presented any statute or decision of Iowa to sustain such allegation. In the absence of any law of Iowa being sufficiently pleaded and presented the laws of that state will be presumed to be the same as ours. Consequently appellant and appellee could not obtain the status of man and wife by merely living together in Iowa after the Nebraska decree of divorce became final.

The marriage ceremony appellant and appellee went through at Elk Point, South Dakota, on May 24, 1948,

being void and the subsequent living together of the parties in Council Bluffs not culminating in a marriage relationship, we find no basis upon which the action can be sustained. This also disposes of all rights which appellant claims against appellee Lucille Linville as those rights are conditioned upon her obtaining a recovery against the appellee. The decision of the trial court being correct, it is affirmed.

AFFIRMED.

DON CUNNINGHAM, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.

46 N. W. 2d 636

Filed March 2, 1951. No. 32965.

Appeal and Error. The limitation of one month within which error proceedings may be instituted in the Supreme Court from a judgment or final order of the district court as provided in section 25-1931, R. S. Supp., 1949, is applicable where the proceeding is for review of the judgment or final order in a criminal action.

ERROR to the district court for Douglas County: HENRY J. BEAL, JUDGE. *Motion to dismiss sustained.*

Eugene D. O'Sullivan, Jr. and *Tom Kelley,* for plaintiff in error.

Clarence S. Beck, Attorney General, and *Walter E. Nolte,* for defendant in error.

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

YEAGER, J.

This case is before this court on motion of the Attorney General to dismiss the petition in error on the ground that it was not filed within the time provided by law and thus the court is without jurisdiction to entertain it.

The plaintiff in error who will hereinafter be referred

to as plaintiff was charged with assault and battery in the county court of Douglas County, Nebraska. He pleaded guilty and was sentenced to serve 90 days in the county jail. From the judgment and sentence he appealed to the district court. The district court dismissed his appeal. From the dismissal he has attempted to prosecute error to this court.

The appeal was dismissed on October 23, 1950. Motion for new trial was filed and overruled on October 24, 1950. On the same day the attorneys for plaintiff filed their affidavit of intention to appeal the said cause to the Supreme Court which affidavit contained a declaration that the prospective appeal was in good faith.

Afterwards on November 22, 1950, a notice of appeal and of intention to apply to the Supreme Court of Nebraska for a writ of error was served upon the county attorney of Douglas County, Nebraska, and filed in the office of the clerk of the district court.

Thereafter on December 2, 1950, the plaintiff filed petition for writ of error out of this court wherein he prayed that the judgment of the district court dismissing his appeal be reversed and that he be given a trial de novo on the charge of crime contained in the complaint on which he had been convicted and sentenced in the county court.

The ground of the motion of the Attorney General is that this court is without jurisdiction to entertain the petition for the reason that it was not filed within the time provided by law for the filing of such petitions. In this connection the Attorney General asserts that the statute requires that in order that this court shall have jurisdiction to hear a petition in error in a case such as this the petition must be filed within one month from the date of the judgment.

Factually as is apparent from what has been said herein the petition was not filed within one month from the date of the judgment being considered herein.

The plaintiff insists on the other hand that there is

no such statutory limitation upon the right to present a petition for writ of error to this court. He substantially says that there is no statutory limitation upon the time when a petition for writ of error in a criminal case may be presented to the Supreme Court beyond a requirement of section 29-2302, R. R. S. 1943, that it shall be without delay.

There is not now and there never has been a provision of the criminal code fixing the time in criminal cases when a petition for writ of error shall be presented to the Supreme Court. This failure has been a matter for attention of this court on numerous occasions. On these occasions it was pointed out that though there was no specific limitation covering the subject in the criminal code there was nevertheless by reference to the civil code a statutory limitation. The limitation was first referred to and declared to be such in Kountz v. State, 8 Neb. 294, 1 N. W. 142. The provision was section 508 of the criminal code. The referral statute at that time and at all times until 1949 was substantially as it appears in section 29-2306, R. R. S. 1943, as follows: "In all criminal cases, writs of error shall be issued by the clerk of the Supreme Court upon the filing of a petition in error and transcript of the record of the proceedings of the district court and payment of costs as in civil cases; * * *."

This court in Kountz v. State, *supra,* said that by the words "as in civil cases" the limitation as to the time for filing petitions for writs of error in civil actions was adopted into the criminal code and became the limitation also in criminal actions. The limitation was at that time one year in civil cases. Laws 1877, § 1, p. 14. This court said that the same limitation applied in criminal cases.

The limitation has been changed since that time by legislative action until 1949 when it became one month. By Chapter 82, section 1, Laws 1901, it was reduced to six months. By Chapter 69, section 1, Laws 1925, it

was reduced to three months. By Chapter 57, section 1, Laws 1949, appearing now as section 25-1931, R. S. Supp., 1949, it was reduced to one month.

In all the later cases after the changes, the reasoning of Kountz v. State, *supra,* has been followed and in each instance a like application has been made. Omaha Loan & Trust Co. v. Ayer, 38 Neb. 891, 57 N. W. 567; Kock v. State, 73 Neb. 354, 102 N. W. 768; Dirksen v. State, 86 Neb. 334, 125 N. W. 618; Dimmel v. State, 128 Neb. 191, 258 N. W. 271; Goodman v. State, 131 Neb. 662, 269 N. W. 383; Iron Bear v. State, 149 Neb. 634, 32 N. W. 2d 130.

By amendment the words "as in civil cases" were removed from section 29-2306, R. R. S. 1943, and the section to the extent necessary to quote it here is as follows: "In all criminal cases, writs of error shall be issued by the Clerk of the Supreme Court upon the filing of a petition in error and transcript of the record of the proceedings of the district court and payment of a docket fee of twenty dollars to the Clerk of the Supreme Court; * * *." This amendment is contained in Chapter 73, section 1, Laws 1949. The section as amended now appears as section 29-2306, R. S. Supp., 1949.

The plaintiff urges that it was solely by these words that the limitation of the civil code was made to apply to the criminal code, therefore with their elimination from the statute there is no limitation as to the time when error proceedings must be filed in the Supreme Court, except that it must be done without delay.

We do not think the contention may be sustained. We do not think that the mere removal of the words mentioned had the effect of destroying the application of the limitation of section 25-1931, R. S. Supp., 1949, to petitions in error to the Supreme Court from judgments in criminal cases. There was clearly no such legislative intent.

The words "as in civil cases" were removed by Legislative Bill No. 226 of the 1949 session of the Legislature which was amendatory of section 29-2306, R. R. S. 1943.

Laws 1949, c. 73, p. 187. The title to this amendatory act is the following: "AN ACT to amend section 29-2306, Revised Statutes of Nebraska, 1943; to provide for payment to the Clerk of the Supreme Court of a docket fee in all criminal cases, except where an affidavit of poverty is filed; and to repeal the original section."

From this it is clear that there was no legislative intention or purpose to disturb the relationship which had been so many times declared by this court to section 25-1931, R. R. S. 1943. The sole purpose was to require payment of a docketing fee to the Clerk of the Supreme Court. We must assume that the intention was that the relation should remain the same as it had previously existed.

It appears therefore that the statute fixing the time for filing a petition in error in the Supreme Court although appearing in the civil code relates to actions under the criminal code. Or in other words, it can make no real difference that the limitation appears in the one code or the other or in an enactment independent of either code.

The cases referred to herein have reference to times when the limitation was three months or more. By Chapter 57, section 1, Laws 1949, the limitation was reduced to one month. This statute as amended is applicable to the cases before the court at this time. The petition in error was not filed within one month after the entry of the judgment which the plaintiff seeks to have reviewed. It was not filed within time to confer jurisdiction upon this court to review.

The motion to dismiss the petition in error is sustained.

MOTION TO DISMISS SUSTAINED.

JIM NEWQUIST, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.

46 N. W. 2d 639

Filed March 2, 1951. No. 32966.

Appeal and Error. The provision of section 25-1931, R. S. Supp., 1949, allowing an infant one year exclusive of the time of disability within which to commence proceedings to reverse, vacate, or modify judgments or final orders has no application except where there is a recognizable legal disability to protect rights or liberties on account of infancy.

ERROR to the district court for Douglas County: HENRY J. BEAL, JUDGE. *Motion to dismiss sustained.*

Eugene D. O'Sullivan, Jr. and *Tom Kelley,* for plaintiff in error.

Clarence S. Beck, Attorney General, and *Walter E. Nolte,* for defendant in error.

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

YEAGER, J.

This is a companion case to Cunningham v. State, *ante* p. 912, 46 N. W. 2d 636, and all of the questions therein are found in this case. The two cases have an identical history. What is said there is adopted as controlling here.

The plaintiff in error in this case presents a question here which was not presented in No. 32965. By this new question he insisted that he is a minor and under the terms of section 25-1931, R. S. Supp., 1949, he is entitled to one year after attaining his majority to prosecute error. The section is the following:

"No proceedings for reversing, vacating, or modifying judgments or final orders shall be commenced unless within one calendar month after the rendition of the judgment or making of the final order complained of; except that when the person entitled to such proceedings is an infant, a person of unsound mind, or imprisoned, he shall have one year exclusive of the time of his dis-

ability, within which to commence such proceedings."

Obviously this statute contemplates a situation involving a disability to proceed in a legal action to protect rights or liberties. This is made clear by the opinion in Kock v. State, 73 Neb. 354, 102 N. W. 768.

This plaintiff in error has pointed out no disability the effect of which would be to deprive him of any recognizable legal right or liberty. Hence it cannot be said that this provision extends his right to file a petition in error later than one month after the judgment which he seeks to have reviewed.

The motion to dismiss the petition in error is sustained.

MOTION TO DISMISS SUSTAINED.

WENKE, J., concurring.

I concur in the result of the majority opinion but I am not satisfied that it sets forth with sufficient clarity just when the exception contained in section 25-1931, R. S. Supp., 1949, is applicable. As I interpret said section the provision thereof allowing an infant, a person of unsound mind or imprisoned, (here a minor) one year, exclusive of the time of disability, within which to commence proceedings to reverse, vacate, or modify any judgment or final order has no application except where, on account of the infancy, unsound mind, or imprisonment, there is or has been a recognizable legal disability which prevents or prevented such person from protecting his rights or liberties within the time as in said statute provided.

CARTER, J., concurring.

The statute in question was enacted at a time when error proceedings were available to review judgments of the district court in both civil and criminal actions. The concluding exception of this section was intended to apply only in a civil action when an infant, an insane person, or a prisoner was under legal disability to sue. Infancy as a disability never did, and does not now, exist in a criminal proceeding. I would sustain the motion to dismiss on this basis.

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Acknowledgments.

1. An acknowledgment is the act by which a party who has executed an instrument of conveyance as grantor goes before a competent officer or court, and declares or acknowledges the same to be his genuine and voluntary act and deed. *Trowbridge v. Bisson* 389
2. If the party executing an instrument knows that he is before an officer having authority to take acknowledgments, understands that such officer is present for the purpose of taking his acknowledgment, intends to then do whatever is necessary to make the instrument effective, and the acknowledging officer's official certificate is attached thereto, such acknowledgment, in the absence of fraud, will be conclusive in favor of those who in good faith rely upon it. *Trowbridge v. Bisson* 389
3. A grantor in an instrument of conveyance who never at any time appeared for the purpose of acknowledging the instrument is not bound in anywise by the recitals in a certificate of acknowledgment attached by a notary public. *Trowbridge v. Bisson* 389
4. In proceedings which involve only the rights of the parties to the transaction or other persons having notice of the facts, parol evidence is admissible to contradict the recitals of a notary certificate and show them to be false. *Trowbridge v. Bisson* 389
5. A certificate of acknowledgment in proper form can only be impeached by clear, satisfactory, and convincing evidence that its recitals are false, and the burden is ordinarily upon the party alleging the same to so prove it. *Trowbridge v. Bisson* 389
6. A stockholder in a corporation, who is likewise a notary, has such a direct beneficial interest in the corporation as to disqualify him from taking an acknowledgment to an instrument running to it. *Loyal's Auto Exchange, Inc. v. Munch* 628

Administrative Agencies.

1. The Nebraska Liquor Control Commission has the

power to regulate all phases of the control of the manufacture, distribution, sale, and traffic in alcoholic liquors, except as otherwise specifically delegated in the Liquor Control Act, and for that purpose may promulgate such reasonable rules and regulations as it may deem necessary to carry out the intent, purpose, and requirements of the act. *State ex rel. Nebraska Beer Wholesalers Assn. v. Young* 395

2. The Liquor Control Commission may not adopt rules and regulations which are in conflict with the Liquor Control Act as the power to regulate must be exercised in conformity with all the provisions of the act and in harmony with its spirit and expressed intent. *State ex rel. Nebraska Beer Wholesalers Assn. v. Young* 395

Administrative Law and Procedure.

1. Where an administrative tribunal is authorized to ascertain and declare the existence or nonexistence of certain facts, and no provision is made for an appeal to the courts, the courts are limited to a determination of two questions; whether the tribunal had jurisdiction of the subject matter and whether the findings and order based thereon are arbitrary or capricious. *Lewis v. City of Omaha* 11
2. If all the jurisdictional facts are established and there is evidence to support the order made by the administrative tribunal, no basis exists for interference by the courts. *Lewis v. City of Omaha* 11
3. Whether a cause of removal of an officer is a sufficient ground for removal as a matter of law is for the courts. If the ground for removal be sufficient, whether removal is justified is for the administrative tribunal subject to the limitation that it must not be arbitrary or capricious. *Lewis v. City of Omaha* 11
4. Findings and orders of an official administrative agency or body acting in a quasi-judicial capacity will ordinarily be upheld in error proceedings to the district court and on appeal to the Supreme Court, if it appears that such agency or body has acted within its jurisdiction and that all of the jurisdictional facts essential to uphold its findings and orders are sustained by some competent evidence. *Lynch v. City of Omaha* 147

Adverse Possession.

1. A person claiming title by adverse possession must,

to establish it, prove open, notorious, exclusive, continuous, and adverse possession of the real estate for the full period of ten years. *Ohm v. Clear Creek Drainage District* 428

2. In order to create title by adverse possession, the possession, in addition to other elements, must be exclusive for the period of limitations. *Ohm v. Clear Creek Drainage District* 428

3. One claiming ownership of real estate by adverse possession must recover upon the strength of his title and not because of a possible weakness in the title of his adversary. *Ohm v. Clear Creek Drainage District* 428

Appeal and Error.

1. The function of the Supreme Court in a workmen's compensation case is to consider the case de novo unless from the record it appears that the findings are conclusively supported by the evidence. *Tucker v. Paxton & Gallagher Co.* 1

2. Section 25-1315.03, R. R. S. 1943, deals with the power of the Supreme Court on appeal. *Krepcik v. Interstate Transit Lines* 98

3. The statute providing for entry of judgment notwithstanding the verdict vests power in the Supreme Court on appeal to review the action taken by the trial court and to enter judgment in favor of the party who was entitled to the judgment in the trial court. *Krepcik v. Interstate Transit Lines* 98

4. An order is not final when the substantial rights of the parties involved in the action remain undetermined and when the cause is retained for further action. In such a case, the order is interlocutory. When no further action of the court is required to dispose of the cause pending, the order becomes final and from which an appeal or proceedings in error will lie. *Krepcik v. Interstate Transit Lines* 98

5. Upon appeal from a judgment entered notwithstanding the verdict, the action of the trial court is within the appellate jurisdiction and not the original jurisdiction of the Supreme Court. *Krepcik v. Interstate Transit Lines* 98

6. The striking of a motion for new trial, timely filed in the district court, is the equivalent of overruling the same and finally disposing of the cause upon the merits, from which appeal may be taken to the

Supreme Court, where upon review such judgment may be entered or directed as should have been rendered by the trial court. *Lynch v. City of Omaha* 147

7. In the absence of an express finding by the district court on an issue adverse to the appellee, a cross-appeal in reference to such issue may not be had in the Supreme Court. *Sarraillon v. Stevenson* 182

8. 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 Moritz* 206
In re Application of Petersen & Petersen, Inc. 517

9. The appeal to the district court in a proceeding before the Department of Roads and Irrigation for permission to drain a natural lake is a trial de novo as in equity. On appeal to the Supreme Court the review is by trial de novo as in equity. *Lackaff v. Department of Roads and Irrigation* 217

10. In error proceedings in a criminal case the one-calendar-month period begins to run from the time the court's ruling on a motion for a new trial has been entered on the journal of the court. *Fisher v. State* 226

11. The only question that can be presented to the Supreme Court on appeal, in the absence of a bill of exceptions, is the sufficiency of the pleadings to support the judgment. *Blake v. Pathfinder Hotel Co.* 231

12. A bill of exceptions in a case tried in district court must be authenticated by certificate of the clerk thereof to be considered in the Supreme Court. *Wabel v. Ross* 236

13. The Supreme Court will, on its own motion, refuse to consider a document appearing in the record and purporting to be a bill of exceptions when not authenticated as such by certificate of the clerk of the district court. *Wabel v. Ross* 236

14. In the absence of a bill of exceptions, no question will be considered, a determination of which requires an examination of evidence produced at the trial. *Wabel v. Ross* 236

15. In the absence of a bill of exceptions, it is presumed that an issue of fact raised by the pleadings was sustained by the evidence, that it was correctly determined, and if the pleadings are sufficient to

support the judgment of the district court, it will be affirmed. *Wabel v. Ross* 236
Bryant v. State 490

16. The filing of the statement of error on an appeal from an award of a single judge of the compensation court is not a jurisdictional requirement. *Peek v. Ayres Auto Supply* 239

17. On an appeal from the district court in a compensation case a trial de novo in the Supreme Court is not authorized where findings of fact do not appear from the record to have been made by the tribunal required to make the same. *Peek v. Ayres Auto Supply* 239

18. Affidavits used as evidence on the hearing of an issue of fact must be offered in evidence in the trial court and embodied in a bill of exceptions to be available to plaintiff in error in the Supreme Court. *Darlington v. State* 274

19. Whether the giving of an instruction in a civil case constitutes prejudicial error is dependent upon the situation existing in each particular case. If the instruction under the facts shown is prejudicial to the rights of a party to a fair trial it is reversible error, but otherwise not. *Keiserman v. Lydon* 279

20. The Supreme Court in determining an appeal in an equity action involving questions of fact is required to reach an independent conclusion, but in determining the weight of evidence, where there is an irreconcilable conflict on a material issue, it may properly consider the fact that the trial court observed the witnesses and their manner of testifying.
Strasser v. Strasser 288
Sopcich v. Tangeman 506
Hall v. Modern Woodmen of America 600

21. Errors assigned by a plaintiff in error but not discussed by him will be considered waived and will not be examined by the Supreme Court. *Smith v. State* 308
Schluter v. State 317

22. In an appeal from the entry of a judgment notwithstanding the verdict the parties must preserve all errors upon which they rely, alternative or otherwise, by adequate assignments in their respective briefs. *Armer v. Omaha & Council Bluffs St. Ry. Co.* 352

23. Where an appeal is taken from the entry of a judgment notwithstanding the verdict, a failure to assign as error, in the alternative, the overruling of the motion for a new trial precludes the Supreme Court

from considering the correctness of the trial court's ruling on such motion for a new trial. Under such circumstances any right to a new trial will be deemed to have been waived. *Armer v. Omaha & Council Bluffs St. Ry. Co.* 352

24. Upon appeal the same cause must be presented in the Supreme Court that was tried in the court below. If an issue is there tried by both parties without objection from either that the issue is not sufficiently pleaded, such objection will not be considered as ground for reversal. *In re Application of Bruno* 445

25. The maximum time allowed in a criminal case, unless the time is extended by the Supreme Court, for service of a bill of exceptions is within 90 days, and for the allowance and settlement thereof is within 110 days, from the time of the filing of the petition in error in the Supreme Court. *Bryant v. State* 490

26. The Supreme Court is authorized to grant an extention of time for the preparation of a bill of exceptions upon application and good cause shown therefor; however, a situation justifying an exercise of this authority must be one beyond the capacity and power of the applicant to have prevented. *Bryant v. State* 490

27. A proper judgment under the pleadings and the evidence will not be reversed on appeal merely because the trial court did not give the right reason for the decision. *Sopcich v. Tangeman* 506

28. The Supreme Court will not disturb the findings of a jury unless on examination of the record it may be said that such findings are not supported by any evidence or are clearly wrong. *Fitzsimons v. Frey* 550

29. An appeal lodged in the Supreme Court from a decree rendered in a divorce action is tried de novo. *Zoppelli v. Zoppelli* 577

30. On an appeal to the Supreme Court from a judgment of the district court convicting a defendant of a violation of a city ordinance, the same being a review of the proceedings and not a trial de novo, the existence of a valid ordinance creating the offense charged will be presumed where the ordinance is not properly set forth in the record. *State v. Novak* 596

31. A complaint based on a violation of a municipal ordinance will be deemed sufficient on appeal, except in case of a complete failure to state a cause of action. *State v. Novak* 596

32. The action of the trial court in excluding testimony of a witness during his direct examination may not be reviewed on appeal in the absence of an offer to prove what it is claimed the testimony would show. *Snyder v. Lincoln* 611
33. The failure of a litigant to object to the introduction of evidence when it is offered precludes him from afterwards complaining that its reception was error. *Snyder v. Lincoln* 611
34. A litigant is entitled to have his theory, when pleaded and supported by evidence, submitted to the jury, and it is error to refuse a proffered instruction warranted by evidence and correctly stating law applicable to the case, unless the matter is covered by instructions given by the court. *Snyder v. Lincoln* 611
35. The effect of an appeal bond and institution of an original action in the district court, as the Real Estate Commission Act permits, is to stay the order of the State Real Estate Commission until the final disposition of the case. *Rhoades v. State Real Estate Commission* 625
36. The time of the commencement of a period of suspension of a license, as fixed by order of the State Real Estate Commission, when enforcement of the order has been stayed in the manner provided by law pending further contest in the matter, is automatically postponed until the order of suspension becomes final and enforceable. *Rhoades v. State Real Estate Commission* 625
37. When a case is remanded by the Supreme Court to the district court with directions for its disposition, the district court must obey and perform the mandate of the Supreme Court. *Rhoades v. State Real Estate Commission* 625
38. An appeal from a decree of the district court in a proceeding to detach property is triable de novo in the Supreme Court. *Davidson v. City of Ravenna* 652
39. Error may not be predicated upon the refusal of an instruction not applicable to evidence in the case. *Brown v. Hyslop* 669
40. 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 an instruction is reasonably clear. *Brown v. Hyslop* 669
41. When different instructions are given on the same subject, they should be considered together, and if

they fairly submit the case, it will not be reversed for indefiniteness or ambiguity in one of the instructions. *Brown v. Hyslop* 669

42. In determining whether or not there was error in a sentence or clause of an instruction, it will be considered with the instruction of which it is a part and the 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. *Brown v. Hyslop* 669

43. On appeal in a jury case the function of the Supreme Court is not to weigh the evidence but to determine whether or not there was sufficient evidence to sustain the verdict. If the evidence is substantial and competent but in conflict and is such that reasonable minds may draw different conclusions therefrom, the verdict will not be set aside. *Conley v. Hays* 733

44. In a law action tried to a jury on substantially conflicting evidence and under proper instructions, the verdict of the jury will not be disturbed. *Clute v. Mach* 772

45. To justify a reversal of the judgment of the district court, error must affirmatively appear. *Clute v. Mach* 772

46. The limitation of one month within which error proceedings may be instituted in the Supreme Court from a judgment or final order of the district court is applicable where the proceeding is for review of the judgment or final order in a criminal action. *Cunningham v. State* 912

47. The exception in the statute allowing an infant one year exclusive of the time of disability within which to commence proceedings to reverse, vacate, or modify judgments or final orders has no application except where there is a recognizable legal disability to protect rights or liberties on account of infancy. *Newquist v. State* 917

Arbitration and Award.

1. Where arbitration constitutes a part of the contract between parties to it and an attempt is made to enforce arbitration by invoking the Federal Arbitration Act, in the courts of this state the issue is one of procedure and not of substantive right, and the laws of this state are controlling. *Wilson & Co., Inc. v. Fremont Cake & Meal Co.* 160

2. In this jurisdiction a provision in a contract requir-

ing arbitration, whether of disputes arising under the contract generally or only of the amount of any loss or damages sustained by the parties thereto, will not be enforced; nor will refusal to arbitrate be available in an action growing out of the contract. *Wilson & Co., Inc. v. Fremont Cake & Meal Co.* 160

Attorney and Client.

1. A reasonable attorney fee in any proceeding is to be determined by the nature of the case, the amount involved in the controversy, the results obtained, and the services actually performed therein, including the length of time necessarily spent in the case, the care and diligence exhibited, and the character and standing of the attorneys concerned. *Strasser v. Strasser* 288
2. The purpose of a disbarment proceeding is not so much to punish the lawyer as it is to determine in the public interest whether he should be permitted to practice. *State ex rel. Nebraska State Bar Assn. v. Wiebusch* 583
3. In admitting a lawyer, and granting him a license to practice law, it is on the implied understanding that the party receiving such license shall in all things demean himself in a proper manner and abstain from such practices as cannot fail to bring discredit upon himself, the profession, and the courts. *State ex rel. Nebraska State Bar Assn. v. Wiebusch* 583
4. The oath taken by a lawyer requires a lawyer to faithfully discharge his duties; uphold and obey the Constitution and laws of this state; observe established standards and codes of professional ethics and honor; maintain the respect due to courts of justice; and abstain from all offensive practices which cast reproach on the courts and the bar. *State ex rel. Nebraska State Bar Assn. v. Wiebusch* 583
5. A lawyer owes his first duty to the court. He assumed his obligations toward it before he ever had a client. He cannot serve two masters, and the one he has undertaken to serve primarily is the court. *State ex rel. Nebraska State Bar Assn. v. Wiebusch* 583
6. Misconduct of a lawyer acting as a judge may constitute grounds for his suspension or disbarment, since his untrustworthiness and infidelity in the other, and a violation of his judicial oath only ag-

gravates the offense of violating his oath as a lawyer. *State ex rel. Nebraska State Bar Assn. v. Wiebusch* 583

7. A duty rests on the courts to maintain the integrity of the legal profession by disbarring lawyers who indulge in practices designed to bring the courts or the profession into disrepute, to perpetrate a fraud on the courts, or to corrupt and defeat the administration of justice. *State ex rel. Nebraska State Bar Assn. v. Wiebusch* 583

8. The ethical standards relating to the practice of law in this state are the canons of professional ethics of the American Bar Association and those which may from time to time be approved by the Supreme Court. *State ex rel. Nebraska State Bar Assn. v. Wiebusch* 583

9. Canons of ethics and rules governing professional conduct of lawyers are recognized and applied by the Supreme Court in proper cases. *State ex rel. Nebraska State Bar Assn. v. Wiebusch* 583

10. In cases where the divorced wife seeks modification of a decree of alimony, alleging that the decree was obtained by fraud of the husband, or his agents, the district court has authority to require the husband to pay into court a reasonable sum of money, including an attorney's fee, to enable her to prosecute or defend her action. *Pasko v. Trela* 759

11. An action seeking modification of award of alimony is a proceeding ancillary to the original divorce proceeding and deemed a part thereof, giving the court authority to exercise a judicial discretion and grant the same relief, including an allowance for suit money or attorneys' fees, as it had in the original suit, and such allowance may be made at any stage of the litigation or included in the final decree. *Pasko v. Trela* 759

12. Where one partner of a law partnership over a period of years represented a client of the firm and drafted a will which is subsequently contested, requiring him to testify as a witness as to the testamentary capacity of the testator at the time the will was executed, and he participated no further in the case, under the rules of professional ethics recognized by the Supreme Court another member of the law firm is not barred from trying the case. *In re Estate of Benson* 824

13. Where a decree for child support is entered in a

divorce action and the wife, having been awarded the custody of a minor child, files an application against the husband for an order to show cause why he should not pay arrearages due for child support, and the husband files an application to modify the decree with reference to the child support, such proceeding is simply a continuation of the divorce suit and one of its incidents, and the authority of the court to allow counsel fees continues until the subject matter of the divorce suit is finally settled and determined. *Miller v. Miller* 890

Automobiles.

1. In those cases where reasonable minds may differ on the question of whether or not the operator of an automobile exercised the ordinary care 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. *Weisenmiller v. Nestor* 153
2. The Certificate of Title Act was enacted for the protection of owners of motor vehicles, those holding liens thereon, and the public. *Securities Credit Corp. v. Pindell* 298
3. The Certificate of Title Act eliminates the practice of filing and recording chattel mortgages on motor vehicles in the chattel mortgage records, and substitutes the recording of such upon the certificate of title itself. *Securities Credit Corp. v. Pindell* 298
4. One holding a lien upon a motor vehicle must, insofar as he can reasonably do so, protect himself and others thereafter dealing in good faith, by complying and requiring compliance with applicable laws concerning certificates of title to motor vehicles. *Securities Credit Corp. v. Pindell* 298
5. Under the act relating to certificates of title to motor vehicles, no valid lien can be asserted against a motor vehicle unless it is disclosed by a valid certificate of title regularly issued by the county clerk of the county in which the applicant resides. *Securities Credit Corp. v. Pindell* 298
6. A motor vehicle mortgage lien, not shown in the title certificate, is not valid against a subsequent holder of a mortgage lien shown in the certificate of title. *Securities Credit Corp. v. Pindell* 298
7. When one operates a motor vehicle in violation of law pertaining to the operation thereof on a public

highway, and in so doing, as a result of the violation of law, causes the death of another, he is guilty of manslaughter. *Schluter v. State* 317

8. Ordinarily the speed of an automobile is not a matter of exclusive expert knowledge. Any one who has knowledge of time and distance and a reasonable opportunity to formulate a basis for an opinion is a competent witness to give an estimate of speed. *Schluter v. State* 317

9. A witness who has shown himself qualified to give an opinion as to the speed of a motor vehicle may do so even though it had bright headlights and was coming directly toward him in the nighttime. Such facts go to the weight and not the competency of the evidence. *Schluter v. State* 317

10. Proof of violation of a statute or city ordinance relating to speed does not of itself establish negligence in an action for damages but it is evidence which is to be considered in determining whether a party is guilty of negligence. *Tempero v. Adams* .. 331

11. Evidence as to conditions at the place of a traffic accident an appreciable time thereafter, such as the existence and location of marks or tracks, is admissible upon a proper showing that the conditions have not been changed in the meantime. *Ficke v. Gibson* 478

12. A driver of an automobile should have his car under such reasonable control as will enable him to avoid collision with other vehicles, assuming that the drivers thereof will exercise due care. *Ficke v. Gibson* 478

13. Reasonable control by drivers of motor vehicles is such as will enable them to avoid collision with other vehicles operated without negligence in streets or intersections, and with pedestrians in the exercise of due care. *Ficke v. Gibson* 478

14. 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. *Hendrix v. Vana* 531

15. 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. *Hendrix v. Vana* 531

16. 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. *Hendrix v. Vana* 531

17. The negligence of a husband while driving an automobile, in which his wife is a guest, may not be imputed to her. *Hendrix v. Vana* 531

18. A purchaser of an automobile in Colorado may acquire title thereto without complying with the law of that state on the subject of transfer of title of a motor vehicle. *Snyder v. Lincoln* 611

19. The Certificate of Title Act, together with the amendments made thereto, constitutes an authorized exercise of police power on the part of the Legislature and does not violate any of the provisions of our state or federal Constitution. *Loyal's Auto Exchange, Inc. v. Munch* 628

20. A purchaser who receives possession of an automobile without obtaining the certificate of title thereto acquires no title or ownership therein. *Loyal's Auto Exchange, Inc. v. Munch* 628

21. A subsequent purchaser for value of the automobile, who obtains the certificate of title by complying with the statutory requirements relating thereto, obtains the title and ownership thereof. His title and ownership are superior to any rights which the first purchaser may have. *Loyal's Auto Exchange, Inc. v. Munch* 628

22. In an action for damages to an automobile, where the automobile cannot be placed in substantially as good condition as it was before the injury, the measure of damages is the difference between its reasonable market value immediately before and immediately after the accident. The injured party

is not permitted to recover in addition thereto damages for loss of use. *Lund v. Holbrook* 706

23. The owner of an automobile kept for family purposes is liable for injuries inflicted upon a stranger as a result of the negligent driving of one of his children, where the car is occupied by members of the family and is being used for one of the purposes for which it is kept. *Lund v. Holbrook* 706

24. When the driver of a motor vehicle turning across a highway between intersections fails to look to the front and rear for oncoming traffic at a time and place when to look would be effective, or looks and negligently fails to see that which is in plain sight, or is in a position where he cannot see, a question for the court is usually presented. *Petersen v. Schneider* 815

25. Where a driver looks but does not see an approaching motor vehicle because of unusual conditions or circumstances, or sees the approaching vehicle and erroneously misjudges its speed or distance, or for some other reason assumes he could safely complete the movement, the question of negligence is usually for the jury. *Petersen v. Schneider* 815

26. A left-hand turn across a public highway between intersections is fraught with danger, and one making such a movement is required to exercise a degree of care commensurate with the danger. *Petersen v. Schneider* 815

27. The giving of the statutory signal for a left turn will not absolve the driver from negligence where he fails to exercise care for his own safety, and that of others, by looking to the front and rear for the approach of other vehicles using the highway. *Petersen v. Schneider* 815

28. The failure to look before turning left across a public highway between intersections is negligence as a matter of law. *Petersen v. Schneider* 815

Banks and Banking.

1. When a deposit in any bank in this state is made in the name of two or more persons, deliverable or payable to either or to their survivor or survivors, such deposit, or any part thereof or increase thereof, may be delivered or paid to either of said persons or to the survivor or survivors in due course of business. *Scriven v. Scriven* 655

2. Statute relating to the payment by a bank of de-

posits entered as payable to any one of two or more persons named therein, not only is intended for the protection of the bank, but also to fix the property rights of the persons named, unless the contrary appears from the terms of the deposit. *Scriven v. Scriven* 655

3. A deposit of money in a bank by a husband and made payable to himself or wife, whether expressly as joint tenants with right of survivorship or not, is presumed to have been made by the husband with a donative intent and for the benefit of the wife with the intention of giving to her, if she survives, the complete title to the funds. *Scriven v. Scriven* 655

4. By statute, when a deposit is made in a bank payable to either of two or more persons, either expressly as joint tenants with right of survivorship or without those qualifying words, upon the death of one of the payees the deposit is payable to the survivor or survivors of those named in the deposit. *Parkening v. Haffke* 678

Bonds.

The County Hospital Act permits a county board of a county with the required population, when authorized by the voters of the county in the manner specified, to issue and sell bonds of the county in an amount fixed by the board and to use the proceeds thereof for the construction or acquisition of a county community hospital and the purchase of suitable equipment therefor. *Armstrong v. Board of Supervisors* .. 858

Bridges.

1. A county is not an insurer of the safety of the bridges it constructs and maintains upon highways for the use of the public. *Wittwer v. County of Richardson* 200

2. In an action to recover damages from a county on account of injury or death caused by a defective bridge on a public highway the plaintiff must prove by a preponderance of the evidence that the defect was known or that it existed for such a length of time that with reasonable diligence it could or should have been discovered by the county. *Wittwer v. County of Richardson* 200

3. A county is not liable for negligence on account of latent defects in a bridge on a public highway but only for such as are patent and may be ascertained

by reasonable inspection. *Wittwer v. County of Richardson* 200

Burglary.

1. The material elements of the crime of burglary may be proved by direct or circumstantial evidence. *Kitts v. State* 784
2. The material elements of the crime of possession of burglar tools may be proved by direct or circumstantial evidence. *Kitts v. State* 784

Commerce.

1. Property in transit in interstate commerce through this state only as an incident to its transfer to some other state acquires no situs for taxation and is not taxable in this state. *Archer-Daniels-Midland Co. v. Board of Equalization* 776
2. Property purchased in transit within this state which does not thereafter lose its character as property in transit in interstate commerce until it reaches its destination outside the state is not taxable. *Archer-Daniels-Midland Co. v. Board of Equalization* 776

Common Law.

The adoption of the common law by this state was strictly qualified and limited. Any part thereof may be abrogated by statute or modified or disregarded by the Supreme Court as not applicable. *Baskins v. Krepcik* 36

Constitutional Law.

1. The words and terms of a constitutional provision are to be interpreted and understood in their most natural and obvious meaning, unless the subject indicates or the text suggests that they have been used in a technical sense. While the Constitution must be construed as a whole, still where the words employed in a constitutional provision are plain, direct, and unambiguous, no interpretation is necessary to ascertain their meaning. Courts may not supply what they deem unwise omissions, or add words which substantially add to or take from the Constitution as framed. *Ramsey v. County of Gage* .. 24
2. The courts should accord to the language of the Constitution the meaning which obviously would be accepted by a layman. *Ramsey v. County of Gage* 24
3. In construing a constitutional amendment for the

purpose of ascertaining the intent of the people in adopting it, the courts must find such intent in the language of the amendment itself and they are not to hold that the people intended anything different from what the language employed imports. *Ramsey v. County of Gage* 24

4. The Legislature is prohibited from increasing or diminishing the salary of any public officer during his term of office, where such salary is fixed by the Legislature subsequent to the adoption of the constitutional amendments of 1920. *Ramsey v. County of Gage* 24

5. Generally the courts will not in advance of passage or adoption of legislation by a city enjoin such legislation or inquire into the validity or constitutionality thereof. *Noble v. City of Lincoln* 79

6. Generally the courts will not inquire into the validity or constitutionality of an election or enjoin it at the suit of a taxpayer unless it be made to appear that the passage or enactment thereof would immediately destroy or irreparably damage special property rights or interests peculiar to the taxpayer and not enjoyed by the public at large. *Noble v. City of Lincoln* 79

7. A party invoking the provisions of a statute is not in a position to raise the question of its constitutionality. *Lackaff v. Department of Roads and Irrigation* 217

8. The conditions and restrictions of the Constitution and statutes relative to the former Bicameral Legislature, so far as they may be applicable, attach to the present Legislature of one chamber. *State ex rel. Caldwell v. Peterson* 402

9. The words and terms of a constitutional provision are to be interpreted and understood in their most natural and obvious meaning, unless the subject indicates or the text suggests that they have been used in a technical sense. *State ex rel. Caldwell v. Peterson* 402

10. Where the words of the Constitution are plain, direct, and unambiguous, no interpretation is needed to ascertain their meaning. *State ex rel. Caldwell v. Peterson* 402

11. The Legislature, the executive officers, and the judiciary cannot lawfully act beyond the limitations of the Constitution. *State ex rel. Caldwell v. Peterson* 402

12. The Certificate of Title Act, together with the

amendments made thereto, constitutes an authorized exercise of police power on the part of the Legislature and does not violate any of the provisions of our state or federal Constitution. *Loyal's Auto Exchange, Inc. v. Munch* 628

13. The Constitution permits a levy of taxes by a county in excess of fifty cents per one hundred dollars actual valuation as determined by the assessment rolls in only two classes of cases: First, "for the payment of indebtedness existing at the adoption hereof," and second, when "authorized by a vote of the people of the county." *Chicago, B. & Q. R. R. Co. v. County of Gosper* 805

14. The Constitution contains a limitation upon the power of taxation of county authorities. *Chicago, B. & Q. R. R. Co. v. County of Gosper* 805

15. Mere authority to levy a special or additional tax does not authorize the county board to levy a tax above the limitation fixed by the statute or the Constitution. *Chicago, B. & Q. R. R. Co. v. County of Gosper* 805

16. A special or additional tax authorized by the voters of the county may or may not be in excess of the statutory or constitutional limitation, depending on whether the full tax which the county board is authorized to levy has been levied for other purposes. *Chicago, B. & Q. R. R. Co. v. County of Gosper* 805

17. It cannot be assumed that the voters by merely authorizing a special or additional tax are authorizing one in excess of the limitations fixed by the Constitution. *Chicago, B. & Q. R. R. Co. v. County of Gosper* 805

18. Before an excess tax may be legally levied there must be a favorable vote of the people of the county authorizing the levy of the additional tax and a favorable vote on the proposition to levy the tax in excess of what is otherwise the constitutional limit. *Chicago, B. & Q. R. R. Co. v. County of Gosper* 805

19. When taxes levied by a county exceed the maximum permitted by the Constitution, the excess is levied for an illegal and unauthorized purpose. *Chicago, B. & Q. R. R. Co. v. County of Gosper* 805

20. Due process of law, within the meaning of the constitutional provisions, is not intended to control the power of the state to determine by what process or on what manner of service rights may be asserted

or determined, provided such procedure will afford reasonable notice and a fair opportunity to be heard before the courts, at some stage of the proceedings, prior to final determination. *Miller v. Miller* 890

Contracts.

1. Language used in an agreement prepared by one of the parties thereto, which is susceptible of 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. *Fitzsimons v. Frey* 124
2. In this jurisdiction a provision in a contract requiring arbitration, whether of disputes arising under the contract generally or only of the amount of any loss or damages sustained by the parties thereto, will not be enforced; nor will refusal to arbitrate be available in an action growing out of the contract. *Wilson & Co., Inc. v. Fremont Cake & Meal Co.* 160
3. If a party by his contract creates a duty or imposes a charge upon himself, he must under any and all conditions substantially comply with the undertaking. *Wilson & Co., Inc. v. Fremont Cake & Meal Co.* 160
4. Inconvenience or the cost of compliance, though they might make compliance a hardship, cannot excuse a party from the performance of an absolute and unqualified undertaking to do a thing that is possible and lawful. *Wilson & Co., Inc. v. Fremont Cake & Meal Co.* 160
5. A contract is not invalid, nor is the obligor therein in any manner discharged from its binding effect, because it turns out to be difficult or burdensome to perform. *Wilson & Co., Inc. v. Fremont Cake & Meal Co.* 160
6. An abnormal rise in the price of soybean products due to war or unusual trade conditions, so that the processor thereof cannot perform a contract to process and deliver the same to a contractee without greater expense than anticipated, is not an impossibility excusing performance. *Wilson & Co., Inc. v. Fremont Cake & Meal Co.* 160
7. 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. *Sopcich v. Tangeman* 506

8. The right of a party to the specific performance of his contract may be lost by his failure of performance, by his abandonment thereof, by his acquiescence in the breach of the other party, by laches, or by conduct inconsistent with the right to relief which amounts to a waiver or an estoppel. *Sopcich v. Tangeman* 506
9. A promise may be proved either by express words, or by evidence of such facts and circumstances, together with the words used by the parties at the time, from which reasonable persons in conducting the ordinary affairs of business, but with special reference to the particular matter in hand, would be justified in inferring such a promise. *Brown v. Hyslop* 669
10. A written contract clear and specific in its terms and without ambiguity, in the absence of fraud, accident, or mutual mistake, may not be changed, altered, or modified by parol evidence. *Conley v. Hays* 733
11. Parol evidence is admissible in explanation and interpretation of the terms of a written contract which are indefinite and uncertain and require extraneous information in order to ascertain the meaning of the words as they were understood by the parties at the time the contract was entered into. *Conley v. Hays* 733

Corporations.

Generally the declarations and admissions of executive officers and managers as agents of a corporation, made while acting within the scope of such authority and in connection with the performance of some duty to which such declarations are pertinent, are admissible against such corporation. *Loyal's Auto Exchange, Inc. v. Munch* 628

Counties.

1. In an action to recover damages from a county caused by the insufficiency or want of repair of a county bridge, the burden is on the plaintiff to establish negligence on the part of the county. *Wittwer v. County of Richardson* 200
2. A county is not an insurer of the safety of the bridges it constructs and maintains upon highways for the use of the public. *Wittwer v. County of Richardson* 200
3. In an action to recover damages from a county on

account of injury or death caused by a defective bridge on a public highway the plaintiff must prove by a preponderance of the evidence that the defect was known or that it existed for such a length of time that with reasonable diligence it could or should have been discovered by the county. *Wittwer v. County of Richardson* 200

4. A county is not liable for negligence for injury or death on account of defects caused by climatic conditions beyond its control. *Wittwer v. County of Richardson* 200

5. A county is not liable for negligence on account of latent defects in a bridge on a public highway but only for such as are patent and may be ascertained by reasonable inspection. *Wittwer v. County of Richardson* 200

6. Counties have no inherent power in matters relating to taxation. *Chicago, B. & Q. R. R. Co. v. County of Gosper* 805

7. Mere authority to levy a special or additional tax does not authorize the county board to levy a tax above the limitation fixed by the statute or the Constitution. *Chicago, B. & Q. R. R. Co. v. County of Gosper* 805

8. A special or additional tax authorized by the voters of the county may or may not be in excess of the statutory or constitutional limitation, depending on whether the full tax which the county board is authorized to levy has been levied for other purposes. *Chicago, B. & Q. R. R. Co. v. County of Gosper* 805

9. It cannot be assumed that the voters by merely authorizing a special or additional tax are authorizing one in excess of the limitations fixed by the Constitution. *Chicago, B. & Q. R. R. Co. v. County of Gosper* 805

10. Before an excess tax may be legally levied there must be a favorable vote of the people of the county authorizing the levy of the additional tax and a favorable vote on the proposition to levy the tax in excess of what is otherwise the constitutional limit. *Chicago, B. & Q. R. R. Co. v. County of Gosper* 805

11. When taxes levied by a county exceed the maximum permitted by the Constitution, the excess is levied for an illegal and unauthorized purpose. *Chicago, B. & Q. R. R. Co. v. County of Gosper* 805

12. The County Hospital Act permits a county board of a county with the required population, when author-

ized by the voters of the county in the manner specified, to issue and sell bonds of the county in an amount fixed by the board and to use the proceeds thereof for the construction or acquisition of a county community hospital and the purchase of suitable equipment therefor. *Armstrong v. Board of Supervisors* 858

13. The fact that the county board has once established, equipped, and is operating such a hospital, does not prevent it from acquiring or constructing, equipping, and operating another hospital on the same or a different site. *Armstrong v. Board of Supervisors* 858

14. The County Hospital Act provides the methods by which the cost of improvements or additions to and equipment for a county community hospital may be provided after it has been established. *Armstrong v. Board of Supervisors* 858

Courts.

1. Where an administrative tribunal is authorized to ascertain and declare the existence or non-existence of certain facts, and no provision is made for an appeal to the courts, the courts are limited to a determination of two questions; whether the tribunal had jurisdiction of the subject matter and whether the findings and order based thereon are arbitrary or capricious. *Lewis v. City of Omaha* 11

2. If all the jurisdictional facts are established and there is evidence to support the order made by the administrative tribunal, no basis exists for interference by the courts. *Lewis v. City of Omaha* 11

3. Whether a cause of removal of an officer is a sufficient ground for removal as a matter of law is for the courts. If the ground for removal be sufficient, whether removal is justified is for the administrative tribunal subject to the limitation that it must not be arbitrary or capricious. *Lewis v. City of Omaha* 11

4. The courts should accord to the language of the Constitution the meaning which obviously would be accepted by a layman. *Ramsey v. County of Gage* 24

5. In construing a constitutional amendment for the purpose of ascertaining the intent of the people in adopting it, the courts must find such intent in the language of the amendment itself and they are not to hold that the people intended anything different

from what the language employed imports. *Ramsey v. County of Gage* 24

6. Federal Rule 50 (b) and section 25-1315.02, R. R. S. 1943, deal with the power of a trial court. *Krepcik v. Interstate Transit Lines* 98

7. Section 25-1315.03, R. R. S. 1943, deals with the power of the Supreme Court on appeal. *Krepcik v. Interstate Transit Lines* 98

8. Where arbitration constitutes a part of the contract between parties to it and an attempt is made to enforce arbitration by invoking the Federal Arbitration Act, in the courts of this state the issue is one of procedure and not of substantive right, and the laws of this state are controlling. *Wilson & Co., Inc. v. Fremont Cake & Meal Co.* 160

9. The courts will in an appropriate action instituted for that purpose declare invalid a zoning ordinance where it is made to appear that such ordinance is unreasonable and arbitrary. *Davis v. City of Omaha* 460

10. When a contract to devise property and the relation of plaintiff thereto are established under a single and indivisible contract, and the promisor dies without having complied with the terms of his promise, the county court is without, and the district court has, jurisdiction of an action for the specific performance of such contract. *Sopcich v. Tangeman* 506

11. The grant or denial of a certificate of convenience and necessity by the Nebraska State Railway Commission requires the exercise of administrative and legislative functions and not of judicial powers. *In re Application of Petersen & Petersen, Inc.* 517

12. Ordinarily, the jurisdiction of a court over both subject matter and parties, once fully attached in a cause, continues until all issues, both of fact and of law, have been fully determined. *Miller v. Miller* 890

Criminal Law.

1. Where an affidavit has been filed, after conviction, by the defendant in a criminal case that he is unable by reason of his poverty to pay for a bill of exceptions, the court is required to direct the reporter to prepare and deliver a bill of exceptions to the defendant to be paid for by the county, unless, on objections and hearing, it is disclosed that defendant's claim of poverty is untrue, or that his inability to pay is occasioned by his own willful act for the purpose of avoiding payment. *Fisher v. State* 226

2. When the State introduces a written statement of the defendant it is not bound by exculpatory statements contained therein but such statements are to be considered by the jury in the light of the surrounding facts and circumstances. *Truman v. State* 247
3. 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. *Truman v. State* 247
4. There is no specified time that must elapse between filing of an information or indictment and the commencement of trial thereon, except defendant may not without his consent be arraigned or required to answer it until at least one day after he has received a copy thereof. *Darlington v. State* 274
5. A person accused of crime must be afforded reasonable opportunity to secure available evidence and appropriate time to prepare for trial. *Darlington v. State* 274
6. An application for postponement of time of trial of a criminal case is addressed to the sound discretion of the trial court, and in the absence of abuse of discretion disclosed by the record, a denial thereof is not error. *Darlington v. State* 274
7. An instruction to a jury in the trial of a criminal case defining the expression "beyond a reasonable doubt" and an instruction on the subject of circumstantial evidence of the character indicated in the opinion are proper. *Smith v. State* 308
8. The same rule as to the information, conduct of the case, and punishment applicable to a principal in fact governs his aider, abettor, or procurer, and no additional facts are required to be set out in the information against the latter than are necessary against the principal. *Smith v. State* 308
9. A specification of an unlawful act in which the person was engaged at the time he wrongfully caused the death of another is not essential in charging the crime of manslaughter. The State may not be required to state or elect upon what violation of law the prosecution is based, and the jury may not be compelled to find or disclose upon what violation of law it founded the conviction. *Schluter v. State* 317
10. Crimes of the same class or grade subject to the

same punishment may be charged in separate counts of an information. *May v. State* 369

11. The essential elements of the offense of failure to provide child support are that a decree of divorce and support of children was rendered by a court of this state against the accused requiring him to pay an amount in a specified manner at a designated time for the benefit of his children, and that the accused has, without good cause, failed to pay it at the time and in the manner required by the decree. *May v. State* 369

12. Where the record shows that the jury in arriving at a verdict of guilty in a criminal case disregarded the instructions of the court, the verdict is contrary to law and will be set aside and the judgment thereon reversed. *May v. State* 369

13. A verdict of guilty in a criminal case that is contrary to the evidence will not be sustained. *May v. State* 369

14. The test by which to determine the sufficiency of circumstantial evidence in a criminal prosecution is whether the facts and circumstances tending to connect accused with the crime charged are of such conclusive nature as to exclude every reasonable hypothesis except that of his guilt. *Kitts v. State* 784

15. It is the province of the jury to determine the circumstances surrounding and which shed light upon the alleged crime; and if, assuming as proved the facts which the evidence tends to establish, they cannot be accounted for upon any rational theory which does not include the guilt of the accused, the proof cannot, as a matter of law, be said to have failed. *Kitts v. State* 784

16. The unsupported testimony of the accused in a criminal case, which the jury does not believe, cannot be said to furnish a hypothesis consistent with the innocence of the accused. *Kitts v. State* 784

17. The court in a criminal action will not interfere with a verdict of guilty based upon conflicting evidence unless it is so lacking in probative force that, as a matter of law, it is insufficient to support a finding of guilt beyond a reasonable doubt. *Kitts v. State* 784

Damages.

1. The measure of damages for failure to perform contract of sale of soybeans is the difference in the

contract price of the merchandise and the market value of the same at the time to which delivery is postponed. If delivery is postponed by agreement of the parties, the market value at the time to which delivery is postponed is taken as the criterion. *Wilson & Co., Inc. v. Fremont Cake & Meal Co.* 160

2. In an action for damages to an automobile, where the automobile cannot be placed in substantially as good condition as it was before the injury, the measure of damages is the difference between its reasonable market value immediately before and immediately after the accident. The injured party is not permitted to recover in addition thereto damages for loss of use. *Lund v. Holbrook* 706

Declaratory Judgments.

1. A justiciable issue is presented when a petition is tendered setting forth a cause of action proper for determination between proper parties in a court having jurisdiction. *Noble v. City of Lincoln* 79
2. Where there is an actual controversy, recognizable as such under law, between the officials of a municipality and its taxpayers concerning the rights over the disposition of public funds and of property belonging to the municipality declaratory judgment proceedings are proper for the determination of the legal rights involved. *Noble v. City of Lincoln* 79

Deeds.

1. The possession of a duly executed deed is prima facie proof of delivery thereof and the burden is on one contesting to overcome the presumption of delivery. *Busteed v. Sheffield* 253
2. A quitclaim deed is sufficient to convey the right of redemption. *County of Lancaster v. Schwarz* 472
3. In determining the mental capacity of the grantor to execute a deed, if it clearly appears that when the instrument was executed the grantor had the capacity to understand what he was doing, knew the nature and extent of his property and what he proposed to do with it, and to decide intelligently whether or not he desired to make the conveyance, it cannot be said he was incompetent or incapable of executing the instrument. *Parkening v. Haffke* 678
4. In order to invalidate a deed on the ground of mental incapacity on the part of the grantor it is necessary

to show such a degree of mental weakness as renders the maker of the deed incapable of understanding and protecting his own interests. *Parkening v. Haffke* 678

Descent and Distribution.

1. Although no county court decree has ever been entered determining the heirs at law of a deceased person, the district court has original jurisdiction to make such determination where the question becomes material in a proceeding of which such court has original jurisdiction. *Dennis v. Omaha National Bank* 865
2. If, on failure of testamentary trust, the deceased shall leave no wife, nor issue, nor father, nor mother, nor sister, nor brother, then the estate shall descend and be distributed to his next kin in equal degree, except that where there are two or more collateral kindred in equal degree but claiming through different ancestors, those who claim through the nearest ancestor shall be preferred to those claiming through an ancestor more remote. *Dennis v. Omaha National Bank* 865
3. Where all claiming as heirs of the testator on the date of the failure of the trust claim through the same ancestors, and are not collateral kindred in equal degree, the exception in the statute of descent and distribution on inheritance by collateral kindred has no application. *Dennis v. Omaha National Bank* 865
4. The word "children" appearing in the statute regulating descent and distribution does not include "grandchildren." *Dennis v. Omaha National Bank* .. 865

Dismissal and Nonsuit.

1. Before the final submission of a case to the jury or court a dismissal by plaintiff without prejudice to a future action is not a matter of judicial grace or discretion but is a statutory right. *Feight v. Mathers* 839
2. A plaintiff has the right, before final submission of his cause of action, to dismiss the same, but this right does not control the right of the defendant to proceed to the trial of a set-off or counterclaim properly pleaded by him in his answer. *Feight v. Mathers* 839

Divorce.

1. Condonation is forgiveness, express or implied, for a breach of marital duty, with the implied condition that the offense shall not be repeated. Forgiveness sufficient for condonation is complete if there is a voluntary resumption of the marital relations. *Wright v. Wright* 18
2. Where condonation is relied upon as a defense, it should be pleaded. Where a repetition of the wrong condoned is relied upon, it should be pleaded. *Wright v. Wright* 18
3. The absence of a plea of condonation does not prevent the court from considering that question. *Wright v. Wright* 18
4. While a divorce proceeding is pending, the parties must live separate and apart from each other. *Wright v. Wright* 18
5. There is a rebuttable presumption that a husband and wife living in the same house live on terms of matrimonial cohabitation. *Wright v. Wright* 18
6. Sexual intercourse is not an indispensable element of condonation. *Wright v. Wright* 18
7. In a divorce suit, where the court has jurisdiction of the parties, it has the power and authority to adjust all of their respective property interests and rights. *Francil v. Francil* 243
   Kroger v. Kroger 265
8. The division of property and allowance of alimony in divorce actions are always to be determined by the facts in each case. *Francil v. Francil* 243
9. No decree of divorce can be lawfully entered unless the allegations of the petition for divorce are supported by satisfactory evidence other than the admissions of the parties. *Kroger v. Kroger* 265
   Strasser v. Strasser 288
10. It is impossible to lay down a general rule as to the degree of corroboration required in a divorce action as each case must be decided on its own facts and circumstances. *Kroger v. Kroger* 265
    Strasser v. Strasser 288
    Peterson v. Peterson 727
11. In the division of property and allowance of alimony in a divorce action, the court, in the exercise of judicial discretion, should consider all relevant circumstances and make such an award as appears to be fair and equitable. *Francil v. Francil* 243
    Kroger v. Kroger 265

Strasser v. Strasser 288
Brudevold v. Brudevold 545
Zoppelli v. Zoppelli 577
Mangiameli v. Mangiameli 753
Pasko v. Trela 759

12. The essential elements of the offense of failure to provide child support are that a decree of divorce and support of children was rendered by a court of this state against the accused requiring him to pay an amount in a specified manner at a designated time for the benefit of his children, and that the accused has, without good cause, failed to pay it at the time and in the manner required by the decree. *May v. State* 369

13. There may be extreme cruelty justifying a decree of divorce without physical injury or violence. Unjustifiable conduct on the part of husband or wife, which utterly destroys the legitimate ends and objects of matrimony, may constitute extreme cruelty. *Kroger v. Kroger* 265
Peterson v. Peterson 727

14. An appeal lodged in the Supreme Court from a decree rendered in a divorce action is tried de novo. *Zoppelli v. Zoppelli* 577

15. The rules of pleading in civil cases are applicable to and should be observed in divorce cases. *Peterson v. Peterson* 727

16. If a decree of divorce is sought on the ground of extreme cruelty, the particular facts relied upon as constituting the cruelty should be alleged with reasonable certainty. *Peterson v. Peterson* 727

17. An allegation that the adverse party has been guilty of extreme cruelty in the language of the statute is a conclusion and is generally not sufficient. *Peterson v. Peterson* 727

18. A decree of divorce may not be granted on the uncorroborated declarations, confessions, or admissions of the parties to the case. *Peterson v. Peterson* 727

19. In appropriate and timely proceedings, the district court has jurisdiction and authority to vacate and modify any part or all of its own judgment or orders in a divorce action after the term at which they were made for fraud practiced by the successful party in obtaining the same. *Pasko v. Trela* 759

20. In cases where the divorced wife seeks modification of a decree of alimony, alleging that the decree was obtained by fraud of the husband, or his agents, the

district court has authority to require the husband to pay into court a reasonable sum of money, including an attorney's fee, to enable her to prosecute or defend her action. *Pasko v. Trela* 759

21. An action seeking modification of award is a proceeding ancillary to the original divorce proceeding and deemed a part thereof, giving the court authority to exercise a judicial discretion and grant the same relief, including an allowance for suit money or attorneys' fees, as it had in the original suit, and such allowance may be made at any stage of the litigation or included in the final decree. *Pasko v. Trela* 759

22. The decree of a district court in a divorce action insofar as a minor child is concerned is never final in the sense that it cannot be changed but is subject to review at any time in the light of changing conditions. *Miller v. Miller* 890

23. The district court has a continuing power, after a decree of divorce, alimony, and child support has been granted, to review or revise the provisions for child support at its subsequent terms on petition of either of the parties. *Miller v. Miller* 890

24. In a proceeding to modify a divorce decree under statutory provision authorizing subsequent changes in such decree, due process of law requires only that the method of service be reasonably calculated to give the person served knowledge of the proceedings and opportunity to be heard. *Miller v. Miller* 890

25. A decree for child support in a divorce action is not a judgment within the meaning of the statutes providing for revivor of dormant judgments. *Miller v. Miller* 890

26. The court, in a divorce action, retains jurisdiction of the subject matter and of the parties for the enforcement or modification of a judgment for the maintenance of children. *Miller v. Miller* 890

27. The statute of limitations is not a defense to an application to compel the adverse party to pay arrearages in child support nor as against an application to modify a divorce decree with reference to child support. *Miller v. Miller* 890

28. As a judgment for child support is a continuing judgment always subject to modification by the court, the statute of limitations does not apply. *Miller v. Miller* 890

29. An application to modify the terms of a decree of

divorce is not an independent proceeding and is not the commencement of an action. *Miller v. Miller* 890

30. Where a decree for child support is entered in a divorce action and the wife, having been awarded the custody of a minor child, files an application against the husband for an order to show cause why he should not pay arrearages due for child support, and the husband files an application to modify the decree with reference to the child support, such proceeding is simply a continuation of the divorce suit and one of its incidents, and the authority of the court to allow counsel fees continues until the subject matter of the divorce suit is finally settled and determined. *Miller v. Miller* 890

31. Without seeking a divorce, a wife, who has not violated any duty growing out of the marriage relation, may maintain a suit in equity aganst her husband for separate maintenance, where he has violated his legal duty to support her. *Scott v. Scott* 906

32. When a decree of divorce is rendered it does not become operative until six months thereafter. During the period of time from the rendition of the decree until it becomes final, as provided by law, the bonds of matrimony which previously existed between the parties are not dissolved. *Scott v. Scott* 906

Drains.

1. The owner of land may drain the same in the general course of natural drainage by constructing an open ditch or tile drain, discharging the water therefrom into any natural watercourse or into any natural depression or draw, whereby such water may be carried into some natural watercourse. When such drain or ditch is wholly on the owner's land, he is not liable in damages therefor. *Pospisil v. Jessen* 346

2. An owner of land has the right in the interest of good husbandry to drain ponds or basins thereon of a temporary character, and which have no natural outlet or course of flow, by discharging the waters thereof by means of an artificial channel into a natural surface-water drain on his own property, and through such drain over the land of another proprietor in the general course of drainage in that locality, even though the flow in such natural drain is thereby increased over the lower estate upon condition that this is done in a reasonable and careful manner and without negligence. *Pospisil v. Jessen* 346

3. It is the duty of those who build structures across natural drainways to provide for the natural passage through such obstruction of all waters which may be reasonably anticipated to drain there. This is a continuing duty. *Beetison v. Ballou* 360

Easements.

1. The nature and extent of an easement arising by prescription are determined by the use made of the land during the prescriptive period. *Paloucek v. Adams* 744
2. A trial court may determine the extent of an easement arising by prescription in an injunction action and restrain interference with rights found to exist by virtue of the findings so made. *Paloucek v. Adams* 744
3. The servient owner of land subject to an easement may make such use of it as he sees fit, subject only to the right of the dominant owner of the easement to use it for the purposes out of which the right arose. *Paloucek v. Adams* 744

Elections.

1. Generally the courts will not inquire into the validity or constitutionality of an election or enjoin it at the suit of a taxpayer unless it be made to appear that the passage or enactment of the statute or ordinance authorizing same would immediately destroy or irreparably damage special property rights or interests peculiar to the taxpayer and not enjoyed by the public at large. *Noble v. City of Lincoln* 79
2. Where the passage of a legislative act would be followed by some irreparable loss or injury beyond the power of redress by subsequent judicial proceedings, equity will enjoin the holding of an illegal election. *Noble v. City of Lincoln* 79
3. When the passage of an illegal ordinance would cause a multiplicity of suits, equity may enjoin holding of an election pursuant thereto. *Noble v. City of Lincoln* 79
4. Where the conduct of a political subdivision has been such as to estop it, equity may enjoin the holding of an election. *Noble v. City of Lincoln* 79
5. Where by amendment to a home rule charter bonds for a project have been voted and directions given to the city council to acquire a site and to construct a project thereon without a further vote of the

people, an election may be enjoined which has as its purpose the selection of another site and thereby would defeat the prompt and successful completion of the project as directed by the previous vote of the people. *Noble v. City of Lincoln* 79

6. The Constitution requires the returns of every election for officers of the executive department of the state to be sealed up and transmitted by the returning officers to the Secretary of State, directed to the Speaker of the Unicameral Legislature. *State ex rel. Caldwell v. Peterson* 402

7. The duty of a Speaker of the Unicameral Legislature, under a constitutional provision requiring him to open and publish the returns in an election for executive officers of the state and to declare the result of such election, is an administrative duty. *State ex rel. Caldwell v. Peterson* 402

8. The Constitution governs the canvass of votes and declaration of election of executive officers. Unless the declaration is made in the way so provided, the process of election is not complete. *State ex rel. Caldwell v. Peterson* 402

9. The Board of State Canvassers does not have authority to canvass the returns of election to state executive offices. *State ex rel. Caldwell v. Peterson* 402

10. A person elected to an executive office in this state, to fill a vacancy or otherwise, cannot qualify for such office, receive a certificate of election, and take office until the canvass of the election returns by the Legislature. *State ex rel. Caldwell v. Peterson* 402

11. Revenue bonds issued under the authority of a special election cannot be set aside simply because all that may have been said by interested parties during the campaign which preceded the election does not turn out to be in every respect true. *Inslee v. City of Bridgeport* 559

12. Generally, inducements in the way of statements and representations made to influence a voter will not invalidate an election if it does not appear that by coercion or fraud the voter was compelled to vote in a way he did not desire to vote. *Inslee v. City of Bridgeport* 559

Electricity.

1. The Revenue Bond Act authorizes any city or village to construct, purchase, or otherwise acquire an electric light and power plant and real and personal

property needed or useful in connection therewith, and pay the cost thereof by the issue and sale of revenue bonds or debentures or by pledging and hypothecating the revenue and earnings of any such plant owned or to be owned by such city or village only if the proposition is first submitted to the electorate and approved by a majority voting thereon. *Inslee v. City of Bridgeport* 559

2. A proposition to issue revenue bonds, if submitted in the language of the statute, is sufficient. *Inslee v. City of Bridgeport* 559

3. A submission by a city council to the voters of a city of a proposition to issue revenue bonds in a stated amount for the purpose of constructing, purchasing, or otherwise acquiring an electric light and power system, distribution system, transmission lines, and real and personal property needed and used in connection therewith to serve the city and its inhabitants is not a dual proposition but a single one. *Inslee v. Cty of Bridgeport* 559

Eminent Domain.

1. 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. *Lynn v. City of Omaha* 193

2. The market value of property taken in condemnation is not measured by the benefits to, or needs of, the condemner. The question is, What has the owner lost? not, What has the taker gained? *Lynn v. City of Omaha* 193

3. A village may not condemn real estate for airport purposes by virtue of the statute providing a method of condemnation by cities of the first class, when it alone is interested in acquiring the property, and its charter provides a different method of procedure for condemnation of real estate needed by it. *Spencer v. Village of Wallace* 536

4. The provisions of the Revised Airports Act that if but one municipality is involved and its charter prescribes a method of acquiring property by condemnation, proceedings shall be as provided by its charter is unambiguous and mandatory that a village, provided with a method of condemnation by its charter and being alone interested, may only

condemn real estate for airport purposes by the method prescribed by its charter. *Spencer v. Village of Wallace* 536

5. The authority granted by the Revised Airports Act to municipalities is limited to (1) joint condemnation of real estate for airport purposes by two or more municipalities, and (2) condemnation of real estate for airport purposes by one municipality, the charter of which does not contain a method of taking property by the exercise of eminent domain. *Spencer v. Village of Wallace* 536
6. Since the power of eminent domain is an attribute of sovereignty and inherent in the state, only those agencies to whom the Legislature has delegated the power can exercise the right, and it must be resorted to only on the occasion, in the mode or manner, and by the agency prescribed by the Legislature. *Spencer v. Village of Wallace* 536
7. Condemnation is a matter of state-wide concern. A provision of a charter of a city which has adopted a home rule charter contrary to or in conflict with a statute on the subject is void. *Spencer v. Village of Wallace* 536

Equity.

1. The relief ordinarily granted in equity is such as the nature of the case, the law, and the facts demand, not at the beginning of the litigation, but at the time the decree is entered. *Beetison v. Ballou* 360
2. The proper remedy in a court of equity for a unilateral mistake in a contract is rescission. *School District v. Olson Construction Co.* 451
3. A court of equity will afford relief by way of rescission for a unilateral mistake where it appears that (1) the mistake was of so great a consequence that to enforce the contract as made would be unconscionable, (2) the matter as to which the mistake was made relates to a material feature of the contract, (3) the mistake occurred notwithstanding the exercise of reasonable care by the party making the mistake, and (4) such relief is without serious prejudice to the other party except for the loss of the bargain. *School District v. Olson Construction Co.* .. 451
4. A district court, under appropriate facts and circumstances, may exercise its equity power to direct the equitable distribution of the proceeds of a matured mutual benefit life insurance policy which

have been deposited in court pending litigation between claimed beneficiaries. *Hall v. Modern Woodmen of America* 600

5. Statutory prohibition against seizure of insurance benefits by judicial process refers to proceedings to collect general and ordinary debts of the insured or beneficiary and not to a contest of equitable cognizance and determination involving the relative rights of rival claimants as beneficiaries to the proceeds of a mutual benefit life insurance policy already matured and in the hands of the court for distribution as equity may require. *Hall v. Modern Woodmen of America* 600

6. It is the practice of courts of equity, when they once have obtained jurisdiction of a case, to administer all the relief which the nature of the case and facts demand, and to bring such relief down to the close of the litigation between the parties. *Herrin v. Johnson Cashway Lumber Co.* 693

7. Where an equity court has obtained jurisdiction of a cause for any purpose it will retain it for all, and proceed to a final determination of the case, adjudicate all matters in issue, and thus avoid unnecessary litigation. *Dennis v. Omaha National Bank* 865

8. The defense of laches prevails only when it has become inequitable to enforce the claimant's right, and is not available to one who has caused or contributed to the cause of delay or to one who has had it within his power to terminate the action. *Miller v. Miller* 890

9. Where the obligation is clear, and its essential character has not been affected by the lapse of time, equity will enforce a claim of long standing as readily as one of recent origin. *Miller v. Miller* 890

Estates.

1. At common law an estate in remainder subject to an existing particular estate in the whole of the real estate could not be the subject of involuntary or compulsory partition. *Baskins v. Krepcik* 36

2. The rights of an owner of a life estate in the whole of the premises, of which partition is sought by the owner of an estate in remainder therein, cannot over the objection of the life tenant be in any way or to any extent changed or disturbed. *Baskins v. Krepcik* 36

3. A remainderman in fee of an undivided interest

in real estate may maintain a suit for partition against the owner of the remaining undivided interest in remainder, the whole of the premises being subject to a life estate. *Baskins v. Krepcik* 36

4. The mere existence of a life estate in the whole of the premises does not prevent partition among the remaindermen prior to the death of the life tenant. If the life tenant consents or does not object, the whole of the real estate may be sold. *Baskins v. Krepcik* 36

5. An estate in fee simple determinable is created by any limitation which, in an otherwise effective conveyance of land, creates an estate in fee simple and provides that the estate shall automatically expire upon the occurrence of a stated event. *Ohm v. Clear Creek Drainage District* 428

6. An estate in fee simple subject to a condition subsequent is created by any limitation which, in an otherwise effective conveyance of land, creates an estate in fee simple and provides that upon the occurrence of a stated event the conveyor or his successor in interest shall have the power to terminate the estate so created. *Ohm v. Clear Creek Drainage District* 428

7. The holder of a fee, defeasible upon condition subsequent, has all the rights in respect to it of a fee simple owner until the happening of the condition and divestment by re-entry of the grantor or his successor for breach of the condition. *Ohm v. Clear Creek Drainage District* 428

Estoppel.

1. Under the theory of estoppel action may be had to test the validity of a proposed amendment before adoption thereof when a municipality acting under its municipal capacity has gained a clear and decided advantage by the act or acts relied upon. *Noble v. City of Lincoln* 79

2. The doctrine of equitable estoppel may under certain conditions apply to municipalities, and is based on the grounds of public policy and good faith, and interposed to prevent injury, fraud, injustice, and inequitable consequences. Where such do not appear the doctrine does not apply. *Inslee v. City of Bridgeport* 559

Evidence.

1. In a personal injury suit wherein the character

of injuries can only be ascertained by scientific examination and analysis, the testimony of a party who has no scientific knowledge on the subject, which testimony is in conflict with testimony based on scientific examination and analysis, will not bind such party. *Tucker v. Paxton & Gallagher Co.* 1

2. 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. *Fitzsimons v. Frey* 124

3. Evidence as to conditions at the place of a traffic accident an appreciable time thereafter, such as the existence and location of marks or tracks, is admissible upon a proper showing that the conditions have not been changed in the meantime. *Ficke v. Gibson* 478

4. A municipal court will take judicial notice of the ordinances of the city, and on an appeal therefrom to the district court from a conviction under a city ordinance the latter court will on a trial de novo take notice of whatever facts the municipal court was required to notice judicially. *State v. Novak* 596

5. The courts of Nebraska are authorized to take judicial notice of the common law and statutes of another state. *Snyder v. Lincoln* 611

6. When part of a writing is put in evidence by one party, the whole, on the same subject, may be inquired into by the other party. *Snyder v. Lincoln* 611

7. Generally the declarations and admissions of executive officers and managers as agents of a corporation, made while acting within the scope of such authority and in connection with the performance of some duty to which such declarations are pertinent, are admissible against such corporation. *Loyal's Auto Exchange, Inc. v. Munch* 628

8. A declaration by a litigant against interest relevant to a matter in issue and inconsistent with what is alleged or testified to by him is properly received in evidence. *Brown v. Hyslop* 669

9. An offer of compromise is one made without regard to liability, the offerer denying or only hypothetically assuming liability for the purpose of the offer in an effort to effect a disposition of the matter. *Brown v. Hyslop* 669

10. An admission of an existing liability, as distin-

guished from a mere offer to compromise without regard to the existence or non-existence of a liability, is admissible as evidence although it is embraced in an offer of compromise. *Brown v. Hyslop* 669

11. Where the fact of whether or not a party carries liability insurance is not relevant to some issue in the case it is not admissible. *Lund v. Holbrook* 706

12. If evidence is properly admissible for any purpose, it cannot be excluded for the reason that it tends to prejudice the party because it shows or tends to show that the party carries liability insurance. *Lund v. Holbrook* 706

13. A written contract clear and specific in its terms and without ambiguity, in the absence of fraud, accident, or mutual mistake, may not be changed, altered, or modified by parol evidence. *Conley v. Hays* 733

14. Parol evidence is admissible in explanation and interpretation of the terms of a written contract which are indefinite and uncertain and require extraneous information in order to ascertain the meaning of the words as they were understood by the parties at the time the contract was entered into. *Conley v. Hays* 733

15. Where evidence improperly received is afterwards stricken out and expressly withdrawn from the jury, error involved in its reception is ordinarily cured. *Conley v. Hays* 733

16. Where inadmissible evidence is allowed to be introduced on one side it is not error to refuse to admit evidence in rebuttal thereof. *Conley v. Hays* 733

17. The plaintiff in an action may meet by rebuttal evidence any admissible evidence adduced by the defendant by evidence which is not a part of the evidence of the plaintiff in chief. *Conley v. Hays* 733

18. The material elements of the crime of burglary may be proved by direct or circumstantial evidence. *Kitts v. State* 784

19. The material elements of the crime of possession of burglar tools may be proved by direct or circumstantial evidence. *Kitts v. State* 784

20. The test by which to determine the sufficiency of circumstantial evidence in a criminal prosecution is whether the facts and circumstances tending to connect accused with the crime charged are of such conclusive nature as to exclude every reasonable hypothesis except that of his guilt. *Kitts v. State* 784

21. It is the province of the jury to determine the circumstances surrounding and which shed light upon the alleged crime, and if, assuming as proved the facts which the evidence tends to establish, they cannot be accounted for upon any rational theory which does not include the guilt of the accused, the proof cannot, as a matter of law, be said to have failed. *Kitts v. State* 784

22. Extrinsic evidence is not admissible for the purpose of changing a will or in the making of a new one which was intended by the testator but which was not in fact made by him. *Borah v. Lincoln Hospital Assn.* 846

23. In construing a will the whole thereof will be considered and from its four corners the court will determine the intent of the testator and give effect thereto, and extrinsic evidence is not admissible to determine the intent of the testator as expressed in his will unless there is a latent ambiguity. *Borah v. Lincoln Hospital Assn.* 846

24. In case of a latent ambiguity which consists of an erroneous description of a beneficiary, sufficient language must remain in the will, which, together with extrinsic evidence, will identify the intended beneficiary with reasonable certainty, otherwise the legacy is void. *Borah v. Lincoln Hospital Assn.* 846

25. Extrinsic evidence is admissible to prove that a will contains a latent ambiguity and to explain the ambiguity for the purpose of arriving at the true intent of the testator. *Borah v. Lincoln Hospital Assn.* 846

26. The intent which may be shown must be the intent which the testator had when he employed the words which appear in the will. *Borah v. Lincoln Hospital Assn.* 846

27. Where a latent ambiguity consists of an erroneous description of a beneficiary, such erroneous description will not avoid the legacy if it can be struck out and from the remaining portion, together with proof dehors the instrument, the intended beneficiary clearly appears. *Borah v. Lincoln Hospital Assn.* 846

28. When a description is found in a will which does not accurately apply to anybody and the alternatives are either that it means nothing and the bequest fails, or that an effort may be made to ascertain the identity of the person intended, extrinsic evidence

should be admitted to aid in ascertaining such identity. *Borah v. Lincoln Hospital Assn.* 846

29. The receiving in evidence of a copy of a written agreement as secondary evidence is erroneous in the absence of proof that the original was in fact executed, that the original is not available, and that the offered instrument is a true copy thereof. *National Fire Ins. Co. v. Evertson* 854

30. Evidence may not properly be supplied after the trial to correct the error of the trial court in admitting secondary evidence without the proper foundation being laid for its admission. *National Fire Ins. Co. v. Evertson* 854

31. The courts of a state may take judicial notice of the population of a county created by it and of the counties therein in which a statute of the state is effective if its operation depends upon the existence of a specified population. *Armstrong v. Board of Supervisors* 858

32. In the absence of the common law or statutes of any other jurisdiction in the United States being pleaded and presented, the presumption is that the common law or statutes of such other jurisdiction is the same as that of Nebraska. *Scott v. Scott* 906

Executions.

The title of a purchaser at judicial sale depends upon a final confirmation of the sale made; and until this is had, and a conveyance of the real estate is executed and delivered in pursuance of such confirmation, the legal title of the execution debtor to the real estate is not devested. *County of Lancaster v. Schwarz* 472

Fraud.

1. Fraud may consist in words, acts, or the suppression of material facts with intent to mislead and deceive. *Pasko v. Trela* 759

2. Where fraud or misrepresentation is material with reference to a transaction subsequently entered into by a person deceived thereby, it is assumed, in the absence of facts showing the contrary, that it was induced by the fraud or misrepresentations. *Pasko v. Trela* 759

3. The fact that plaintiff made inquiries elsewhere which did not disclose the falsity of the representations is ordinarily no defense. The plaintiff is

entitled to relief if the representations were a material inducement to the contract, although he may have made efforts to discover the truth thereof, and did not rely wholly on the veracity of the defendant. *Pasko v. Trela* 759

4. The fact that the recipient of a fraudulent misrepresentation relies in part upon his own investigation does not relieve the maker from liability if he by false statements or otherwise intentionally prevents the investigation from being effective, and no right is ordinarily affected by an investigation which confirms the representations. *Pasko v. Trela* 759

5. The truth or falsity of representations must be determined as of the time they were acted on. *Pasko v. Trela* 759

6. One suffers no damage where he is fraudulently induced to do something which he is under legal obligation to do. *Beltner v. Carlson* 797

7. As a general rule, a misrepresentation which involves a statement of matters of law is one upon which a party cannot rely, as all parties are bound to know the law. *Beltner v. Carlson* 797

8. To maintain an action for fraudulent representations it is not only necessary to establish the telling of the untruth, knowing it to be such, or that it was told without knowledge of the facts, but also to prove that the plaintiff had a right to rely upon it, and did so rely, and altered his condition because thereof, and suffered damages thereby. *Beltner v. Carlson* 797

9. It is a general rule that fraud must relate to a present or preexisting fact, and cannot ordinarily be predicated on unfulfilled promises or statements as to future events. *Beltner v. Carlson* 797

10. If an advantage is obtained by fraudulent promises in the nature of the assertion of facts which there was no intention to perform, that is, when the representation is that of a fact in the future and not a mere promise, and it is relied upon and turns out to be false, the remedies of the injured party are the same as where fraudulent misrepresentations are made in regard to existing facts. *Beltner v. Carlson* 797

11. One of the essential elements of fraud practiced by means of false representations is that the representation must be concerning a matter material to the contract. *Beltner v. Carlson* 797

Frauds, Statute of.

1. One seeking specific performance of an oral contract for the conveyance of real estate has the burden to prove by a preponderance of the evidence a contract which is clear, satisfactory, and unequivocal in its terms; that he has performed the obligations imposed upon him by the contract capable of performance to the time of the commencement of the litigation; that he is able to and will perform any other obligation thereof when it becomes capable of satisfaction by him; and that his acts constituting performance were such as were referable solely to the contract sought to be enforced and not such as might be referable to some other contract. *Noetzelmann v. Noetzelmann* 133
2. In determining whether or not acts of one seeking specific performance of an oral contract are referable solely to the contract alleged, the acts must be considered as a whole, and proper consideration must be given to all other relevant facts and circumstances shown by the evidence. *Noetzelmann v. Noetzelmann* 133
3. When the acts performed by the one seeking specific performance of an oral contract for the conveyance of real estate tend to show, not only that there was an agreement, but also throw some light on the nature of the agreement, the evidence cannot be said to rest wholly in parol, the parol evidence being auxiliary to the proof afforded by the case itself. *Noetzelmann v. Noetzelmann* 133
4. Oral contracts to will property 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. *Sopcich v. Tangeman* 506

Furniture.

The word "furniture" has been defined to include movable articles including articles of ornamentation such as a pair of branch candlesticks or candelabra. *Fitzsimons v. Frey* 124

Gifts.

1. In the case of a gift and voluntary conveyance from a parent to his child or children, no presumption of fraud or undue influence arises as between the

parties thereto by the mere fact of the relation. *Parkening v. Haffke* 678

2. The affection, confidence, and gratitude of a parent to a child which inspires the gift is a natural and lawful influence, and will not render it voidable, unless this influence has been so used as to confuse the judgment and control the will of the donor. *Parkening v. Haffke* 678
3. It is essential to the validity of a gift that the donor shall have sufficient mental capacity to make the gift. *Parkening v. Haffke* 678
4. If the donor has sufficient mental capacity to comprehend the transaction, if he understands the extent and value of his property, what persons are the objects of his bounty, and the manner in which he is distributing his property among them, his gift will be valid. *Parkening v. Haffke* 678
5. All of the facts necessary to constitute a valid gift inter vivos may be inferred from subsequent declarations of the donor, which are in the nature of admissions by him against interest. *Parkening v. Haffke* 678
6. The burden of proof is on the person asserting undue influence to prove by a preponderance of the evidence (1) that the grantor, testator, or donor was a person who would be subject to such influence, (2) that there was an opportunity to exercise such influence, (3) that there was a disposition to exercise such influence, and (4) that the result was the effect of such influence. *Parkening v. Haffke* 678

Habeas Corpus.

1. In the return to a writ of habeas corpus facts must appear which warrant restraint of the relator. *In re Application of Bruno* 445
2. In a habeas corpus action involving the custody of a child, the failure to file a return until after the trial has commenced is not such a defect as to render the hearings and judgment invalid. *In re Application of Bruno* 445
3. The writ of habeas corpus is not a corrective remedy and is never allowed as a substitute for appeal or proceedings in error for the purpose of reviewing mere errors or irregularities in the proceedings of a court having jurisdiction over the person and the subject matter. *In re Application of Bruno* 445

Highways.

One who attempts to cross a street between intersections without looking is guilty of such negligence as will bar a recovery as a matter of law. If he testifies that he did look, it is implied that he looked in such a manner that he would see that which was in plain sight, unless some reasonable excuse for not seeing is shown. *Ficke v. Gibson* 478

Homesteads.

1. A surviving spouse who elects to partition the homestead premises thereby forfeits all homestead rights therein. *Baskins v. Krepcik* 36
2. A contract to convey the homestead of a married person is absolutely void and unenforceable unless voluntarily executed and acknowledged by both husband and wife. *Trowbridge v. Bisson* 389
3. The homestead of a married person cannot be conveyed or encumbered unless the instrument by which it is conveyed or encumbered is executed and acknowledged by both the husband and the wife. A contract to convey a homestead which is not so executed is void. *Phifer v. Miller* 748
4. The burden of establishing an abandonment of a homestead rests upon the one asserting such an abandonment. *Phifer v. Miller* 748
5. An intention to abandon and an actual abandonment must concur to establish the abandonment of a homestead interest. *Phifer v. Miller* 748
6. Where the evidence shows that the parties left the premises claimed as a homestead, without any intention of returning to it for homestead purposes, an abandonment of the homestead right will be deemed to have been established. *Phifer v. Miller* 748
7. In determining whether there has been an abandonment of a homestead interest the court will consider the real intention of the parties viewed in the light of all the surrounding circumstances. *Phifer v. Miller* 748
8. Where the evidence shows an intent to abandon a homestead right in property, coupled with an actual leaving of the premises, the failure to have the instrument, by which the property is conveyed, executed and acknowledged by both the husband and wife is not a defense to a suit for specific performance. *Phifer v. Miller* 748

Homicide.

1. When one operates a motor vehicle in violation of law pertaining to the operation thereof on a public highway, and in so doing, as a result of the violation of law, causes the death of another, he is guilty of manslaughter. *Schluter v. State* 317
2. An information which charges the crime of murder in the first degree includes murder in the second degree, and a conviction of the accused of the latter is sustained thereby. *Bryant v. State* 490

Hospitals.

1. The fact that the county board has once established, equipped, and is operating a hospital, does not prevent it from acquiring or constructing, equipping, and operating another hospital on the same or a different site. *Armstrong v. Board of Supervisors* 858
2. The County Hospital Act provides the methods by which the cost of improvements or additions to and equipment for a county community hospital may be provided after it has been established. *Armstrong v. Board of Supervisors* 858

Indictments and Informations.

1. There is no specified time that must elapse between filing of an information or indictment and the commencement of trial thereon, except defendant may not without his consent be arraigned or required to answer it until at least one day after he has received a copy thereof. *Darlington v. State* 274
2. The same rule as to the information, conduct of the case, and punishment applicable to a principal in fact governs his aider, abettor, or procurer, and no additional facts are required to be set out in the information against the latter than are necessary against the principal. *Smith v. State* 308
3. When words appear in an information which might be stricken out, leaving an offense sufficiently charged, and such words do not tend to negative any of the essential elements of the offense, they may be treated as surplusage and entirely disregarded. *Schluter v. State* 317
4. A specification of an unlawful act in which the person was engaged at the time he wrongfully caused the death of another is not essential in charging the crime of manslaughter. The State may not be required to state or elect upon what violation of law

the prosecution is based, and the jury may not be compelled to find or disclose upon what violation of law it founded the conviction. *Schluter v. State* 317

5. An information must inform the accused, with reasonable certainty, of the accusation made against him that he may have an opportunity to prepare a defense and plead the judgment as a bar in any later prosecution for the same offense. *May v. State* 369

6. An information must allege directly each fact that is an essential element of the crime intended to be charged, so that the accused will not be required to go beyond it to be informed of the charge against him. The information may not be aided by intendment, inference, implication, or matters stated by mere recital. *May v. State* 369

7. The court will not disregard a defect as to any matter of pleading in a criminal action when because thereof the constitutional rights of the accused have been violated by failure to give him proper information of the nature and cause of the accusation against him. *May v. State* 369

8. The information or indictment and a plea of not guilty are the pleadings and formulate the issue on the merits in a criminal case. *Bryant v. State* 490

9. An information which alleges the essential elements of an offense described in the statute and intended to be charged against the accused is sufficient. *Bryant v. State* 490

10. An information which charges the crime of murder in the first degree includes murder in the second degree, and a conviction of the accused of the latter is sustained thereby. *Bryant v. State* 490

Injunction.

1. A resident taxpayer without showing any other interest may maintain an action to enjoin the improper disposition of public funds raised by taxation to prevent the creation of an invalid obligation. *Noble v. City of Lincoln* 79

2. In granting an injunction against a nuisance, a court of equity will not go beyond the necessities of the particular case before it. *Sarräillon v. Stevenson* 182

3. The exercise of due care by the owner of a business in its operation does not constitute a defense to an action to enjoin its operation as a nuisance where notwithstanding such care the business as conducted

materially and injuriously affects the comfort, enjoyment, and property rights of those in its vicinity. *Sarraillon v. Stevenson* 182

4. Where an obstruction in a natural drainage course constitutes a continuing and permanent injury to landowners, such landowners may, on a proper showing, obtain a decree ordering the removal of the obstruction. *Pospisil v. Jessen* 346

5. Where a landowner wrongfully diverts waters flowing in a well-defined watercourse and casts them upon the lands of an adjoining landowner where it was not wont to run in its natural state, injunction affords a proper remedy. *Pospisil v. Jessen* 346

6. Where a person constructs a dam or dike that diverts floodwater from its natural flood plane where it was wont to flow in its natural state for many years, injunction affords the proper remedy to relieve from the continuing damage from recurring floods which are certain to occur in the future and which are the proximate result of the dam or dike construction. *Beetison v. Ballou* 360

7. Injunction is a proper remedy to prevent recurring damages to crops or continuing injury to lands by water unlawfully diverted from a natural watercourse over or upon lands of adjacent or adjoining proprietors. *Beetison v. Ballou* 360

8. Injunction to enjoin the enforcement of an illegal regulation promulgated by the Liquor Control Commission is the proper remedy. *State ex rel. Nebraska Beer Wholesalers Assn. v. Young* 395

9. Equity will afford relief by injunction against a continuing injury to land caused by an unlawful discharge of surface waters by an adjoininng landowner. *Schomberg v. Kuther* 413

10. Injunction is the proper remedy to prevent interference with the flow of surface water in a well-defined course. Equity looks to the nature of the injury inflicted, together with the fact of its constant repetition, or continuation, rather than to the magnitude of the damage inflicted, as the ground of affording relief. *Schomberg v. Kuther* 413

11. A trial court may determine the extent of an easement arising by prescription in an injunction action and restrain interference with rights found to exist by virtue of the findings so made. *Paloucek v. Adams* 744

Insurance.

1. A district court, under appropriate facts and circumstances, may exercise its equity power to direct the equitable distribution of the proceeds of a matured mutual benefit life insurance policy which have been deposited in court pending litigation between claimed beneficiaries. *Hall v. Modern Woodmen of America* 600
2. Statutory prohibition against seizure of insurance benefits by judicial process refers to proceedings to collect general and ordinary debts of the insured or beneficiary and not to a contest of equitable cognizance and determination involving the relative rights of rival claimants as beneficiaries to the proceeds of a mutual benefit life insurance policy already matured and in the hands of the court for distribution as equity may require. *Hall v. Modern Woodmen of America* 600

Intoxicating Liquors.

1. Intoxication is a fact which a witness may learn as he ascertains other facts. He may give the details upon which he bases his conclusion and may then state the ultimate fact of intoxication as derived from his observation of the person alleged to have been intoxicated. *Schluter v. State* 317
2. The Nebraska Liquor Control Commission has the power to regulate all phases of the control of the manufacture, distribution, sale, and traffic in alcoholic liquors, except as otherwise specifically delegated in the Liquor Control Act, and for that purpose may promulgate such reasonable rules and regulations as it may deem necessary to carry out the intent, purpose, and requirements of the act. *State ex rel. Nebraska Beer Wholesalers Assn. v. Young* 395
3. The Liquor Control Commission may not adopt rules and regulations which are in conflict with the Liquor Control Act as the power to regulate must be exercised in conformity with all the provisions of the act and in harmony with its spirit and expressed intent. *State ex rel. Nebraska Beer Wholesalers Assn. v. Young* 395
4. The Liquor Control Act prohibits any manufacturer, distributor, or wholesaler of intoxicating liquor from giving, either directly or indirectly, money or anything of value to any retail licensee of in-

toxicating liquor or to the manager, representative, agent, officer, or director of such licensee. *State ex rel. Nebraska Beer Wholesalers Assn. v. Young* 395

5. The Liquor Control Act prohibits a retail licensee or any officer, associate, member, representative, or agent of such licensee from accepting or receiving money or anything else of value, either directly or indirectly, from any person, partnership, or corporation engaged in such manufacturing, distributing, or wholesaling of intoxicating liquor, or from any person connected with or in any way representing any manufacturer, distributor, or wholesaler, or from any member of the family thereof, or from any stockholder in any corporation so engaged or from any officer, manager, agent, or representative thereof. *State ex rel. Nebraska Beer Wholesalers Assn. v. Young* 395

Joint Tenancy.

By statute, when a deposit is made in a bank payable to either of two or more persons, either expressly as joint tenants with right of survivorship or without those qualifying words, upon the death of one of the payees the deposit is payable to the survivor or survivors of those named in the deposit. *Parkening v. Haffke* 678

Judges.

1. No person is permitted to practice as a lawyer in any of the courts of this state while holding the office of county judge in any county having a population of more than sixteen thousand. Any lawyer who holds the office of county judge is not permitted in any event to practice as a lawyer in any action, matter, or proceeding brought before himself, or to draw any paper or written instrument to be filed in his own court, except such as he is required by law to draw. *State ex rel. Nebraska State Bar Assn. v. Wiebusch* 583

2. If forbidden to practice law while serving as county judge, a lawyer should refrain from accepting any employment as such while in office. Even if permitted to practice elsewhere, he should never practice law in the court in which he is a judge or appear therein for himself in any controversy, even if presided over by another judge, and a violation thereof

is highly improper. *State ex rel. Nebraska State Bar Assn. v. Wiebusch* 583

3. A county judge cannot practice law in any court in any matter arising in or growing out of any proceeding in his own court, and a violation thereof is highly improper. *State ex rel. Nebraska State Bar Assn. v. Wiebusch* 583

Judgments.

1. All presumptions exist in favor of the regularity and correctness of judgments of courts of general jurisdiction, and he who asserts the contrary is required to establish the alleged defect or error by an exhibition of the record. *Darlington v. State* 274
Bryant v. State 490
2. In appropriate and timely proceedings, the district court has jurisdiction and authority to vacate and modify any part or all of its own judgment or orders in a divorce action after the term at which they were made for fraud practiced by the successful party in obtaining the same. *Pasko v. Trela* 759
3. Proceedings for a declaratory judgment are appropriate and authorized to determine the validity, construction, or interpretation of a statute when there is a justiciable controversy between parties in respect to their rights under the statute. *Armstrong v. Board of Supervisors* 858
4. An application to modify the terms of a decree of divorce is not an independent proceeding and is not the commencement of an action. *Miller v. Miller* 890

Juries.

1. If the voir dire examination of a juror, considered as a whole, does not show incompetency, a challenge upon that ground is properly overruled, although during the examination statements are made which, if unexplained, might be ground for challenge. *Kitts v. State* 784
2. The qualifications of a juror, when challenged for cause, are to be determined by the trial court from a consideration of his entire examination and such other evidence and circumstances as tend to throw light upon the subject. The appearance and general demeanor of the juror while being examined may be taken into consideration in determining his competency to serve. *Kitts v. State* 784
3. The finding of the trial court in deciding a chal-

lenge for cause will not be set aside by the appellate court unless it is clearly wrong. *Kitts v. State* 784

4. An opinion formed by a juror does not ordinarily affect his competency, or afford cause for challenge, unless it is unqualified as to the guilt or innocence of the accused as to the offense charged. *Kitts v. State* 784

5. The publication of newspaper articles prior to the trial is not ground for a continuance where defendant has been given ample opportunity to determine on voir dire examination whether any of the prospective jurors have formed or expressed an opinion as to the guilt or innocence of the defendant, as a result of having read such articles. *Kitts v. State* 784

6. Where the jury has been clearly admonished not to read newspaper accounts of the trial, the granting or denying of defendant's request that the jurors be interrogated during the trial as to whether they have read newspaper accounts rests in the sound discretion of the trial court. *Kitts v. State* 784

7. When a jury has been clearly admonished not to do a certain act, the mere opportunity to violate that admonition without any proof of its violation provides no basis on which the Supreme Court can find that the trial court has abused its discretion in refusing to investigate the jury for such possible misconduct. *Kitts v. State* 784

Landlord and Tenant.

1. In the event of an occurrence which gives a lessor a right of forfeiture of a lease the lessor has an option to declare the lease at an end or to overlook the breach and allow the lease to remain in full force and effect, and if after notice of breach he accepts rent which accrues after breach such acceptance of rent constitutes a waiver of the right to forfeit the lease. *Snyder v. Hill* 721

2. The breach which may be waived by acceptance of rent after breach may be a breach for nonpayment of rent or of any covenant or material condition imposed upon the lessee by the terms of the lease. *Snyder v. Hill* 721

3. The acceptance of rent after breach waives the forfeiture whether before or after action is commenced to enforce a forfeiture. *Snyder v. Hill* 721

4. By merely assigning a lease the lessee only places his assignee in the same relationship with the lessor

as was occupied by the lessee and nothing else is implied as against the assignor. If the assignee desires further assurances from the lessee he must exact express provisions for the purpose. *Beltner v. Carlson* 797

Larceny.

If the owner of personal property is induced by fraud to part with its possession without intending to transfer its title, the transaction is larceny if the person receiving the possession without the title has at the time a secret intention of converting it permanently to his use and does so without the consent of the owner. *Snyder v. Lincoln* 611

Licenses.

1. The effect of an appeal bond and institution of an original action in the district court, as the Real Estate Commission Act permits, is to stay the order of the State Real Estate Commission until the final disposition of the case. *Rhoades v. State Real Estate Commission* 625
2. The time of the commencement of a period of suspension of a license, as fixed by order of the State Real Estate Commission, when enforcement of the order has been stayed in the manner provided by law pending further contest in the matter, is automatically postponed until the order of suspension becomes final and enforceable. *Rhoades v. State Real Estate Commission* 625

Limitations of Actions.

1. The statute of limitations is not a defense to an application to compel the adverse party to pay arrearages in child support nor as against an application to modify a divorce decree with reference to child support. *Miller v. Miller* 890
2. As a judgment for child support is a continuing judgment always subject to modification by the court, the statute of limitations does not apply. *Miller v. Miller* 890

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 govern-

mental agency. *State ex rel. Nebraska Beer Wholesalers Assn. v. Young* 395

2. Mandamus will not lie to compel the repeal or revocation of the exercise of discretion by a governing body of a governmental agency by the enactment of an ordinance or the promulgation of a rule although such ordinance or rule is not valid because not within their authority. *State ex rel. Nebraska Beer Wholesalers Assn. v. Young* 395

Marriage.

1. A marriage contract between a man and woman, one of whom is married, is contrary to public policy, illegal, and void. *Scott v. Scott* 906
2. Common law marriages are no longer recognized in Nebraska. *Scott v. Scott* 906

Master and Servant.

The relation of employer and employee is the same relation as is familiar throughout the law under the name of master and servant, except that to be an employee, as distinguished from a servant, one must serve under a contract of hire. *Shamburg v. Shamburg* 495

Motor Carriers.

1. Duplicate lines of transportation by competing common carriers are ordinarily incompatible with the public interest. Such a competing line will be authorized only for compelling reasons. *In re Application of Moritz* 206
2. The method of regulating public utilities in Nebraska is based upon the theory of regulated monopoly rather than competition and, before one carrier is permitted to take the business of another already in the field, it must be shown that the existing carrier is rendering unsatisfactory service, is unable or unwilling to provide adequate transportation facilities, and that the operation proposed by the new carrier will better serve the public convenience and necessity. *In re Application of Moritz* 206
3. When a certificate of public convenience and necessity has already been issued and an application is made by another to acquire the operating rights thereunder, such application comes within the provisions of the Motor Carrier Act requiring notice

and hearing. *In re Application of M. & S. Transport Co.* 260

4. An order of the Nebraska State Railway Commission, the effect of which is to revoke the old and issue a new certificate of public convenience and necessity to an applicant in conformity with the Motor Carrier Act, is valid, effective, and not subject to collateral attack except that such certificate may be suspended, changed, or revoked upon statutory grounds. *In re Application of M. & S. Transport Co.* 260
5. The Nebraska State Railway Comission has authority to permit consolidation of carriers only when the situations set forth by statute are present and when the conditions therein specified are found to exist. *In re Application of Silberman* 338
6. The term "such motor carrier" as used in the Motor Carrier Act means a motor carrier in intrastate commerce. *In re Application of Silberman* 338

Municipal Corporations.

1. In a city operating under a home rule charter the charter is the fundamental law for the government of the city. *Noble v. City of Lincoln* 79
2. The charter of a city operating under a home rule charter may contain by amendment anything relating to its government which is not violative or in conflict with the United States Constitution or the Constitution or laws of the state. *Noble v. City of Lincoln* 79
3. The people of a city in the adoption or amendment of a home rule charter act legislatively. *Noble v. City of Lincoln* 79
4. The power of a city to adopt or amend a home rule charter is a constitutional power but the exercise of the power is legislative. *Noble v. City of Lincoln* 79
5. Generally the courts will not in advance of passage or adoption of legislation by a city enjoin such legislation or inquire into the validity or constitutionality thereof. *Noble v. City of Lincoln* 79
6. Where the passage of a legislative act would be followed by some irreparable loss or injury beyond the power of redress by subsequent judicial proceedings, equity will enjoin the holding of an illegal election. *Noble v. City of Lincoln* 79
7. When the passage of an illegal ordinance would cause a multiciplicity of suits, equity may enjoin

holding of an election pursuant thereto. *Noble v. City of Lincoln* 79
8. Where the conduct of a political subdivision has been such as to estop it, equity may enjoin the holding of an election. *Noble v. City of Lincoln* 79
9. Where by amendment to a home rule charter bonds for a project have been voted and directions given to the city council to acquire a site and to construct a project thereon without a further vote of the people, an election may be enjoined which has as its purpose the selection of another site and thereby would defeat the prompt and successful completion of the project as directed by the previous vote of the people. *Noble v. City of Lincoln* 79
10. Under the theory of estoppel action may be had to test the validity of a proposed amendment before adoption thereof when a municipality acting in its municipal capacity has gained a clear and decided advantage by the act or acts relied upon. *Noble v. City of Lincoln* 79
11. Where there is an actual controversy, recognizable as such under law, between the officials of a municipality and its taxpayers concerning the rights over the disposition of public funds and of property belonging to the municipality, declaratory judgment proceedings are proper for the determination of the legal rights involved. *Noble v. City of Lincoln* 79
12. As provided by statute, if a metropolitan city refuses or neglects to defend any suit at law or in equity brought against it, any resident taxpayer may defend said suit on its behalf at cost of the city, not including attorneys' fees. *Lynch v. City of Omaha* 147
13. Powers conferred upon municipal boards by legislative charter will not be extended beyond the plain import of the language used therein. *Manners v. City of Wahoo* 437
14. Statutes empowering municipal boards to perform certain functions will be strictly construed, and all doubt will be resolved against the exercise of the power rather than in favor of it. *Manners v. City of Wahoo* 437
15. A city council cannot, by enactment of an ordinance, extend its powers beyond the limits prescribed in its charter. *Manners v. City of Wahoo* 437
16. The method prescribed by statute granting to cities of the second class and villages power to pave or otherwise improve their streets is mandatory and

jurisdictional, and unless the governing boards of such municipalities act within the prescribed limitations thereof, they have no power and authority to act thereunder. *Manners v. City of Wahoo* 437

17. Cities of the metropolitan class are, for the purpose of promoting the health, safety, morals, or the general welfare of the community, empowered to regulate and restrict the height, number of stories, and size of buildings and other structures; the percentage of lot that may be occupied; the size of yards, courts, and other open spaces; the density of population; and the location and use of buildings, structures, and land for trade, industry, residence, or other purposes. *Davis v. City of Omaha* 460

18. In zoning a city, the city council may divide the municipality into districts of such number, shape, and area as may be deemed best suited to carry out the purposes of regulation. Within such districts it may regulate, restrict, or prohibit the erection, construction, reconstruction, alteration, or use of buildings, structures, or land. All such regulations must be uniform for each class or kind of buildings throughout each district, but the regulations in one district may differ from those in other districts. *Davis v. City of Omaha* 460

19. Restrictions upon the power to zone are that such regulations shall be made in accordance with a comprehensive plan and specified statutory elements. Such regulations must be made with reasonable consideration, among other things, as to the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout the municipality. *Davis v. City of Omaha* 460

20. A village, city, or county is a municipality within the provisions of the Revised Airports Act and the powers and authority granted by it may be exercised by the state. *Spencer v. Village of Wallace* 536

21. A village may not condemn real estate for airport purposes by virtue of the statute providing a method of condemnation by cities of the first class, when it alone is interested in acquiring the property, and its charter provides a different method of procedure for condemnation of real estate needed by it. *Spencer v. Village of Wallace* 536

22. The provisions of the Revised Airports Act that if

but one municipality is involved and its charter prescribes a method of acquiring property by condemnation, proceedings shall be as provided by its charter is unambiguous and mandatory that a village, provided with a method of condemnation by its charter and being alone interested, may only condemn real estate for airport purposes by the method prescribed by its charter. *Spencer v. Village of Wallace* 536

23. The authority granted by the Revised Airports Act to municipalities is limited to (1) joint condemnation of real estate for airport purposes by two or more municipalities, and (2) condemnation of real estate for airport purposes by one municipality, the charter of which does not contain a method of taking property by the exercise of eminent domain. *Spencer v. Village of Wallace* 536

24. Condemnation is a matter of state-wide concern. A provision of a charter of a city which has adopted a home rule charter contrary to or in conflict with a statute on the subject is void. *Spencer v. Village of Wallace* 536

25. The Revenue Bond Act authorizes any city or village to construct, purchase, or otherwise acquire an electric light and power plant and real and personal property needed or useful in connection therewith, and pay the cost thereof by the issue and sale of revenue bonds or debentures or by pledging and hypothecating the revenue and earnings of any such plant owned or to be owned by such city or village only if the proposition is first submitted to the electorate and approved by a majority voting thereon. *Inslee v. City of Bridgeport* 559

26. A proposition to issue revenue bonds, if submitted in the language of the statute, is sufficient. *Inslee v. City of Bridgeport* 559

27. A submission by a city council to the voters of a city of a proposition to issue revenue bonds in a stated amount for the purpose of constructing, purchasing, or otherwise acquiring an electric light and power system, distribution system, transmission lines, and real and personal property needed and used in connection therewith to serve the city and its inhabitants is not a dual proposition but a single one. *Inslee v. City of Bridgeport* 559

28. A municipal court will take judicial notice of the ordinances of the city, and on an appeal therefrom

to the district court from a conviction under a city ordinance the latter court will on a trial de novo take notice of whatever facts the municipal court was required to notice judicially. *State v. Novak* 596

29. On an appeal to the Supreme Court from a judgment of the district court convicting a defendant of a violation of a city ordinance, the same being a review of the proceedings and not a trial de novo, the existence of a valid ordinance creating the offense charged will be presumed where the ordinance is not properly set forth in the record. *State v. Novak* 596

30. The constitutionality of an ordinance cannot be considered by the Supreme Court unless the ordinance is admitted by the pleadings or offered in evidence. *State v. Novak* 596

31. A complaint based on a violation of a municipal ordinance will be deemed sufficient on appeal, except in case of a complete failure to state a cause of action. *State v. Novak* 596

32. Where the evidence shows that lands within the corporate limits of a city of the second class are agricultural in nature and have no unity or community of interest with the city, and that justice and equity require that they be disconnected therefrom, a court of equity is empowered to disconnect such lands from the city. *Davidson v. City of Ravenna* 652

Negligence.

1. Negligence is not presumed; the mere happening of an accident does not prove negligence. *Schroeder v. Sharp* 73

2. The burden of proving a cause of action is not sustained by evidence from which negligence can only be surmised or conjectured. *Schroeder v. Sharp* 73

3. 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. The presumption is raised by the instinct of self-preservation on behalf of the deceased that he was not guilty of negligence, but was in the exercise of due care and caution for his own safety, unless the contrary is shown. *Schroeder v. Sharp* 73

4. It is essential to the existence of negligence that there be some fault on the part of the person sought to be held liable. *Schroeder v. Sharp* 73

5. 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. This rule applies to the affirmative defense of contributory negligence. *Krepcik v. Interstate Transit Lines* 98

6. Where specific charges of contributory negligence are pleaded and supported by proof the instructions should submit those specific charges to the jury for its determination. *Krepcik v. Interstate Transit Lines* 98

7. A party who alleges negligence has the burden of proving it by a preponderance of the evidence. *Armstrong v. State Farm Mutual Automobile Ins. Co.* 144

8. Where a party alleges negligence as the basis of his cause of action and fails to produce evidence of any act of negligence, the trial court, on motion, should direct a verdict for the defendant. *Armstrong v. State Farm Mutual Automobile Ins. Co.* 144

9. A plaintiff is required to establish by a preponderance of the evidence that injury occurred in the manner alleged, but when facts and circumstances are adduced from which the manner of sustaining injuries and damages may be logically inferred, an issue thereon is for the jury to determine. *Weisenmiller v. Nestor* 153

10. In those cases where reasonable minds may differ on the question of whether or not the operator of an automobile exercised the ordinary care 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. *Weisenmiller v. Nestor* 153

11. Where under the evidence adduced it appears that negligence of defendant alleged to have proximately caused injuries and damages to plaintiff was not joint or concurrent with others in such manner as to impose liability upon defendant as a joint tortfeasor, then he is liable for only such injuries and damages as a preponderance of the evidence establishes that plaintiff sustained as the proximate result of defendant's negligence as distinguished from those, if any, caused by others. *Weisenmiller v. Nestor* 153

12. A county is not liable for negligence for injury or death on account of defects caused by climatic condi-

tions beyond its control. *Wittwer v. County of Richardson* 200

13. It is not error for the trial court to refuse to instruct that defendant was guilty of negligence as a matter of law where the evidence is in conflict as to the proximate cause of the injury. *Keiserman v. Lydon* 279

14. Proof of violation of a statute or city ordinance relating to speed does not of itself establish negligence in an action for damages but it is evidence which is to be considered in determining whether a party is guilty of negligence. *Tempero v. Adams* 331

15. Contributory negligence is an affirmative defense, which must be pleaded, and ordinarily involves questions of fact for the determination of the jury. *Tempero v. Adams* 331

16. The original petition will be regarded as an affirmative charge of contributory negligence as to the cross-petition in a case where (1) a plaintiff has charged a defendant with negligence which he claims was the proximate cause of a particular accident, (2) the defendant by cross-petition charges the plaintiff with negligence which he contends was the proximate cause of the same accident, (3) the plaintiff fails in response to the cross-petition to affirmatively charge the defendant with contributory negligence, and (4) the case is tried and the jury instructed on the theory that he had so pleaded. *Tempero v. Adams* 331

17. In a case where there is no specific allegation of contributory negligence, the character of the plea will be determined by its effect. If the parties by their introduction of evidence have assumed that such a defense was in issue, it is not reversible error for the court to instruct thereon. *Tempero v. Adams* 831

18. When the evidence, although conflicting, is sufficient to sustain a verdict for the plaintiff, it is error for the trial court to sustain a motion for judgment notwithstanding the verdict on the ground that the contributory negligence of the plaintiff barred recovery. *Armer v. Omaha & Council Bluffs St. Ry. Co.* 352

19. Violations of ordinances and traffic regulations constitute evidence of negligence only, which the jury may properly consider in determining a question of negligence and the degree thereof. *Ficke v. Gibson* .. 478

20. One who attempts to cross a street between inter-

sections without looking is guilty of such negligence as will bar a recovery as a matter of law. If he testifies that he did look, it is implied that he looked in such a manner that he would see that which was in plain sight, unless some reasonable excuse for not seeing is shown. *Ficke v. Gibson* 478

21. 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. *Hendrix v. Vana* 531

22. 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. *Hendrix v. Vana* 531

23. 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. *Hendrix v. Vana* 531

24. 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. *Hendrix v. Vana* 531

25. The negligence of a husband while driving an automobile, in which his wife is a guest, may not be imputed to her. *Hendrix v. Vana* 531

26. A recovery cannot be had for acts of negligence not alleged in the petition. The rule is the allegata and the probata must agree. *Lund v. Holbrook* 706

27. 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. *Lund v. Holbrook* 706

28. When the driver of a motor vehicle turning across a highway between intersections fails to look to the front and rear for oncoming traffic at a time and place when to look would be effective, or looks and negligently fails to see that which is in plain sight, or is in a position where he cannot see, a question for the court is usually presented. *Petersen v. Schneider* 815
29. Where a driver looks but does not see an approaching motor vehicle because of unusual conditions or circumstances, or sees the approaching vehicle and erroneously misjudges its speed or distance, or for some other reason assumes he could safely complete the movement, the question of negligence is usually for the jury. *Petersen v. Schneider* 815
30. A left-hand turn across a public highway between intersections is fraught with danger, and one making such a movement is required to exercise a degree of care commensurate with the danger. *Petersen v. Schneider* 815
31. The giving of the statutory signal for a left turn will not absolve the driver from negligence where he fails to exercise care for his own safety, and that of others, by looking to the front and rear for the approach of other vehicles using the highway. *Petersen v. Schneider* 815
32. The failure to look before turning left across a public highway between intersections is negligence as a matter of law. *Petersen v. Schneider* 815

New Trial.
1. As to new trials, the law, prior to the adoption of the 1947 act with respect to entry of judgment notwithstanding the verdict was: An order of a district court setting aside the verdict of a jury and granting a new trial was not a final order from which a direct appeal could be taken to the Supreme Court. *Krepcik v. Interstate Transit Lines* 98
2. The remedy adopted by the Legislature by the act providing for judgment notwithstanding the verdict was to provide that an order granting or denying a new trial is an appealable order. *Krepcik v. Interstate Transit Lines* 98
3. Federal Rule 50 (b) and section 25-1315.02, R. R. S. 1943, deal with the power of a trial court. *Krepcik v. Interstate Transit Lines* 98
4. Where a party litigant has taken the necessary steps under the act providing for entry of judgment not-

withstanding the verdict, and pursuant thereto has filed a motion for judgment notwithstanding the verdict and in the alternative for a new trial, the denial of the motion for a new trial is implicit in the action of the trial court in granting the motion for judgment notwithstanding the verdict and dismissing the action, and operates as a denial of the motion for a new trial. *Krepcik v. Interstate Transit Lines* 98

5. A new trial may be granted only for a legal cause and where it appears that a legal right has been prejudicially invaded or denied. *Keiserman v. Lydon* 279
6. Where a litigant has sustained the burden of a trial, and secured the verdict of a jury on the facts in issue, he is entitled to retain the benefit of the verdict if the proceedings are free from prejudicial error. *Keiserman v. Lydon* 279
7. Where an appeal is taken from the entry of a judgment notwithstanding the verdict, a failure to assign as error, in the alternative, the overruling of the motion for a new trial precludes the Supreme Court from considering the correctness of the trial court's ruling on such motion for a new trial. Under such circumstances any right to a new trial will be deemed to have been waived. *Armer v. Omaha & Council Bluffs St. Ry. Co.* 352
8. It is sufficient to assign the grounds of the motion for a new trial in the language of the statute and without further or other particularity. *Lund v. Holbrook* 706

Notaries.

1. A grantor in an instrument of conveyance who never at any time appeared for the purpose of acknowledging the instrument is not bound in anywise by the recitals in a certificate of acknowledgment attached by a notary public. *Trowbridge v. Bisson* 389
2. In proceedings which involve only the rights of the parties to the transaction or other persons having notice of the facts, parol evidence is admissible to contradict the recitals of a notary certificate and show them to be false. *Trowbridge v. Bisson* 389
3. A certificate of acknowledgment in proper form can only be impeached by clear, satisfactory, and convincing evidence that its recitals are false, and the burden is ordinarily upon the party alleging the same to so prove it. *Trowbridge v. Bisson* 389

4. A notary public is disqualified to act as such officer when he has a direct pecuniary interest in the matter and under such a situation cannot lawfully take the acknowledgment. *Loyal's Auto Exchange, Inc. v. Munch* 628

Nuisances.

1. A legitimate business is generally not a nuisance, but it may become a nuisance in fact by reason of the manner of its operation, and because of conditions implicit in and that unavoidably result from its operation, especially in a residential or other closely occupied area. *Sarraillon v. Stevenson* 182
2. A legitimate business conducted in a residential neighborhood that pollutes or contaminates the air through noisome and noxious odors created by it, that by noises emanating from it disturbs the peace, quiet, and comfort of the residents thereof, and injuriously affects property rights of adjoining and nearby property owners, is a nuisance in fact. *Sarraillon v. Stevenson* 182
3. In granting an injunction against a nuisance, a court of equity will not go beyond the necessities of the particular case before it. *Sarraillon v. Stevenson* 182
4. The exercise of due care by the owner of a business in its operation does not constitute a defense to an action to enjoin its operation as a nuisance where notwithstanding such care the business as conducted materially and injuriously affects the comfort, enjoyment, and property rights of those in its vicinity. *Sarraillon v. Stevenson* 182

Officers.

1. The dismissal of an employee of the fire department is "necessary for the proper management or discipline, or for the more effective working or service of the fire department" when it is established that the employee lacks the qualifications for the position, has failed in the performance of his duties, or has been shown to be an unfit or improper person to hold the position. *Lewis v. City of Omaha* 11
2. The Legislature is prohibited from increasing or diminishing the salary of any public officer during his term of office, where such salary is fixed by the Legislature subsequent to the adoption of the constitutional amendments of 1920. *Ramsey v. County of Gage* 24

3. Within the contemplation of the Constitution the Attorney General of the state is an executive officer. *State ex rel. Caldwell v. Peterson* 402
4. Within the contemplation of the Constitution, if the office of Attorney General shall be vacated by resignation, it is the mandatory duty of the Governor to fill the same by appointment, and the appointee shall hold such office until his successor shall be elected and qualified in such manner as may be provided by law. *State ex rel. Caldwell v. Peterson* 402
5. The Constitution requires the returns of every election for officers of the executive department of the state to be sealed up and transmitted by the returning officers to the Secretary of State, directed to the Speaker of the Unicameral Legislature. *State ex rel. Caldwell v. Peterson* 402
6. The duty of a Speaker of the Unicameral Legislature, under a constitutional provision requiring him to open and publish the returns in an election for executive officers of the state and to declare the result of such election, is an administrative duty. *State ex rel. Caldwell v. Peterson* 402
7. The Constitution governs the canvass of votes and declaration of election of executive officers. Unless the declaration is made in the way so provided, the process of election is not complete. *State ex rel. Caldwell v. Peterson* 402
8. The Board of State Canvassers does not have authority to canvass the returns of election to state executive offices. *State ex rel. Caldwell v. Peterson* 402
9. A person elected to an executive office in this state, to fill a vacancy or otherwise, cannot qualify for such office, receive a certificate of election, and take office until the canvass of the election returns by the Legislature. *State ex rel. Caldwell v. Peterson* .. 402

Parent and Child.

1. In the case of a gift and voluntary conveyance from a parent to his child or children, no presumption of fraud or undue influence arises as between the parties thereto by the mere fact of the relation. *Parkening v. Haffke* 678
2. The affection, confidence, and gratitude of a parent to a child which inspires the gift is a natural and lawful influence, and will not render it voidable, unless this influence has been so used as to confuse

the judgment and control the will of the donor. *Parkening v. Haffke* 678

Parties.

A defect of parties who are not indispensable is ordinarily waived unless appropriate objection thereto is made before the cause is finally submitted upon the merits. *Lynch v. City of Omaha* 147

Partition.

1. A surviving spouse who elects to partition the homestead premises thereby forfeits all homestead rights therein. *Baskins v. Krepcik* 36
2. At common law an estate in remainder subject to an existing particular estate in the whole of the real estate could not be the subject of involuntary or compulsory partition. *Baskins v. Krepcik* 36
3. The rights of an owner of a life estate in the whole of the premises, of which partition is sought by the owner of an estate in remainder therein, cannot over the objection of the life tenant be in any way or to any extent changed or disturbed. *Baskins v. Krepcik* 36
4. A remainderman in fee of an undivided interest in real estate may maintain a suit for partition against the owner of the remaining undivided interest in remainder, the whole of the premises being subject to a life estate. *Baskins v. Krepcik* 36
5. The mere existence of a life estate in the whole of the premises does not prevent partition among the remaindermen prior to the death of the life tenant. If the life tenant consents or does not object, the whole of the real estate may be sold. *Baskins v. Krepcik* 36
6. A legal right of partition of property is absolute and not a matter of grace. *Baskins v. Krepcik* 36

Pleading.

1. Contributory negligence is an affirmative defense, which must be pleaded, and ordinarily involves questions of fact for the determination of the jury. *Tempero v. Adams* 331
2. The original petition will be regarded as an affirmative charge of contributory negligence as to the cross-petition in a case where (1) a plaintiff has charged a defendant with negligence which he claims was the proximate cause of a particular accident,

(2) the defendant by cross-petition charges the plaintiff with negligence which he contends was the proximate cause of the same accident, (3) the plaintiff fails in response to the cross-petition to affirmatively charge the defendant with contributory negligence, and (4) the case is tried and the jury instructed on the theory that he had so pleaded. *Tempero v. Adams* 331

3. In a case where there is no specific allegation of contributory negligence, the character of the plea will be determined by its effect. If the parties by their introduction of evidence have assumed that such a defense was in issue, it is not reversible error for the court to instruct thereon. *Tempero v. Adams* 331

4. A recovery cannot be had for acts of negligence not alleged in the petition. The rule is the allegata and probata must agree. *Lund v. Holbrook* 706

5. 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. *Lund v. Holbrook* 706

6. The rules of pleading in civil cases are applicable to and should be observed in divorce cases. *Peterson v. Peterson* 727

7. If a decree of divorce is sought on the ground of extreme cruelty, the particular facts relied upon as constituting the cruelty should be alleged with reasonable certainty. *Peterson v. Peterson* 727

8. An allegation that the adverse party has been guilty of extreme cruelty in the language of the statute is a conclusion and is generally not sufficient. *Peterson v. Peterson* 727

9. Where no attempt is made to prove certain allegations of a petition, and the plaintiff abandons them as a ground of recovery, the issues as to such matters should be eliminated from the charge. *Conley v. Hays* 733

10. It is error to set forth literally or substantially the pleadings in an action when to do so is to place before the jury issuable matters which find no support in the evidence. *Conley . Hays* 733

11. A party may not allege one cause of action in his petition and prove another upon the trial. *National Fire Ins. Co. v. Evertson* 854

12. In the absence of the common law or statutes of any other jurisdiction in the United States being pleaded and presented, the presumption is that the common

law or statutes of such other jurisdiction is the same as that of Nebraska. *Scott v. Scott* 906

Process.

1. The question whether process may be served on a nonresident party may be determined by the nature of the proceeding in which process was issued and its relation to the suit which the party or witness had been attending. *Miller v. Miller* 890
2. The rule that suitors from a foreign jurisdiction are exempt from service of civil process while attending court and for such reasonable time before and after as may enable them to come from and return to their homes does not extend to process in an action or proceeding involving or connected with the subject matter of the litigation during attendance upon which the nonresident suitor is served. *Miller v. Miller* 890

Property.

1. Possession of land is notice to the world of the rights of the person in possession and of all his interests of which inquiry of him would elicit knowledge. *Noetzelmann v. Noetzelmann* 133
2. The selection of the place of business is not in all cases left to the owner alone. It is often a matter of private and public concern. *Sarraillon v. Stevenson* 182

Public Service Commissions.

1. When an application is made to the Nebraska State Railway Commission for a certificate of public convenience and necessity authorizing the operation covered by the application, the burden of proof at the hearing is upon the applicant to show that the proposed service is or will be required by the present or future public convenience and necessity, and that the applicant is fit, able, and willing to perform such service. *In re Application of Moritz* 206
2. In determining the issue of public convenience and necessity, controlling questions are whether the operation will serve a useful purpose responsive to a public demand or need; whether this purpose can or will be served as well by existing carriers; and whether it can be served by applicant in a specified operation without endangering or impairing the

operations of existing carriers contrary to the public interest. *In re Application of Moritz* 206

3. The real purpose of Nebraska State Railway Commission control is to secure adequate sustained service for the public at minimum cost and to protect and conserve investments already made for that purpose. In doing so primary consideration must be given to the public rather than to individuals. *In re Application of Moritz* 206

4. Duplicate lines of transportation by competing common carriers are ordinarily incompatible with the public interest. Such a competing line will be authorized only for compelling reasons. *In re Application of Moritz* 206

5. The method of regulating public utilities in Nebraska is based upon the theory of regulated monopoly rather than competition and, before one carrier is permitted to take the business of another already in the field, it must be shown that the existing carrier is rendering unsatisfactory service, is unable or unwilling to provide adequate transportation facilities, and that the operation proposed by the new carrier will better serve the public convenience and necessity. *In re Application of Moritz* 206

6. An order of the Nebraska State Railway Commission, the effect of which is to revoke the old and issue a new certificate of public convenience and necessity to an applicant in conformity with the Motor Carrier Act, is valid, effective, and not subject to collateral attack except that such certificate may be suspended, changed, or revoked upon statutory grounds. *In re Application of M. & S. Transport Co.* 260

7. The Nebraska State Railway Commission has authority to permit consolidation of carriers only when the situations set forth by statute are present and when the conditions therein specified are found to exist. *In re Application of Silberman* 338

8. The grant or denial of a certificate of convenience and necessity by the Nebraska State Railway Commission requires the exercise of administrative and legislative functions and not of judicial powers. *In re Application of Petersen & Petersen, Inc.* 517

9. On an appeal to the Supreme Court from an order of the Nebraska State Railway Commission administrative or legislative in nature, the only questions to be determined are whether the Nebraska State

Railway Commission acted within the scope of its authority and if the order complained of is reasonable and not arbitrarily made. *In re Application of Petersen & Petersen, Inc.* 517

Quieting Title.

Plaintiff in an action to quiet title has the burden of proof. He must recover upon the strength of his title and not because of any weakness in the title of his adversary. *Stratbucker v. Junge* 885

Records.

A public record is a written memorial made by a public officer authorized by law to make it. It is required by law to be kept, or necessary to be kept, in the discharge of a duty imposed by law, or directed by law to serve as a memorial and evidence of something written, said, or done. *Securities Credit Corp. v. Pindell* 298

Reformation of Instruments.

Although the mistake of one party to a contract is not a ground for its reformation, it may afford a basis for rescission. *School District v. Olson Construction Co.* 451

Replevin.

The plaintiff in a replevin action must recover, if at all, upon the strength of his own title to the property involved and not upon the weakness of the defendant's title to the property. *Loyal's Auto Exchange, Inc. v. Munch* 628

Rescission.

1. Although the mistake of one party to a contract is not a ground for its reformation, it may afford a basis for rescission. *School District v. Olson Construction Co.* 451
2. The proper remedy in a court of equity for a unilateral mistake in a contract is rescission. *School District v. Olson Construction Co.* 451
3. A court of equity will afford relief by way of rescission for a unilateral mistake where it appears that (1) the mistake was of so great a consequence that to enforce the contract as made would be unconscionable, (2) the matter as to which the mistake was

made relates to a material feature of the contract, (3) the mistake occurred notwithstanding the exercise of reasonable care by the party making the mistake, and (4) such relief is without serious prejudice to the other party except for the loss of the bargain. *School District v. Olson Construction Co.* .. 451

Sales.

1. Where a certain date is fixed as the time limit for delivery of six tank cars of soybean oil by the seller to the purchaser, and by subsequent agreement between the parties in the form of correspondence the time limit date for delivery is postponed, such agreement does not discharge the original contract, but the same remains in full force, changed only to the extent that delivery is postponed. *Wilson & Co., Inc. v. Fremont Cake & Meal Co.* 160
2. An abnormal rise in the price of soybean products due to war or unusual trade conditions, so that the processor thereof cannot perform a contract to process and deliver the same to a contractee without greater expense than anticipated, is not an impossibility excusing performance. *Wilson & Co., Inc. v. Fremont Cake & Meal Co.* 160
3. The measure of damages for failure to perform contract of sale of soybeans is the difference in the contract price of the merchandise and the market value of the same at the time to which delivery is postponed. If delivery is postponed by agreement of the parties, the market value at the time to which delivery is postponed is taken as the criterion. *Wilson & Co., Inc. v. Fremont Cake & Meal Co.* 160
4. Where the seller of personal property has a voidable title thereto, but his title has not been avoided at the time of the sale, the buyer acquires a good title to the property provided he buys in good faith, for value, and without notice of the seller's defect of title. *Snyder v. Lincoln* 611
5. The status of a bona fide purchaser from a fraudulent buyer is determined by rules applicable in any other situation where one asserts the right to protection as an innocent purchaser. *Snyder v. Lincoln* 611
6. An innocent purchaser is one who buys property for a present valuable consideration without knowledge sufficient to charge him in law with notice of any infirmity in the title of the seller. *Snyder v. Lincoln* 611

Set-Off and Counterclaim.

A plaintiff has the right, before final submission of his cause of action, to dismiss the same, but this right does not control the right of the defendant to proceed to the trial of a set-off or counterclaim properly pleaded by him in his answer. *Feight v. Mathers* 839

Specific Performance.

1. One seeking specific performance of an oral contract for the conveyance of real estate has the burden to prove by a preponderance of the evidence a contract which is clear, satisfactory, and unequivocal in its terms; that he has performed the obligations imposed upon him by the contract capable of performance to the time of the commencement of the litigation; that he is able to and will perform any other obligation thereof when it becomes capable of satisfaction by him; and that his acts constituting performance were such as were referable solely to the contract sought to be enforced and not such as might be referable to some other contract. *Noetzelmann v. Noetzelmann* 133
   Busteed v. Sheffield 253
2. In determining whether or not acts of one seeking specific performance of an oral contract are referable solely to the contract alleged, the acts must be considered as a whole, and proper consideration must be given to all other relevant facts and circumstances shown by the evidence. *Noetzelmann v. Noetzelmann* 133
3. When the acts performed by the one seeking specific performance of an oral contract for the conveyance of real estate tend to show, not only that there was an agreement, but also throw some light on the nature of the agreement, the evidence cannot be said to rest wholly in parol, the parol evidence being auxiliary to the proof afforded by the case itself. *Noetzelmann v. Noetzelmann* 133
4. A suit in the district court to enforce the specific performance of a parol agreement to devise real property and to quiet title in the plaintiff, as against those claiming under a will duly allowed and ad-admitted to probate in the county court, is not a collateral attack on the judgment admitting such will to probate. *Sopcich v. Tangeman* 506
5. When a contract to devise property and the relation of plaintiff thereto are established under a

single and indivisible contract, and the promisor dies without having complied with the terms of his promise, the county court is without, and the district court has, jurisdiction of an action for the specific performance of such contract. *Sopcich v. Tangeman* 506

6. One seeking specific performance of an oral contract to will property to him has the burden not only of proving the contract but also that he has performed the obligations imposed upon him thereby. *Sopcich v. Tangeman* 506

7. Equity will grant specific performance of a parol agreement to leave property to another if it is proved by evidence convincing and satisfactory, if it has been wholly performed by one party, and if its nonperformance would be a fraud on him. *Sopcich v. Tangeman* 506

8. Oral contracts to will property 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. *Sopcich v. Tangeman* 506

9. Specific performance of an oral agreement to make a will will not be enforced where there has been a substantial failure of performance by the party seeking enforcement of the agreement. *Sopcich v. Tangeman* 506

10. The right of a party to the specific performance of his contract may be lost by his failure of performance, by his abandonment thereof, by his acquiescence in the breach of the other party, by laches, or by conduct inconsistent with the right to relief which amounts to a waiver or an estoppel. *Sopcich v. Tangeman* 506

11. One seeking specific performance of an oral contract for the repurchase of corporate stock must prove a contract which is clear, satisfactory, and unequivocal in its terms. *Herrin v. Johnson Cashway Lumber Co.* 693

12. Specific performance of a contract will not be decreed unless the minds of the parties to the contract have met. In order to establish a contract capable of specific performance it must be shown that there was a definite offer and an unconditional acceptance. *Herrin v. Johnson Cashway Lumber Co.* 693

13. To entitle a party to specific performance, there must be a clear, mutual understanding and a positive

assent on the part of each party. Mutuality of obligation is an essential element of the right to enforce specific performance of a contract in a court of equity. *Herrin v. Johnson Cashway Lumber Co.* .. 693

14. Where the evidence shows an intent to abandon a homestead right in property, coupled with an actual leaving of the premises, the failure to have the instrument, by which the property is conveyed, executed and acknowledged by both the husband and the wife is not a defense to a suit for specific performance. *Phifer v. Miller* 748

Statutes.

1. Legislative act changing salaries contained a saving clause to the effect that if it be held that the increase in salary could not be paid during the existing term of office, the act would not be declared void but would become operative upon the beginning of the first future term of office of the officer affected. *Ramsey v. County of Gage* 24
2. In construing remedial statutes, there are three elements to be considered: (1) The old law, (2) the mischief, and (3) the remedy; and, unless restrained by constitutional authority, it is the duty of courts to so construe such acts as to suppress the mischief and advance the remedy. *Krepcik v. Interstate Transit Lines* 98
3. Remedial statutes are to be liberally construed with a view to effectuate the purposes of the Legislature; and if there be any doubt or ambiguity, that construction should be adopted which will best advance the remedy provided and help to suppress the mischief against which it was aimed. *Krepcik v. Interstate Transit Lines* 98
4. In the construction of statutes the intention of a remedial statute will always prevail over the literal sense of its terms, and therefore when the expression is special or particular, but the reason is general, the expression shall be deemed general. *Krepcik v. Interstate Transit Lines* 98
5. Specific statutory provisions, relating to a particular subject, control over general provisions and leave the latter to operate only outside the former. *Lackaff v. Department of Roads and Irrigation* 217
6. 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 as deduced from the whole will prevail over that of a particular part considered separately. *In re Application of Silberman* 338

7. A statute is not to be read as if open to construction as a matter of course. It is only in the case of ambiguous statutes of uncertain meaning that the rules of construction can have any application. Where the language of a statute is plain and unambiguous and its meaning clear and unmistakable there is no room for construction and the courts are not permitted to search for its meaning beyond the statute itself. *State ex rel. Nebraska Beer Wholesalers Assn. v. Young* 395

8. A word in the singular number may be construed to include the plural when necessary to effectuate the intended meaning or scope of legislation. The word "municipality" used in the first sentence of the Revised Airports Act may include more than one municipality. *Spencer v. Village of Wallace* 536

9. Grain brokers are required to list and return the average amount of capital invested in such business in excess of real estate and other tangible property separately assessed for the preceding year. *Archer-Daniels-Midland Co. v. Board of Equalization* 776

10. The average amount of capital invested in the business of a grain broker in excess of real estate and other tangible property separately assessed bears the same rate of taxation as tangible property. *Archer-Daniels-Midland Co. v. Board of Equalization* 776

11. The classification of grain brokers and the assessment of them on the basis of the average investment in grain in the State of Nebraska is a valid and constitutional exercise of legislative power. *Archer-Daniels-Midland Co. v. Board of Equalization* 776

12. An investment in grain which grain never entered the State of Nebraska is not taxable. *Archer-Daniels-Midland Co. v. Board of Equalization* 776

13. Neither tangible personal property nor the investmen of a grain broker in grain which has not acquired a situs in this state is subject to an ad valorem tax. *Archer-Daniels-Midland Co. v. Board of Equalization* 776

14. A court in considering the meaning of a statute should if possible discover the legislative intent from

the language of the act and give it effect. *Armstrong v. Board of Supervisors* 858

15. If the language of a statute is clear and unambiguous, courts will not by interpretation or construction usurp the function of the lawmaking body and give it a meaning not intended or expressed by the Legislature. *Armstrong v. Board of Supervisors* 858

Taxation.

1. The right of redemption from a tax sale is a property right and, as such, may be sold or transferred by the owner. *County of Lancaster v. Schwarz* 472
2. Article VIII, section 3, of the Constitution is self-executing. No statute or decree is necessary to enforce it or place it in operation. *County of Lancaster v. Schwarz* 472
3. Where a tax foreclosure has gone to decree and sale, and the owner subsequently and before confirmation conveys to another, the grantee of such a conveyance has the right of redemption. *County of Lancaster v. Schwarz* 472
4. Grain brokers are required to list and return the average amount of capital invested in such business in excess of real estate and other tangible property separately assessed for the preceding year. *Archer-Daniels-Midland Co. v. Board of Equalization* 776
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8. Neither tangible personal property nor the investment of a grain broker in grain which has not acquired a situs in this state is subject to an ad valorem tax. *Archer-Daniels-Midland Co. v. Board of Equalization* 776
9. Property in transit in interstate commerce through this state only as an incident to its transfer to some other state acquires no situs for taxation and is not

taxable in this state. *Archer-Daniels-Midland Co. v. Board of Equalization* 776

10. Property purchased in transit within this state which does not thereafter lose its character as property in transit in interstate commerce until it reaches its destination outside the state is not taxable. *Archer-Daniels-Midland Co. v. Board of Equalization* 776

11. Counties have no inherent power in matters relating to taxation. *Chicago, B. & Q. R. R. Co. v. County of Gosper* 805

Trial.

1. The statute providing for entry of judgment notwithstanding the verdict vests power in the Supreme Court on appeal to review the action taken by the trial court and to enter judgment in favor of the party who was entitled to the judgment in the trial court. *Krepcik v. Interstate Transit Lines* 98

2. Where a party litigant has taken the necessary steps under the act providing for entry of judgment notwithstanding the verdict, and pursuant thereto has filed a motion for judgment notwithstanding the verdict and in the alternative for a new trial, the denial of the motion for a new trial is implicit in the action of the trial court in granting the motion for judgment notwithstanding the verdict and dismissing the action, and operates as a denial of the motion for a new trial. *Krepcik v. Interstate Transit Lines* 98

3. Where two conflicting instructions are given on a question, one containing an incorrect, and the other a correct, statement of the law, the latter will not cure the former. *Krepcik v. Interstate Transit Lines* 98

4. 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. This rule applies to the affirmative defense of contributory negligence. *Krepcik v. Interstate Transit Lines* 98

5. Where specific charges of contributory negligence are pleaded and supported by proof the instructions should submit those specific charges to the jury for its determination. *Krepcik v. Interstate Transit Lines* 98

6. An instruction concerning the credibility of witnesses that "you have no right to reject the testimony of any of the witnesses without good reason, and you should not do so until you find it irreconcilable with

other testimony which you may find to be true" is erroneous. *Krepcik v. Interstate Transit Lines* 98
Keiserman v. Lydon 279
7. The "burden of proof" means the duty resting on one party or the other, usually the party having the affirmative, to establish by preponderance of evidence a proposition essential to the maintenance of the action. In this sense the burden of proof never shifts or changes, but remains from the first to last where it is placed by the pleadings or the substantive law of the case. *Fitzsimons v. Frey* 124
8. An instruction on the burden of proof which fails to inform the jury as to what their verdict should be in the event the evidence is equally balanced or preponderates in favor of the defendant is prejudicially erroneous. *Fitzsimons v. Frey* 124
9. Evidence on question of whether candelabra was included within agreement as furniture examined and held sufficient to warrant submission to the jury. *Fitzsimons v. Frey* 124
10. A party who alleges negligence has the burden of proving it by a preponderance of the evidence. *Armstrong v. State Farm Mutual Automobile Ins. Co.* 144
11. Where a party alleges negligence as the basis of his cause of action and fails to produce evidence of any act of negligence, the trial court, on motion, should direct a verdict for the defendant. *Armstrong v. State Farm Mutual Automobile Ins. Co.* 144
12. The striking of a motion for new trial, timely filed in the district court, is the equivalent of overruling the same and finally disposing of the cause upon the merits, from which appeal may be taken to the Supreme Court, where upon review such judgment may be entered or directed as should have been rendered by the trial court. *Lynch v. City of Omaha* 147
13. A motion to dismiss or for directed verdict admits the truth of all material and relevant evidence adduced by the party against whom the motion is made. Such party is entitled to have such evidence considered in the light most favorable to him and to have the benefit of all inferences reasonably deducible therefrom in testing validity of the court's action in disposing of the motion. *Weisenmiller v. Nestor* 153
Wilson & Co., Inc. v. Fremont Cake & Meal Co. 160
14. The purpose of instructions is to furnish guidance to the jury in their deliberations, and to aid them

in arriving at a proper verdict; and, with this end in view, they should state clearly and concisely the issues of fact and the principles of law which are necessary to enable them to accomplish the purpose desired. *Lynn v. City of Omaha* 193

15. When a defendant at the close of the evidence of the plaintiff moves for dismissal of the action for want of evidence to support a judgment or decree, he admits the truth of the evidence and every reasonable conclusion which may be drawn therefrom. *Busteed v. Sheffield* 253

16. When a motion is made at the close of plaintiff's evidence to dismiss for want of evidence to sustain a cause of action, it is the duty of the court to determine the question as a matter of law. *Busteed v. Sheffield* 253

17. Affidavits used as evidence on the hearing of an issue of fact must be offered in evidence in the trial court and embodied in a bill of exceptions to be available to plaintiff in error in the Supreme Court. *Darlington v. State* 274

18. It is not error for the trial court to refuse to instruct that defendant was guilty of negligence as a matter of law where the evidence is in conflict as to the proximate cause of the injury. *Keiserman v. Lydon* 279

19. Whether the giving of an instruction in a civil case constitutes prejudicial error is dependent upon the situation existing in each particular case. If the instruction under the facts shown is prejudicial to the rights of a party to a fair trial it is reversible error, but otherwise not. *Keiserman v. Lydon* 279

20. An instruction to a jury in the trial of a criminal case defining the expression "beyond a reasonable doubt" and an instruction on the subject of circumstantial evidence of the character indicated in the opinion are proper. *Smith v. State* 308

21. It is not error to refuse requested instructions when the substance of them is given by the court in its instructions to the jury. *Smith v. State* 308

22. The failure of the court to instruct on an issuable matter in any action is prejudicially erroneous and is a proper ground on which to grant a new trial. *Tempero v. Adams* 331

23. When the evidence, although conflicting, is sufficient to sustain a verdict for the plaintiff, it is error for the trial court to sustain a motion for judgment notwithstanding the verdict on the ground that the

contributory negligence of the plaintiff barred recovery. *Armer v. Omaha & Council Bluffs St. Ry. Co.* 352

24. When a party has filed a motion for judgment notwithstanding the verdict and in the alternative for a new trial, the granting of the motion for judgment notwithstanding the verdict operates as a denial of the motion for a new trial. *Armer v. Omaha & Council Bluffs St. Ry. Co.* 352

25. Where the record shows that the jury in arriving at a verdict of guilty in a criminal case disregarded the instructions of the court, the verdict is contrary to law and will be set aside and the judgment thereon reversed. *May v. State* 369

26. A verdict of guilty in a criminal case that is contrary to the evidence will not be sustained. *May v. State* 369

27. A motion of proponents on the trial of a will contest made at the close of the evidence of the contestants to withdraw from consideration of the jury the issue of undue influence admits the truth of all material and relevant evidence submitted by the contestants, and they are entitled to have it and all inferences fairly deducible therefrom viewed in the most favorable light in testing the correctness of the ruling of the court granting the motion. *In re Estate of Thompson* 375

28. To establish undue influence, the evidence must tend to show undue influence directly in reference to the will in question, and be of such a nature as to control the will of the testator and cause him to do something that he did not intend. Suspicion or supposition of undue influence is not sufficient to require the submission of the question to a jury or to sustain a verdict. *In re Estate of Thompson* 375

29. The mere opportunity of the wife, when living happily with the husband, to influence the execution of a will favorable to herself is not alone sufficient to warrant submission to the jury of the question of undue influence. *In re Estate of Thompson* 375

30. In a will contest on the ground of undue influence, if the evidence is insufficient to sustain a verdict upon that issue in favor of the contestants, the trial court should direct a verdict. *In re Estate of Thompson* 375

31. Where a certain fact or group of facts, if established, leaves no room for men of ordinary intelligence to differ as to the legal effect thereof, it is

proper to instruct the jury what such legal effect is. *Ficke v. Gibson* 478
32. The trial court is charged with the duty of informing the jury of the legal effect of facts which they find to be true from the evidence. *Ficke v. Gibson* 478
33. An instruction on the burden of proof which fails to inform the jury as to what their verdict should be in the event the evidence is equally balanced or preponderates in favor of the defendant is prejudicially erroneous. *Ficke v. Gibson* 478
34. A motion for judgment on the pleadings admits facts well pleaded or admitted in an answer but does not admit conclusions of law contained therein. *State ex rel. Nebraska State Bar Assn. v. Wiebusch* 583
35. Where, upon statements in the pleadings, one party is entitled by law to judgment in his favor, judgment should be so rendered by the court. *State ex rel. Nebraska State Bar Assn. v. Wiebusch* 583
36. In determining the sufficiency of evidence to sustain a verdict it must be considered most favorably to the successful party, any controverted fact must be resolved in his favor, and he is entitled to the benefit of inferences reasonably deducible therefrom. *Snyder v. Lincoln* 611
37. A litigant is entitled to have his theory, when pleaded and supported by evidence, submitted to the jury, and it is error to refuse a proffered instruction warranted by evidence and correctly stating law applicable to the case, unless the matter is covered by instructions given by the court. *Snyder v. Lincoln* 611
38. A party to an action is entitled to have the jury instructed with reference to his theory of the case, when the pleadings present the theory as an issue and it is supported by competent evidence. *Loyal's Auto Exchange, Inc. v. Munch* 628
39. The giving of erroneous instructions is not cause for reversal, if the instructions are more favorable to the complaining party than he is entitled to under the law. *Loyal's Auto Exchange, Inc. v. Munch* 628
40. 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 an instruction is reasonably clear. *Brown v. Hyslop* 669
41. When different instructions are given on the same subject, they should be considered together, and if they fairly submit the case, it will not be reversed

for indefiniteness or ambiguity in one of the instructions. *Brown v. Hyslop* 669
42. In determining whether or not there was error in a sentence or clause of an instruction, it will be considered with the instruction of which it is a part and the 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. *Brown v. Hyslop* 669
43. Where a party has filed a motion for judgment notwithstanding the verdict and in the alternative for a new trial, and the trial court denies the motion for a new trial and makes no ruling on the motion for judgment notwithstanding the verdict, the denial of the motion for a new trial operates as a denial of the motion for judgment notwithstanding the verdict. *Lund v. Holbrook* 706
44. A judgment will not be reversed for error in overruling a motion for a directed verdict at the close of plaintiff's case when certain essential testimony was not then in the record, when, at the time of renewing the motion at the close of all the evidence, such testimony is in the record and its admission is not assigned as error in the Supreme Court. *Lund v. Holbrook* 706
45. The trial court must submit to and instruct the jury upon all material issues raised by the pleadings and supported by the evidence, whether requested to do so or not. *Lund v. Holbrook* 706
46. Where evidence improperly received is afterwards stricken out and expressly withdrawn from the jury, error involved in its reception is ordinarily cured. *Conley v. Hays* 733
47. Where no attempt is made to prove certain allegations of a petition, and the plaintiff abandons them as a ground of recovery, the issues as to such matters should be eliminated from the charge. *Conley v. Hays* 733
48. It is error to set forth literally or substantially the pleadings in an action when to do so is to place before the jury issuable matters which find no support in the evidence. *Conley v. Hays* 733
49. Where inadmissible evidence is allowed to be introduced on one side it is not error to refuse to admit evidence in rebuttal thereof. *Conley v. Hays* 733
50. The plaintiff in an action may meet by rebuttal evidence any admissible evidence adduced by the de-

fendant by evidence which is not a part of the evidence of the plaintiff in chief. *Conley v. Hays* 733

51. In a law action tried to a jury on substantially conflicting evidence and under proper instructions, the verdict of the jury will not be disturbed. *Clute v. Mach* 772

52. The unsupported testimony of the accused in a criminal case, which the jury does not believe, cannot be said to furnish a hypothesis consistent with the innocence of the accused. *Kitts v. State* 784

53. The court in a criminal action will not interfere with a verdict of guilty based upon conflicting evidence unless it is so lacking in probative force that, as a matter of law, it is insufficient to support a finding of guilt beyond a reasonable doubt. *Kitts v. State* 784

54. When the State offers the testimony of a deceased witness, it is analogous to the situation presented if the witness were living and had been offered to testify for the State. *Kitts v. State* 784

55. Where a deceased witness testified upon a former trial of the same party for the same offense, it is competent, upon a subsequent trial, to prove the testimony of such deceased witness. Such proof does not violate the provisions of the Constitution of the state which gives to the accused the right to meet the witnesses against him face to face. *Kitts v. State* 784

56. Counsel for the State may offer and read prior testimony of a deceased witness as he desires, to which no objection is made or which is competent, relevant, and material, under the issues presented, and is not required to offer or read all of the testimony. *Kitts v. State* 784

57. Counsel for defendant may offer and read, if he so desires, not only the cross-examination but also any omitted portions of the direct evidence given at a prior hearing by a witness now deceased, as evidence introduced by him who first offered it. Both situations are, however, subject to the test of competency, relevancy, and materiality. *Kitts v. State* 784

58. The publication of newspaper articles prior to the trial is not ground for a continuance where defendant has been given ample opportunity to determine on voir dire examination whether any of the prospective jurors have formed or expressed an opinion

as to the guilt or innocence of the defendant, as a result of having read such article. *Kitts v. State* 784

59. Where the jury has been clearly admonished not to read newspaper accounts of the trial, the granting or denying of defendant's request that the jurors be interrogated during the trial as to whether they have read newspaper accounts rests in the sound discretion of the trial court. *Kitts v. State* 784

60. When a jury has been clearly admonished not to do a certain act, the mere opportunity to violate that admonition without any proof of its violation provides no basis on which the Supreme Court can find that the trial court has abused its discretion in refusing to investigate the jury for such possible misconduct. *Kitts v. State* 784

61. It is the duty of the trial court to determine the issues upon which there is competent evidence and submit them to the jury. In a will contest on the ground of mental incompetency and undue influence, if the evidence is insufficient to sustain a verdict upon either of such issues in favor of the contestants, then the trial court should withdraw both issues from the jury and direct a verdict. *In re Estate of Benson* 824

62. The action of a trial court in making findings of fact not pleaded and basing a judgment thereon is prejudicially erroneous. *National Fire Ins. Co. v. Evertson* 854

Trover and Conversion.

1. An action in trover for the conversion of personal property cannot be maintained unless title, absolute or special, or right to immediate possession at the time of the alleged conversion is in the plaintiff. *Fitzsimons v. Frey* 550

2. In order to maintain an action for conversion of chattels, a party must have had actual possession of the property, or the right to immediate possession, at the time of the conversion. *Fitzsimons v. Frey* 550

Trusts.

1. Where property has been acquired by fraud equity at the suit of 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 such third person is in the position of a bona fide purchaser for value without notice, or has changed his position thereby so as to give rise to an equitable defense in his favor and against the plaintiff. *Meier v. Meyer* 222

2. An antecedent debt is not such a consideration as will have the effect of cutting off a 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. Meyer* 222

3. Regardless of the nominal duration of the trust it will not continue in equity longer than the thing sought to be secured by the trust demands. Consequently the trust will terminate as soon as it has been fully performed or executed, or where the object and purposes of the trust or its execution, performance, or accomplishment becomes impossible. *Dennis v. Omaha National Bank* 865

4. Where a testator by his will bequeaths and devises absolutely all of his estate and income therefrom to a trustee in trust to pay a part of the income therefrom monthly to his children, their issue or descendants, so long as any of his children survive and twenty years after the death of the last surviving child, the property then to vest in uncertain and unascertained remaindermen, then the whole estate or full title in fee simple, including the title of the then uncertain and unascertained remaindermen vests in the trustee, until they are certain and ascertained at termination of the trust. *Dennis v. Omaha National Bank* 865

5. Generally, where the legal and equitable estates in trust property unite in the same person, there is a merger of such estates and the trust is terminated. However, a merger does not take place until the legal and equitable titles vest in the same person, and even then equity may refuse to recognize a merger, as where such result would be contrary to the intention of the trustor and would destroy a valid trust. *Dennis v. Omaha National Bank* 865

6. Where complete disposition of an estate has been made by a will, which by language and necessity vested the whole of the fee in the trustee, defeasible only at termination of the trust, when it was to vest in a class, none of whom then or ever will exist,

and the trust is terminated by operation of law for failure of purpose or accomplishment, then the trustee holds the trust estate upon a resulting trust implied by intention, for the heirs of the testator who are such as of the date of the failure of the trust. *Dennis v. Omaha National Bank* 865

Vendor and Purchaser.

Possession of land is notice to the world of the rights of the person in possession and of all his interests of which inquiry of him would elicit knowledge. *Noetzelmann v. Noetzelmann* 133

Waters.

1. Where the evidence shows that a drainage ditch to be constructed for the purpose of draining a natural lake will result in damage to another person, the Department of Roads and Irrigation is required to deny an application for a permit to construct such ditch. *Lackaff v. Department of Roads and Irrigation* 217
2. The owner of land may drain the same in the general course of natural drainage by constructing an open ditch or tile drain, discharging the water therefrom into any natural watercourse or into any natural depression or draw, whereby such water may be carried into some natural watercourse. When such drain or ditch is wholly on the owner's land, he is not liable in damages therefor. *Pospisil v. Jessen* 346
3. An owner of land has the right in the interest of good husbandry to drain ponds or basins thereon of a temporary character, and which have no natural outlet or course of flow, by discharging the waters thereof by means of an artificial channel into a natural surface-water drain on his own property, and through such drain over the land of another proprietor in the general course of drainage in that locality, even though the flow in such natural drain is thereby increased over the lower estate upon condition that this is done in a reasonable and careful manner and without negligence. *Pospisil v. Jessen* 346
4. Water flowing in a well-defined watercourse cannot lawfully be diverted and cast upon the lands of another to his damage where it was not wont to run in the natural course of drainage. *Pospisil v. Jessen* 346
5. Where an obstruction in a natural drainage course constitutes a continuing and permanent injury to

landowners, such landowners may, on a proper showing, obtain a decree ordering the removal of the obstruction. *Pospisil v. Jessen* 346

6. Where a landowner wrongfully diverts waters flowing in a well-defined watercourse and casts them upon the lands of an adjoining landowner where it was not wont to run in its natural state, injunction affords a proper remedy. *Pospisil v. Jessen*.... 346

7. 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. This is a continuing duty. *Beetison v. Ballou* 360

8. A stream which is accustomed to extend itself beyond its banks in times of high water and to flow over the adjacent lands in its flood plane in a broader stream retains its character as a live stream, and the law relating to floodwaters applies. *Beetison v. Ballou* 360

9. The flood channel must be considered as a part of the channel of the stream. 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. *Beetison v. Ballou* 360

10. The owners or proprietors of lands 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. No one has the lawful right by diversions or obstructions to interfere with its accustomed flow to the damage of another. *Beetison v. Ballou* 360

11. A riparian owner may not dam, retard, or bank against the floodwaters of a running stream to the injury of lower proprietors. *Beetison v. Ballou* 360

12. Injunction is a proper remedy to prevent recurring damages to crops or continuing injury to lands by water unlawfully diverted from a natural watercourse over or upon lands of adjacent or adjoining proprietors. *Beetison v. Ballou* 360

13. Where a person constructs a dam or dike that diverts floodwater from its natural flood plane where it was wont to flow in its natural state for many years, injunction affords the proper remedy to relieve from the continuing damage from recurring floods which are certain to occur in the future and which are the

proximate result of the dam or dike construction. *Beetison v. Ballou* 360

14. Surface water is that which is diffused over the surface of the ground, derived from falling rains or melting snows, and continues to be such until it reaches some well-defined channel in which it is accustomed to and does flow with other waters. *Schomberg v. Kuther* 413

15. A proprietor may defend himself against the encroachments of surface water by embankment or dike or otherwise and will not be liable in damages which may result from the deflection and repulsion defended against, provided he is not negligent in so doing. *Schomberg v. Kuther* 413

16. Every proprietor may lawfully improve his property by doing what is reasonably necessary for that purpose, and unless guilty of some act of negligence in the manner of its execution, will not be answerable to an adjoining proprietor, although he may thereby cause the surface water to flow on the premises of the latter to his damage; but if, in the execution of such enterprise, he is guilty of negligence, which is the natural and proximate cause of injury to his neighbor, he is accountable therefor. *Schomberg v. Kuther* 413

17. A proprietor may not collect surface waters on his estate into a ditch or drain and discharge them in a volume on the lands of his neighbor, nor can he divert them so they go in a direction different from the natural flow. *Schomberg v. Kuther* 413

18. Where surface water resulting from rain and snow flows in a well-defined course, whether it be a ditch, swale, or draw in its primitive condition, its flow cannot be arrested or interfered with by a landowner to the injury of neighboring proprietors. *Schomberg v. Kuther* 413

19. Injunction is the proper remedy to prevent interference with the flow of surface water in a well-defined course. Equity looks to the nature of the injury inflicted, together with the fact of its constant repetition, or continuation, rather than to the magnitude of the damage inflicted, as the ground of affording relief. *Schomberg v. Kuther* 413

20. Equity will afford relief by injunction against a continuing injury to land caused by an unlawful discharge of surface waters by an adjoining landowner. *Schomberg v. Kuther* 413

21. An owner of land on the shore of an unnavigable river, in the absence of restrictions in his grant, owns to the thread of the stream and subsequent accretions formed by the gradual recession of the bank of the stream attach to and become a part of the grant. *Ohm v. Clear Creek Drainage District* 428
22. Land, to be riparian, must have the stream flowing over it or along its border. *Stratbucker v. Junge* 885
23. The basis of the riparian doctrine, and an indispensable requisite of it, is actual contact of the land with the water. *Stratbucker v. Junge* 885
24. The right to acquisition through an accession or reliction is one of the riparian rights. *Stratbucker v. Junge* 885

Wills.

1. In order to invalidate a will, undue influence must be of such a character as to destroy the free agency of the testator and substitute another person's will for his own. *In re Estate of Thompson* 375
In re Estate of Benson 824
2. In a will contest on the ground of undue influence the burden is on the contestant to prove by a preponderance of the evidence (1) that the testator was a person who would be subject to such influence, (2) that there was opportunity to exercise such influence, (3) that there was a disposition to exercise such influence, and (4) that the result was the effect of such influence. *In re Estate of Thompson* 375
In re Estate of Benson 824
3. Undue influence cannot be inferred alone from motive or opportunity. There must be some evidence, direct or circumstantial, to show that undue influence not only existed, but that it was exercised at the very time the will was executed. *In re Estate of Thompson* 375
4. A motion of proponents on the trial of a will contest made at the close of the evidence of the contestants to withdraw from consideration of the jury the issue of undue influence admits the truth of all material and relevant evidence submitted by the contestants, and they are entitled to have it and all inferences fairly deducible therefrom viewed in the most favorable light in testing the correctness of the ruling of the court granting the motion. *In re Estate of Thompson* 375
5. To establish undue influence, the evidence must tend

to show undue influence directly in reference to the will in question, and be of such a nature as to control the will of the testator and cause him to do something that he did not intend. Suspicion or supposition of undue influence is not sufficient to require the submission of the question to a jury or to sustain a verdict. *In re Estate of Thompson* 375

6. Mere suspicion, surmise, or conjecture is not enough to warrant a finding of undue influence. There must be a solid foundation of established facts upon which to rest an inference of its existence. This proposition applies with peculiar force when the result of drawing such an inference is to destroy the effect of a written instrument prepared with deliberation and signed and attested with all the formalities required by law for the execution of a will. *In re Estate of Thompson* 375

7. There may be influences directing the will-maker's attention to proper obligations which it might be thought ought to be satisfied by testamentary provisions. Such influences may be persuasive and effective, but, so long as not coercive, they are not undue. Circumstances often arise where such conduct is wholly justifiable. *In re Estate of Thompson* 375

8. The mere opportunity of the wife, when living happily with the husband, to influence the execution of a will favorable to herself is not alone sufficient to warrant submission to the jury of the question of undue influence. *In re Estate of Thompson* 375

9. Although in general confidential relations may raise strong suspicion of undue influence, this is not true to the same extent of the relation of husband and wife, where the relation has subsisted for a long time under circumstances which give rise to a strong legitimate influence and the disposition in question is not unjust or unnatural. *In re Estate of Thompson* 375

10. In a will contest on the ground of undue influence, if the evidence is insufficient to sustain a verdict upon that issue in favor of the contestants, the trial court should direct a verdict. *In re Estate of Thompson* 375

11. The making of a will which violates unperformed obligations of testator under a valid oral contract, after full performance by the other party, does not destroy the contract. *Sopcich v. Tangeman* 506

12. A suit in the district court to enforce the specific performance of a parol agreement to devise real

property and to quiet title in the plaintiff, as against those claiming under a will duly allowed and admitted to probate in the county court, is not a collateral attack on the judgment admitting such will to probate. *Sopcich v. Tangeman* 506

13. Specific performance of an oral agreement to make a will will not be enforced where there has been a substantial failure of performance by the party seeking enforcement of the agreement. *Sopcich v. Tangeman* 506

14. The term "elevator property" as used in a will may be construed to include the physical structures, the leasehold, the merchandise on hand for use and being used in the transaction of the business, the outside equipment used in pursuit of the business, and certain cash on hand. *Scriven v. Scriven* 655

15. In determining the intention of a testator it is the duty of the court to examine the will and give to it the true intent of the testator as it is expressed in the will. *Scriven v. Scriven* 655

16. Parol evidence is inadmissible to determine the intent of a testator as expressed in his will, unless there is a latent ambiguity therein which makes his intention obscure or uncertain. *Scriven v. Scriven* 655

17. A legacy which is specific but alternative as distinguished from a general one remains specific and payable ahead of general legacies unless an intent that it shall abate as a specific legacy is apparent from the will. *Scriven v. Scriven* 655

18. An answer to a petition for probate of a will raising only the question of the statutory formality of the execution of a will which imposes no greater burden on the proponent than that imposed by statute is not in a true sense a contest of the will. *Scriven v. Scriven* 655

19. The mental capacity of a testator is tested by the state of his mind at the time he executed his will. If a testator knows the extent and character of his property, the natural objects of his bounty, and the purposes of his devises and bequests, he is mentally competent to make a will. *In re Estate of Benson* 824

20. In a will contest based on objection that the testator was mentally incompetent to make a will the burden devolves on the proponent to make a prima facie case that the testator was mentally competent. The burden then devolves on the contestant to produce

sufficient evidence to support a contrary finding by a jury. *In re Estate of Benson* 824

21. In order that a will may be rejected on the ground of incompetency of the testator the evidence of the contestant must be sufficient to sustain a reasonable inference that the testator was incompetent to make a will. *In re Estate of Benson* 824

22. A testator may dispose of his property as he pleases. The law does not require that he recognize his relatives therein, nor does it put any obstacle in the way of the aged or infirm in making disposition of their property by will; provided, only, that their mentality conforms to the accepted tests at the time of the execution of such testamentary instrument. *In re Estate of Benson* 824

23. It is the duty of trial courts to determine the issues upon which there is competent evidence and submit them to the jury. In a will contest on the ground of mental incompentency and undue influence, if the evidence is sufficient to sustain a verdict upon either of such issues in favor of the contestants, then the trial court should withdraw both issues from the jury and direct a verdict. *In re Estate of Benson* 824

24. Extrinsic evidence is not admissible for the purpose of changing a will or in the making of a new one which was intended by the testator but which was not in fact made by him. *Borah v. Lincoln Hospital Assn.* 846

25. In construing a will the whole thereof will be considered and from its four corners the court will determine the intent of the testator and give effect thereto, and extrinsic evidence is not admissible to determine the intent of the testator as expressed in his will unless there is a latent ambiguity. *Borah v. Lincoln Hospital Assn.* 846

26. In case of a latent ambiguity which consists of an erroneous description of a beneficiary, sufficient language must remain in the will, which, together with extrinsic evidence, will identify the intended beneficiary with reasonable certainty, otherwise the legacy is void. *Borah v. Lincoln Hospital Assn.* 846

27. Extrinsic evidence is admissible to prove that a will contains a latent ambiguity and to explain the ambiguity for the purpose of arriving at the true intent of the testator. *Borah v. Lincoln Hospital Assn.* 846

28. The intent which may be shown must be the intent

which the testator had when he employed the words which appear in the will. *Borah v. Lincoln Hospital Assn.* 846

29. Where a latent ambiguity consists of an erroneous description of a beneficiary, such erroneous description will not avoid the legacy if it can be struck out and from the remaining portion, together with proof dehors the instrument, the intended beneficiary clearly appears. *Borah v. Lincoln Hospital Assn.* 846

30. When a description is found in a will which does not accurately apply to anybody and the alternatives are either that it means nothing and the bequest fails, or that an effort may be made to ascertain the identity of the person intended, extrinsic evidence should be admitted to aid in ascertaining such identity. *Borah v. Lincoln Hospital Assn.* 846

31. In interpreting a will containing no ambiguity the court must ascertain the intent and purpose of the testator as disclosed by the language of the will and then give effect thereto if not contrary to law. *Dennis v. Omaha National Bank* 865

32. Where provisions in a will are couched in correct grammatical language, they will be given the ordinary and natural meaning which that language imports, unless it clearly appears from the whole instrument that a different meaning was intended. *Dennis v. Omaha National Bank* 865

33. Where particular words in a will are followed by general, the general words are ordinarily restricted in meaning to provisions of like kind. *Dennis v. Omaha National Bank* 865

34. In the interpretation of language used in a will, where a word or words are used in a definite and clearly stated sense, and again used in the same paragraph, it is presumed to be meant in the same sense unless there is a clear indication to the contrary. *Dennis v. Omaha National Bank* 865

35. A testator will be presumed to have executed his will with knowledge of applicable rules of law, and in interpreting his will such knowledge will be imputed to him. *Dennis v. Omaha National Bank* 865

36. Where a testator by his will bequeaths and devises absolutely all of his estate and income therefrom to a trustee in trust to pay a part of the income therefrom monthly to his children, their issue or descendants, so long as any of his children survive and twenty years after the death of the last surviv-

ing child, the property then to vest in uncertain and unascertained remaindermen, then the whole estate or full title in fee simple, including the title of the then uncertain and unascertained remaindermen vests in the trustee, until they are certain and ascertained at termination of the trust. *Dennis v. Omaha National Bank* 865

37. Where complete disposition of an estate has been made by a will, which by language and necessity vested the whole of the fee in the trustee, defeasible only at termination of the trust, when it was to vest in a class, none of whom then or ever will exist, and the trust is terminated by operation of law for failure of purpose or accomplishment, then the trustee holds the trust estate upon a resulting trust implied by intention, for the heirs of the testator who are such as of the date of the failure of the trust. *Dennis v. Omaha National Bank* 865

38. Where all claiming as heirs of the testator on the date of the failure of the trust claim through the same ancestors, and are not collateral kindred in equal degree, the exception in the statute of descent and distribution on inheritance by collateral kindred has no application. *Dennis v. Omaha National Bank* 865

Witnesses.

1. A witness may be impeached by showing that he testified differently on a former trial of a case than he did at a subsequent trial thereof in regard to a matter relevant to the issue. *Schluter v. State* 317

2. An impeaching declaration is not substantive evidence of the fact declared, unless made against interest by one who is a party to the record, and is received only to aid the court or jury in estimating the character and credibility of the witness. *Schluter v. State* 317

3. Ordinarily the speed of an automobile is not a matter of exclusive expert knowledge. Any one who has knowledge of time and distance and a reasonable opportunity to formulate a basis for an opinion is a competent witness to give an estimate of speed. *Schluter v. State* 317

4. A witness who has shown himself qualified to give an opinion as to the speed of a motor vehicle may do so even though it had bright headlights and was coming directly toward him in the nighttime.

Such facts go to the weight and not the competency of the evidence. *Schluter v. State* 317

5. Intoxication is a fact which a witness may learn as he ascertains other facts. He may give the details upon which he bases his conclusion and may then state the ultimate fact of intoxication as derived from his observation of the person alleged to have been intoxicated. *Schluter v. State* 317

6. An unexplained variance in the evidence of a litigant on a material fact from that given at a previous trial, not required by the exigencies pointed out in the previous trial, is a matter of impeachment, credibility, and weight for the jury to determine. The evidence of such witness is not incredible as a matter of law. *Armer v. Omaha & Council Bluffs St. Ry. Co.* 352

7. A witness may be impeached by showing that he made statements out of court contrary to those made in court in regard to a matter or matters relevant to the issue. *Lund v. Holbrook* 706

8. Where a deceased witness testified upon a former trial of the same party for the same offense, it is competent, upon a subsequent trial, to prove the testimony of such deceased witness. Such proof does not violate the provisions of the Constitution of the state which gives to the accused the right to meet the witnesses against him face to face. *Kitts v. State* 784

9. When the State offers the testimony of such a deceased witness, it is analogous to the situation presented if the witness were living and had been offered to testify for the State. *Kitts v. State* 784

10. Counsel for the State may offer and read prior testimony of a deceased witness as he desires, to which no objection is made or which is competent, relevant, and material, under the issues presented, and is not required to offer or read all of the testimony. *Kitts v. State* 784

11. Counsel for defendant may offer and read, if he so desires, not only the cross-examination but also any omitted portions of the direct evidence given at a prior hearing by a witness now deceased, as evidence introduced by him who first offered it. Both situations are, however, subject to the test of competency, relevancy, and materiality. *Kitts v. State* 784

12. Where one partner of a law partnership over a

period of years represented a client of the firm and drafted a will which is subsequently contested, requiring him to testify as a witness as to the testamentary capacity of the testator at the time the will was executed, and he participated no further in the case, under the rules of professional ethics recognized by the Supreme Court another member of the law firm is not barred from trying the case. *In re Estate of Benson* 824

Workmen's Compensation.

1. The function of the Supreme Court in a workmen's compensation case is to consider the case de novo unless from the record it appears that the findings are conclusively supported by the evidence. *Tucker v. Paxton & Gallagher Co.* 1
2. The word "accident" within the meaning of the Workmen's Compensation Act means an unexpected or unforeseen event happening suddenly and violently, with or without human fault, and producing objective symptoms of an injury. *Tucker v. Paxton & Gallagher Co.* 1
3. The burden is upon the plaintiff in a workmen's compensation action to prove by a preponderance of the evidence that personal injury was caused by an accident arising out of and in the course of his employment. *Tucker v. Paxton & Gallagher Co.* 1
4. A plaintiff in a workmen's compensation action is entitled to recover an award if he has shown by a preponderance of the evidence that he has sustained injury resulting from an accident arising out of and in the course of his employment even if preexisting disability combined to produce his disability. *Tucker v. Paxton & Gallagher Co.* 1
5. In the workmen's compensation law the word "willful" in its relation to negligence of an employee while in the performance of duty, means deliberate act; conduct evidencing reckless indifference to safety; more than want of ordinary care but not necessarily amounting to wantonness but approximating it in degree. *Schroeder v. Sharp* 73
6. The burden of proof to establish willful negligence of the injured employee is on the employer. *Schroeder v. Sharp* 73
7. The filing of the statement of error on an appeal from an award of a single judge of the compensa-

tion court is not a jurisdictional requirement. *Peek v. Ayres Auto Supply* 239

8. On an appeal from the district court in a compensation case a trial de novo in the Supreme Court is not authorized where findings of fact do not appear from the record to have been made by the tribunal required to make the same. *Peek v. Ayres Auto Supply* 239

9. Under the Workmen's Compensation Act the relation of employer and employee is dependent upon the contract for hire. *Shamburg v. Shamburg* 495

10. The relation of employer and employee is the same relation as is familiar throughout the law under the name of master and servant, except that to be an employee, as distinguished from a servant, one must serve under a contract of hire. *Shamburg v. Shamburg* 495

11. In ascertaining when a person is an employee of another, although his contract of employment is not directly made with such person, each case must be decided on its peculiar facts and ordinarily no one feature of relationship is determinative. *Shamburg v. Shamburg* 495

12. The general test in determining whether an employee is a servant of his original master or of the party to whom he has been furnished is whether in the particular service which he is engaged to perform he continues to be liable to the direction and control of his master, or becomes subject to that of the party to whom he is lent or hired. Other factors are looked to only to aid in determining whether such relationship exists in a given case. *Shamburg v. Shamburg* 495

13. In order to transfer liability from the general employer of a loaned employee to the borrowing employer, there must be some consensual arrangement sufficient to create a new employer-employee relationship. *Shamburg v. Shamburg* 495

14. Where an employee at the command and pursuant to the direction of his employer enters the service of another, no new employer-employee relationship is created; the consent necessary to shift the employer-employee relationship from the general to the special employer cannot be inferred from the fact that the employee obeyed the commands of the master in entering such service. *Shamburg v. Shamburg* 495

15. From a review of the evidence in this case, the loaned employee at all times remained the employee of the original employer with whom he had a contract for hire, and the compensation award entered by the district court is conclusively supported by the evidence. *Shamburg v. Shamburg* 495

Zoning.

1. Cities of the metropolitan class are, for the purpose of promoting the health, safety, morals, or the general welfare of the community, empowered to regulate and restrict the height, number of stories, and size of buildings and other structures; the percentage of lot that may be occupied; the size of yards, courts, and other open spaces; the density of population; and the location and use of buildings, structures, and land for trade, industry, residence, or other purposes. *Davis v. City of Omaha* 460
2. In zoning a city, the city council may divide the municipality into districts of such number, shape, and area as may be deemed best suited to carry out the purposes of regulation. Within such districts it may regulate, restrict, or prohibit the erection, construction, reconstruction, alteration, or use of buildings, structures, or land. All such regulations must be uniform for each class or kind of buildings throughout each district, but the regulations in one district may differ from those in other districts. *Davis v. City of Omaha* 460
3. Restrictions upon the power to zone are that such regulations shall be made in accordance with a comprehensive plan and specified statutory elements. Such regulations must be made with reasonable consideration, among other things, as to the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout the municipality. *Davis v. City of Omaha* 460
4. The zoning of property is permissible under the police power and its exercise may not be denied on the ground that individual property rights may be adversely affected. *Davis v. City of Omaha* 460
5. The validity of a zoning ordinance will be presumed in the absence of clear and satisfactory evidence to the contrary. *Davis v. City of Omaha* 460
6. In zoning what relates to the public good is a

question primarily for determination by the zoning authority and in the absence of violation of law or unreasonable or arbitrary action its determination will be allowed to control. *Davis v. City of Omaha* 460

7. The courts will in an appropriate action instituted for that purpose declare invalid a zoning ordinance where it is made to appear that such ordinance is unreasonable and arbitrary. *Davis v. City of Omaha* 460