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HARRY BAEDARO, DOING BUSINESS AS BILL'S CAFE, APPELLEE, v. HAROLD P. CALDWELL ET AL., APPELLANTS.

56 N. W. 2d 706

Filed January 23, 1953. No. 33212.

1. **Constitutional Law: Gaming.** Article III, section 24, of the Constitution prohibits any game of chance no matter what is given for the play.
2. ———: ———. Within the contemplation of Article III, section 24, of the Constitution and section 28-945, R. R. S. 1943, a five-ball pinball machine which gives a player an additional free game or games upon obtaining a high enough score is a game of chance played for money or property and is prohibited in this state.

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

Clarence S. Beck, Attorney General, *Dean G. Kratz, Edward F. Fogarty,* and *Eugene F. Fitzgerald,* for appellants.

White, Lipp & Simon, for appellee.

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

MESSMORE, J.

The plaintiff Harry Baedaro brought this action in the district court for Douglas County for the purpose of obtaining a declaratory judgment declaring the five-ball pinball machine installed in his place of business is not a gambling device within the meaning of section 28-945, R. R. S. 1943, and for an injunction to prohibit the defendants, who are law enforcing officers, from arresting him, confiscating the pinball machine, or interfering with its operation and use. Trial was had. The district court found that there was a justifiable controversy between the plaintiff and defendants and the case was a proper one for declaratory judgment; denied the plaintiff's prayer for an injunction; found that a

coin-operated five-ball pinball machine of the type and character of the machine in question was not adapted, devised, or designed for the purpose of playing any game of chance for money or property or for betting or gambling, and that such machine was not per se a gambling device; and found that the extension of playing time or the giving of additional free game or games achieved by the player by manual operation of the machine in acquiring a predetermined score, where such extension of playing time is not exchanged for money or property, did not constitute money or property and was not in violation of the criminal statutes of Nebraska, and particularly section 28-945, R. R. S. 1943. The defendants filed motions for new trial which were overruled. Defendants perfected appeal to this court.

The principal assignments of error predicated by the appellants and determinative of this appeal may be summarized as follows: (1) That the district court erred in declaring the pinball machine in controversy is not per se a gambling device; (2) that the district court erred in declaring the extension of playing time secured by a player by manual operation of the machine in obtaining a predetermined score does not constitute money or property and is not violative of the criminal statutes of this state; and (3) that the judgment of the district court is contrary to the law and the evidence.

The record discloses that the appellee operates a restaurant in the city of Omaha. The five-ball pinball machine in controversy is installed in his place of business. This pinball game may be briefly described as follows: It is a mechanically modified game of bagatelle operated under a combination of mechanical, electrical, and manual devices, and consists of a cabinet about 3 feet high with a sloping surface 2 feet by 4 feet on which are installed a number of scoring holes or receptacles and an arrangement of bumpers and obstacles. The playing surface is encased by a glass-

topped cover. There is a spring-operated catapult by the use of which a steel ball or marble is propelled upon the playing surface. At the back of the playing surface is a glass-covered scoring board. Each of the holes, receptacles, bumpers, and obstacles is electrified so that contact with the steel ball registers a score, the amount of the score varying. The object of the game is for the player to cause the steel ball to make contact with as many obstacles as possible, and particularly those which yield the highest score. To play the machine a person inserts a nickel in a coin-receiving device which releases five steel balls or marbles for playing. By means of a manually-operated lever the player causes one ball at a time to be placed in position before the catapult. The player propels the ball by pulling back the spring-powered catapult discharging the ball onto the playing surface. When the player has thus discharged successively each of the five balls onto the playing surface the machine locks and his right to play for the nickel deposited is ended unless the player achieves a predetermined score. In this event the player may continue to play until having failed to achieve the predetermined score. The machine then automatically locks. There are certain other attachments and equipment on the machine which will be referred to and discussed later in the opinion.

It was stipulated that the appellee has paid all taxes of every kind and nature required to be paid by him with reference to the machine. Also, it was stipulated that in the event the machine is used or operated by a player whereby the player may receive an additional free game, or games, by achieving a predetermined score, the defendant law enforcing officers will prosecute the appellee under section 28-945, R. R. S. 1943; and that the appellee intends and desires to offer the playing of the game as recreation, amusement, and diversion for his patrons and invitees.

The legality of a five-ball pinball machine of the type

and character being considered here has never been determined in Nebraska.

In determining this appeal the following are applicable: The Constitution of Nebraska provides that the Legislature shall not authorize any game of chance, lottery, or gift enterprise. See Art. III, § 24, Constitution.

Section 28-945, R. R. S. 1943, provides in part: "Whoever shall set up or keep any * * * gambling device or gaming machine of any kind or description, under any denomination or name whatsoever, adapted, devised and designed for the purpose of playing any game of chance for money or property * * *" shall be punished as provided for in said section of the statute.

The first question to determine is whether or not the pinball machine involved in this case, as heretofore described, is a game of chance prohibited by the Constitution of the state and condemned by section 28-945, R. R. S. 1943.

The appellee contends the machine is designed so that a successful player must use up his right to continuing play, and said right cannot be canceled out by any device but must be exhausted in play. In this connection the machine is not equipped with a knock-off button which is a device that registers the number of games that were won by a player but which were not actually played off. In addition, the machine is equipped with two flippers at the bottom portion of the machine controlled by buttons placed on the side of the machine. The machine contains a tilt device which locks the machine if the player employs too much manual abuse.

Further, the appellee contends, and evidence is introduced to the effect, that a player, by the exercise of manual manipulation and the use of the flipper, is able to control the action of the ball in that it may be deflected, retarded, or repelled toward the scoring objectives as it rolls in gravity toward the lower portion of the playing surface; that the player may influence the course of the ball by shaking or moving the machine;

that as the ball leaves the top of the playing surface in its course to the bottom of the playing surface, the player has another opportunity to control the ball and to force it back onto the upper portion of the playing surface by means of the flippers; and that by the use of the flippers, referred to as "flipper controls," the ball is caused to score the maximum which the player's skill can accomplish.

Contra, the evidence shows the player is unable to determine from the degree of force applied to the catapult in what direction the ball will roll down the inclined board, is unable to shoot the ball into any lane he chooses, and is unable by the use of the catapult to direct the ball toward the flipper device. When the ball reaches the playing surface it may go in any direction, and cannot be controlled. All five balls may be played at once, completely uncontrolled. The acquiring of a free game, or games, is made in the event the player gets a high enough score, which is determined by the balls, over which the player has very little control, striking certain bumpers and dropping into certain holes. The machine was played in open court by a player qualified as an expert and by a novice. The result was that the expert received varying scores on three separate occasions, and a lower score than that obtained by the novice.

It is apparent from the evidence that the player cannot direct the ball by physical manipulation, nor can the ball be directed by the use of the catapult. When free games are obtained, it is through the element of chance.

The test of the character of the game is not whether it contains an element of chance or an element of skill, but which of these is the dominating element that determines the result of the game. See 24 Am. Jur., Gaming and Prize Contests, § 18, p. 410. See, also, Annotation, 135 A. L. R. 112; City of Milwaukee v. Burns, 225 Wis. 296, 274 N. W. 273.

A game of chance is one in which the result as to success or failure depends less on the skill and experience of the player than on purely fortuitous or accidental circumstances incidental to the game or the manner of playing it or the device or apparatus with which it is played, but not under the control of the player. See 38 C. J. S., Gaming, § 1, p. 35.

It is true that with practice a player may develop some skill which would aid him in bringing about the successful result of obtaining the right to a replay; but even with such practiced manipulator the chances of success in the playing of the five balls allotted to him are few and far between, and the opportunity for skill to have any appreciable effect on the result of the play is almost completely overshadowed by the element of chance. See, Steely v. Commonwealth, 291 Ky. 554, 164 S. W. 2d 977; Commonwealth v. Bowman, 267 Ky. 602, 102 S. W. 2d 382; Commonwealth v. Miller, 246 Ky. 83, 54 S. W. 2d 632; State v. Coats, 158 Or. 122, 74 P. 2d 1102; Alexander v. Hunnicutt, 196 S. C. 364, 13 S. E. 2d 630; Hunter v. Mayor, 128 N. J. Law 164, 24 A. 2d 553; State v. Abbott, 218 N. C. 470, 11 S. E. 2d 539; Hoke v. Lawson, 175 Md. 246, 1 A. 2d 77.

As stated in State ex rel. Dussault v. Kilburn, 111 Mont. 400, 109 P. 2d 1113, 135 A. L. R. 99: "While the evidence shows that by long practice a certain amount of skill may be developed, yet we must view the operation and result of the machine as it is played by the mass of the patronizing public, with whom it is purely a game of chance."

The language contained in Article III, section 24, of the Constitution is clear, explicit, and unambiguous that the Legislature shall not authorize any game of chance. Section 28-945, R. R. S. 1943, conforms to the constitutional provision in banning any game of chance in this state. We conclude that under the evidence and the authorities cited the pinball machine in the instant case is a game of chance.

Is a pinball machine or bagatelle machine which is coin-operated and which automatically gives the successful player free plays on the machine, depending on the score he makes, a gambling device?

The evidence shows that the machine here considered has very little play when the play is one game for a nickel deposited. However, the chance to obtain a predetermined high score by virtue of which the player may win one or more free games is the inducement to play the machine, and players are allured or enticed to play it for that reason.

Anything affording necessary lure to indulge the gambling instinct and appeal to the gambling propensities of man is a gambling device. See State ex rel. Hunter v. Omaha Motion Picture Exhibitors Assn., 139 Neb. 312, 297 N. W. 547.

A gambling device is any instrument adapted and designed to play any game of chance for money or property. See, State v. Doe, 242 Iowa 458, 46 N. W. 2d 541; State v. Wiley, 232 Iowa 443, 3 N. W. 2d 620; Oatman v. Davidson, 310 Mich. 57, 16 N. W. 2d 665; State v. Jaskie, 245 Wis. 398, 14 N. W. 2d 148.

We conclude under the evidence and the authorities heretofore cited that the pinball machine here in issue is a gambling device.

The question is raised as to whether or not the five-ball pinball machine here considered is a game designed for the purpose of playing for money or property within the purview of section 28-945, R. R. S. 1943. Previously in this opinion we have cited cases from a number of jurisdictions that have passed upon the legality of machines of the type and character as in the instant case and machines analogous to the pinball machine. For the most part jurisdictions passing upon the issues as appear in the instant case have, under their respective statutes, banned the machines. The statutes of the various states differ in the language used, in some instances the play of the machine is for money or a thing of value,

or similar terms, or, as in section 28-945, R. R. S. 1943, "for money or property."

The appellee's contention is that the words "money or property" as used in section 28-945, R. R. S. 1943, have no application to a machine such as the one at bar, for the reason that there is no play for money, and free games do not constitute property. In this connection we believe the following applicable to the instant case: A predecessor to the pinball machine was what is known as a mint-vending machine. In a majority of the decisions from foreign jurisdictions mint-vending machines, which by chance occasionally delivered discs to the player, have been held to be a gambling device, even though the discs were exchanged for nothing other than additional whirls of the machine. The basis of such holding is that free games are things of value. See, State ex rel. Manchester v. Marvin, 211 Iowa 462, 233 N. W. 486; Howell v. State, 184 Ark. 109, 40 S. W. 2d 782; Painter v. State, 163 Tenn. 627, 45 S. W. 2d 46, 81 A. L. R. 173; Jenner v. State, 173 Ga. 86, 159 S. E. 564; State v. Mint Vending Machine, 85 N. H. 22, 154 A. 224. There are many other cases to the same effect which we deem unnecessary to cite. It seems reasonable, if free plays of the mint-vending machine are things of value, that free games upon a device such as described in the instant case are likewise things of value. If one game is worth a nickel, it is clear that additional games are things of value, and the rule is the same whether the machine emits discs with which it can be replayed, or works automatically as in the instant case. See State v. Wiley, *supra.*

In Kraus v. City of Cleveland, 135 Ohio St. 43, 19 N. E. 2d 159, this language appears: "Amusement is a thing of value. Were it not so, it would not be commercialized. * * * Since amusement has value, and added amusement has additional value, and since it is subject to be procured by chance without the payment of additional consideration therefor, there is involved in the game three ele-

ments of gambling, namely, chance, price and a prize." See, also, Couch v. State, 71 Okl. Cr. 223, 110 P. 2d 613; State ex rel. Green v. One 5¢ Fifth Inning Base Ball Machine, 241 Ala. 455, 3 S. 2d 27.

In any event, the obligation on our part is to interpret section 28-945, R. R. S. 1943, and, from the language contained therein, to discern whether or not the machine in issue comes within the statute and should, if it does, be prohibited insofar as the free games are allowed the player in obtaining a predetermined score.

It must be remembered that the dominant intention of the Legislature in enacting the gambling statutes was for the purpose of eliminating gambling devices. As previously stated, Article III, section 24, of our Constitution prohibits any game of chance. This means that the machine is prohibited in any event if it is a game of chance no matter what is given for the play. The use of the word "property" in section 28-945, R. R. S. 1943, when considered and construed with the constitutional provision means anything of value. The free games obtained in the manner heretofore discussed would then constitute property within the contemplation of the constitutional provision and section 28-945, R. R. S. 1943, construed therewith.

We conclude the five-ball pinball machine in issue is a game of chance played for money or property, and intended to be prohibited by the law of this state.

The judgment of the district court is reversed and the cause remanded with directions to enter judgment in conformity with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

THRESSIE M. BAY, APPELLANT, V. NORMAN ROBERTSON, APPELLEE.

56 N. W. 2d 731

Filed January 23, 1953. No. 33213.

1. **Negligence.** Contributory negligence, in its legal signification, is such an act or omission on the part of a plaintiff, amounting to a want of ordinary care, as, concurring or cooperating with the negligent act of the defendant, is a proximate cause or occasion of the injury complained of.
2. **Negligence: Trial.** The mere fact that contributory negligence may be pleaded as a defense does not justify the submission of that issue to the jury where there is no evidence to support it.
3. ———: ———. Ordinarily, contributory negligence is a question for the jury; but, where there is no basis in the evidence for a finding of contributory negligence, it is error to instruct on the subject and thereby to submit to the jury an issue which is outside the evidence.

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

William S. Padley, for appellant.

Bernard B. Smith and *Elbert H. Smith,* for appellee.

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

MESSMORE, J.

This action was instituted in the district court for Dawson County by Thressie M. Bay as plaintiff against Norman Robertson defendant. The purpose of the action was to recover for personal injuries and property damage which the plaintiff received in an accident involving her automobile and the defendant's truck, driven by him, allegedly caused by the negligence of the defendant in the operation of the truck. The case was tried to a jury on the issues of negligence of the defendant, contributory negligence of the plaintiff, and on the comparative negligence of plaintiff and defendant. The jury returned a verdict in favor of the plaintiff and against the defendant in the amount of $644.60. The plaintiff filed a motion

for new trial which was overruled. Plaintiff perfected appeal to this court.

For convenience we will hereafter refer to the parties as originally designated in the district court.

It appears from the record that on November 15, 1950, the plaintiff was the owner of a 1935 model two-door Chevrolet. The defendant owned a 1950 Ford tractor and semitrailer equipped with hydraulic brakes on the rear wheels of the tractor and vacuum brakes on the trailer. The truck had a four-speed transmission. At the time of the accident the truck was loaded with five-high baled straw, 6½ tons in weight. The plaintiff resides in Kearney and is a traveling saleslady for a silverware concern. On November 15, 1950, between the hours of 10 and 11 p. m., she left Gothenburg, traveling east on U. S. Highway No. 30 at a rate of speed of 35 to 40 miles an hour. The highway was dry, and the weather clear and cold. She continued to drive east at the same rate of speed.

The plaintiff testified that as she was driving east on her own side of the highway she was watching for traffic ahead of her, and traffic that might be behind her by looking into the rear-view mirror on her car. There were no cars in front of her driving in the same direction. The traffic seemed to be some distance from the front of her, coming towards her, and behind her. All at once bright lights shown into her car. She looked into the rear-view mirror and saw what she believed to be a truck, but was not sure. This vehicle appeared to be running bumper to bumper with her car. She glanced to the front to see if the truck was there or had gone around her, but could see that it had dropped back quite a little ways. She observed traffic approaching from the opposite direction, quite a distance away. She could barely see the lights. She did not remember whether that oncoming traffic met her car or not. The first thing she knew glass was crashing and the vehicle behind her had run into the rear of her car. After her

car was struck it was pushed straight down the highway, she did not know how far. When it finally stopped, two men came to the door and asked her if she was hurt. Her car was pushed onto the shoulder of the highway. The rear end was mashed in. She tried to open one of the doors and it nearly fell off. The body of the car was knocked out of line.

The defendant testified that he was engaged in the trucking business and owned two trucks. The 1950 Ford tractor with the semitrailer was the one involved with the plaintiff's car in the accident which occurred about 3½ miles east of Gothenburg. He was traveling behind the plaintiff's car, and when about a block distant from her car he pulled out to pass. He believed he had a lot of time as far as the traffic ahead was concerned. As he moved along beside the plaintiff's car he was unable to proceed as fast as he thought he would be, and when he got within 50 to 100 feet he saw he could not pass for the reason that there was a car coming towards him awfully fast. He estimated the speed of this car to be 70 miles an hour. It had bright lights. He dimmed his lights but believed the oncoming car did not. He pulled back into his own lane of traffic. Defendant further testified that he believed the plaintiff's car must have "slowed up, or something" because he thought he had a lot of room, and the next thing he knew he was right behind the plaintiff's car. He tried to stop, but struck the rear end of the plaintiff's car. It was a direct blow, his truck coming into contact with the back of the plaintiff's car. He slammed on his brakes and endeavored to stop the whole outfit. He brought his outfit to a stop about 150 feet distant, both the plaintiff's car and his truck proceeding straight down the highway that distance. He pushed the plaintiff's car off onto the shoulder of the highway with his truck. The two vehicles had become hooked together on the pavement and continued so when they were pulled off onto the shoulder of the highway. One taillight on the left side of the

plaintiff's car was burning. To get the plaintiff's car and his truck apart, the plaintiff's car was turned to the shoulder of the highway and it came loose as it went over into the shoulder.

On cross-examination the defendant testified that the plaintiff was going a little slower than he was. He was not gaining on her very fast, and he was traveling about 40 miles an hour. There was a distance of 50 feet between his truck and the plaintiff's car when he pulled back into his lane of traffic. The plaintiff's car had no stop light on it, and he had no way of telling whether she slowed her car down or not. The only observation he could make in this respect was the distance between the two vehicles. The difference in speed between the plaintiff's car and his truck when he endeavored to pass was 5 to 10 miles an hour. At that time he was traveling at a rate of speed of 40 to 45 miles an hour while the plaintiff was traveling at 30 to 35 miles an hour. When he pulled back into his lane of traffic he was maintaining the same rate of speed and thought the minute the oncoming car would pass he would proceed around the plaintiff's car. He further testified that he could not automatically increase his speed to go around the plaintiff's car with the truck loaded as it was. After his truck was stopped he went over to the plaintiff and asked her if she was hurt.

An employee of the defendant who was driving one of his trucks testified that he was about 60 rods behind the defendant's truck proceeding in the same direction. He saw a puff of dust and believed that the defendant had a flat tire. He slowed down as there was a car coming from the opposite direction and he figured he should drive to the shoulder of the road. He stopped about 100 feet behind the defendant's truck. By direction of the defendant he put up flares. He did not help with the wreckage for that reason.

A traffic enforcement officer of the Nebraska Safety Patrol on duty arrived at the scene of the accident about

11:30 p. m. At that time the vehicles had been moved off onto the shoulder of the highway and were upright and headed in an easterly direction. He asked the defendant how the accident happened and the defendant told him that he was "trying to jockey" traffic, that he saw the oncoming traffic and tried to maintain his speed in order to keep going and pass the plaintiff's car. He thought he would have time enough to swing around the plaintiff's car before the car approaching from the opposite direction met the plaintiff's car; that he had misjudged the speed of the oncoming car and did not have time to apply his brakes; and that in returning to his lane of traffic his truck struck the rear end of the plaintiff's car. This witness testified that there was a standard taillight that was still burning on the plaintiff's car; that there was no opportunity to make measurements with reference to the distance from the point of impact to the place where the vehicles stopped; and that he was unable to determine where the truck and the plaintiff's car came together on the highway. There was no indication of black marks on the pavement to the rear of where he found the two vehicles. If there was any debris on the highway it was slight; he noticed none. He made a report which showed there were no defects on the vehicles involved which had anything to do with the accident.

The plaintiff assigns as error that the district court erred in submitting any question of contributory negligence on behalf of the plaintiff, for the reason that no evidence was introduced from which any contributory negligence could be charged to the plaintiff.

Under the facts as to the submission of contributory negligence to the jury, the following authorities are applicable:

"Contributory negligence, in its legal signification, is such an act or omission on the part of a plaintiff, amounting to a want of ordinary care, as, concurring or cooperating with the negligent act of the defendant,

is a proximate cause or occasion of the injury complained of.

"The mere fact that contributory negligence may be pleaded as a defense does not justify the submission of that issue to the jury where there is no evidence to support it.

"Ordinarily, contributory negligence is a question for the jury; but, where there is no basis in the evidence for a finding of contributory negligence, it is error to instruct on the subject and thereby to submit to the jury an issue which is outside the evidence." Hartford Fire Ins. Co. v. County of Red Willow, 149 Neb. 10, 30 N. W. 2d 51. See, also, Andersen v. Omaha & C. B. St. Ry. Co., 116 Neb. 487, 218 N. W. 135; Koehn v. City of Hastings, 114 Neb. 106, 206 N. W. 19; Stephenson v. De Luxe Parts Co., 133 Neb. 749, 277 N. W. 44; Allen v. Clark, 148 Neb. 627, 28 N. W. 2d 439; Simcho v. Omaha & C. B. St. Ry. Co., 150 Neb. 634, 35 N. W. 2d 501; Remmenga v. Selk, 150 Neb. 401, 34 N. W. 2d 757; 38 Am. Jur., Negligence, § 348, p. 1052; Novak v. Laptad, 152 Neb. 87, 40 N. W. 2d 331.

In view of the evidence, we conclude there was no evidence of contributory negligence on the part of the plaintiff that warranted submission of this issue to the jury by the trial court, and in this respect the trial court committed prejudicial error. It also follows that the instruction on comparative negligence should not have been given, and it was error to give this instruction under the circumstances.

Other assignments of error need not be determined.

We reverse the judgment and remand the cause for new trial.

REVERSED AND REMANDED.

RICHARD F. LINDER, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.

56 N. W. 2d 734

Filed January 23, 1953. No. 33225.

1. **Appeal and Error.** Assignments of error relied upon for reversal and intended to be urged in the brief shall be separately numbered and paragraphed, bearing in mind that consideration of the cause will be limited to errors assigned and discussed. However, the court may, at its option, notice a plain error not assigned.
2. ———. Under Rule 8 a 2 (7) of the Revised Rules of the Supreme Court propositions of law are to be presented in connection with questions argued which are raised by the assignments of error. It is the assignments of error that the rule requires be discussed.
3. **Criminal Law.** In a criminal case the trial court is invested with a broad judicial discretion in allowing or denying an application to require the state to produce written confessions, statements, and other documentary evidence for the inspection of defendant's counsel before the trial. Error may be predicated only for an abuse of such discretion.
4. **Criminal Law: Insane Persons.** No form of insanity is recognized as a defense to a criminal action, unless it affects the mind of the accused to such an extent that it renders him incapable of distinguishing between right and wrong with reference to the act committed.
5. **Continuances: Trial.** An application for a continuance is addressed to the sound discretion of the trial court and its ruling thereon will not be held erroneous, unless an abuse of discretion is disclosed by the record.
6. ———: ———. It is no abuse of discretion for the trial court to refuse defendant a continuance unless it clearly appears that defendant suffered prejudice.
7. **Rape.** In a prosecution for rape, it is not essential to a conviction that the prosecutrix should be corroborated by the testimony of other witnesses as to the particular act constituting the offense. It is sufficient if she be corroborated as to material facts and circumstances which tend to support her testimony, and from which, together with her testimony as to the principal fact, the inference of guilt may be drawn.
8. **Criminal Law.** Trial judges and public prosecutors are charged with the duty of conducting criminal trials in such a manner that the accused may have a fair and impartial trial, uninfluenced by prejudice, passion, and public clamor.

9. **Criminal Law: Appeal and Error.** Remarks made by the trial court are not ground for reversal where confined to orderly procedure, to the proper ascertainment of issuable facts, to the exclusion of inadmissible or unnecessary testimony, and to the observance by counsel of recognized rules of evidence and procedure.
10. **Witnesses.** In the absence of a statute rendering children under a specified age incompetent, or presumably so, a witness is not disqualified because of his youth.
11. **Witnesses: Trial.** The question of the competency of such a witness rests largely in the sound discretion of the trial court, whose decisions will not be disturbed in the absence of clear abuse.
12. ———: ———. The principle upon which the ruling should be determined is that the child is sufficiently mature to receive correct impressions by his senses, to recollect and narrate intelligently, and to appreciate the moral duty to tell the truth.

ERROR to the district court for Douglas County: CARROLL O. STAUFFER, JUDGE. *Affirmed.*

Theodore L. Richling, for plaintiff in error.

Clarence S. Beck, Attorney General, and *Clarence A. H. Meyer,* for defendant in error.

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

SIMMONS, C. J.

Plaintiff in error was charged with, found guilty of, and sentenced for, the offense of rape. He brings the cause here by petition in error. We affirm the judgment of the trial court.

Plaintiff in error will be referred to herein as defendant. He was 43 years of age at the time involved. The complaining witness is a girl who was 7 years of age at that time.

Defendant here assigns 35 errors. Rule 8 a 2 (4) of the Revised Rules of the Supreme Court is as follows: "Assignments of error relied upon for reversal and intended to be urged in the brief shall be separately numbered and paragraphed, bearing in mind that consideration of

the cause will be limited to errors assigned and discussed. However, the court may, at its option, notice a plain error not assigned."

Defendant states six propositions of law. In his brief he argues those propositions. Under Rule 8 a 2 (7) of the Revised Rules of the Supreme Court propositions of law are to be presented in connection with questions argued which are raised by the assignments of error. It is the assignments of error that the rule requires be discussed. The reason for the distinction is patent here. Defendant does not directly relate his propositions argued to his assignments of error. Under the circumstances we consider the propositions argued to be the assignments of error which he desires be determined here.

The first two propositions are interrelated. The first is: "The trial court's refusal to require the county attorney to make available to the defendant the results of a medical examination of the defendant or to permit the defendant to be examined to determine his mental status was prejudicial to the rights of the defendant." This has two parts. We find no record of a refusal of the trial court to permit the defendant to be examined to determine his mental status.

Defendant's second argued proposition is: "The trial court's refusal of the defendant's request for a continuance for the purpose of securing a medical examination and medical testimony was, under the circumstances, an abuse of discretion and prejudicial to the rights of the defendant."

The record shows the following proceedings in this case preliminary to the trial.

Complaint was filed in county court on June 19, 1951, charging the offense as of June 17, 1951. On June 21, 1951, defendant entered a plea of not guilty, waived preliminary examination, and was held for trial in the district court.

On June 25, 1951, information was filed in district court charging the offense.

On December 3, 1951, the public defender was appointed to represent the defendant.

It appears that as early as September 1951, defendant's present counsel had been employed by defendant's father to represent him (the father) in making certain investigations of this matter and in doing so had conferred with the defendant. The county attorney assumed that counsel was representing defendant at that time. Defendant's counsel was employed to represent him on or before January 1, 1952.

On January 10, 1952, defendant's counsel made formal appearance of record for defendant in the case.

On February 2, 1952, defendant was in court with his counsel, was arraigned, and plead not guilty. The case was set for trial February 11, 1952.

On February 6, 1952, the trial court entered an order, "that, upon proper showing by the defendant and his counsel, the attendance of the witnesses requested by the defendant shall be required. * * * without cost to this defendant or his counsel."

On February 6, 1952, defendant filed a motion to require the state to furnish to him the results or reports on any and all medical treatment, examinations, or inquiry concerning this defendant. It appears from the record that sometime in December 1951, defendant was taken to the county hospital where a needle was inserted in the base of his spine. That is the extent of the record as to what was done. Defendant knew by hearsay of the result of that examination. Defendant's counsel knew prior to February 2, 1952 (the date of the not-guilty plea), that defendant had been so treated in the county hospital. On February 8, 1952, the court overruled the motion of February 6, 1952.

Also, on February 8, 1952, the defendant made an oral motion to cause examination of the defendant by

the board of mental health of Douglas County which was overruled.

On February 9, 1952, defendant filed a written motion for an order directing defendant's examination by three qualified doctors to determine his then present sanity and his sanity as of the time of the commission of the alleged offense. This was overruled February 9, 1952.

On February 11, 1952, at the beginning of the trial, defendant moved for a continuance and asked for the appointment of one or more doctors to determine the mental condition of the defendant. That motion was denied. Defendant then moved for a continuance to enable him to secure medical testimony stating that over the week end he had tried to secure medical examination and assistance and had been unable to do so. On February 11, 1952, at the time of the consideration of the motion for a continuance, defendant offered evidence showing that on August 22, 1947, complaint was made to the board of commissioners of insanity charging that defendant was insane, that a hearing was had, and that he was found to be insane and was committed to the state hospital on September 10, 1947. The charge was based on excessive drinking and that he was "confused." The doctor's report showed that he was "well oriented" and that "tests indicate no abnormality of intellectual abilities"; that he was suffering "from an acute alcoholism with psychosis" and should be committed; and that examination of spinal fluid and the patient's history suggests a diagnosis of paresis, but that laboratory tests on the spinal fluid had not been "reported back." He was committed to the hospital and later released, although the date does not appear.

The state offered evidence that on January 25, 1949, information was made to the county board of mental health that defendant was "mentally ill" suggesting his commitment. This was based on the use of alcoholic beverages. The board found that he was not mentally

ill and ordered him discharged on February 1, 1949. The report shows a "Return on spinal fluid-negative. Return on blood-positive." Defendant's counsel knew of the defendant's hospitalization prior to February 2, 1952, probably as early as December prior thereto, and in January considered and put aside a possible plea of insanity.

It is patent from the record that defendant had been advised of the contents of the report, which it is alleged was in the possession of the county attorney, and that his counsel had information as to that a considerable time prior to the motions here made. The defendant at no point in this record shows or undertakes to show what his understanding of the contents of the report to be. We have the sole fact that there was claimed to have been a report. Defendant did not undertake to secure the report by the calling of witnesses who had or might have had a knowledge of its contents. He did nothing save demand its production. Our holding in Cramer v. State, 145 Neb. 88, 15 N. W. 2d 323, is applicable here. We said in the body of the opinion: "The defense counsel in a criminal prosecution have no right to inspect or compel the production of evidence in the possession of the state unless a valid reason exists for so doing. The defendant has no inherent right to invoke this means of examining the state's evidence merely in the hope that something may be uncovered which would aid his defense. In the administration of these rules the trial court has a broad judicial discretion and it is only when such discretion is abused that error can be based thereon." In the syllabus we stated the rule as follows: "In a criminal case the trial court is invested with a broad judicial discretion in allowing or denying an application to require the state to produce written confessions, statements and other documentary evidence for the inspection of defendant's counsel before the trial. Error may be predicated only for an abuse of such discretion."

We find no abuse of discretion as to that matter under the circumstances here.

As to the question of the medical examinations, defendant cites no authority which would require the court to order an examination by the board of mental health, or would authorize or require the court to order an examination by a specially created board of doctors. The court did not deny defendant the right to initiate such a proceeding before the board of mental health. The court clearly indicated a willingness to require witnesses to attend for defendant. Defendant did not act to get medical witnesses until a day or two before trial.

Defendant, then, here contends that it is his right to require the state to furnish medical experts for the purpose of examination and possible use as witnesses, or in the language of one of the assignments of error, "to furnish to the defendant an expert opinion" as to his "mental condition or capacity." Defendant cites no provision of law that authorizes such an order and we have found none.

The motion for a continuance for the purpose of securing a medical examination and medical testimony was made on the morning of the trial. The evidence taken pointed definitely to the conclusion that the defendant was not mentally ill at that time.

"Under the law of this state, no form of insanity is recognized as a defense to a criminal action, unless it affects the mind of the accused to such an extent that it renders him incapable of distingushing between right and wrong with reference to the act committed." Fisher v. State, 140 Neb. 216, 299 N. W. 501. The evidence of the commitment of defendant to a hospital for the mentally ill raised no presumption that the accused was at the time in question insane in the sense that he was not accountable for the act charged. Fisher v. State, *supra.*

The evidence also shows that defendant's counsel knew of the state-hospital commitment as early as the first

of January 1952. He claimed to have received other information subsequent to February 2, 1952 (the date of the plea of not guilty), contended it was a privileged communication from his client, and refused to divulge it to the trial judge.

The rules applicable are:

"An application for a continuance is addressed to the sound discretion of the trial court and its ruling thereon will not be held erroneous, unless an abuse of discretion is disclosed by the record.

"It is no abuse of discretion for the trial court to refuse defendant a continuance unless it clearly appears that defendant suffered prejudice." Sundahl v. State, 154 Neb. 550, 48 N. W. 2d 689.

No showing of prejudice suffered appears. The motion for a continuance was properly overruled.

Defendant's next contention goes to his assignment that there was not sufficient corroborating evidence. The rule long established is: "In a prosecution for rape, it is not essential to a conviction that the prosecutrix should be corroborated by the testimony of other witnesses as to the particular act constituting the offense. It is sufficient if she be corroborated as to material facts and circumstances which tend to support her testimony, and from which, together with her testimony as to the principal fact, the inference of guilt may be drawn." Medley v. State, *ante* p. 25, 54 N. W. 2d 233.

We do not deem it necessary to set out the evidence in detail. It is sufficient to state that the complaining witness testified clearly to the events involved. As to the principal movements of the defendant and the witness both before and after the commission of the offense her testimony was corroborated by eyewitnesses. She testified positively to the act constituting the offense. As to this her testimony is amply corroborated by the evidence of the physician who examined her within two hours of the time of the act. We deem the evidence ample under the rule. The contention is not sustained.

Defendant next states his proposition that trial judges and public prosecutors are charged with the duty of conducting criminal trials in such a manner that the accused may have a fair and impartial trial. He cites Cooper v. State, 120 Neb. 598, 234 N. W. 406, wherein we held: "Trial judges and public prosecutors are charged with the duty of conducting criminal trials in such a manner that the accused may have a fair and impartial trial, uninfluenced by prejudice, passion and public clamor."

Defendant charges that the trial judge violated his duty in the trial of this case, as stated in one assignment of error, "in evidencing hostility toward the defendant throughout the trial, and in evidencing a feeling of friendliness toward the prosecution," and that the sum total amounts to prejudice to the rights of the defendant. He bases these contentions on the court's rulings hereinbefore summarized and upon the following incidents which the record shows occurred during the trial. The court overruled objections of the defendant to the introduction of evidence; the defendant, although contending that these rulings were error, does not contend that they were "sufficient themselves to require a reversal, * * *." In one instance the defendant's counsel stated: "Let the record show that the witness paused a considerable time before answering that question." The court stated: "Let the record also show that the time elapsed did not exceed six seconds." In one instance the defendant's counsel said: "Let the record show that the Deputy County Attorney is standing in such a position that this witness, in facing him, has her face turned away from the defendant and defendant's counsel and is facing the Deputy County Attorney." The court said: "Objection overruled." The prosecutor said that he wanted the record to show that he had changed his position so that the defendant could be faced by the witness. In one instance defendant charged the state with "indulging in * * * leading questioning" and asked

that the state be "instructed to refrain from * * * leading questions." The court ruled, "Objection sustained." In one instance a state's witness on rebuttal had testified without objection during his entire direct examination. Defendant then moved to strike the testimony as immaterial, the state resisted, defendant asked to be heard on the motion in the absence of the jury, the court agreed to the argument but indicated there was no need for it, the defendant did not insist, and the court overruled the motion. In his argument to the jury defendant's counsel stated that if the jury found the defendant guilty, the court could do nothing but send the defendant to the penitentiary; the state objected to the statement; the court sustained the objection, instructed the jury to disregard the statement of counsel, and told them that the matter of possible punishment was a matter for the court and "it is improper argument on behalf of counsel for the defense." Defendant's counsel does not contend here that his remarks were proper but claims prejudice because the court told the jury that the argument was improper. It is a conclusion which obviously the jury would get from the ruling. The defendant finally complains that prejudice was shown because of "the extremely excessive sentence of ten years."

We have stated all of the instances about which defendant complains. They do not severally or together sustain the charge made against the trial court. We find no violation of the cited rule. The rule also is: "Remarks made by the trial court are not ground for reversal where confined to orderly procedure, to the proper ascertainment of issuable facts, to the exclusion of inadmissible or unnecessary testimony, and to the observance by counsel of recognized rules of evidence and procedure." Sedlacek v. State, 147 Neb. 834, 25 N. W. 2d 533, 169 A. L. R. 868.

Defendant next argues that there was prejudicial error in the giving of instruction No. 9. The instruction states the degree of penetration which must be proven to con-

stitute the offense. Defendant does not challenge the correctness of the instruction as a matter of law, but rather argues that the evidence was not sufficient to sustain a verdict within the rule contained in the instruction. We have examined the evidence in that regard. It is ample to sustain a finding of the fact question.

Defendant next states the proposition that: "A child is incompetent to testify over the objection of the defendant without proper inquiry into whether or not she has sufficient ability to understand the obligation of an oath." He cites the statute which provides in part: "Every human being of sufficient capacity to understand the obligation of an oath, is a competent witness in all cases, civil and criminal, except as otherwise herein declared." § 25-1201, R. R. S. 1943. The exceptions are not here involved. Under this proposition defendant argues as to two witnesses: "To submit their statements to the jury as testimony given under oath without a more sufficient foundation and after the trial court had refused the defendant permission to inquire into their competency, was prejudicial to the defendant and reversible error." The record shows that the state called a witness to the stand and without asking that she be sworn, asked her name, and she told her name. The defendant then objected to her testifying because "she is of young and tender years" and requested permission to inquire into her competency. The trial court overruled the objection and denied the request. The state then asked questions as to her age (8 years) and her understanding of the obligation of an oath. The court directed that she raise her right hand. Defendant then objected to the witness being sworn and testifying for the reason that no proper showing had been made that she understood the obligation of an oath and particularly because the court had refused the defendant the right to inquire into the competency of the witness. The witness was then sworn and testified.

Substantially the record is the same as to a second

witness who was 7 years of age except that here the state asked permission to inquire as to competency, received it, and did so inquire without a court ruling on the objection and request. At the end of the inquiry the court asked the defendant if he wished to interpose the same objection, which he did. The court then overruled the objection and denied the request. The witness was then sworn.

As we read this record the court did not deny the defendant the right to inquire into the competency of the witness save at the beginning, and before the state inquired as to that matter. We know of no rule of law, and none is cited, which would deny a proponent of a witness the right to examine as to competency before the opponent is accorded that right. The defendant's objections must be held to go to the competency of the witness.

We considered comparable contentions in Davis v. State, 31 Neb. 247, 47 N. W. 854; Evers v. State, 84 Neb. 708, 121 N. W. 1005; and Abbott v. State, 113 Neb. 517, 204 N. W. 74. In Rueger v. Hawks, 150 Neb. 834, 36 N. W. 2d 236, we reviewed our decisions and held:

"In the absence of a statute rendering children under a specified age incompetent, or presumably so, a witness is not disqualified because of his youth.

"There is no precise age which determines the question of his competency, it depending upon his capacity and intelligence and his appreciation of the difference between truth and falsehood.

"The question of the competency of such a witness rests largely in the sound discretion of the trial court, whose decisions will not be disturbed in the absence of clear abuse."

In Wells v. State, 152 Neb. 668, 42 N. W. 2d 363, we said: "The principle upon which the ruling should be determined is that the child is sufficiently mature to receive correct impressions by his senses, to recollect and narrate intelligently, and to appreciate the moral duty to tell the truth."

The defendant does not point out wherein the foundation laid fails to meet these tests. The record is clear that the witnesses met all the required tests as to competency. The assignment is without merit.

The judgment of the district court is affirmed.

AFFIRMED.

SEWARD COUNTY RURAL FIRE PROTECTION DISTRICT, APPELLEE, V. THE COUNTY OF SEWARD, NEBRASKA, ET AL., APPELLANTS.

56 N. W. 2d 700

Filed January 23, 1953. No. 33256.

1. **Statutes.** In construing a statute, the legislative intention is to be determined from a general consideration of the whole act with reference to the subject matter to which it applies and the particular topic under which the language in question is found, and the intent as deduced from the whole will prevail over that of a particular part considered separately.
2. ———. All parts of an act relating to the same subject should be considered together and not each by itself.
3. ———. A word or phrase repeated in a statute will bear the same meaning throughout the statute, unless a different intention appears.
4. **Municipal Corporations.** The petition referred to in section 35-514, R. R. S. 1943, requires the signatures only of the required number of qualified electors in the territory proposed to be annexed to an existing rural fire protection district.
5. ———. Where the boundaries of an existing rural fire protection district comprise land all within one county and the boundaries of territory proposed to be annexed thereto comprise land all within an adjacent county the notice required by section 35-514, R. R. S. 1943, need be published only in a newspaper of general circulation in the county where the land proposed to be annexed is situated.
6. ———. Where the boundaries of an existing rural fire protection district comprise land all within one county and the boundaries of territory proposed to be annexed thereto comprise land all within an adjacent county, the proper county board to hold a hearing upon a petition for annexation and to determine the

questions presented by the petition is the county board of the county where the land proposed to be annexed is situated.

7. ———. The formation of municipal corporations, such as counties, cities, villages, school districts, or other subdivisions, and the fixing of the boundaries of such municipal corporations are legislative functions.

8. ———. The Legislature has the power to authorize the annexation to an existing rural fire protection district of territory adjacent thereto, upon the petition of 60 percent of the electors qualified as required in section 35-514, R. R. S. 1943, and by the consent of the board of directors of the existing district.

9. ———. Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be entrusted to them. The number, nature, and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the state.

APPEAL from the district court for Seward County: HARRY D. LANDIS, JUDGE. *Affirmed.*

Clarence S. Beck, Attorney General, *Homer L. Kyle, Russell A. Souchek,* and *John D. Zeilinger,* for appellants.

McKillip, Barth & Blevens, for appellee.

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

SIMMONS, C. J.

This is a declaratory judgment action brought to determine the legality of the existence of the plaintiff, a rural fire protection district, and to determine the legality of the annexation of territory to the plaintiff district, as originally organized. The defendants are the Counties of Seward and York and certain of the officers of those counties and the Attorney General.

Issues were made, a trial had, and a decree entered sustaining the legality of the proceedings involved. Defendants appeal, challenging the judgment in certain particulars. We determine the assignments made and argued, and affirm the judgment of the trial court.

As originally organized the territory of the Seward

County Rural Fire Protection District was entirely within the County of Seward. In 1951 proceedings were begun and carried to completion to annex thereto certain lands adjacent to the district but entirely within York County. The legality of the annexation procedures is involved in this appeal.

The statutes involved and which require construction are, in the order of their consideration, sections 35-514 and 35-504, R. R. S. 1943.

In Behrens v. State, 140 Neb. 671, 1 N. W. 2d 289, we stated certain rules to be followed in the construction of statutes where we are required to determine the legislative intent:

" 'In construing a statute, the legislative intention is to be determined from a general consideration of the whole act with reference to the subject-matter to which it applies and the particular topic under which the language in question is found, and the intent as deduced from the whole will prevail over that of a particular part considered separately.' 59 C. J. 993.

"All parts of an act relating to the same subject should be considered together and not each by itself.

" 'A word or phrase repeated in a statute will bear the same meaning throughout the statute, unless a different intention appears.' 2 Lewis' Sutherland, Statutory Construction (2d ed.) 758, sec. 399."

The petitions here were signed by electors residing within the boundaries of the territory proposed to be annexed to the existing district. Defendants contend that the statute requires that the petitions must come from the electors of the existing district and ultimately contend that petitions must come from both the existing district and the territory proposed to be annexed. The sufficiency of the petitions otherwise is not questioned.

The first four sentences of section 35-514, R. R. S. 1943, are: "(1) Any territory which is equivalent in area to six sections or more and which is outside the limits of any incorporated city, village, or rural fire pro-

tection district and which is adjacent to the boundary of an existing rural fire protection district may be annexed to such district in the manner hereinafter provided. (2) Such proceedings may be initiated by the presentation to the county clerk of a petition signed by sixty per cent or more of the electors who are owners of any interest in real or personal property assessed for taxation in the district and who are residing within the boundaries of such territory stating the desires and purposes of such petitioners. (3) The petition shall contain a description of the boundaries of the territory proposed to be annexed and shall be accompanied by a map or plat, and a deposit for publication costs. (4) The county clerk shall consult the tax schedules in the office of the county assessor and shall determine and certify that said petition has been signed by at least sixty per cent of the electors who are owners of any interest in real or personal property assessed for taxation in the district and who appear to reside within the boundaries described by such petition." Numerals in parentheses above are supplied by us.

It is noted that in the first sentence the Legislature used the word "territory" with reference to the area proposed to be annexed. It used the words "existing * * * district" with reference to the "district" to which the annexation is proposed. In the second sentence it calls for petitions by electors who are owners of property assessed for taxation "in the district and who are residing within the boundaries of such territory." It is defendants' contention that the words "in the district" mean the existing district. Of necessity it would follow that the word "territory" means "existing district." Obviously the word "territory" was not so used in the first sentence, but is there used with reference to the "area" to "be annexed." Defendants contend that the trial court construed the word territory as synonymous with district and construed district to mean territory to be annexed, and says the trial court erred in doing so.

Defendants do the same thing in reverse and in effect construe "territory" to mean "existing district." It is a construction not in accord with its use in the first sentence. Such a construction would lead to the conclusion that the only petition required for annexation would come from the existing district which is an improbable legislative intent, as it would enable an existing district to at least initiate the annexation of "territory" without any action of the electors in the territory to be annexed. It also is to be noted that the third sentence calls for a petition containing a description of "the boundaries of the territory proposed to be annexed" and the fourth sentence requires a determination that the petitioners own property "in the district" and who reside "within the boundaries" described in the petition. It is obvious that to meet these requirements the petition must be signed by electors residing in the territory proposed to be annexed and just as obvious that electors residing in the existing district could not meet that requirement.

As pointed out defendants contend that there must be petitions from both the annexing territory and the existing district. There is nothing in the language of the act which suggests a requirement of petitions from both the "territory" proposed to be annexed and the "existing district."

The fifth, sixth, seventh, and eighth sentences of the section provide: "(5) Thereafter, the county clerk shall forward such petition, map or plat, and certificate to the board of directors of the district concerned. (6) Within thirty days thereafter, such board of directors shall transmit said petition to the proper county board accompanied by a report in writing approving or disapproving the proposal contained in said petition, or approving such proposal in part and disapproving it in part. (7) If the report of the board of directors disapproves the proposal, the petition shall be rejected. (8) If the report of the board of directors is favorable

to such proposal, either in whole or in part, the county board shall promptly designate a time and place for a hearing upon the petition and shall give notice thereof in the manner prescribed by section 35-504." Numerals in parentheses above are supplied by us.

The proviso to the last sentence of the section is: "*Provided,* that no area shall be annexed to an existing rural fire protection district contrary to the recommendation of the board of directors of such existing district."

To accept defendants' construction of the section would be to hold that the Legislature intended to give the board of directors of the existing district power to disapprove and cause to be rejected the petition of 60 percent of the qualified electors of the existing district. We find nothing in the act to justify such a construction. It is patent that these provisions were placed in the statute for the purpose of giving an adequate means for the existing district to speak and control the result of the annexation proceedings.

It is also to be noted that elsewhere in the act the Legislature used the words "proposed district." §§ 35-503 and 35-504, R. R. S. 1943. In section 35-506, R. R. S. 1943, it used the words "in the district" and "within the boundaries of the district" when referring to a district not completely organized. The statute as a whole does not demonstrate that the word "district" was used as meaning a fully organized and existing district in all instances. We conclude that the petition referred to in section 35-514, R. R. S. 1943, requires the signatures only of the required number of qualified electors in the territory proposed to be annexed to an existing rural fire protection district.

The second assignment of error raises the question of where the notice shall be published which is provided by the eighth sentence above quoted. Here the notice was published in York County. The defendants contend that the statute requires that it shall be published in a newspaper of general circulation in the county

where the existing rural fire protection district is organized—which here means in Seward County.

Section 35-504, R. R. S. 1943, provides: "(1) Upon the filing of such petition in the office of the county clerk, the county clerk shall determine and certify that such petition has been signed by at least sixty per cent of the freeholders whose names appear on the current tax schedules in the office of the county assessor and who appear to reside within the suggested boundaries of the proposed district. (2) He shall thereafter designate a time and place for said petition to be heard by the county board. (3) Notice of such hearing shall be given by publication two weeks in a newspaper of general circulation in the county, the last publication appearing at least seven days prior to said hearing; said notice shall be addressed to 'all persons residing in or having any interest in real or personal property located within the following boundaries' and shall include a statement of the proposed boundaries as set forth in the petition; *Provided,* that if the proposed district shall be situated within two or more counties, the county clerk of the county wherein the largest number of petitioners shall have signed, shall confer with the clerk or clerks of the other county or counties concerned and shall obtain a certificate as to the adequacy of the petitions pertaining to said county or counties, and thereafter he shall designate a time and place for a hearing before a joint meeting of the county boards of all counties in which the proposed district is to be situated and shall give notice thereof by publication in the manner hereinbefore provided. (4) At the time and place so fixed, the county board or boards shall meet, and all persons residing in or owning taxable property within, the proposed district shall have an opportunity to be heard respecting the formation of such district or the location of the boundaries thereof. (5) Thereupon the county board or boards shall determine whether the proposed district is suited to the general fire protection policy of the

county, or each of such counties, as a whole, determine the boundaries of the proposed district, whether as suggested in the petition or otherwise, and make a written order of such determination which shall describe the boundaries of the district and be filed in the office of the county clerk or clerks of each county in which such district is situated." Numerals in parentheses are supplied by us.

The above part following the *"Provided"* obviously relates to the notice to be given where a district is being organized in two or more counties and provides for notices depending on the fact situation presented. The question here is what notice the Legislature required to be given where an existing district was all in one county and the territory proposed to be annexed was all in an adjacent county.

Defendants contend that to approve the notice here given as sufficient is to approve a legislative intent that ex parte proceedings may be had without notice to or participation in the proceedings by the county clerk or county board of Seward County.

Obviously section 35-514, R. R. S. 1943, contemplates that an annexation proceeding may be pending in one county involving an existing district in another. The second sentence of section 35-514, R. R. S. 1943, above quoted, contemplates that the petition is to be presented to the county clerk of the county where the territory to be annexed is situated. The provision of the fourth sentence of section 35-514, R. R. S. 1943, quoted above, indicates that it is that county clerk who is to consult the tax schedules in the office of the assessor of that county, for the information required would be found in the records of that county.

It is likewise apparent that the language "directors shall transmit said petition to the proper county board" in the sixth sentence of section 35-514, R. R. S. 1943, above quoted, recognizes that the "proper county board" may be one other than the county board of the county

in which the existing district is organized. The statute, section 35-514, R. R. S. 1943, requires notice to the board of directors of the existing district in the procedural steps to be followed prior to the published notice. The statute then requires published notice to "* * * 'all persons residing in or having any interest in real or personal property located within the following boundaries' and shall include a statement of the proposed boundaries as set forth in the petition * * *." Third sentence, § 35-504, R. R. S. 1943. Here the "proposed boundaries" are of land in York County, where the required notice was given.

Accordingly, we hold that where the boundaries of an existing rural fire protection district comprise land all within one county and the boundaries of territory proposed to be annexed thereto comprise land all within an adjacent county the notice required by section 35-514, R. R. S. 1943, need be published only in a newspaper of general circulation in the county where the land proposed to be annexed is situated.

In reaching this conclusion we are not unmindful of the provision in the ninth sentence of section 35-514, R. R. S. 1943: "At such hearing, any person owning taxable property or residing within the boundaries of the existing district or within the boundaries of the territory to be annexed, shall have the opportunity to be heard respecting the proposed annexation." We think that the Legislature intended that notice to the board of directors of an existing rural fire protection district of a petition proposing annexation of territory was notice to persons owning property and residing within the boundaries of the existing district.

Defendants' next contention is that the statute requires that the hearing be held before the county board of York and Seward Counties in joint meeting and that the proposed annexation be approved by joint action of the two boards. Here the hearing was before the York County board and approval made by it alone.

The defendants rely on the proviso in the latter part of section 35-504, R. R. S. 1943. This provision directly relates to the organization of districts where the proposed district is situated within two or more counties.

Following the reasoning heretofore set out we hold that where the boundaries of an existing rural fire protection district comprise land all within one county and the boundaries of territory proposed to be annexed thereto comprise land all within an adjacent county, the proper county board to hold a hearing upon a petition for annexation and to determine the questions presented by the petition is the county board of the county where the land proposed to be annexed is situated.

Defendants contend that so construed the act is violative of the constitutional provision that: "No person shall be deprived of life, liberty, or property, without due process of law." Art. I, § 3, Constitution of Nebraska.

Defendants argue that it permits the residents and county authorities of York County to impose legal obligations and additional taxes on the members of the plaintiff district, without their consent and without notice or adequate and reasonable opportunity to be heard.

The question here presented is answered in our decision in Rowe v. Ray, 120 Neb. 118, 231 N. W. 689, 70 A. L. R. 1056. We there held: "* * * the formation of municipal corporations, such as counties, cities, villages, school districts, or other subdivisions, and the fixing of the boundaries of such municipal corporations are legislative functions." In discussing applications of the rule we said: "It may and does authorize one city to annex an adjacent suburb or village upon a majority vote of the electors thereof, and by the consent of the municipal authorities of the larger city. In all such cases the legislative function has been performed. The legislature, in those cases, has fixed the terms and conditions on which an electorate, which is definite and certain, may

determine whether the act of the legislature shall become operative."

Here the Legislature required a petition of 60 percent of the electors instead of a majority vote of the electors; here it required the consent of the board of directors of the rural fire protection district. Applying the rule here we hold that the Legislature has the power to authorize the annexation to an existing rural fire protection district of territory adjacent thereto, upon the petition of 60 percent of the electors qualified as required in section 35-514, R. R. S. 1943, and by the consent of the board of directors of the existing district, the other requirements of the act having been complied with. For a general discussion of this subject, see, 1 Dillon, Municipal Corporations (5th ed.), § 355, p. 617; 2 McQuillin, Municipal Corporations (3d ed.), C. 7, p. 254; 62 C. J. S., Municipal Corporations, § 43, p. 123, and following; 37 Am. Jur., Municipal Corporations, § 23, p. 639, and following.

There is no showing in this record of any increased tax burdens on the existing district. We put that aside and assume that it is a contention of the possibility of that result and assume also that these defendants have the right to raise the question that there is a violation of the due process provision of Article I, section 3, of the Constitution of Nebraska. That contention is answered in Hunter v. City of Pittsburgh, 207 U. S. 161, 28 S. Ct. 40, 52 L. Ed. 151. There the court considered a contention that a consolidation of two cities would subject property to the burden of additional taxation and deprive owners of property without due process of law. The court held: "Municipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them. * * * The number, nature and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the State.

Neither their charters, nor any law conferring governmental powers, or vesting in them property to be used for governmental purposes, or authorizing them to hold or manage such property, or exempting them from taxation upon it, constitutes a contract with the State within the meaning of the Federal Constitution. The State, therefore, at its pleasure may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the State is supreme, and its legislative body, conforming its action to the state constitution, may do as it will, unrestrained by any provision of the Constitution of the United States. Although the inhabitants and property owners may by such changes suffer inconvenience, and their property may be lessened in value by the burden of increased taxation, or for any other reason, they have no right by contract or otherwise in the unaltered or continued existence of the corporation or its powers, and there is nothing in the Federal Constitution which protects them from these injurious consequences. The power is in the State and those who legislate for the State are alone responsible for any unjust or oppressive exercise of it."

We see no merit in the assignment.

The decree of the district court is affirmed.

AFFIRMED.

FREDA MAE TESAR, APPELLEE, V. J. R. LEU ET AL., APPELLANTS, IMPLEADED WITH MARGARET LEU ET AL., APPELLEES.

56 N. W. 2d 803

Filed February 6, 1953. No. 33267.

1. **Tenancy in Common.** If a tenant in common appropriates to himself the exclusive possession and use of the common property, he is generally liable to the cotenant for his proportionate share of the rental value of the common property.
2. ———. A cotenant charged with the rental value of the common property should be credited on an accounting with payments made by him which were required for the protection of the property.
3. **Partition: Tenancy in Common.** It is competent for a court of equity in partition proceedings to establish a lien on the interest of a cotenant for the amount found due from him to the other cotenant on an accounting had of the rental value of the common property.
4. **Lis Pendens: Judgments.** An interest in property involved in litigation, acquired after jurisdiction of the court in which the matter is pending has attached, is subject to any judgment rendered in the litigation.

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

Edward E. Carr, for appellants.

E. H. Evans, for appellees.

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

BOSLAUGH, J.

Si Leu was the owner of a school land lease of Section 16, Township 12 North, Range 32 West, of the 6th P. M., in Lincoln County. He died intestate on November 17, 1948, a resident of Hayes County. His heirs were appellee, his widow; J. R. Leu, his father; and Margaret Leu, his mother. The estate of the deceased was administered in the county court of Hayes County.

The final decree was entered therein on July 21, 1949.

Appellee was the administratrix of the estate of Si Leu. He died without issue. Appellee on the death of Si Leu became the owner of one-half of the lease and his father and mother each inherited one-fourth thereof. § 30-101, R. R. S. 1943. The lease was not reported as an asset of the estate or mentioned in the administration proceedings because appellee had no knowledge of it until two years after the death of the deceased, and more than a year after the estate proceedings were terminated. She received no rent, income, or benefit from the lease or the land the subject of it. She did not know that she had a right to the use or of the income from one-half thereof until a proceeding was instituted by the state about two years after the death of her husband involving the validity and ownership of the lease. Margaret Leu sold and assigned her interest in the lease to J. R. Leu. Thereafter appellee brought suit against the appellants, Margaret Leu, and the Board of Educational Lands and Funds to partition the lease and for an accounting by J. R. Leu of her share of the rental value of the land covered by it from the time of the death of Si Leu because, as alleged, he had the exclusive occupancy and use of the land.

Appellant J. R. Leu, after jurisdiction of the parties and of the subject matter of the partition case had been obtained by the district court, sold and assigned his one-half interest in the lease to the appellant Mary E. Runner, who is also referred to in the record as Elizabeth Runner. She was made a party to the case because thereof.

There was a decree of partition of the lease without prejudice to the accounting feature of the case. An actual partition resulted. The lease on the north half of the land was allotted to and confirmed in Mary E. Runner, and the lease on the south half was allotted to and confirmed in the appellee. An accounting with reference to the occupation and use of the land for the years

1949, 1950, and 1951 was had. The determination of the trial court was that J. R. Leu had been in the exclusive possession of all of the land during those years; that one-half of the rental of the land for that period was $1,391.79; that the amount paid by J. R. Leu to the state on account of the lease for those years and the first half of 1952 was $659.40, and one-half thereof or $329.70 was chargeable to appellee; and that the net amount due her from J. R. Leu as her share of the reasonable rental value of the land was the sum of $1,062.09 with interest thereon at 6 percent from June 5, 1952. Judgment was entered therefor and it was adjudged a lien on the leasehold allotted to and confirmed in Mary E. Runner. Margaret Leu and the Board of Educational Lands and Funds were dismissed from the case.

The litigants concerned in this appeal are the appellants J. R. Leu and Mary E. Runner, and the appellee Freda Mae Tesar. The change of her name was occasioned by her second marriage.

J. R. Leu, one of the appellants, resided in Hayes County where the estate of his son Si Leu was administered. He knew of the existence of the lease and the ownership of it by his son at the time of his death. Appellant paid the rental required by the lease for and on behalf of his son much of the time after it was acquired by him until his death. Appellant claimed he acquired an assignment of the lease from his son and he "kept the land from then on." He did not produce the assignment. He claimed it was lost. He rented the entire land covered by the lease for the years 1949 and 1950, except he reserved the privilege to run a few cattle thereon if he wanted to, but he did not do so. He used the land in 1951 by taking in cattle to pasture. There were 56 head of cattle pastured on the land in 1951. Appellant withheld from his daughter-in-law, the appellee, the fact of the existence of the lease; the ownership thereof by her husband; the fact that appellant was subrenting or using the land; and he made no contribution to her

for any income or benefit derived from the lease or the land.

Si Leu had been dead two years when appellee received her first information of the lease and the ownership of it. Appellant acted toward the lease and the land involved in all respects as though he were the sole owner of the lease and the only lessee of the land. He thereby wholly and effectively excluded appellee as cotenant during the period involved from any benefit of the lease or any occupation, use, or income of the land demised by it. He made himself liable to account to appellee for one-half of the reasonable rental value of the land less one-half of the rental paid by him to the State of Nebraska as required by the terms of the lease. The rule in this state is that if one tenant in common appropriates to himself for his use the exclusive possession of the common property, he is generally liable to the cotenant for his proportionate share of the rental value of the common property. In Winn v. Winn, 131 Neb. 650, 269 N. W. 376, it is said: "Where a tenant in common has the possession of the common property, and holds the same to the exclusion of the other cotenants for his personal use, he is ordinarily liable to account to them for their proportionate share of its rental value." See, also, Names v. Names, 48 Neb. 701, 67 N. W. 751; Schuster v. Schuster, 84 Neb. 98, 120 N. W. 948, 29 L. R. A. N. S. 224, 18 Ann. Cas. 1078; Brayton v. Jackson, 113 Neb. 40, 201 N. W. 653; Hanson v. Hanson, 4 Neb. (Unoff.) 880, 97 N. W. 23; Miller v. Mills, 4 Neb. 362; Annotations, 27 A. L. R. 188, 39 A. L. R. 408; 14 Am. Jur., Cotenancy, § 37, p. 104.

The land, the subject of the school land lease, was during the time important to this inquiry unimproved except it was fenced. It was strictly and exclusively range or grass land. There was no well on the land or other provision for furnishing water thereon for any purpose. There was no one interested who did or would furnish salt for or care of cattle placed thereon. A con-

sideration of the evidence of the rental value of land of this character situated and restricted as it was, the use and the value of the use of such land, and all the information contained in the record tends to establish and the court finds that the fair rental value of the section of land was in the years 1949 and 1950 the sum of $1.25 an acre per year or a total of $1,600; that the rental value thereof for the year 1951 was $1.50 an acre or the sum of $960; that the total rental value for the three years was $2,560; and that J. R. Leu paid to the State of Nebraska the rental the lease required for these years and the first half of the year 1951 in the total sum of $659.40. These payments were for the benefit of the owners of the lease and he is entitled to credit for one-half thereof. J. R. Leu is indebted to Freda Mae Tesar for one-half of the gross rental value of the land as stated above in the sum of $1,280 less one-half the amount paid by him to the state of $329.70. The net amount owing by him to her is the sum of $950.30 with interest thereon at 6 percent per annum from the date of the rendition and entry of judgment as directed herein. She should have judgment therefor against J. R. Leu and it should be adjudged to be a lien on the part of the leasehold allotted to and confirmed in Mary E. Runner by the decree of partition.

Mary E. Runner contests the authority of the court in these proceedings to grant appellee a lien for the amount found due her from J. R. Leu. It is permissible for a court of equity in partition proceedings to adjudge a lien on the interest of the cotenant found liable for a balance due from him to the other cotenant on an accounting had for the rental value of the common property. Winn v. Winn, *supra;* 14 Am. Jur., Cotenancy, § 40, p. 107. Appellant Mary E. Runner purchased one-half of the school land lease involved herein from J. R. Leu after this case was commenced and jurisdiction had attached. She was charged thereby with notice of the pendency of the case and took the interest in the

lease then involved in litigation subject to any judgment legally rendered in the case. Stanton v. Stanton, 146 Neb. 71, 18 N. W. 2d 654.

The judgment in controversy in this appeal should be and it is reversed and the cause remanded with directions to the district court for Lincoln County to render and enter a judgment in favor of Freda Mae Tesar and against J. R. Leu for the sum of $950.30 with interest thereon at 6 percent per annum from the date of the rendition and entry of the judgment, and to tax the costs of the accounting proceedings in the district court and in this court one-half to J. R. Leu and one-half to Freda Mae Tesar.

REVERSED AND REMANDED WITH DIRECTIONS.

JOHN L. RIMMER, APPELLEE, V. CHADRON PRINTING COMPANY, APPELLANT.

56 N. W. 2d 806

Filed February 6, 1953. No. 33295.

1. **Libel and Slander.** A publication is libelous per se if the nature and obvious meaning of the language is such as to impute to a person the commission of a crime, or to subject him to public ridicule, ignominy, or disgrace, or to render him contemptible or ridiculous in public estimation, or to expose him to public hatred or contempt, or to hinder virtuous men from associating with him.
2. ———. One who is liable for a libel or for a slander actionable per se is liable for at least nominal damages.
3. ———. It is immaterial that the imperfection of the description is caused by the careless or even non-negligent error of a clerk, workman, or printer for whose conduct the defamer is responsible as master or principal.
4. ———. A newspaper cannot avoid responsibility in a libel suit by proving that a reporter, by mistake, used the wrong person's name.
5. **Trial: Evidence.** Questions propounded to a witness must not assume the existence of a fact not proven in the cause.
6. **Libel and Slander: Damages.** Plaintiff's recovery must be determined by the damages which proximately flow from the acts done by the defendant.

7. **Libel and Slander.** Malice in law will be presumed from the publication of an article libelous per se, and that presumption will become conclusive unless the truth of the libel is established. Such malice does not mean hatred or ill will, but the want of legal excuse for the publication.

APPEAL from the district court for Dawes County: EARL J. MEYER, JUDGE. *Reversed and remanded.*

Edwin D. Crites, for appellant.

Charles A. Fisher, for appellee.

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

SIMMONS, C. J.

This is an action for damages in the sum of $50,000 for alleged libel. Issues were made and trial was had resulting in a verdict for $1,500. A motion for a new trial was made. Plaintiff was required to remit $500, which he did. The motion for new trial was overruled. Defendant appeals. Plaintiff cross-appeals urging error in the requirement as to a remittitur. We reverse the judgment of the trial court and remand for a new trial.

Plaintiff alleged that defendant published in its newspaper the following: " 'Chadron police picked up John L. Rimmer this week and turned him over to the sheriff of Sheridan County. A Warrant for his arrest charged grand larceny.' " Plaintiff alleged that the publication was a libel.

Defendant by answer admitted the publication and alleged that it was done without malice, believing it to be true when published; that there was a mistake made in good faith in the first name used, made as a result of its reporter "taking off information from the police docket"; and that in its next issue it corrected and retracted the publication, and apologized to the plaintiff. Plaintiff's reply was a denial except as to those allegations that admitted or tended to prove the allegations of his petition.

Relying on the provisions of sections 25-1330, 25-1332, and 25-1333, R. S. Supp., 1951, plaintiff moved for summary judgment on the issue of liability, contending that there was an issue only as to the amount of damages. The trial court held that plaintiff should have a summary judgment for nominal damages at least, with costs, and that the issue as to the amount plaintiff should recover be submitted to the jury.

Defendant here contends first that that judgment was erroneous; that liability could not attach unless the mistake was negligent; and that the issue was one which should have been submitted to the jury for the purpose of determining whether any damages are assessable at all. As we read the answer, defendant presents an issue of a publication by mistake.

Weighed on the basis of either contention the result is that the trial court did not err.

The rule is: "A publication is libelous per se if the nature and obvious meaning of the language is such as to impute to a person the commission of a crime, or to subject him to public ridicule, ignominy, or disgrace, or to render him contemptible or ridiculous in public estimation, or to expose him to public hatred or contempt, or to hinder virtuous men from associating with him." Heckes v. Fremont Newspapers, Inc., 144 Neb. 267, 13 N. W. 2d 110.

Clearly this article imputed to plaintiff the commission of a crime and as such was libelous per se. See Herzog v. Campbell, 47 Neb. 370, 66 N. W. 424.

The rule is: "One who is liable for a libel or for a slander actionable per se is liable for at least nominal damages." Restatement, Torts, § 620, p. 312. See, also, 33 Am. Jur., Libel and Slander, § 5, p. 39, § 282, p. 263, § 120, p. 120; 53 C. J. S., Libel and Slander, § 157, p. 240; Peck v. Tribune Co., 214 U. S. 185, 53 L. Ed. 960, 29 S. Ct. 554.

The rule also is: "* * * it is immaterial that the imperfection of the description is caused by the careless

or even non-negligent error of a clerk, workman, or printer for whose conduct the defamer is responsible as master or principal." Restatement, Torts, § 579, p. 203. The example given is: "The A newspaper prints an account of a fraud practiced on the city by a contractor named AMX. The name of the contractor intended is ANX, the wrong initial being inserted by mistake. The mistake, however reasonable, is no defense in an action for libel by AMX."

Consistent with these rules we have held: "A newspaper cannot avoid responsibility in a libel suit by proving that a reporter, by mistake, used the wrong person's name. The real question is not, at whom was the article aimed, but whom did it injure." Walker v. Bee-News Publishing Co., 122 Neb. 511, 240 N. W. 579.

Defendant's second assignment is that the trial court erred in instructing the jury that plaintiff was entitled to "at least nominal damages." What we have said heretofore disposes of this contention generally. Defendant seems to be of the view that the trial court, by the use of the words "at least nominal damages" and "other than nominal damages," suggested something more than nominal damages. The trial court instructed the jury: "If the plaintiff has failed to establish to your satisfaction by a preponderance of the evidence that he has suffered material harm under all the circumstances as a result of said publication, then you will find for the plaintiff in a nominal amount only." We find no merit in the assignment.

Defendant's next assignment is a claim of prejudice in the admission of certain evidence. Plaintiff on cross-examination was asked if the fact that defendant had admitted his mistake and apologized publicly made any difference to his nervousness or feelings. He replied: "Well, I figured they should run after me and apologize to me, come to me and talk to me or write me a letter and talk to me or something; but they never showed up, never come near me."

Defendant did not object to the answer. Plaintiff was then asked on cross-examination if after he started the libel action he expected the editor to apologize. Plaintiff objected and the witness answered: "* * * I don't know."

Defendant offered the evidence of its editor as its witness. He testified that in the next issue of the paper, after the publication involved, he published a retraction and apology, and that it was not done at plaintiff's request. On cross-examination, he testified without objection that he never made a personal apology to plaintiff for defendant and that no one representing the defendant had written plaintiff a letter or apologized. He was then asked the following question: "Even though you knew that you had done this man a grievous wrong, you never went to him personally and begged his pardon, or begged his pardon for your corporation, or had your officers write a personal apology?" It was objected to as incompetent, irrelevant and immaterial, assuming, argumentative. The objection was overruled and the witness answered: "The suit had already been filed." He was then asked: "Even after the suit had been filed charging your company with a large amount of damages, you didn't figure you owed him a personal apology of any kind, either you or any of your officers; is that right?" That was objected to as incompetent, irrelevant and immaterial, improper cross-examination. The objection was overruled. The witness answered: "I—that is one reason that the correction item included an apology. As for, since the suit had already been filed, I hesitated to make such an attempt because I felt that anything I might say under those circumstances might very possibly be used against me." The witness was then asked if he had gotten out "an extra or anything with an apology in it." He answered: "No, I ran no extra." He was then asked: "And you had the facilities to so do; you had the facilities there in your plant to do that with, didn't you?" The objection that it was im-

material was made. The objection was overruled. The witness answered: "Yes, we can put out another paper under certain conditions."

The above is the admitted evidence which defendant claims was prejudicial.

The first question beginning with the clause, "Even though you knew that you had done this man a grievous wrong," was improper, and requiring the witness to answer was prejudicial error requiring a reversal.

It is the rule: " 'Questions propounded to a witness must not assume the existence of a fact not proven in the cause.' " Hans v. American Transfer Co., 90 Neb. 834, 134 N. W. 943. See, also, 58 Am. Jur., Witnesses, § 566, p. 316; Annotation, 100 A. L. R. 1067; 70 C. J., Witnesses, § 705, p. 546; 3 Wigmore on Evidence (3d ed.), § 771, p. 128.

The question here goes far beyond the prohibition of that rule. Here the extent of the wrong done to the plaintiff by the libel was an issue being tried. The witness, being examined, spoke for and represented the defendant. The question assumed knowledge by the defendant of the truth of an ultimate fact which the jury had to determine. The requirement that the witness answer the question carried inferentially the approval of the court of the truth of the assumption. No matter how the witness answered the question there would be implicit in his answer an admission that the defendant had done the plaintiff a grievous wrong.

A reversal being required, we determine other questions of evidence presented.

The question beginning, "Even after the suit had been filed," is also objectionable. It implies a duty on the part of the defendant to make personal apology after suit is commenced. If the witness answered in the affirmative, then it could well be argued to the jury that he had not done that which he knew he should have done. It would encourage a jury to consider the allowance of damages, not for what the defendant did, but for what it

failed to do after the libel had been made. If he answered in the negative, then it could be argued that malice was shown because the defendant did not do everything after the libel that the plaintiff deemed it should have done. Plaintiff's recovery must be determined by the damages which proximately flow from the acts done by the defendant. Dennison v. Daily News Publishing Co., 82 Neb. 675, 118 N. W. 568, 23 L. R. A. N. S. 362. The above rule applies also to defendant's objections to the evidence as to ability and failure to publish an extra edition of its paper making an apology.

Defendant next assigns error in the rejection of evidence. On direct examination of its editor it asked with reference to the plaintiff: "Did you or your paper bear him any malice or ill will?" The trial court sustained an objection that malice was not an issue. Defendant offered to prove that the witness would answer that at no time did he or his paper bear any malice or ill will toward the plaintiff.

The rule is: "Malice in law will be presumed from the publication of an article libelous per se, and that presumption will become conclusive unless the truth of the libel is established. Such malice does not mean hatred or ill will, but the want of legal excuse for the publication." Sheibley v. Nelson, 84 Neb. 393, 121 N. W. 458. See, also, Iden v. Evans Model Laundry, 121 Neb. 184, 236 N. W. 444.

The trial court did not err in its ruling.

It is not necessary to determine defendant's assignment that the judgment is excessive, nor plaintiff's cross-appeal that the trial court erred in requiring the remittitur.

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

WILSON T. ADAMS, APPELLEE, V. J. STERLING ADAMS, APPELLANT.

57 N. W. 2d 131

Filed February 13, 1953. No. 33192.

1. **Tender.** An offer becomes a tender only if it is coupled with a present ability to act.
2. ———. A formal tender is not waived by an indication of refusal in the absence of ability on the part of the party making the tender to perform at the time and make his tender good.
3. ———. The rule that a formal tender is not required if it appears that if made it would have been futile is not available to a party who is without present ability to make a tender good.

APPEAL from the district court for Lincoln County: JOHN H. KUNS, JUDGE. *Reversed and remanded.*

Baskins & Baskins, for appellant.

Beatty, Clarke, Murphy & Morgan, for appellee.

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

YEAGER, J.

This is an action in equity by Wilson T. Adams, plaintiff and appellee, against J. Sterling Adams, defendant and appellant, the purpose of which is to have dissolved a partnership entered into by and between the parties under a written partnership agreement dated July 14, 1947, to have the respective interests of the parties declared, for an accounting, and for a distribution of the assets of the partnership.

The cause was tried to the court and a decree entered. The decree contains numerous findings. From the decree in its relation to certain of the findings the defendant has appealed. From the decree in its relation to other findings the plaintiff has cross-appealed.

Neither of the parties appears to oppose the dissolution of the partnership. The real controversy relates to the accounting and declaration of interests therein.

The background of the action is that prior to July 14,

1947, the defendant was the sole owner of an undertaking business and establishment in North Platte, Nebraska, known as Adams Funeral Home. On July 14, 1947, plaintiff and defendant entered into a written agreement whereby the two became partners in the business. The agreement is of considerable length and for that reason important essentials only thereof will be set out and referred to herein. The agreement fixed the value of the merchandise, personal property, and good will at $30,000. No real estate was involved although the business was conducted in and upon property of the defendant. The acquirable interest of the plaintiff was one-third. Plaintiff in the beginning made no contribution of the capital assets. The agreed cost of acquisition was $10,000.

The general plan for acquisition of plaintiff's interest was that he should apply his share of the profits of the business upon the purchase price. Specifically it is provided that he had the option of paying by cash or at the rate of $20 per funeral conducted with exceptions as to certain types of funerals. The amount of $20 per funeral the parties have treated as agreed compensation which the plaintiff was to receive from the partnership for his work in addition to salary. The period for the computation of payments and the determination of plaintiff's interest appears to be the fiscal year from October 1 to September 30. If at the end of the fiscal year plaintiff had drawn only his salary, the aggregate of $20 for each funeral conducted during the year was to be credited upon the $10,000 and the amount so credited represented his interest in the partnership. This amount then became payable to the defendant. If plaintiff drew more than his salary then the excess was to be deducted from the aggregate for funerals and the difference credited upon the $10,000. This lesser amount then represented his acquired interest and the amount to which the defendant became entitled. The plaintiff was then entitled to participate in the profits in the proportion that

this amount bore to the entire worth of the business.

It is evident from the evidence of the conduct of the parties that by "entire worth of said business" they meant as of the date of the contract which was $30,000.

The agreement by its terms contemplated that plaintiff should receive a salary from the partnership. No amount however is specified. By agreement, and concerning this there is no dispute, he drew a salary of $200 a month from the beginning of the partnership to and including February 1949. Thereafter he drew $250 a month which he says was also his agreed salary. The defendant on the other hand says that there was no agreement as to the increase of $50 a month but that these amounts should be charged back against the aggregate of the $20 per funeral which he was entitled to receive.

The agreement did not by its terms contemplate a salary for the defendant. No salary was set up in the current operating records in favor of the defendant and there is no record that he withdrew any salary as such. Herein he contends that it was orally agreed that he was to have a salary of $400 a month. In this accounting he claims an indebtedness to him from the partnership of $400 a month for salary. Plaintiff denies the oral agreement and the indebtedness.

The agreement made no provision for rental for the property owned by the defendant and occupied by the partnership. An item of $1,800 a year was carried as a part of the current operating expense. It however was not received by defendant as such from the partnership. The defendant says that this was agreed upon. The plaintiff denies that it was agreed upon and urges that defendant is not entitled to receive it.

As to the salary the finding of the trial court was that the evidence failed to establish that at any time the salary of plaintiff was increased over $200 a month. It was further found that the right to a salary by defendant was not established at all. Also it was found that the

defendant was entitled to receive $150 a month from the partnership for rental of the premises occupied.

As to the question of salary for the defendant and of rent for the premises we conclude that the finding and decree of the district court is correct and should be sustained. As to the salary of plaintiff we think that the evidence sustains the contention that it was increased to $250 a month from March 1949. Both parties agree that up to a certain time the plaintiff repeatedly complained about the amount of his salary. Then at the given time plaintiff says that the increase was agreed upon and that thereafter he drew semi-monthly checks for his salary in the increased amount which were signed in each instance by the defendant without protest. Whether or not there was a notation on the checks or any of them that they were for salary does not appear. The checks are not in evidence. There is an exhibit in evidence showing the withdrawals of the plaintiff from the partnership. These withdrawals are not uniform in amount but from March 1949 a large percentage of them are in the amount of $125 each. The evidence in this respect is far from conclusive but it together with the reasonable inferences to be drawn therefrom appears to preponderate in favor of plaintiff.

The further steps in the accounting herein, if in truth on the record made an accounting may be had, depend largely upon analysis and application of substantially noncontroverted but highly inconclusive facts, under appropriate legal principles, to the controlling provisions of the partnership agreement.

The period involved for the purposes of accounting extends from July 14, 1947, to January 31, 1951. Early in February 1951, the plaintiff withdrew from the partnership and there appears no disagreement on the proposition that his rights in the partnership are to be ascertained with relation to the conduct of the partnership and its condition as of January 31, 1951.

The district court found and the record sustains a find-

ing that up to and including September 30, 1949, the plaintiff had paid and was entitled to have credited on his purchase of interest in the partnership the sum of $3,492.40. Some question was raised about this on the trial but the plaintiff accepts it as correct and a written acknowledgment of it by the defendant appears in the bill of exceptions. The record does not disclose whether or not this amount was ever withdrawn from the partnership as payment by plaintiff to defendant. Incidentally, and of course, if it remains among the funds and assets of the partnership, the defendant has the right of withdrawal and for accounting purposes it may not be regarded as a part of the assets of the partnership.

Just how this amount was arrived at does not authentically appear. This item, as is true of all items ultimately arrived at in the accounting by the district court and which are, if possible, to be ultimately arrived at here, has been and must be arrived at on the basis of an analysis of exhibits prepared by an accountant from data presented to him by the defendant, the partnership agreement, certain oral evidence as to value of physical property, the matter of salaries of plaintiff and defendant, and the matter of rent for the premises occupied by the partnership. None of the data which was used by the accountant in his preparation of exhibits was presented to the court for consideration.

Some of the exhibits are duplicated in the bill of exceptions and where that appears, for the purpose of discussion, only one will be referred to.

Exhibit 5 is an operating statement for the year ending September 30, 1947, and a balance sheet covering the same period. The operating statement shows a gross income of $30,137.71 and a net profit for the period of $7,250.62. The balance sheet for the period shows a net worth of the capital assets of $17,531.24.

Exhibit 6 is an operating statement for the year ending September 30, 1948, and a balance sheet covering the same period. The two show a gross income of

$31,011.93, a net profit of $11,971.31, and a net worth of capital assets of $19,137.16.

Exhibit 3 is an operating statement and balance sheet for the year ending September 30, 1949. These show a gross income of $51,590.67, a net profit of $25,126.89, and a net worth of capital assets of $30,760.05.

Exhibit 11 is an operating statement and balance sheet for the year ending September 30, 1950. These show a gross income of $51,884.13, a net profit of $20,728.09, and a net worth of capital assets of $30,456.57.

Exhibit 12 is an operating statement and balance sheet for the period beginning October 1, 1950, and ending January 31, 1951. These show a gross income for the period of $14,497.23, a net profit of $5,311.69, and a net worth of capital assets of $32,134.74.

Exhibits 13 and 14 purport to be a computation by the accountant of plaintiff's share of the profits in the partnership from January 1, 1946, to January 31, 1951, and his interest as of January 31, 1951. These are of little, if any, value for that purpose for the reasons, among others, that the computation covers the period beginning January 1, 1946, whereas the contract period begins July 14, 1947, and it totally disregards and discards the conclusion that as of September 30, 1949, plaintiff had a credit upon his purchase of the one-third interest of $3,492.40.

Exhibit 7 is a statement of withdrawals from the partnership made by the plaintiff from October 1, 1946, to and including February 1, 1951. This includes salary and other items. On the face of the exhibit some of the items appear to be estimates but the accuracy as to totals does not appear to be challenged.

Exhibit 18 is a statement of withdrawals from the partnership by the defendant from October 1, 1946, to and including September 30, 1949.

Exhibits 15 and 16 are a statement of withdrawals by the defendant from October 1, 1949, to and including January 31, 1951.

Exhibit 17 is what has been denominated "Depreciation Schedule." The value of the items named in this schedule as of January 31, 1951, is in dispute.

As we view the case none of these exhibits is of concern in determining the interest of the plaintiff in the partnership prior to and including September 30, 1949. As has already been held herein, by an apparently mutual determination his credits on his purchase price amounted to $3,492.40, and this represented his interest as of that date. On that date his interest was 11.64 percent.

For the period from this date forward no evidence was adduced or offered by either party upon which to base a determination of the interests of the partners in the partnership or an accounting thereon.

The books and records of the partnership are not now and have never been before the court. There are no exhibits in the record having authenticity as regards the partnership except the partnership agreement itself and the exhibit indicating the interest of plaintiff as of September 30, 1949. The other exhibits described are in the record, it is true, but it cannot be said that they contain information basically necessary either for the determination of the interests of the partners in the partnership or a determination of either the tangible or intangible valuation thereof.

The plaintiff does not admit that the exhibits correctly or authentically reflect the true condition of the partnership, and they on their face demonstrate that they do not. One demonstration among others is that the salary and other compensation of plaintiff is treated as a profit of the partnership whereas it is properly an item of expense.

These exhibits, as has been pointed out, were made up by an accountant, not from an analysis of books and records of the partnership, but from some type of information furnished him by the defendant, with two exceptions. The true source of the information is not

disclosed and neither is its authenticity vouched for. The exceptions are the exhibits containing the statement of withdrawals by the partners from the partnership. Even these were not made up from any source of original entry but from a check register.

From what appears as to the period ending September 1949 and these exhibits the district court was and this court is asked to determine the relative interests of the partners under the partnership agreement as of January 31, 1951; the financial status of the partnership as of January 31, 1951, embracing the amount which defendant was entitled to withdraw up to that time, the value of the capital assets, and the liabilities also as of that time; and the good will. Compliance is not possible. The record leaves all matters of accounting except as noted in the realm of conjecture, speculation, and guess.

It may well be said that the determination of intangible or good will value cannot under any circumstances be entirely taken out of the field of speculation but this certainly is not true of the other values of a partnership which must be considered in order to reasonably arrive at the intangible value. The other values are the tangible and they depend upon production and exposition of pertinent and ascertainable facts and arithmetical computations. Such facts are not present in this record.

There is no known invariable rule for the ascertainment of intangible or good will value. 38 C. J. S., Good Will, § 6, p. 953. There are however certain factors which must be regarded in order to arrive at a valuation. 38 C. J. S., Good Will, § 6, p. 953; 68 C. J. S., Partnership, § 396, p. 910. There is an absence of evidence as to all pertinent factors.

As indicated there has been no substantial effort to separate the tangible from the intangible value. There is an absence of evidence of reasonable rate of income based on investment in assets. There is an absence of evidence of properly anticipated profit on merchandise and merchandise turn-over. There is an absence of evi-

dence of properly anticipated profit on the personal services of the partners. In short there is an absence of all such evidence as would lead to a conclusion as to what ought to be regarded as a reasonable rate of income of an undertaking business of this size and character in this location based upon service contribution of the partners, the invested capital, and the merchandise turnover. These are some factors pertinent in the ascertainment of intangible or good will value.

On this phase of the case we can conclude only that the decree must be reversed and the cause remanded to the district court for further proceedings.

From a part of the decree, as pointed out, the plaintiff took a cross-appeal. The cross-appeal as it is viewed here does not have the effect of in anywise altering the conclusion that the decree must be reversed and the cause remanded to the district court for further proceedings.

The cross-appeal is based upon a contention that at a given time the plaintiff made a tender of the balance of the purchase price of the one-third interest and that from that date he must be regarded as the owner of the full one-third interest and that accounting should be made accordingly. The contention is without merit.

We do not think the evidence sustains a sufficient tender on his part. The record discloses offers on his part to make payment at different times in cash. It does not show an immediate and then present ability to pay. In order to perform it would have been necessary thereafter to make arrangements and to obtain a loan. He could not have immediately performed if his offer or offers had been accepted. The only evidence that he could have obtained a loan is his own oral statement on the trial to that effect and the testimony of his father-in-law that he was willing and able to make the loan. An offer is a tender only if it is coupled with a present ability to act. Linch v. Nebraska Buick Automobile Co., 120 Neb. 819, 235 N. W. 456; Garbark v. Newman, 155 Neb. 188, 51 N. W. 2d 315.

A formal tender is not waived by an indication of refusal in the absence of ability on the part of the party making the tender to perform at the time and make his tender good. Baird v. Union Mutual Life Ins. Co., 103 Neb. 609, 173 N. W. 686, on rehearing, 104 Neb. 352, 177 N. W. 156.

Plaintiff, not having at the time the ability to perform, cannot claim the benefit of the rule stated in Garbark v. Newman, *supra,* as follows: "However, the law does not require vain things, and a formal tender of property is not required if it appears that if made it would have been futile." This rule does not relieve against the necessity for the existence of present ability on the part of the offerer to perform.

On the issues herein involved it is concluded that the agreed salary of plaintiff was $200 a month from the formation of the partnership to and including February 1949; that thereafter until January 31, 1951, it was $250 a month; that no salary for defendant was ever agreed upon and he was entitled to none; that the defendant is entitled to $150 a month as rent for the premises occupied by the partnership from the date of the contract to January 31, 1951; that the plaintiff had paid $3,492.40 on his purchase price of his interest on September 30, 1949, and at that time he became the owner of 11.64 percent interest in the partnership; that the record contains no basis for an accounting or declaration of the interests of the partners for the period after September 30, 1949, and the cause should be remanded for accounting in this respect; and that the cross-appeal of plaintiff is without merit.

The decree of the district court is reversed and the cause remanded for further proceedings in accord with this opinion.

REVERSED AND REMANDED.

JOSEPH W. LYONS, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.

57 N. W. 2d 82

Filed February 13, 1953. No. 33202.

1. **Evidence: Witnesses.** A hypothetical question which consists of a recitation of a succession of facts containing nothing subject to, or furnishing a basis for, an expert opinion is improper and should be excluded by the trial court. Any inferences to be drawn from such facts are for the jury and are not a proper subject for expert opinion.
2. **Criminal Law: Witnesses.** A medical expert may properly give his opinion on the question of whether or not a defendant in a criminal action knew the difference between right and wrong with reference to the act committed, with his examination and the results thereof as the foundation therefor.

ERROR to the district court for Douglas County: JAMES T. ENGLISH, JUDGE. *Reversed and remanded.*

Grenville P. North, for plaintiff in error.

Clarence S. Beck, Attorney General, and *Dean G. Kratz,* for defendant in error.

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

CARTER, J.

The defendant was charged with breaking and entering a building on January 23, 1951, in the city of Omaha, Douglas County, Nebraska. The jury returned a verdict of guilty and defendant was sentenced to serve 5 years in the State Penitentiary. Defendant prosecutes error to this court.

The defendant was found by the Omaha police while in the act of robbing the Stevens Cigar Store at 4909 South Twenty-fourth Street in that city. The evidence amply establishes that defendant broke into and entered the store. The defendant admits being in the store but claims to have no recollection as to how he got there. The defense made is that defendant was insane. The primary issue therefore is whether or not the defendant

at the time of the breaking and entering in question was capable of distinguishing between right and wrong. While many assignments of error are made, the error proceedings may be finally disposed of by a determination of the correctness of the trial court's rulings on the admissibility of certain expert evidence offered by the defendant.

The defendant called as a witness Dr. Frank R. Barta, a physician specializing in psychiatry and neurology, who testified that he had examined the defendant for the purpose of determining his mental condition. During the course of his examination he was asked a hypothetical question which was nine pages in length and detailed the life history of the defendant, his family life, his school records, his troubles with juvenile officers and courts, his stealing of automobiles, the several burglaries he had committed, the places he had broken into, his knowledge of safe cracking and his experiences in that field, his commitment to the State Reformatory for 4 years and the numerous difficulties he had with the officers of that institution, his attempt to enlist in the army and his rejection as unfit, the violation of his parole from the State Reformatory and his return thereto, his numerous arrests after his discharge from the State Reformatory until the commission of the offense here charged, the details of the present offense, the intoxicating liquors that he drank, the jobs he held and the hours he kept, his alleged mistreatment by the police after his arrest, his failures of memory, a fight with a brother which he says he does not remember, and many other matters of a similar nature. Dr. Barta was asked if he had an opinion based upon the facts assumed in the hypothetical question. He answered in the affirmative. He was asked to give his opinion but, upon objection, the witness was not permitted to answer. We think this ruling was correct. The facts recited are not such as would afford a proper basis for an opinion that defendant was insane. Every event detailed therein

is consistent with a finding of sanity. Of course, the evidence set forth in the hypothetical question furnished a basis for an inference, an inference that could be drawn by a jury as well as by any other person. The answer of a medical expert to such a question, containing nothing requiring a medical expert's opinion, is nothing more than a conclusion which the jury itself is able to determine. Inferences of fact from the recital of evidence involving no expert or scientific matters are for the jury, and a trial court is correct in sustaining objections to hypothetical questions by the defendant containing no facts whatever which point towards the insanity of the defendant. Certainly a recitation of an innumerable succession of crimes not ordinarily induced by insanity does not afford of itself evidence of that degree of insanity which excuses crime. If such were the rule, habitual criminals would be clothed with a complete defense. We think the reasoning set forth in In re Henry's Estate, 167 Iowa 557, 149 N. W. 605, is sufficient to sustain the action of the trial court in excluding the answer of the medical expert to the proffered hypothetical question.

The record shows that Dr. Barta was asked certain questions and gave certain answers, the material parts of which were: "Q * * * From your examination of the man himself as you examined him there, and from the examination you conducted, are you able to state whether or not you could form an opinion as to his sanity or insanity on the 23rd of January? * * * A Yes, I can. Q And did you form such an opinion? A I did. Q I now ask you to state whether in your opinion the defendant, Joseph W. Lyons, was sane or insane on January 23, 1951, without paying any attention or taking into consideration any of the matters that were told to you that were not known to you personally?" An objection was sustained on the ground that there was a want of sufficient foundation. This was prejudicial error.

As we have stated, the medical expert had qualified as such. He not only had observed the defendant but he had examined him in the manner recognized by the medical profession to determine whether he was sane or insane, and whether he knew the difference between right and wrong at the time in question. This, we think, is sufficient foundation for the expert to give his opinion, subject to the right of cross-examination. Tvrz v. State, 154 Neb. 641, 48 N. W. 2d 761. While the foregoing sets forth the correct rule, we point out that defendant attempted to lay additional foundation by having the physician describe the manner in which he examined the defendant. This evidence was also excluded on the grounds of insufficient foundation and that it was based on self-serving statements by the defendant himself. Proper offers of proof were made which supported the defense made. It is self-evident, we think, that there may be nothing that can be physically seen in a deranged mind. Its derangement may be discovered in the way it operates and reacts under certain conditions. Questioning of the patient under such circumstances to find out if the mind works normally and rationally is not a self-serving declaration within the ordinary concept of that term. While it is not necessary under the rules laid down by this court for an expert to state in detail the methods used in arriving at his conclusion, it is not improper for him to do so. The authorities appear to be divided on the question as to whether an expert witness should be required to state the methods pursued in his examination as a foundation for an opinion or if he should give his opinion and leave it to cross-examination to uncover all the data used in arriving at such opinion. Torske v. State, 123 Neb. 161, 242 N. W. 408. In any event, the trial court erred in the respects noted. The defendant was entitled to have the testimony of Dr. Barta before the jury for its consideration. The error was clearly prejudicial to the rights of the defendant. The judgment of the dis-

trict court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

ANN K. DUNN, APPELLANT, V. SAFEWAY CABS, INC., A CORPORATION, APPELLEE.
57 N. W. 2d 75

Filed February 13, 1953. No. 33252.

Trial. The district court is vested with the power to set aside a verdict if, from the evidence adduced, it appears that the verdict is so exorbitant and excessive as to indicate that it was the result of passion, prejudice, mistake, or some means not apparent in the record, or it is clear that the jury disregarded the evidence or rules of law.

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

Gaines & Crawford, for appellant.

Gross, Welch, Vinardi & Kauffman, for appellee.

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

MESSMORE, J.

This is an action at law brought in the district court for Douglas County by Ann K. Dunn, plaintiff, against Safeway Cabs, Inc., a corporation, defendant, to recover for personal injuries sustained by her through the negligence of the driver of one of the defendant's taxicabs. The case was tried to a jury resulting in a verdict in favor of the plaintiff and against the defendant in the amount of $4,500. The defendant filed a motion for new trial which was sustained. From the order granting the defendant a new trial the plaintiff appeals.

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

The record shows that the plaintiff is a registered

practical nurse. At the time of the accident she was 58 years of age, a widow, and self-supporting. During the evening of December 30, 1950, she called the defendant to have a cab sent to the Good Shepherd Convent, to be there at 7 a. m., the next morning. She had been employed as a house nurse at the Good Shepherd Convent for 11 months at a salary of $100 a month, board, room, and laundry. The cab arrived at the appointed time. The plaintiff left the main entrance of the convent on Fortieth Street which runs north and south. She was facing west. The home is on the east side of the street. Coming out of the door of the convent there is one step, then a group of about six or seven steps down to the sidewalk level. There are some side steps cut into the curb about a foot and one-half in height. The cab faced north to permit the passenger to get into the right rear seat of the cab. She had with her a small tin box, referred to as a suitcase in the evidence. This suitcase was about 30 inches long, approximately 18 inches high, and 12 inches in width, with a handle on the top. She was carrying it in her right hand. The cab driver did not get out of the cab, but from the driver's seat reached over and opened the door which swung back. She stepped into the line of entrance of the cab, and, after poising herself to step into the cab, she noticed it was moving backwards. When the cab started to move backwards, she found herself squeezed between the suitcase and the curb. The suitcase was pressed against the lower part of her limbs and the curb. When the cab driver noticed her predicament he got out of the cab, went around to the back of it, took hold of her shoulders, and endeavored to pull her out of the wedge. She testified that her limbs were tightly wedged. She asked him to push on the door and not to try to pull her out. He pushed on the door and she was able to extricate her limbs. After she extricated herself she either fell or sat down. She pulled her limbs back out of the wedge, and the cab driver helped her into the back seat of the cab. Her

pain was excruciating, and she had numbness in her limbs. She directed the cab driver to drive her to St. Bernard's Parish, which was two or three miles distant from the convent, to Monsignor Buckley's house. She had known Monsignor Buckley for a number of years. She was going there for the purpose of a visit and to relieve Miss Hite, the housekeeper, who contemplated going to the hospital for a few days. Upon arriving at Monsignor Buckley's house the cab driver carried her suitcase and helped her into the house. He made a statement that it was his fault, and that he had told the company when he left the garage that the brakes on the cab were not working. After a conference in the presence of Monsignor Buckley and Miss Hite, it was decided that the cab driver should take her to the hospital. He had radioed the defendant and was directed to take her to the Doctors Hospital. Her clothing and mesh stockings were damaged. From 30 to 45 minutes elapsed from the time she left the convent until the time she arrived at the hospital. When she arrived at the hospital she had one bad contusion on the outside of the right ankle and one contusion half-way up on her shin bone on the right leg, and she had injured toes. The injury to her toes was caused by being wrenched and turned down abruptly when she came in contact with the running board of the cab, causing a great deal of tissue damage to the left foot.

Dr. Quigley was at the hospital. He cleansed her ankle and limbs and applied sulfa ointment and bandaged them. She was at the hospital 30 to 45 minutes, and was told by the doctor to take aspirin or anacin. After completing the treatment Dr. Quigley took her back to Monsignor Buckley's house. Miss Hite went to the hospital later that day. The plaintiff prepared the meals for Monsignor Buckley with the assistance of two little neighbor girls who did various errands for her. Most of the time she sat with her feet propped up, and applied warm applications to the injured part of her

ankles and limbs three or four times a day. She went to Dr. Quigley on three occasions. The second time he took some X-rays and informed her that there was not much he could do for her. She went to him twice the second week, and once the third week following the accident. She became dissatisfied with his treatment and did not return. Dr. Quigley's X-rays disclosed there were no bones broken. He prescribed sulfa ointment which she put on with fresh bandages. She did not ask Dr. Quigley about being released. Dr. Quigley's services were paid for by the defendant.

After returning to Monsignor Buckley's house the plaintiff remained about 12 days. She read an ad in the newspaper, contacted the R. H. Montgomery residence, and sometime thereafter went to Montgomerys to attend to Mrs. Montgomery's mother who was elderly and bedfast. She received $25 a week and her keep. The patient passed away the 12th of February, 1951. She was in the Montgomery home from January 20, until she left in May. In the fore part of May, Mr. Montgomery suggested that she contact certain counsel, which she did. Her counsel sent her to Dr. Iwersen for treatment.

After leaving the Montgomery home she returned and kept house for Monsignor Buckley for about a week, in the same manner as she had previously. Miss Hite had gone back to the hospital for a few days. Thereafter she went to the home of Mrs. Collins to take care of her. She remained there 6 or 7 weeks, then went to Father Kellihers to stay. He was gone most of the time. She was there about a month. On July 22, 1951, she went to the A. S. Williams home to take care of Mrs. Williams. She was paid $35 a week until March 24, 1952. She attended Mrs. Williams as a practical nurse. When Mrs. Williams was taken to the hospital, her services were concluded. She had not worked from that time to the time of trial.

The plaintiff testified that due to the accident her ankles became swollen and the tissues and veins were

very prominent. She lost all power to stretch her toes or to move them up or down, and such condition still maintained two years after the accident. At the time of trial she had no power in her left foot and was unable to walk very far because she could not put weight on her toes. She further testified that her work required that she be on her feet a great deal of the time, and she was not able to do hospital work. Normally her pay as a practical nurse was $7 a day, but the pay scale at the time of trial was $8 a day.

Mrs. Montgomery testified that the plaintiff came to their home to care for her mother who was ill and bedfast. When the plaintiff arrived she was limping, and during the time she attended the patient both she and this witness would alternate in caring for the patient for the reason that the plaintiff required relaxation due to her condition. This witness further testified that after her mother passed away the plaintiff remained in their home for 2½ or 3 months without pay. Her limbs were swollen and it was necessary for this witness to apply hot packs to the plaintiff's limbs three or four times a day. The cleaning was done by a person called in for that purpose.

Martha Hite testified that she was the housekeeper at Monsignor Buckley's residence. She had known the plaintiff 5 or 6 years. The plaintiff was to relieve her, on the day of the accident, so that she could go to the hospital. She reiterated the facts with reference to the cab driver saying the brakes were bad. She also testified to the condition of the plaintiff when she arrived, that she was limping, was in pain, and that she went to the Doctors Hospital. Before the accident the plaintiff was very active and able to get around. This witness further testified that she herself went to the hospital that evening and remained about 3 weeks, and the plaintiff remained at Monsignor Buckley's residence until she came home. Again on April 23, 1951, the plaintiff replaced her when she took a trip home. At that time this

witness informed the plaintiff just to prepare something to eat, and inferred she should do no heavy work. When this witness returned the plaintiff was better, but she could not do much and did not walk like she had previously.

Dr. Iwersen testified that he was engaged in orthopedic work. He first saw the plaintiff as a patient on May 4, 1951. The history that the plaintiff gave the doctor was that she had been injured in an accident in December 1950. As a result of the accident she suffered bruises and sprains resulting in swelling of her feet and ankles. She complained of pain in her left foot more than in her right. The examination disclosed tenderness over the metatarsal phalangeal joints, which are the joints between the toes and the upper part of the foot. She had limitation of motion in these joints and some tenderness over the external malleolus. This is the bone which goes to make up the ankle joint. X-rays were taken of both her feet and ankles, and she was put on a course of treatment for what he diagnosed as metatarsalgia fibrosis of her feet. He gave her a lotion used for painful feet, and prescribed contrast baths, which is immersing the feet in hot and cold water alternately. He gave her exercises and massage for her ankles, and later prescribed metatarsal bars for her shoes to try to increase the motion in the metatarsal phalangeal joint and to relieve her of some of the pain she was having. She improved quite a bit. She still complained of pain in her left foot, especially at the first metatarsal phalangeal joint of her left foot. That is the large toe of her left foot. She had some rigidity there. He further testified that he believed she had reached her maximum improvement and was not going to get any better. She still complained of pain, and there was some stiffness which he did not believe would improve, and which condition would be permanent. He further testified that trauma to a foot, with a lot of soft tissue injury, will create fibrosis. There was some scarring of the soft

tissue and ligaments of the joint. Trauma to the joints aggravates any preexisting condition, and the fibrosis stiffens the foot causing a rigid foot. Metatarsalgia develops from trauma, or it may come from other things. The plaintiff might not have been bothered with it at the time, but could be in 3 or 4 years or more. She might have had some trouble later from arthritis, and very well could have in later years. He did not know what would happen, but trauma would be a contributing factor.

On cross-examination Dr. Iwersen was asked the question: "There is arthritis in that toe which you can tell by looking at it existed before the accident of which she complained, and even without an accident undoubtedly she will grow older like most of us and it will cause her more difficulty, isn't that a fair statement?" In answer thereto, he testified: "Surely, that is what I said, it might cause her trouble later." The farthest he could go was to say that maybe the accident flared up or aggravated something in the toe joint, and that was speculation. He was asked: "The arthritis around a joint causes irritation in the surrounding tissues and nerves; it is not in the joint itself where you have pain?" The doctor answered "Yes." He could not evaluate how much of it was there before the accident, but it was there. From the X-ray examination he could find nothing wrong except the pain from the chronic arthritis in the big toe. As to the right foot, there was nothing wrong with that foot or ankle except a little arthritis in the big toe which did not bother her and she had not complained about it. There were no fractures and no dislocations, or limitation or restriction of motion in the right foot. At the original examination there was no displacement of tendons and ligaments, and no dislocation of the bones.

The doctor further testified that he would consider she had fairly normal feet for someone her age, both feet and ankles, outside of the big toe. He did not re-

call at any time that he saw her that her ankles and feet were swollen. He did not see any indication of lack of circulation in that area. She had a good dorsal-pedal pulse in her feet. He was asked: "There was good circulation in both ankles and the feet, and blood, of course, nourishes the nerves and the tissues, there is good sensation and all of that, isn't that a fair statement, Doctor?" He answered: "Yes, approximately, I think."

The plaintiff contends that the district court erred in vacating and setting aside the verdict of the jury rendered in favor of plaintiff and against the defendant and the judgment entered thereon; in sustaining defendant's motion for new trial; and that the action of the district court in so doing constitutes an abuse of discretion.

The defendant corporation does not deny that plaintiff is entitled to recover compensatory damages for the injuries she sustained as a proximate result of the negligence of the defendant's driver. The contention of the defendant is that the amount recovered as damages is grossly excessive and such as to shock the conscience of the court; and that while the court did not express the reason for granting a new trial, it was obvious under the evidence that the court believed the amount of the recovery was excessive.

With reference to the granting of a new trial, the district court has the power and is required to consider and determine motions for a new trial by the exercise of its judicial discretion. In doing so the court must be governed and guided by applicable law, that is, the application of the statutes and legal principles to all the facts in the case. While the trial court need not give his reason for reaching a decision, the justification of the decision must be one established from the record. See Greenberg v. Fireman's Fund Ins. Co., 150 Neb. 695, 35 N. W. 2d 772.

While there is no fixed or exact rule known or recognized in our system of jurisprudence in which the same measure of damages for personal injuries may be applied

to all cases alike, as has often been said, much is left to the good sense and reason of the man in the jury box. The law gives to the jury the right to determine the amount of recovery in cases of personal injury. That is, of course, one of its functions, and, if the verdict is not so disproportionate to the injury as to disclose prejudice and passion, it will not be disturbed. See, Remmenga v. Selk, 152 Neb. 625, 42 N. W. 2d 186; Rueger v. Hawks, 150 Neb. 834, 36 N. W. 2d 236; Horky v. Schroll, 148 Neb. 96, 26 N. W. 2d 396; Thoren v. Myers, 151 Neb. 453, 37 N. W. 2d 725.

The foregoing constitutes a general rule of practice. However, there is another rule which gives the trial court the power to set aside a verdict if, from the evidence adduced, it appears that the verdict is so exorbitant and excessive as to indicate that it was the result of passion, prejudice, mistake, or some means not apparent in the record, or it is clear that the jury disregarded the evidence or rules of law. See, Rueger v. Hawks, *supra;* Horky v. Schroll, *supra;* Remmenga v. Selk, *supra.* In the afore-cited cases the verdict of the jury was not set aside, but the rule for setting aside a verdict and granting a new trial was stated.

In the instant case, on May 4, 1951, when the plaintiff went to Dr. Iwersen she complained of tenderness on the right external malleolus when she stood on her feet for an extended period of time. His examination of the muscles in her ankles and legs showed that they were good, and there was no limitation of motion or stiffness in the ankles and legs. There was of the feet. That is the reason he prescribed the metatarsal bars. The treatment he rendered was for her feet. According to the doctor's testimony, the motion was good in all directions. There was some tightening of the muscles and tendons, however that did not limit the motion of the ankle and legs. There was no loss of sensation, no numbness, no lack of feeling, and no swelling. He found nothing wrong with the boney structure of the foot, no

fracture, and no dislocation of any of the bones of the toes. In the large toe of her left foot she had chronic arthritis which she had before the accident. The sensory nerves and reflexes were good. The doctor was rather indefinite as to what extent the accident aggravated the chronic arthritis in her big toe on the left foot. The circulation in the ankle was not affected. While there is some evidence that her condition which existed when he finished treating her was permanent, this must by necessity refer to the chronic condition of arthritis as he found it in the big toe of her left foot.

Dr. Iwersen saw the plaintiff on five occasions over a period of 9 months, first on May 4, 1951, then on June 8, July 11, and August 10 of that year, and on February 9, 1952. For the medical services rendered he charged her $50, and an additional $100 to testify as an expert witness.

It also appears from the record that there was little loss of earnings, if any. The plaintiff had been employed at the convent for $25 a week, board, room, and laundry. She then relieved her friend Miss Hite to keep house for Monsignor Buckley and, as the evidence shows, worked for the Montgomerys at $25 a week. She took care of Mrs. Collins for the same amount, and Mrs. Williams for $35 a week. In other words, she continued to earn as much after the accident as she had earned 11 months previous thereto.

The injuries the plaintiff received were painful and had remained so to some extent as testified to by Dr. Iwersen, but at the time of the trial, according to the doctor's testimony, the plaintiff had fairly normal feet for a person of her age.

When it appears from the record that the verdict in a case is so clearly exorbitant or excessive as to indicate that it was the result of passion, prejudice, or mistake, or some means not apparent in the record, or it is clear that the jury disregarded the evidence or rules of law, then it is the duty and power of the trial court and of

this court to set aside a verdict for damages so large that it does not find support in the evidence. See, Rich v. Dugan, 135 Neb. 63, 280 N. W. 225; Snyder v. Russell, 140 Neb. 616, 1 N. W. 2d 125; Trute v. Holden, 118 Neb. 449, 225 N. W. 238.

It is true, as the plaintiff asserts, this court has recognized that in actions such as this the jury may take into consideration the purchasing power of money with respect to commodities that are in use by the public generally and can be said to constitute necessaries of life, and this factor may be taken into consideration in determining whether or not the verdict rendered by a jury is so grossly excessive as to justify the granting of a new trial under the governing rules of law.

The rule is well settled that in this class of cases it properly comes within the province of the jury to take into account the purchasing power of money with respect to the commodities that are in use by the public generally and that may reasonably be said to constitute the necessaries of life. See, Dailey v. Sovereign Camp, W. O. W., 106 Neb. 767, 184 N. W. 920; Lincoln Gas & E. L. Co. v. City of Lincoln, 250 U. S. 256, 39 S. Ct. 454, 63 L. Ed. 968. There are other cases to the same effect unnecessary to cite.

We are cognizant of the fact that the purchasing power of money is less today than in the past few years and give recognition to that fact. However, after giving careful consideration to the facts and circumstances of this case, we believe the verdict in this case is so clearly exorbitant as to indicate that it was the result of passion, prejudice, mistake, or that it is clear that the jury disregarded the evidence or controlling rules of law.

For the reasons heretofore given in this opinion, we conclude that the trial court was not in error in granting a new trial in this case. Having so held, other assignments of error need not be discussed.

We affirm the judgment of the trial court.

AFFIRMED.

WENKE, J., dissenting.

I cannot agree that the record presents a situation which makes the verdict of $4,500 rendered by the jury so exorbitant or excessive as to indicate that it was the result of passion, prejudice, or mistake, or that it is clear that the jury disregarded the evidence so as to give the trial court the power to set it aside.

When a party has succeeded in securing a verdict of a jury on the facts in issue he is entitled to keep it unless there is prejudicial error in the proceedings by which it was secured. If, after a verdict is obtained, a motion for new trial is made which finds no legal reason in the record to support it the trial court has no judicial discretion in ruling thereon but must deny it. See Greenberg v. Fireman's Fund Ins. Co., 150 Neb. 695, 35 N. W. 2d 772.

Admittedly appellee was liable. The only question presented was the amount appellant was entitled to recover. To determine what the amount should be was the function of the jury and one with which we have no right to interfere as being excessive if there has been evidence adduced sufficient to support it. As stated in Greenberg v. Fireman's Fund Ins. Co., *supra:* "That (the) rule does not authorize the district court to invade the province of the jury and to set aside the verdict and grant a new trial because the court arrived at a different conclusion than the jury on the evidence that went to the jury."

In this regard the appellant, since she recovered the verdict, is entitled to have the evidence adduced considered in the light of the following: "In testing the sufficiency of evidence to support a verdict it must be considered in the light most favorable to the successful party, that is, every controverted fact must be resolved in his favor and he should have the benefit of every inference that can reasonably be deduced therefrom." Borcherding v. Eklund, *ante* p. 196, 55 N. W. 2d 643.

While there is evidence in the record to support a

finding that appellant suffered loss of earnings, had a moderate amount of medical expense, and has some permanent conditions which, with reasonable certainty, the evidence shows will at least cause her pain and inconvenience in the future, if not some disability, this dissent will not consider those items further. What is herein of primary concern is the pain which appellant suffered as a consequence of the injuries received and the suffering arising therefrom during the period between the date of the accident, December 31, 1950, and the date of the trial which began on April 16, 1952, or a period of about 15½ months.

Appellant is a registered practical nurse. At the time of the accident she was a widow, 58 years of age, and self-supporting. The type of work she performed required that she be on her feet a good deal of the time. Prior to the accident she testified she had never experienced trouble with her feet and ankles.

From the evidence adduced the jury could have found: That the immediate result of the accident was injury to appellant's feet and lower limbs consisting of several severe bruises resulting in complete discoloration and severe swelling, and severe injury to the toes of her left foot; that these injuries caused her immediate excruciating pain; that the swelling, discoloration, and bruises, although treated, remained for months and continued to cause her to suffer severe pain; that because of this suffering she was unable to sleep; that her condition made standing or walking difficult and painful, making it necessary for her to rest often and walk with a limp; that because of this condition she became nervous; that after some 4 months this condition began to improve as a result of the treatments she took but she still continued to suffer pain and the inconvenience of not being able to be on her feet for any length of time and continued to have difficulty sleeping; that her left foot, because of the injuries thereto, became stiff and made walking difficult and tiring; and that these conditions continued

to exist at the time of the trial some 15½ months after the accident, although in a lesser degree.

As stated in 25 C. J. S., Damages, § 93, p. 641: "There is no standard by which physical pain and suffering may be measured and compensated for in money."

And as stated in Remmenga v. Selk, 152 Neb. 625, 42 N. W. 2d 186: "In an action for damages, where the law furnishes no legal rule for measuring them, the amount to be awarded rests largely in the sound discretion of the jury, and the courts are reluctant to interfere with a verdict so rendered."

Taking into consideration the pain, suffering, and inconvenience which the evidence shows this appellant suffered during the 15½ months which resulted from appellee's admitted fault, I think the verdict is sustained by the evidence, especially when the other items are included. This is particularly true when these elements are considered in the light of the rule: "* * * that in this class of cases it properly comes within the province of the jury to take into account the purchasing power of money with respect to the commodities that are in use by the public generally and that may reasonably be said to constitute the necessaries of life." Dailey v. Sovereign Camp, W. O. W., 106 Neb. 767, 184 N. W. 920.

As stated in the majority opinion, there are other reasons assigned by appellee why the ruling of the trial court was correct. Since the majority opinion does not discuss them and it is not based thereon this dissent will not in any way deal with the merits thereof. It is directed solely to the grounds upon which the majority opinion is based, that is, the sufficiency of the evidence adduced to support the verdict of the jury.

CHAPPELL, J., joins in this dissent.

THOMAS R. DYER, APPELLEE, V. ROBERT J. ILG, APPELLANT.
57 N. W. 2d 84

Filed February 13, 1953. No. 33272.

1. **Trial: Appeal and Error.** In determining the sufficiency of evidence to sustain a verdict it must be considered most favorably to the successful party, any controverted fact resolved in his favor, and he must have the benefit of inferences reasonably deducible from it.
2. **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.
3. **Trial: Juries.** It will not be presumed that passion and prejudice influence the action of jurors, but it must be affirmatively shown before a verdict will be disturbed.
4. **Appeal and Error.** Where there is no prejudicial error found in the record and the verdict of a jury has sufficient competent evidence to support it, the judgment will be affirmed.

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

George Evens, for appellant.

Frost, Peasinger & Meyers, and *Harry J. Farnham,* for appellee.

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

CHAPPELL, J.

Plaintiff, Thomas R. Dyer, brought this action to recover upon an alleged oral contract for material furnished and labor performed upon a seven-room house, property of defendant Robert J. Ilg, in which plaintiff was a tenant. The issues made by plaintiff's petition and traversed by defendant's answer were tried and submitted to a jury, whereupon it awarded plaintiff a verdict for $513.65 upon which judgment was rendered. Defendant's motion for new trial was overruled, and he appealed, assigning substantially: (1) That the verdict

was the result of passion and prejudice because of misconduct by plaintiff's counsel, the trial court, and the jury; (2) that the verdict was not sustained by the evidence but was contrary thereto and contrary to law; and (3) that generally there were errors of law occurring at the trial. We conclude that such assignments have no merit.

In connection with the first assignment, there is nothing whatever in the record upon which to base any charge of misconduct on the part of the trial court and jury. That matter will not be further discussed.

When the situation is analyzed, we also conclude that plaintiff's counsel was guilty of no misconduct. In that connection three incidents are relied upon by defendant. In the first, plaintiff's counsel asked plaintiff a perfectly proper question upon direct examination to which defendant made no objection. However, when the answer was given, it appeared to be on the borderline of admissibility under the issues pleaded, whereupon the court on its own motion so indicated to counsel and said: "Leave that out." Thereupon, plaintiff's counsel asked leave to make further showing, which the court denied, and counsel for defendant said: "I move what he said be stricken, if your Honor please." The court responded, "Yes, it may go out." Plaintiff's counsel replied, "All right, we won't mention it." That was the end of the incident, which could not upon any theory be construed as misconduct of counsel.

Upon the second occasion plaintiff's counsel, in cross-examination of defendant's wife, asked a question with relation to whether or not the house was sold at a profit of $6,000 in December 1950, to which defendant's counsel interposed an objection that the question was "irrelevant and immaterial, prejudicial and self serving." Thereupon plaintiff's counsel started to ask permission to make a showing but was interrupted at the beginning of it, whereupon defendant's counsel said, "Make your offer." In response to such invitation, plaintiff's counsel

then made an offer, to which the court replied: "I don't think that is proper. I will sustain the objection." Defendant's primary complaint is that the statement contained in such offer made by plaintiff's counsel with relation to the question asked and excluded was prejudicial to defendant and that in making it plaintiff's counsel was guilty of misconduct. Contrary to contention of defendant, such matter was never again referred to by plaintiff's counsel in argument or otherwise. As held in Missouri P. Ry. Co. v. Fox, 60 Neb. 531, 83 N. W. 744: "It is a sound and salutary principle that a party can not be heard to complain of an error which he himself has been instrumental in bringing about." See, also, In re Estate of Mattingly, 121 Neb. 90, 236 N. W. 175; Tucker v. Paxton & Gallagher Co., 152 Neb. 622, 41 N. W. 2d 911; Pahl v. Sprague, 152 Neb. 681, 42 N. W. 2d 367. Clearly, counsel for defendant could not invite error and then take advantage of it. In any event, we conclude that plaintiff's counsel was guilty of no misconduct in connection with such second incident.

The third incident occurred while plaintiff's counsel was cross-examining defendant's daughter. In doing so, he inquired whether or not she had testified differently with relation to certain matters when she was a witness in a former trial of this case in the municipal court. In that connection, however, defendant's counsel never made any objection whatever to any of such questions and cannot now complain. In any event, plaintiff's counsel was guilty of no misconduct with relation to such incident.

Defendant also contended that the trial court erred in refusing to permit two of his witnesses, a subsequent purchaser and her son, to testify that the labor performed by plaintiff was worthless because done in an unworkmanlike manner. They were attempting to base such conclusion upon an inspection of the property after plaintiff had vacated it on September 1, 1951, almost a year and one-half after the work had been completed

by plaintiff, and after plaintiff, his wife, and three children had lived in the property continuously during such period. Clearly the evidence was properly excluded as too remote and, as hereinafter observed, it was immaterial since it had no relation to the issues pleaded. Defendant's position in his answer and during the trial was simply that the work was not done by plaintiff as alleged and that in any event defendant had never agreed to pay for it as claimed by plaintiff.

In that connection, plaintiff alleged in his petition substantially as follows: That on or about February 9, 1950, he rented defendant's house as a home for his family; that at that time the house was in a dirty, run-down condition and in general need of repairs and improvements; and that on or about that time plaintiff and defendant entered into an oral agreement whereby plaintiff agreed to paint and repair the premises, modernize the kitchen, and make said premises generally habitable, in consideration of which defendant agreed to furnish the material and reimburse plaintiff for his labor. Plaintiff alleged that he performed his part of the agreement and in doing so worked 316 hours for which $1.50 an hour was a fair and reasonable rate, making a total of $474 due for labor furnished. Plaintiff also alleged that he furnished $39.65 worth of material, and advanced $50 for labor, making a total of $563.65, all of which defendant agreed to pay, but failed, neglected, and refused to do so. In that connection, during the trial plaintiff discovered that the $50 item for labor aforesaid was a duplication, and in open court withdrew his prayer for that item, which left his prayer for a total of $513.65, the amount which the jury awarded him. Contrary to defendant's contention, he could not have been prejudiced by such withdrawal nor by the fact that plaintiff prayed for a larger total amount in the municipal court than he did upon appeal in the district court.

For answer to plaintiff's petition, defendant admitted that plaintiff was a tenant in his house as alleged, on a

monthly basis, but denied that the house was then in a run-down, dirty condition, and in general need of repairs. He then alleged that a few days after plaintiff rented the premises, he requested that defendant purchase some paper and a little paint, and defendant agreed to do so, but he positively refused to pay for any labor. He then denied generally and specifically all other allegations of plaintiff's petition. The case was tried and submitted to the jury on those issues.

Only recently this court reaffirmed that: "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.

It is also the rule that: "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." Conley v. Hays, 153 Neb. 733, 45 N. W. 2d 900.

This court has held that: "It will not be presumed that passion and prejudice influence the action of jurors, but it must be affirmatively shown before a verdict will be disturbed." Little v. Loup River Public Power Dist., 150 Neb. 864, 36 N. W. 2d 261, 7 A. L. R. 2d 355.

Finally, it is elementary that: "Where there is no prejudicial error found in the record and the verdict of a jury has sufficient competent evidence to support it, the judgment will be affirmed." Pruitt v. Lincoln City Lines, 147 Neb. 204, 22 N. W. 2d 651. As stated in Bolio v. Scholting, *supra*: "The verdict of a jury, based on conflicting evidence, will not be disturbed unless clearly wrong."

With such rules in mind, we have carefully examined

the record. In doing so, we discover that the evidence adduced upon the issues presented was generally conflicting. As heretofore observed, the issues in such a situation were for determination by the jury. To recite the evidence at length would serve no purpose here and would unduly prolong this opinion. No complaint is made with regard to any instruction given by the court, and it is sufficient for us to say that plaintiff adduced ample competent evidence to support the allegations of his petition and sustain the verdict and judgment thereon.

In the light of the record and the foregoing applicable rules, we conclude that there was no error of record prejudicial to defendant, and that the judgment should be and hereby is affirmed.

AFFIRMED.

WILLARD T. KILLIP, APPELLEE, V. ADA NOLEN KILLIP, APPELLANT.

57 N. W. 2d 147

Filed February 20, 1953. No. 33245.

1. **Divorce: Appeal and Error.** Divorce cases are tried de novo on appeal to this court, subject to the rule that when credible evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying and must have accepted one version of the facts rather than the opposite.
2. **Divorce: Parent and Child.** In a divorce suit in which the custody of a minor child is involved, the rule is that the custody of the child is to be determined by the best interests of the child, with due regard for the superior rights of fit, proper, and suitable parents.
3. ———: ———. The statute and the demands of nature commit the custody of young children to their parents rather than to strangers, and the court may not deprive the parent of such custody unless it is shown that such parent is unfit to perform the duties imposed by the relation or has forfeited the right.

4. ———: ———. The right of a parent to the custody of a child is not lost beyond recall by an act of relinquishment performed under circumstances of temporary caprice or discouragement.
5. ———: ———. The right of a parent is not lightly to be set aside, and it should not be done unless unfitness is affirmatively shown or a forfeiture clearly established.
6. ———: ———. Custody of a child of tender years should be awarded the mother unless it is shown that she is unsuitable or unfit to have such custody or through some peculiar circumstances is unable to furnish a good home.
7. **Divorce.** Extreme cruelty may consist of personal injury or physical violence, or it may be acts or omissions of such character as to destroy the peace of mind or impair the bodily or mental health of the one upon whom they are inflicted or toward whom they are directed, or be such as to destroy the objects of matrimony.
8. ———. 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.
9. ———. A decree of divorce may not be granted on the uncorroborated declarations, confessions, or admissions of the parties to the case.
10. ———. The court in deciding the amount of alimony or in making a division of property in a divorce case will consider the age of the parties, their earning ability, the duration of and the conduct of each during the marriage, their station in life, the circumstances and necessities of each, the physical condition of each, the property owned by them and whether or not it was acquired by their joint efforts, and any other pertinent facts.

APPEAL from the district court for Seward County: HARRY D. LANDIS, JUDGE. *Affirmed in part, and in part reversed and remanded with directions.*

Clarence M. Pierson and *Donald J. Kroger,* for appellant.

McKillip, Barth & Blevens, for appellee.

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

CHAPPELL, J.

In this case both parties sought a decree of absolute divorce and the custody of their two small children, a

daughter 6 years of age and a son 4 years of age. After a hearing upon the issues presented by plaintiff's petition, defendant's answer and cross-petition, together with plaintiff's reply and answer thereto, the trial court rendered a decree. It awarded the custody and control of the children "temporarily" to plaintiff's mother, "subject to the further order of this Court, and conditioned on the right of reasonable visitation by the defendant, * * *." It awarded defendant $700 as alimony and as her share of the joint accumulations of the parties, payable $100 July 1, 1952, $100 January 1, 1953, and a like sum each July 1 and January 1 thereafter until paid in full, without interest except upon defaults. It awarded plaintiff their 1946 Chevrolet car and household goods, but taxed all costs to him, including $75 as fees for defendant's counsel.

Defendant's motion for new trial was overruled, and she appealed, assigning that the judgment was not sustained by the evidence but was contrary thereto and contrary to law. In that connection, defendant contended that she should have been granted the divorce together with custody of the children and an allowance for their support, and that the award of $700 as alimony and as her share of their joint accumulations was inadequate.

We affirm that part of the judgment awarding plaintiff a divorce and the allowance of $700 alimony to defendant, upon condition that no deductions shall be made therefrom for monthly support money ordered paid by this court which has accrued or been paid pending this appeal. However, we reverse the judgment in part and remand the issue of custody of the children for further hearing by the trial court as hereinafter prescribed. We remand such issue because an order for temporary custody such as made in this case tends to encourage hardship, unhappiness, and instability not only in the lives of the children but also in that of the parent who is entitled to their custody. Further, we

are unable to determine from the competent evidence now before us whether or not defendant, who we conclude was not shown to be an unsuitable or unfit person to have their custody, has made arrangements for a suitable home and for proper supervision and education of the children while she is employed in Lincoln. Upon a satisfactory showing that she has done so, the trial court should award defendant their custody and order plaintiff to pay a suitable monthly amount for their support, unless it is affirmatively established that since the trial defendant has become unsuitable or unfit to have their custody.

In that connection this court recently reaffirmed that: "In a divorce suit in which the custody of a minor child is involved, the rule is that the custody of the child is to be determined by the best interests of the child, with due regard for the superior rights of fit, proper, and suitable parents." Campbell v. Campbell, *ante* p. 155, 55 N. W. 2d 347.

In Hanson v. Hanson, 150 Neb. 337, 34 N. W. 2d 388, this court held: "The natural rights of the parents are of important consideration and, in the absence of special circumstances, the child or children should be awarded to the parent, or parents, as against more distant relatives or third persons.

"Custody of a child of tender years should be awarded the mother, unless it is shown that she is unsuitable or unfit to have such custody, or through some peculiar circumstance is unable to furnish a good home." See, also, Bath v. Bath, 150 Neb. 591, 35 N. W. 2d 509.

As early as Norval v. Zinsmaster, 57 Neb. 158, 77 N. W. 373, 73 Am. S. R. 500, it was held: "The statute and the demands of nature commit the custody of young children to their parents rather than to strangers, and the court may not deprive the parent of such custody unless it be shown that such parent is unfit to perform the duties imposed by the relation or has forfeited the right.

"The right of a parent to the custody of a child is not

lost beyond recall by an act of relinquishment performed under circumstances of temporary caprice or discouragement." As stated in the opinion: "The right of the parent is not lightly to be set aside, and it should not be done where unfitness is not affirmatively shown, or a forfeiture clearly established." Such rules are controlling here upon the question of custody.

We turn then to the question of whether or not defendant should have been granted a divorce for extreme cruelty by plaintiff. In that connection we have carefully examined the record and find therein no satisfactory evidence corroborating defendant's testimony with relation to the facts alleged in her cross-petition, as required by section 42-335, R. R. S. 1943. The controlling applicable rule is that: "A decree of divorce may not be granted on the uncorroborated declarations, confessions, or admissions of the parties to the case." Parker v. Parker, 155 Neb. 325, 51 N. W. 2d 753. See, also, Peterson v. Peterson, 153 Neb. 727, 46 N. W. 2d 126; Christensen v. Christensen, 144 Neb. 763, 14 N. W. 2d 613; O'Reilly v. O'Reilly, 120 Neb. 720, 234 N. W. 916. Upon such basis we conclude that defendant was properly denied a decree of divorce.

We are confronted then with the question of whether or not plaintiff was entitled to a divorce. It is elementary that divorce cases are tried de novo on appeal to this court, subject to the rule that when credible evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying and must have accepted one version of the facts rather than the opposite. Hodges v. Hodges, 154 Neb. 178, 47 N. W. 2d 361.

In Parker v. Parker, *supra,* this court held: "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."

Following the formal jurisdictional allegations, plaintiff's petition alleged substantially that defendant had been guilty of extreme cruelty in that she left the home furnished by him, concealed her whereabouts, and refused to reside with him; that she abandoned plaintiff and their children, compelling him to care for them; and that she failed, refused, and neglected to perform the household duties devolving upon a woman in the marriage relation. He also alleged as conclusions only that defendant had been guilty of other acts of extreme cruelty well known to her, which would be set forth particularly if required. In that connection, the rule is that: "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." Peterson v. Peterson, *supra.*

Further, plaintiff alleged "*that by virtue of the abandonment of the children as above forth,* the defendant is not a fit and proper person to have the care and custody and control of said minor children" (italics supplied), but that plaintiff, who had cared for them, is a fit and proper person to have their care, custody, and control, which should be awarded to him. It will be noted that plaintiff alleged but one reason for defendant's unfitness to have the custody of the children, to wit, that she had abandoned them, and that the trial court did not find that plaintiff was a fit and proper person to have their custody. Instead, the custody was "temporarily" given to the grandmother, doubtless anticipating a reconciliation, or that defendant would subsequently be able to show that she had made suitable arrangements for their care, supervision, and education, heretofore discussed.

Insofar as important here, there is evidence in the record disclosing that the parties were married in Las

Vegas, Nevada, on April 23, 1942, while plaintiff was in the army. They lived together part of the duration of his army service, but plaintiff was in England 2 years of that period, while defendant lived at Friend, Nebraska. Upon plaintiff's return in 1945, he had $700 or $800, and the parties lived first in one place then in another where plaintiff was employed, until about 2 years before the trial, when they moved into a small house on a 40-acre farm belonging to plaintiff's mother. Such house was located about 75 or 100 feet from the mother's house on the same farm. Plaintiff's father had started to build it for the parties herein, but his death intervened, so plaintiff and defendant completed it and moved in. Their investment therein is disputed, but we believe the evidence discloses that it was about $1,200 or $1,300. They paid no rent, but by arrangement with plaintiff's mother they operated the 40 acres on a 50-50 basis, with livestock belonging to plaintiff's mother and machinery formerly belonging to plaintiff's father. They also received their milk and eggs used in the household. In addition, plaintiff did outside carpenter and electrical work when opportunity afforded, and his entire income was about $2,000 yearly. At the time of the divorce plaintiff had $200 or $300 cash and a few small unpaid accounts due him. The parties also owned an old Chevrolet car and household goods inclusively worth about $1,000, plus the aforesaid investment in the house.

For clarity we will dispose of the question of alimony at this point. In Parker v. Parker, *supra,* this court held: "The court in deciding the amount of alimony or in making a division of property in a divorce case will consider the age of the parties, their earning ability, the duration of and the conduct of each during the marriage, their station in life, the circumstances and necessities of each, the physical condition of each, the property owned by them, and whether or not it was acquired by their joint efforts, and any other pertinent facts." In that connection, the earning ability of defendant is as

much or more than that of plaintiff. In addition, the record here discloses that effective July 1, 1952, this court ordered plaintiff to pay defendant $25 per month support money pending this appeal. We conclude that such sums shall not be deducted from the $700 alimony allowed by the district court, and that such total amount is a proper allowance for alimony. That is, defendant shall receive as alimony the $700 heretofore allowed by the trial court, without any deduction for such sum as will have accrued or been paid at $25 per month from July 1, 1952, to the date of mandate herein.

Serious marital difficulty began about 6 months before the divorce. Plaintiff's contention is that it occurred when defendant's affection for plaintiff cooled and she appeared to have become unduly friendly with their near neighbor, a single man about 26 or 27 years old. Concededly defendant was not guilty of any moral wrong, but her friendly association with such neighbor, most of which occurred in plaintiff's presence, caused gossip and aroused suspicion in the minds of plaintiff, his mother, and other members of the family, who gave vocal expression thereto. Most of such gossip and suspicion was based on fiction rather than facts, but there was some evidence which, if true, indicated that defendant was somewhat indiscreet at times. On the other hand, defendant denied any affection for such neighbor or that she ever associated with him unless plaintiff was present, except upon one occasion when they sat and visited a few moments in such neighbor's car directly in front of their home and that of plaintiff's mother. Concededly such neighbor was plaintiff's close boyhood friend, who had a big new car in which he took both plaintiff and defendant with him to shows and elsewhere. Defendant's contention is that before their marriage plaintiff promised that they would never live on a farm. She did not want to live on the farm. She did not like and was physically unable to do the chores and farm work demanded by plaintiff, who was not overly industrious,

and by his mother, who supervised everything. She claims that it was only because thereof and because she was nervous and ill that she was unable to perform her household work or look after her two children as efficiently as demanded.

Be that as it may, in September 1951, plaintiff went on a week-end business trip. When he returned, defendant and their little girl had gone away in plaintiff's car, leaving their little boy with plaintiff's mother. The car was found sitting in a yard in Beaver Crossing, with a friendly note from defendant appended to the ashtray. In substance it informed plaintiff that she was going to see her ill mother in Indiana, and told him to write her at a sister's given address. She said that she would like to have taken the little boy also, and urged plaintiff to take good care of him and not worry because she would take good care of the little girl, and would write upon arrival.

After waiting a few days and hearing nothing further, plaintiff sent a telegram to the address of defendant's sister and, receiving no response, called the sister, who informed him that defendant had not arrived. Worried and fearful, plaintiff then contacted the sheriff of Seward County and Lincoln police, who, about a week later located defendant and the little girl staying at her married sister's home in Lincoln. Plaintiff then went to the sister's home and stayed 2 or 3 days, where he talked to defendant, urging her to return to their home, but she refused, preferring to live and be employed in Lincoln. At that time, over defendant's protests but ultimately with her reluctant consent, plaintiff's sister took the little girl home with her and thence back to plaintiff's home, where both the little girl and boy have been cared for by plaintiff's mother and sister-in-law. Such persons are both women of character who have concededly given the children as good care and supervision as it is possible for a grandmother and aunt in their circumstances to give children of tender age, who

above all else need their mother.

In the meantime, defendant has visited the children twice at plaintiff's home, and in his sister's home at Seward, or elsewhere upon other occasions. At innumerable times, also, an average of twice a week or more, plaintiff has visited defendant in Lincoln, often taking the children with him, urging her to return with him to their home or to start life again together elsewhere, but she has consistently refused, saying that she wanted a divorce. At her request, they consulted lawyers in Lincoln who urged reconciliation to no avail, and plaintiff refused to sign a voluntary appearance in Lancaster County, but subsequently filed this action in Seward County. In such a situation we do not believe it could be said that plaintiff ever believed defendant was an unsuitable or unfit person to have the custody of their children.

We conclude that there was competent evidence, satisfactorily corroborated, sufficient to establish that defendant was guilty of extreme cruelty. Upon such hypothesis we conclude that plaintiff was entitled to a divorce, but under the circumstances we cannot conclude that defendant abandoned her children as alleged by plaintiff.

For reasons heretofore stated, we affirm that part of the judgment awarding plaintiff a divorce, together with that part of the judgment with relation to alimony, upon condition that no deductions shall be made therefrom for support money ordered paid by this court which has accrued or has been paid pending this appeal, but we reverse the judgment in part and remand the cause for further proceedings with regard to the care, custody, and control of the two minor children for decision, in conformity with that part of this opinion relating thereto. All costs are taxed to plaintiff, including $150 allowed for the services of the defendant's counsel in this court.

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

STATE OF NEBRASKA EX REL. WILLIAM M. SHELLEY, APPELLANT, V. BOARD OF COUNTY COMMISSIONERS OF FRONTIER COUNTY ET AL., APPELLEES.

57 N. W. 2d 129

Filed February 20, 1953. No. 33247.

Elections: Counties. Section 23-129, R. S. Supp., 1949, was applicable here to determine the requisite vote where a county board called an election and submitted a single proposition of the issuance of bonds to secure funds to pay for the erection of a courthouse and the levy of a tax to pay principal and interest thereon in excess of the limitations of Article VIII, section 5, of the Constitution.

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

Cloyd E. Clark and *Van Pelt, Marti & O'Gara,* for appellant.

F. J. Schroeder and *George B. Hastings,* for appellees.

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

SIMMONS, C. J.

In this action relator sought a writ of mandamus directing respondents to issue bonds for the erection of a courthouse. Respondents demurred generally. The trial court sustained the demurrer. Relator stood on his petition. The action was dismissed. Relator appeals. We affirm the judgment of the trial court.

The demurrer admits the following factual situation:

December 21, 1950, the State Fire Marshal ordered the courthouse of Frontier County either repaired in an extensive way or that the building be demolished.

April 20, 1951, the county board adopted a resolution and order dealing with that matter. In it they found that it was necessary to provide a courthouse; $200,000 was an adequate sum for that purpose; a bond issue was required; and it was necessary to assess taxes the aggregate of which would exceed the constitutional limita-

tion of 50¢ per $100 actual valuation of the property of the county, for the purpose of providing the funds necessary for paying the principal and interest on the bonds. They determined that the excess tax was to be used for that purpose. A special election was called for May 28, 1951, to vote on the "proposition and question": Shall the board be authorized to borrow money and issue general obligation bonds in any sum not exceeding $200,000 for the purpose of erecting a suitable courthouse and pledge the resources and property of the county to pay for the same (the terms of the bonds being specified) *and,* shall the county authorities be authorized to make a tax levy annually in excess of the constitutional limit in a rate and amount sufficient to pay the principal and interest on the bonds. They provided for a vote for "said bonds and tax" or against "said bonds and tax." The notice of the election carried the above information, particularly reciting that it had been determined that a tax in excess of the constitutional limit would be necessary to pay the principal and interest on said bonds.

The election ballot contained the proposition of authority to issue the bonds and make the tax levy. Those voting were required to vote for or against the one proposition. At the election there were 2,713 votes cast. One thousand seven hundred and twenty-five were in favor of the proposition and 988 against it.

On June 15, 1951, the county board found that the vote in favor was less than two-thirds of the number of votes cast and that the bonds could not be legally issued.

This action was then brought to compel the issuance of the bonds and the construction of a courthouse.

The constitutional provision is: "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." Art. VIII, § 5, Constitution of Nebraska.

It is the relator's contention that section 23-120, R. S. 1943, is a special statute controlling this matter and that only a majority vote is required. As a secondary position he advances the contention that the bonds carried in any event and that it is the duty of the respondents to proceed to issue the bonds and pay therefor out of the general revenue of the county.

It is the respondents' contention that sections 23-125 to 23-129, R. S. 1943, control, and that a favorable vote of two-thirds of the total number of votes cast must be in favor of the proposition and that that vote not being had here the trial court was correct in its denial of the writ.

We take up first relator's secondary contention. To accept it would be to hold that the proposition of bonds and tax was divisible. Clearly the proposition submitted was intended to be and was one indivisible proposition.

Relator contends that the respondents were exercising the power given in section 23-120, R. S. 1943, and undertaking to provide a suitable courthouse by the erection of such a structure, and that they submitted the same to a vote where the required majority was had under the provision that: "But no appropriation exceeding fifteen hundred dollars shall be made for the erection of any county building except as hereinafter provided, without first submitting the proposition to a vote of the people of the county at a general election or a special election ordered by the board for that purpose, and the same is ordered by a majority of the legal voters thereon; * * *." This, however, ignores the final provision of the section: "* * * but in no case shall the levy of taxes made by the county board for all purposes, including the taxes levied herein provided for the erection or repair of a courthouse or jail, exceed in any one year the sum of fifty cents on every one hundred dollars of the assessed valuation of the county."

In State ex rel. Polk County v. Marsh, 106 Neb. 760,

184 N. W. 901, we held that this last-quoted provision was a restriction on the power granted.

The authority to levy a tax in excess of the constitutional limit must be found elsewhere in the statutes. That authority exists in section 23-125, R. S. 1943, which provides: "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." Section 23-129, R. S. Supp., 1949, fixed the vote required. It 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." The parties agree that the 1951 amendment to the above statute is not applicable here.

Here the required vote was not had. It necessarily follows that the writ should not issue.

The judgment of the trial court is affirmed.

AFFIRMED.

CLARENCE E. FRANZ, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.

57 N. W. 2d 139

Filed February 20, 1953. No. 33248.

1. **Intoxicating Liquors.** Intoxicating liquor is any liquor intended for use as a beverage, or capable of being so used, which contains alcohol to the extent that it will produce some degree of intoxication when consumed in a quantity that may practically be drunk.
2. ———. The distinctive characteristic of all liquors is that they contain alcohol; that they are capable of being consumed as a beverage; and that when so used, they will produce, to some degree, intoxication in the common acceptation of the term.
3. ———. A complaint charging the offense defined by section 39-727, R. R. S. 1943, is not defective or insufficient because the words intoxicating liquor are used therein instead of the words alcoholic liquor.
4. **Criminal Law: Witnesses.** The credibility of witnesses and the weight of their testimony are for the jury to determine in a criminal case, and the conclusion of the jury may not be disturbed unless it is clearly wrong.
5. **Trial: Criminal Law.** Absence of any direct, incriminatory evidence is ordinarily made the test of the obligation of the trial court to instruct as to the probative value and manner of considering circumstantial evidence in a criminal case, and, if there is direct evidence of the principal facts essential to guilt, the failure to instruct in that respect is not error.
6. **Witnesses: Intoxicating Liquors.** A witness may testify from observation made by him, after stating the facts upon which the conclusion is drawn, that a person was or was not under the influence of intoxicating liquor.
7. ———: ———. The condition of being under the influence of intoxicating liquor is a fact which a nonexpert may ascertain in the same manner in which he gains knowledge of other facts.
8. **Trial: Criminal Law.** It is the duty of the court upon request of the accused to instruct the jury upon his theory of the case, if there is evidence to support it.
9. **Trial: Appeal and Error.** If the jury is correctly instructed

generally as to law, error cannot be predicated upon an omission of the court to charge as to some particular phase of the case unless a proper instruction was requested by the party complaining of the omission.

10. **Criminal Law: Appeal and Error.** An error in a criminal case to require a reversal of a conviction must be harmful to a substantial right of the defendant.

11. ———: ———. In deciding if there was error in a part of an instruction it will be considered with the whole instruction and any additional matter in the charge on the subject.

ERROR to the district court for Dodge County: RUSSELL A. ROBINSON, JUDGE. *Affirmed.*

Ginsburg & Ginsburg, for plaintiff in error.

Clarence S. Beck, Attorney General, and *Dean G. Kratz,* for defendant in error.

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

BOSLAUGH, J.

Clarence E. Franz was charged with the offense of operating a motor vehicle on or about November 15, 1951, on a public highway in Dodge County while he was under the influence of intoxicating liquor. He was convicted in the justice of the peace court and from the adjudication made there he took an appeal to the district court. He was unsuccessful in a jury trial in that court, and he was adjudged to pay a fine and ordered not to operate a motor vehicle for a designated period from the date of the satisfaction of the fine. His motion for new trial was denied and this error proceeding was instituted.

The authority for the charge made against the defendant is the statutory declaration that it is unlawful for any person to operate a motor vehicle "while under the influence of *alcoholic* liquor." § 39-727, R. R. S. 1943. The complaint charges that defendant operated a motor vehicle "while under the influence of *intoxicating* liquor." The defendant timely and properly challenged the suffi-

ciency of the complaint to state an offense under the penal laws of the state and has continued his objection throughout the litigation. The argument pertinent to the suggested fatality of the deviation in the complaint from the language of the statute is that the main defense was that defendant may have been under the influence of a medicinal preparation which affected his conduct, but it was not the kind and nature forbidden by the statute; that the complaint and an instruction in agreement with it allowed the jury to speculate and find that the preparation taken by the defendant may have had an intoxicating effect and was therefore within the expression "intoxicating liquor" unjustifiably substituted for the words of the statute "alcoholic liquor"; and that the phrase intoxicating liquor is much broader and more comprehensive than the expression alcoholic liquor and it permitted a finding of guilt under facts which would not have admitted of such a conclusion under the more restrictive statutory expression.

Intoxicating liquor generally includes and means any liquor intended for use as a beverage, or capable of being so used, which contains alcohol no matter how obtained, in such a percent that it will produce some degree of intoxication when imbibed in a quantity that may practically be drunk. The distinctive characteristic of all liquors is that they contain alcohol, the basis of all intoxicating drinks; that they are capable of being consumed as a beverage; and that when so used, they will produce intoxication to some extent in the usual and common acceptation of the term. 30 Am. Jur., Intoxicating Liquors, § 6, p. 255; 48 C. J. S., Intoxicating Liquors, § 1, p. 135; 1 Woollen and Thornton, Intoxicating Liquors, § 5, p. 8; Annotation, 4 A. L. R. 1137; Coleman v. State, 112 Tex. Cr. 635, 18 S. W. 2d 162; Roberts v. State, 4 Ga. App. 207, 60 S. E. 1082; People v. Haney, 100 Cal. App. 295, 279 P. 1054; Commonwealth v. L. & N. R. R. Co., 140 Ky. 21, 130 S. W. 798; United States v. Kinsel, 263 F. 141. This is what the terms mean to people generally.

This is obviously the meaning alcoholic liquor and intoxicating liquor had to the Nebraska lawmakers. In the amendment of 1949 concerning the offense involved here the legislators used the terms interchangeably. The first section of the act contains the words "under the influence of *alcoholic liquor.*" The next section refers specifically and definitely to the first section as relating to driving a motor vehicle while "under the influence of *intoxicating liquor.*" (Emphasis supplied.) Laws 1949, c. 116, p. 309. The first section of the act of 1949 was amended in 1951, and the Legislature evidenced its understanding of the sameness of the meaning of the two expressions by continuing the use of identical language in the two sections. Laws 1951, c. 118, § 1, p. 528; § 39-727, R. R. S. 1943. An ordinary individual would not believe that intoxicating liquor or alcoholic liquor described or included a medicine prescribed by a doctor and taken by a patient for a known serious chronic physical defect or ailment, without regard to the alcoholic content of the medicine.

The words alcoholic liquor as used by the Legislature in the act defining the offense charged herein mean any intoxicating liquor intended to be and capable of being used as a beverage and which when so used may result in the one who indulged in it being under its influence. The Legislature was not dealing with technical and scientific distinctions between various liquors. Its concern was with the use of any kind of alcoholic beverage capable of having an intoxicating effect and dangerous result when consumed by any person in control of or operating a motor vehicle. The record does not establish that the defendant was prejudiced by the substitution and use of the words intoxicating liquor for the words alcoholic liquor.

A member of the police department of the city of Fremont saw the accused, who will be identified as defendant, about 6:30 p. m. on November 15, 1951, operating a motor vehicle on a street of the city. He disregarded a red traffic control light as he entered and passed

through an intersection. He stopped in the lane of traffic some distance from the intersection. He had been sounding the horn of his car since the policeman first saw him. When the officer went to the car defendant had opened the door of the car and was "raving and using abusive language." The officer stated he was a police officer, exhibited his badge, said he did not think the defendant was in a condition to drive his car, and asked him to "slide over." Defendant said he was a federal officer, struck the policeman in the mouth, closed the door, and drove down the street towards the north. He drove slowly in an irregular course to the right, off the pavement, then to the left near, but not across, the center line until he had gone several blocks, came to an intersection, and violated the requirement of a stop sign. He continued to travel on streets of the city and committed another traffic violation by failing to stop before entering an intersection protected by a stop sign. The policeman and a member of the Nebraska Safety Patrol overtook defendant on Clarkson Street where he had stopped his car. When they opened a door of the car defendant was abusive, called them vulgar and indecent names, and attempted to strike the patrolman. They placed him under arrest, called a police car, and took him to the police station. On the way there he talked abnormally loud, was abusive, and his language was inelegant. He had the odor of alcohol on his breath. His eyes were dilated and glassy. He was unsteady when he stood or attempted to walk. His clothes were disarranged, wet, and soiled. His speech was thick. The policeman, the captain of the Nebraska Safety Patrol, and the sergeant of the police department were each of the opinion that defendant was under the influence of intoxicating liquor when he was arrested and brought to the station. A doctor who saw, talked with, and examined him about 10:30 that night said that he had every symptom of being under the influence of intoxicating beverage; that his pupils were dilated; that his

skin was flushed; that he had the odor of alcohol on his breath; and that his conversation indicated and it was the conclusion of the witness that defendant had taken too much alcohol.

A doctor on the staff of the Veterans' Hospital at Lincoln who had known and prescribed for defendant for 8 or 9 months said that on November 15, 1951, and since long prior thereto defendant had an active stomach ulcer, and a condition which was spasm in nature known as Raynaud's disease. It was characterized by pain due to spasms of the small vessels of the extremities of his body accompanied by blotching of the skin due to diminution of the blood flow and generally more severe during cold weather; that when the disease has existed for a considerable time there is loss of sensation in and strength of the extremities of the body; and that the disease was chronic with defendant and because thereof he was unsteady. The doctor had prescribed and defendant had taken banthine, tincture of belladonna, and elixir of phenobarbital. The banthine was tablet in form. The tincture of belladonna and elixir of phenobarbital when compounded was a solution. The total mixture was about 22 percent alcohol by volume. The purpose of the use of it was to relax the central nervous system, the brain, and the spinal cord of the patient, because of the pain he suffered and because of a specific action of the belladonna on the ganglionic fibers. Phenobarbital is affiliated with Raynaud's disease. Defendant had a degree of emotional rigidity secondary to pain and other symptoms caused by the disease and the phenobarbital was directed to the central system as a sedation to quiet the patient. Belladonna has two actions, central and peripheral. One of the peripheral actions is dilation of the pupils of the eyes. Belladonna sometimes causes a person to become very active and violent, but when it does its use under ordinary circumstances is not continued. Banthine is a synthetic organic chemical which has actions similar to the belladonna group

of alkaloids. The prescription for defendant was refilled on October 16 and 29, and November 9 and 21, 1951.

Defendant, a veteran of both world wars, had operated motor vehicles for 32 years and had not before the occurrence here involved been accused of drunken driving. He had been for years before and on November 15, 1951, afflicted with a hemorrhaging ulcer, Berger's disease, and Raynaud's disease. He had about a 50 percent disability of control of his extremities. He lost the ability to maintain normal balance about 1944 and it required 2 years in a government hospital for him to learn to walk again. In the fall of 1951 his condition became much worse. He was directed by the Veterans' Administration to be and he was in Omaha on the date here involved for a complete physical examination. Because of the instructions given him he refrained from eating, drinking, or taking his medicine during the day before and the day of the examination. He had generally taken the medicine prescribed every 3 hours day and night. The examination was made at the medical center and occupied from about 8 a. m. until 4:30 p. m. These things irritated and aggravated his condition, increased the pain in his stomach, and decreased his ability to use his arms, hands, and legs.

After the examination defendant took a banthine tablet, two capsules of resinat, and a teaspoon of phenobarbital. He did not consume any liquor or alcoholic beverage that day. He had been forbidden to do so at any time because of the ulcer and the hemorrhages it caused. He was told if he drank liquor of any kind a part of his stomach would have to be removed. He strictly complied with the prohibition imposed by his doctor. He left Omaha about 5 p. m. for Lincoln. He traveled on U. S. Highway No. 30, intending to go by way of Wahoo, because repairs were then being made on U. S. Highway No. 6. He was not familiar with U. S. Highway No. 30 and when he reached the place west of Omaha where there is a wide curve to the south and

another to the north he mistakenly took the latter. He had an attack and was quite ill while on the Dodge Street road, and after he made the turn his condition became much worse. He took two drinks of belladonna from the bottle he had. He did not know what quantity he drank. The next thing he remembered was that he was stopped by two men on a street in Fremont, taken from his car, and detained by them. They were in civilian clothes, did not say they were officers, and he thought he was being held up, that was why he attempted to keep them out of his car. He told the men at the police station of his physical condition, where he had been, what he had done, and that he was not intoxicated, but was very ill. He gave them his name and address, said he wanted to contact his family, and he gave them the names of two prominent citizens of Lincoln as persons of whom they could make inquiry concerning him. He did not say he was a federal officer. His car was not searched. He was put in a cell, was very ill, and had a hemorrhage. He asked for a doctor but none came until late that night. He took all of the medicine remaining in the bottle he had. When the doctor came defendant told him of his condition, that he had a hemorrhage that evening because of the ulcer, and of the medicine he had taken. The doctor said there was nothing he could do, visited a few minutes, and left.

The wife and a friend of the defendant came to the station about 12:30 a. m. He was released and returned to Lincoln with them. His wife described his physical condition and the treatment he had for it; the difficulty he had at times in walking or moving his arms; and the pain he suffered on those occasions. She or the friend of the defendant who went to Fremont with her saw nothing unusual or extraordinary in the activity, condition, appearance, or conversation of defendant. They each said he gave no indication that he was or had been under the influence of intoxicating liquor.

The only element of the offense in controversy is the fact of defendant being under the influence of intoxicating liquor while he was driving and operating a motor vehicle at the time charged. The evidence as to this was sharply conflicting. It was the right and duty of the jury to decide the issue. There was evidence to sustain its conclusion. Fisher v. State, 154 Neb. 166, 47 N. W. 2d 349, states the rule: "The credibility of witnesses and the weight of their testimony are for the jury to determine in a criminal case, and the conclusion of the jury cannot be disturbed unless it is clearly wrong." See, also, Poppe v. State, 155 Neb. 527, 52 N. W. 2d 422; Danielson v. State, 155 Neb. 890, 54 N. W. 2d 56; Haffke v. State, 149 Neb. 83, 30 N. W. 2d 462. The evidence does not permit a conclusion that the verdict of the jury is without adequate proof to sustain it. The determination of the trial court that the evidence required a submission of the case to the jury was correct and the contention of defendant to the contrary must be denied.

Defendant proposed an instruction on the subject of circumstantial evidence. It was rejected. The charge of the court did not advise the jury of the probative value or the manner of measuring or applying this character of evidence. Prejudice is claimed because of this omission. The record exhibits direct and positive proof of matters claimed by the State to show guilt of the accused and defendant produced the same class of evidence to convince the jury of his innocence. "When the existence of any fact is attested by witnesses, as having come under the cognizance of their senses * * * the evidence of that fact is said to be direct or positive. When, on the contrary, the existence of the principal fact is only inferred from one or more circumstances which have been established directly, the evidence is said to be circumstantial." Black's Law Dictionary (3d ed.), Circumstantial Evidence, p. 328. See, also, 20 Am. Jur., Evidence, § 270, p. 258. In Fisher v. State, *supra,* this

court said: "Absence of any direct, incriminatory evidence is ordinarily made the test of the obligation of the trial court to instruct as to the probative value and manner of considering circumstantial evidence in a criminal case, and, if there is direct incriminatory evidence of the principal facts essential to guilt, the failure to instruct in this regard is not error." Schluter v. State, 153 Neb. 317, 44 N. W. 2d 588, a prosecution for manslaughter, involved the issue of whether or not the defendant was under the influence of intoxicating liquor at the time of the accident, and the competency and sufficiency of admitted evidence as proof that he was. It is stated therein: "In Howard v. State, 109 Neb. 817, 192 N. W. 505, it is said: 'The rule, as deduced from the weight of authority, is that a witness may testify, from observation, whether a person was intoxicated. Intoxication is a fact which a witness may ascertain in the same manner in which he ascertains other facts. He may give the details and then may state the ultimate fact of intoxication as derived from observation.' See, also, Rhodes v. State, 124 Neb. 147, 245 N. W. 402; Annotations, 42 A. L. R. 1506, 68 A. L. R. 1362." See, also, State v. Franklin, 242 Iowa 726, 46 N. W. 2d 710; Tuggle v. State, 152 Tex. Cr. 162, 211 S. W. 2d 756; State v. Oliver, —— N. D. ——, 49 N. W. 2d 564. An instruction on circumstantial evidence would not have been appropriate in this case.

It is said by defendant that the trial court refrained from charging the jury on either of the two theories of the defense. These were that his condition, appearance, and conduct at the time of his arrest were caused by physical defects and suffering caused by illness; that the result and indications thereof produced outward manifestations similar to that of alcoholism; that to the extent he was under the influence of anything it was a medical preparation taken on advice of a competent medical consultant for medicinal purposes; and that the medicine was not alcoholic liquor within the statute de-

claring the offense charged against defendant though one element of it was alcohol.

It is the duty of the court upon request to instruct the jury upon the theory of defendant if there is evidence to support it. Trobough v. State, 120 Neb. 453, 233 N. W. 452. However, if the jury is correctly instructed generally as to law, error cannot be based upon an omission of the court to charge as to some particular phase of the case unless a proper instruction was requested by the party complaining. Planck v. State, 151 Neb. 599, 38 N. W. 2d 790; Sedlacek v. State, 147 Neb. 834, 25 N. W. 2d 533, 169 A. L. R. 868; Carleton v. State, 43 Neb. 373, 61 N. W. 699. The instruction tendered by the defendant did not satisfy this requirement. The fact that defendant had taken medicine containing some alcohol and that it "influenced the conduct and activities" of defendant would not require his acquittal. He could also have been at the same time under the influence of intoxicating liquor. The requested charge should have been in substance that if the jury after a consideration of the evidence had a reasonable doubt as to whether the condition, appearance, and conduct of defendant at the time of the arrest were caused by his physical defects or by the medicines taken by him, or by both, it should find him not guilty. Trobough v. State, *supra*.

The court by an instruction permitted the jury to apply to the case the maxim that he who speaks falsely on one point will speak falsely upon all. It was not applicable and should not have been interjected into the case. Defendant claims he was prejudiced by it because of the condition of the record. He testified that after his physical examination was completed in Omaha on the afternoon of November 15, 1951, he went to a restaurant which he thought was on Douglas or Fifteenth Street about a half block from the medical building, and had lunch consisting of a glass of milk, some white meat of chicken, and toast. He was asked what restaurant it was and he answered Valentine

Restaurant. He said it had no bar and did not serve beer or alcoholic drinks. Defendant was asked by the State on cross-examination if he had not stated at a prior hearing in the case that the name of the restaurant was the Virginia Cafe. He promptly and frankly answered "That is right, it was the Virginia Cafe." He was then asked if beer was sold there and he answered none where he could see, that he was only in the front part of the cafe. This testimony was not directly related to the issue of the case. It was at the best incidental and remote. It will ordinarily be sufficient to give a correct charge on the subject of the credibility of witnesses and disregard the maxim to which reference has been made. Knihal v. State, 150 Neb. 771, 36 N. W. 2d 109, 9 A. L. R. 2d 891. The giving of the instruction was error but it does not appear to be a prejudicial one. Errors in the trial of a criminal case to require a reversal of a conviction must be harmful to a substantial right of the defendant. Hameyer v. State, 148 Neb. 798, 29 N. W. 2d 458.

A part of an instruction given by the court—"Insofar as there may be any conflict in the evidence, it is your duty to reconcile it if you can"—is separated by the defendant from the other parts of it and the conclusion is pressed upon this court that it infringes the right of the jury freely to accept or reject testimony; that the jury has the privilege of crediting or discounting testimony as it desires; that its right of rejection may not be conditioned upon a preliminary finding that evidence is uncontradicted or irreconcilable with other testimony; and that the quoted language of the instruction imposed on the jury the duty and obligation to reconcile the evidence though it was in direct conflict.

In determining if 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 all that is said in the charge on the subject. Brown v. Hyslop, 153 Neb. 669, 45 N. W. 2d 743. This additional language of the

instruction should be noted: "You are instructed that you are the sole judges of the credibility of the witnesses and the weight to be given to their testimony. * * * Insofar as there may be any conflict in the evidence, it is your duty to reconcile it if you can; if you cannot, then to determine which is true and which is untrue, and give such weight to the testimony of any witness as in your judgment it should have under all the circumstances of the case."

This instruction did not violate the rule that in the trial of criminal cases as in civil cases the credibility of witnesses and the weight to be given their testimony is for the jury and, within its province, it has the right to reject the whole or any part of the evidence of any witness. Wilson v. State, 150 Neb. 436, 34 N. W. 2d 880; Clark v. State, 151 Neb. 348, 37 N. W. 2d 601; Hans v. State, 147 Neb. 67, 22 N. W. 2d 385. Language very similar to that objected to by the defendant was contained in instructions given approval by this court. Driscoll v. Troughton, 22 Neb. 260, 34 N. W. 497; Albright v. Brown, 23 Neb. 136, 36 N. W. 297; Ballard v. Hansen, 33 Neb. 861, 51 N. W. 295; Hirschberg Optical Co. v. Michaelson, 1 Neb. (Unoff.) 137, 95 N. W. 461.

The judgment should be and it is affirmed.

AFFIRMED.

SIMMONS, C. J., not participating.

HELEN G. HAHL, APPELLANT, V. WILLARD HEYNE, DOING BUSINESS AS HILLSIDE DAIRY, APPELLEE.
57 N. W. 2d 137

Filed February 20, 1953. No. 33257.

1. **Workmen's Compensation.** An accident within the meaning of the Workmen's Compensation Act is defined as an unexpected or unforeseen event happening suddenly and violently with or without human fault and producing at the time objective symptoms of an injury.

2. ———. The burden of proof is upon the claimant to show that the disability for which compensation is sought resulted from an accident arising out of and in the course of his employment.
3. ———. Awards for compensation benefits cannot be based upon possibilities or probabilities. They must be supported by evidence showing that claimant incurred disability from an accident arising out of and in the course of the employment.

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

Rohn & Rohn and *Cook & Cook,* for appellant.

Spear & Lamme, for appellee.

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

CARTER, J.

The plaintiff, Helen G. Hahl, claims benefits under the Workmen's Compensation Act for an injury alleged to have been sustained while in the employ of the defendant, Willard Heyne. The trial court found against the plaintiff and she appeals.

Plaintiff was a married woman approximately 25 years of age at the time of the accident on February 16, 1951. The defendant carried on a business known as the Hillside Dairy. He became the owner of a business known as the Dairy Bar at Hooper, Nebraska, and entered into an arrangement whereby plaintiff was to manage this latter business. Plaintiff contends that she was an employee, but defendant asserts that she was a partner. In view of the conclusions we have reached, a determination of this issue is not necessary to a decision of the case.

The record shows that two places of business were operated in the building housing the Dairy Bar. The left side of the building was occupied by the Dairy Bar and the right side by a grocery store. Each had a separate entrance but there was a common entranceway extending from the sidewalk to the doors of the two

stores. The floor of the entranceway sloped slightly up from the sidewalk to the doors, the same being a distance of approximately 3 feet.

On the morning of February 16, 1951, shortly after 7 a. m., plaintiff parked her car in front of the Dairy Bar. There was ice on the sidewalk which extended a small distance into the entranceway. Plaintiff got out of her car, walked to the door of the Dairy Bar, which she unlocked, pushed a box of bread inside, and deposited some parcels on the counter. She started to return to her automobile to bring in some sandwich spread and cookies, which she had prepared at home for use in the Dairy Bar, when she slipped and fell two or three steps outside the door. After the accident she was lying on the sidewalk near the edge of the entranceway.

Dr. C. C. Nelson testified that he attended plaintiff on February 16, 1951, at the hospital immediately following the accident. The history of the accident as revealed by plaintiff showed that she was suffering pain in her back and that she was unable to move her left leg or thigh. He testified that there was no external evidence of injury. Laboratory and X-ray examinations were made, her reflexes were checked, and her reactions to pain were investigated. No organic reason was discovered for her inability to use her left leg. After remaining in the hospital at Fremont for 3 days she was taken to the University Hospital where she remained for examination and observation until March 10, 1951. Dr. Nelson examined her again on March 28, 1951, and came to the definite conclusion that she was suffering from hysterical paralysis. This conclusion is supported by the report of the University Hospital which Dr. Nelson took into consideration. Plaintiff, according to the evidence, had not regained the use of her left leg at the time of trial and was able to get around only by the use of crutches. The final conclusion of Dr. Nelson is that plaintiff has an hysterical paralysis of the left leg

which is the result of a deep emotional condition often referred to as a mental block. He testified further that the paralysis thus existing is just as incapacitating as that induced by traumatic injury and that her disability could be permanent. As to whether the fall was the cause of her condition, Dr. Nelson stated that this might be presumed, although it is unusual for conditions of this type to be accompanied by a history of injury. The most that he would say was that he presumed that the fall might have set off this paralysis.

There is evidence that plaintiff was in an automobile-train accident in 1942 or 1943. There is no contention that this was a direct contributing factor. There is evidence, however, that plaintiff suffered an attack of polio in 1946. This resulted in her left leg being shorter and smaller than the right. She walked thereafter with a limp and suffered occasional numbness and loss of sensation "like when your arm goes asleep when you sit down." There is evidence that after her fall plaintiff's husband came to the Dairy Bar and berated her. This evidence is fragmentary but of some importance in considering the disputed questions of fact in this case. The evidence further shows that plaintiff had her 3-year-old son with her on the morning of the accident and that he had gotten out of the car while she was entering the Dairy Bar. There is evidence that she hurried after the child and fell while in the act of so doing. Other lay evidence was produced tending to show that prior to the accident plaintiff had complained of numbness in her left leg. There is evidence of Dr. Joseph R. Simmons who examined and treated the plaintiff in January 1952. He testified that it was his opinion plaintiff was suffering from an hysterical reaction brought about by an emotional disturbance.

It is fundamental in maintaining a claim for compensation benefits under the Workmen's Compensation Act that it be established that the personal injury upon which it is grounded is caused by an accident arising out of

and in the course of the employment, of which the actual or imputed negligence of the employer is the natural and proximate cause. § 48-101, R. R. S. 1943. The word "accident" as used in the act is defined as an unexpected or unforeseen event happening suddenly or violently, with or without human fault, and producing at the time objective symptoms of an injury. § 48-151, R. R. S. 1943. Admittedly the plaintiff slipped and fell as alleged. The question is whether or not she has established that the fall caused the injuries suffered, or if the fall was the result of hysterical paralysis as contended by the defendant. On this issue the burden of proof is upon the plaintiff to show that the injury was the result of the accident alleged to have arisen out of and in the course of the employment. Shamp v. Landy Clark Co., 134 Neb. 73, 277 N. W. 802; Skochdopole v. State, 133 Neb. 440, 275 N. W. 665.

We do not think the plaintiff established that her left leg was paralyzed as a result of the fall. Her injury is shown by the medical testimony in the record to have been an hysterical paralysis induced by a deep emotional or mental upset. The history of her physical difficulties reveals that she had previously suffered a polio attack which reduced the size of her left leg and produced a pronounced limp. It shows also that she had suffered from a numbness in the leg before the accident, which appears to have been a symptom of the more serious disability which followed. There is no evidence of objective symptoms of an injury. In fact there is no evidence of any connection between the fall and the injuries sustained, other than the time element involved. The most that the medical testimony shows is that the accident possibly contributed to the injury, although it probably did not. The fear for the safety of her young son could well have been the inducing cause of an hysterical or mental upset, causing her disability and bringing about her fall. We have said many times that awards for compensation benefits cannot be based upon

speculation and conjecture. They must be supported by evidence showing that the disability was caused by the accident which has been shown to have arisen out of and in the course of the employment. McCall v. Hamilton County Farmers Telephone Assn., 135 Neb. 70, 280 N. W. 254; Price v. Burlington Refrigerator Express Co., 131 Neb. 657, 269 N. W. 425.

Plaintiff has failed to establish by a preponderance of the evidence that the disability for which compensation benefits are claimed resulted from her fall on February 16, 1951. The trial court having arrived at the same conclusion, the judgment entered in the district court is affirmed.

AFFIRMED.

M. K. GOETZ BREWING COMPANY, A CORPORATION, APPELLEE, V. ROBINSON OUTDOOR ADVERTISING COMPANY, A CORPORATION, APPELLANT, IMPLEADED WITH JOHN J. MCLAUGHLIN ET AL., APPELLEES.

57 N. W. 2d 169

Filed February 27, 1953. No. 33198.

1. **Landlord and Tenant.** Where prompt payment of the rental payments due under a lease has been waived by the conduct of the parties, a demand for payment is a condition precedent to the forfeiture of the lease.
2. ———. The measure of damages for breach of a lessor's obligation to deliver possession of the leased property is the difference between the rental value and the rent reserved in the lease.
3. ———. By rental value is meant, not the probable loss of profits that the lessee might suffer, but the reasonable value that the premises would rent for as ascertained by proof or by evidence of other facts from which the fair rental value may be determined.
4. ———. Where the proof shows that the fair and reasonable rental value of the property leased does not exceed the rent reserved, plaintiff can recover nothing more than nominal

damages because of the failure of the lessor to deliver possession in accordance with the terms of the lease.

5. ———. A lessee may recover, in addition to the difference between the reasonable rental value and the rent reserved, such special damages as he pleads and proves to have necessarily resulted from the breach of the lease.

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

Max Kier, for appellant.

Jack Devoe, for appellee M. K. Goetz Brewing Company.

Cline, Williams, Wright & Johnson, for appellees McLaughlin.

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

CARTER, J.

This is a suit by the M. K. Goetz Brewing Company, plaintiff, against the Robinson Outdoor Advertising Company, John J. McLaughlin, Edward P. McLaughlin, and Loretto M. McLaughlin, defendants, for an injunction restraining the defendants from interfering with plaintiff's possession of certain property described in the petition. Plaintiff prayed for damages against the defendant Robinson Outdoor Advertising Company. The latter company also sought damages against the plaintiff and the defendants McLaughlin. The trial court found for the plaintiff generally, found that plaintiff was entitled to injunctive relief, fixed the damages owing to plaintiff from the Robinson Outdoor Advertising Company at $467, and determined that the Robinson Outdoor Advertising Company was entitled to nominal damages only as against the defendants McLaughlin. The defendant Robinson Outdoor Advertising Company appeals.

On April 23, 1945, John J. McLaughlin for himself and as agent for his brother Edward P. McLaughlin,

executed a 1-year lease on the east wall of the building described as 1521 O Street, Lincoln, Nebraska, to Gene Carraher, for a consideration of $20 a year with an option to renew for 3 years on the same terms. On July 2, 1945, John J. McLaughlin executed a 1-year lease on the west wall of the building described as 1500 O Street, Lincoln, Nebraska, to Gene Carraher for a consideration of $20 a month and on like terms and conditions for the next succeeding 5 years.

Gene Carraher died on June 7, 1947. Thereafter, on July 17, 1947, John J. McLaughlin executed a 1-year lease on the east wall of the building described as 1521 O Street to the Robinson Outdoor Advertising Company, for a consideration of $25, and on like terms and conditions for the next 4 years. On the same day, John J. McLaughlin executed a 1-year lease on the west wall of the building at 1500 O Street to the Robinson Outdoor Advertising Company, for a consideration of $300, and on like terms and conditions for the next 4 years.

On July 18, 1947, the special administrator of the estate of Gene Carraher, deceased, duly sold the two leases on the walls of the two buildings described as 1500 O Street and 1521 O Street to the plaintiff, and executed a bill of sale therefor.

It is the contention of the Robinson Outdoor Advertising Company that the leases held by Carraher were terminated because stipulated payments were in default. The record conclusively establishes that there were payments past due under both leases, but this does not appear to have been unusual. The evidence of John J. McLaughlin reveals that he did not consider the lease terminated on account of the nonpayment of rentals prescribed. He admits that he thought the leases had expired by their terms. The record shows further that when John J. McLaughlin discovered that the leases were not terminated by their terms, he promptly advised the Robinson Outdoor Advertising Company that he had inadvertently overlooked this fact and returned

its check given pursuant to its leases with McLaughlin on the walls here involved. The leases did not make time of payment of rentals the essence of the contracts and it appears to have been customary to make the payments at irregular periods of time. Prompt payment was clearly waived by the conduct of the parties. No forfeiture of the leases was sought and no demand for the payment of the back rentals was ever made. The prompt payment of rent in accordance with the terms of a lease may be waived by the landlord. John J. McLaughlin testifies that he made no demand on Gene Carraher in his lifetime or upon the special administrator or executor after Gene Carraher's death and that it was not even his intention to press for the back rentals. Under such circumstances a demand is necessary to work a forfeiture. Farmer v. Pitts, 108 Neb. 9, 187 N. W. 95, 24 A. L. R. 719; House v. Lewis, 108 Neb. 257, 187 N. W. 784, 23 A. L. R. 877.

The record shows that the Robinson Outdoor Advertising Company had knowledge of the prior leases held by the Gene Carraher estate. It had knowledge, also, that payments on these leases were in default. It is quite evident that the Robinson Outdoor Advertising Company erroneously assumed that the leases were automatically forfeited for this reason. On July 17, 1947, the Robinson Outdoor Advertising Company obtained its leases from the McLaughlins. It knew also that the Carraher leases had been sold to the plaintiff on July 18, 1947, before it took possession of the property on or about September 1, 1947. The evidence shows that the Robinson Outdoor Advertising Company entered upon the property at 1500 O Street on or about September 1, 1947, and painted out the Goetz Brewing Company sign on the west wall of the building. The evidence also sustains a finding that the Robinson Outdoor Advertising Company at or about the same time painted out the Goetz Brewing Company sign at 1521 O Street. Further efforts to take over these premises were restrained by court order. The reason-

able cost of replacing these two signs was $350 and $117, respectively.

The leases held by the plaintiff were valid. Plaintiff was in lawful possession of these two properties when its possession was interrupted to its damage by the Robinson Outdoor Advertising Company. Clearly, plaintiff was entitled to an injunction against the Robinson Outdoor Advertising Company, restraining the latter from interfering with plaintiff's lawful possession of the property. The evidence shows that plaintiff was damaged to the extent of $467 and a judgment for plaintiff for that amount against the Robinson Outdoor Advertising Company is in all respects correct.

The defendant Robinson Outdoor Advertising Company asserts that it was entitled to the possession of the property in question since September 11, 1947, the date of the filing of this action, and that defendant Robinson Outdoor Advertising Company has been damaged in the sum of $1,800 by the failure of the defendants McLaughlin to give possession for the period ending June 30, 1948, the date of filing of its answer and cross-petition, and in the further amount of $150 for each month the Robinson Outdoor Advertising Company is denied the use of the premises under the terms of its lease. The Robinson Outdoor Advertising Company also claims $125 for the cost of repainting signs painted out by the plaintiff. There is no evidence in the record to sustain this last item of damage.

The evidence shows that the defendants McLaughlin failed to place the Robinson Outdoor Advertising Company in possession of the premises in accordance with the terms of the lease. The measure of damages for breach of a lessor's obligation to deliver possession of the leased property is the difference between the rental value and the rent reserved in the lease. Herpolsheimer v. Christopher, on rehearing, 76 Neb. 355, 111 N. W. 359, 9 L. R. A. N. S. 1127; Shutt v. Lockner, 77 Neb. 397, 109 N. W. 383; Jarman v. Sexton, 130 Neb. 453, 264 N. W.

305. As to the rental value of the premises, Robert F. Robinson testified that when he agreed to pay $300 a year for the lease on 1500 O Street he thought this was higher than the fair and reasonable value. There is no competent evidence in the record that the fair and reasonable market value of the lease at 1521 O Street was higher than the rent reserved. The rule applicable to this situation is stated in Philips v. Bossung, 108 Neb. 658, 189 N. W. 172, as follows: "Plaintiff offered no proof of the value of the lease at the time it is alleged to have been made, or of its value at the time it is alleged to have been breached. The defendant offered proof which conclusively shows that it was then worth nothing in excess of the rent reserved. Therefore, on this cause of action, plaintiff could recover no more than nominal damages." See, also, Shutt v. Lockner, *supra*.

The defendant Robinson Outdoor Advertising Company attempted to show that it lost profitable contracts because of the failure of the defendants McLaughlin to give possession. While in a proper case special damages may be awarded, prospective profits do not fall within this classification. The breach of the lease occurred when the McLaughlins failed to give possession at the time stated in the lease. Philips v. Bossung, *supra*. Had the action been tried at that time the elements which would enter into the question of whether or not the Robinson Outdoor Advertising Company would profit or lose by entering into the lease were matters of conjecture and speculation. No rule of law permits damages to be predicated on opinions that might be formed relating to these questions. Shutt v. Lockner, *supra*. We have stated the applicable rule in the following language: "In such a case, ordinarily, the measure of damages is the difference between the rental value of the premises and the rent that the plaintiff agreed to pay. By rental value is meant, not the probable loss of profits that might occur to the lessee, but the value, as ascertained by proof, of what the premises

would rent for, or by evidence of other facts from which the fair rental value may be determined. But special damages may also be allowed if pleaded and proved." Herpolsheimer v. Christopher, *supra*.

Special damages are something other than prospective profits. It is elemental that special damages must be pleaded and proved. None are pleaded and established by this record. Consequently, there is no basis for a judgment for special damages.

The decree of the trial court is in all respects correct and it is affirmed.

AFFIRMED.

A. R. SOFIO ET AL., APPELLEES, V. HENRY C. GLISSMANN, APPELLANT, IMPLEADED WITH HAROLD W. GLISSMANN, APPELLEE.

57 N. W. 2d 176

Filed February 27, 1953. No. 33233.

1. **Appeal and Error.** Actions in equity, on appeal to this court, are triable de novo, subject, however, to the rule that when credible evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite.
2. **Vendor and Purchaser.** A vendee, who enters into a contract to purchase real property with full knowledge of an outstanding leasehold, or the contract provides that possession shall be given to him subject to rights of tenants then in possession with rents therefrom to be prorated as of closing date, cannot refuse to perform upon the ground that the title is encumbered by such tenancies.
3. **Signatures.** Ordinarily a signature authenticating an instrument in writing is placed at the end thereof, but in the absence of statutory direction it may be placed anywhere on the instrument.
4. ———. When the signature is at the end of the instrument it generally authenticates everything above it, but when written or printed matter appears below the signature, on the back of the

instrument, or on a separate sheet of paper, the signature authenticates only the matter intended by the parties to be included as a part of the instrument, which intention must ordinarily be manifested either by express reference or by internal evidence in the writings involved from which an inference of such intention arises.

5. **Specific Performance.** Specific performance of a contract by a court of equity is not generally demandable or awarded as a matter of absolute legal right, but is directed to and governed by the sound legal discretion of the court, dependent upon the facts and circumstances of each particular case. It will not be granted where enforcement would be unjust and may be denied when the party seeking it has failed to perform.

6. ———. A party who seeks specific performance must show not only that he has a valid legally enforceable contract but also that he has substantially complied with its terms, by performing or offering to perform on his part the acts which formed the consideration of the undertaking on the part of defendant or that he is ready, able, and willing to perform his obligations under the contract and do whatever has been made a condition precedent on his part, or show a valid excuse for nonperformance of the covenants incumbent upon him.

7. ———. The right of a party to the specific performance of his contract may be lost by his failure of performance, by his abandonment thereof, or 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.

8. **Vendor and Purchaser: Specific Performance.** It is generally the rule that where a plaintiff who has himself been ready, willing, and able to perform has repeatedly requested a defendant to perform a recorded contract for the purchase of real property by defendant, and such defendant has failed to tender or pay the purchase price or otherwise perform according to the terms of his agreement, then defendant is not entitled to specific performance but plaintiff is entitled to have title quieted in him.

9. **Damages: Contracts.** If the damages arising from a breach of the contract are difficult of ascertainment or admeasurement, and if the stipulated amount is not disproportionate to the amount of damages that may be reasonably anticipated from the breach, it will usually be regarded as a provision for liquidated damages.

10. ———: ———. As a general rule, the question of whether a sum mentioned in a contract is to be considered as liquidated damages or as a penalty is a question of law, dependent on the construction of the contract by the court.

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

Robert E. O'Connor and *John F. Mackenzie,* for appellant.

Paul J. Garrotto and *James A. Nanfito,* for appellees Sofio.

Tesar & Tesar, for appellee Harold W. Glissmann.

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

CHAPPELL, J.

Plaintiffs, A. R. Sofio and Agnes H. Sofio, owned a legally described tract of land known as Parkwood Dairy in Omaha. They brought this action against defendants Henry C. Glissmann and Harold W. Glissmann to quiet their title to said land and recover $1,500 earnest money as liquidated damages because defendants had breached the provisions of a written purchase agreement entered into by the parties on or about November 20, 1950, which defendants had subsequently recorded. Defendants by separate answers each admitted execution and recording of the agreement and denied generally. Defendant Harold W. Glissmann alleged that after its execution he had assigned all of his right, title, and interest in the agreement to defendant Henry C. Glissmann, who in his answer admitted such assignment but alleged that plaintiffs had failed to perform the agreement because they were unable to give possession by virtue of a lease of part of the property to a tenant until March 1, 1952. He also alleged that on August 11, 1951, certain improvements on the property were destroyed by fire, for which plaintiffs had been reimbursed, and prayed the court to determine the amount thereof, allow him credit therefor on the purchase price, and decree that plaintiffs should convey the property to him upon payment of the balance. For reply plaintiffs denied

generally; alleged that defendants had no right, title, or interest in the agreement or property; and admitted the fire and reimbursement therefor, but alleged that the agreement had theretofore been canceled as of August 1, 1951, after numerous described extensions of closing dates and breach thereof by defendants who were unable to perform and at all times failed and refused to perform and pay the purchase price, not even offering to do so in their answer filed herein. Also, the record discloses that they did not even do so in open court.

After a hearing upon the merits, the trial court rendered a decree which found and adjudged the issues generally in favor of plaintiffs and against defendants, quieted title in plaintiffs, and ordered $1,500 earnest money paid by defendants to be retained by plaintiffs for liquidated damages as provided in the agreement, since plaintiffs had at all times fully complied with all the terms and conditions of the agreement but defendants had failed, neglected, and refused at all times to comply with the terms and conditions thereof. It also concluded that by virtue of the assignment aforesaid defendant Harold W. Glissmann had no right, title, or interest whatever in the agreement or real estate.

Defendant Henry C. Glissmann's motion for new trial was overruled and he appealed, assigning substantially that: (1) The decree quieting title and ordering $1,500 earnest money to be retained by plaintiffs as liquidated damages was not supported by the evidence; and (2) the trial court erred in refusing to grant specific performance relief as prayed by said defendant. We conclude that the assignments have no merit.

In Gatchell v. Henderson, *ante* p. 1, 54 N. W. 2d 227, this court said: "Actions in equity, on appeal to this court, are triable de novo, subject, however, to the rule that when credible evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact

that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite." In the light of such rule we have examined the record.

The contract involved was a "Uniform Purchase Agreement." It consisted of a written offer, a conditional receipt for the down payment made by defendants as earnest money, and an acceptance of defendants' offer by plaintiffs, all in one instrument, with each provision a necessary dependant part thereof. To hold otherwise it would be necessary to conclude that no agreement for purchase had ever been perfected, contrary to its express provisions and the affirmative positions of all the parties.

Insofar as important here, defendants agreed therein to purchase the property described upon condition that plaintiffs had "a good, valid and marketable title, in fee simple," and would "furnish abstract of title down to date of sale, and convey * * * by Warranty Deed." Defendants agreed, "to pay for same Twenty seven thousand five hundred ($27,500.00) Dollars, on the following terms, to-wit: $500.00, deposited herewith as evidenced by your receipt attached below, Balance to be paid at time of closing sale. It is further agreed and understood the present owner shall have until Febr. 1, 1951 to meet the conditions of rezoning. * * * This offer is subject to present owner having premises re-zoned to permit a trailer park and golf course operation." It also provided, "Present owner to have benefit of rent on farm land until March 1, 1951, which includes apartment on second floor of house. Rent on remainder of house, which is occupied by Wm. A. Mott, to be prorated as of closing date, who rents from month to month." Defendant Henry C. Glissmann concedes that the words "who rents from month to month" were written in at his request, although there is competent evidence in the record that he then had full knowledge that such tenant in possession had a lease until March 1, 1952, which plaintiff believed had been theretofore canceled by oral agreement. In

any event, defendants concededly knew all about such lease within 1 month after the purchase agreement had been signed and before the property had been rezoned or the abstract had been examined. In that connection, on January 29, 1951, before closing date and while the abstract was being examined, defendants negotiated an agreement in writing with such tenant canceling the lease but permitting him to remain in the property until 60 days from February 1, 1951. True, such agreement was never signed by the parties but concededly it was prepared by agreement between them, and thereafter defendants were given numerous extensions of time for closing, with full knowledge of all the facts with reference to the rights of tenants on the property. The tenant refused and could not be forced to vacate, so finally, in order to complete the transaction without controversy, it was agreed between plaintiffs, defendants, and the tenant that plaintiffs and defendants each would pay the tenant $200 and he would vacate the premises on July 1, 1951. In that connection, however, defendants did not pay their $200 share, and plaintiffs, solely to facilitate closing of the transaction, paid the tenant $400 to vacate, which he did on July 5, 1951. In the meantime, defendants had been given a purchase agreement extension to August 1, 1951, which nevertheless expired without performance by them. On or about July 10, 1951, plaintiffs notified defendants that unless they performed by August 1, 1951, the agreement would be canceled for breach thereof. They did not perform, so the agreement was thereby canceled.

Further, if that were not enough to show that defendants could not rely upon such lease to excuse performance, the same agreement itself also provided that: "Possession of said premises shall be given me subject to rights of tenants now in possession * * *.

"If this proposition is accepted, I agree to close said purchase in accordance therewith within ten days after delivery to me of abstract of title, and I further agree

to furnish a written opinion from my attorney showing defects, if any, in the title to the above property.

"This offer is based upon my personal inspection or investigation of the premises and not upon any representation or warranties of condition by the seller or his agent."

As stated in 55 Am. Jur., Vendor and Purchaser, § 154, p. 625: "Also, it has been held that where the vendee has knowledge of a lease of the premises which were in possession of the lessee, he is chargeable with notice of the conditions and options in the lease, and he cannot, because of these matters, refuse to take title. If the vendee enters into a contract with knowledge of a defect in the title, and he agrees not to object to the title upon this ground, he cannot rely upon this defect as an excuse for not performing the contract." Also, as stated in § 232, p. 690: "If the purchaser was made aware of, and purchased with full knowledge of, an outstanding leasehold, the leasehold does not render the title unmarketable. So, where a contract for the sale of land contains a provision for the adjustment of rents from the date of passing of title, the vendee cannot complain that the title is encumbered because of these outstanding tenancies." See, also, 57 A. L. R., Annotation, Marketable Title, p. 1403. In Pillsbury v. Alexander, 40 Neb. 242, 58 N. W. 859, this court held: "In an action brought by a vendor against a vendee to compel the latter to specifically perform his contract to purchase real estate, such vendee is estopped from alleging, as a defense to said action, a defect in his vendor's title; which defect was brought to the actual knowledge of the vendee at the time he entered into such contract of purchase, and where the evidence shows that he contracted to purchase such real estate incumbered with the alleged defect." In the light of the record and such rules we conclude that the lease to William A. Mott was no excuse for defendant's failure to perform the agreement.

As provided in the agreement, the parties understood

that it should "in no manner be construed to convey the premises, to create a lien thereon or to give any right to take possession thereof" and that "Upon acceptance of this offer present insurance on the premises shall be deemed for the benefit of the buyer and the seller, as their respective interests may appear." The receipt portion of the agreement provided: "Received from Henry C. Glissmann the sum of Five hundred ($500.00) Dollars, to apply on the purchase price of the above described property on terms and conditions as stated above, it being hereby agreed and understood that in the event the above offer is not accepted by the owner or vendor of said premises within the time hereinafter specified, or that in the event there are any legal defects in the title which cannot be cured after purchaser has filed or caused to be filed with us written notice of such legal defects, the money hereby paid is to be refunded. In the event of the refusal or failure of the purchaser to consummate the purchase, the owner or vendor may, at his option, retain the said money hereby paid, as liquidated damages for such failure to carry out said agreement of sale.

"This receipt is not an acceptance of the above offer, it being understood that the above proposition is taken subject to the written approval and acceptance of the owner on or before November 25, 1950."

Plaintiffs timely executed the acceptance portion of the agreement, which provided as follows: "We hereby accept the above proposition on the terms above stated and agree to deliver and convey said premises and perform all the terms and conditions above set forth. Providing 1000. more pd. as earnest money." Defendants thereupon promptly accepted the provision for the payment of $1,000 more as earnest money and deposited said additional sum with the agent, which made up the total of $1,500 retained under the conditions provided in the receipt portion of the agreement.

In seeking a return of the $1,500 earnest money in-

stead of awarding it to plaintiffs as liquidated damages, defendants in effect take the position that there were three separate contracts, with defendants bound by only one of them. We cannot agree. Clearly there was but one complete and coordinated agreement. The fact that defendants' signatures did not appear at the end of the agreement is of little importance under the provisions contained therein. Brown v. State Automobile Ins. Assn., 216 Minn. 329, 12 N. W. 2d 712, relied upon by defendants cites numerous cases and so concludes, saying: "The place of a signature on a writing is not controlling. While ordinarily a signature is placed at the end of an instrument, it may, unless by statute a signature is required to be subscribed, be placed anywhere on the instrument, as, for example, at the top, to one side, in the body, or elsewhere. * * * The rule, as the cited cases show, is one of general application and applies to such instruments as contracts, promissory notes, bills of sale, deeds, leases, wills, and the like. * * * Where the signature is at the end of the instrument, it is generally plain that it authenticates everything above it. Where, however, written or printed matter appears below the signature, or on the back of the instrument, or on separate sheets of paper, a signature authenticates only the matter intended by the parties to be included as a part of the instrument. The intention must be manifested either by express reference or by internal evidence in the writings involved from which an inference of such intention follows. It has been so held in numerous cases involving the sufficiency of contracts and memoranda under the statute of frauds." See, also, Dollarhide v. James, 107 Neb. 624, 186 N. W. 989; Myers v. Moore, 78 Neb. 448, 110 N. W. 989. The evidence herein and the very instrument itself conclusively establishes that defendants accepted all matters above and below their signatures. They clearly intended that all written, typed, and printed matter both above

and below their signatures was and should be simply one entire contract.

In December 1950, the parties concerned met in the Council Chamber of the City Hall in Omaha for hearing upon plaintiffs' application to rezone the property. There were objections and plaintiffs were required to employ counsel, incurring an expense of $500. It will be noted that February 1, 1951, was concededly closing date, and before that date the property had been rezoned. The abstract had been extended and forwarded to defendants, and it had been examined without any contention or notice that it showed any defects. A check appearing in the record as an exhibit shows that defendants paid their attorney on February 1, 1951, for making such examination.

On that date, however, with full knowledge of all facts with relation to tenancy and otherwise, defendants requested and were granted an extension from February 1 to February 3, 1951, on which date it was again so extended to February 10, 1951, because defendants could not perfect a loan with which to close the transaction. Again on that date it was likewise extended to February 23, 1951, at which time defendants did not offer to close the transaction, but again on February 25, 1951, they requested a further extension, expressing for the first time in effect that the lease of William A. Mott prevented plaintiffs from giving possession and performing in any event. Be that as it may, on February 25, 1951, defendants requested and were granted another extension to March 1, 1951. However, from that date until March 9, 1951, defendants took no step to complete the transaction, and they were informed that by reason thereof they were in default and the earnest money would be retained as liquidated damages. Defendants then claimed by registered letter the right to not consummate the transaction before March 1, 1952, because of the William A. Mott lease, and claimed in fact that they then owned the property, whereupon they filed the

agreement of record on March 12, 1951, after defendant Henry C. Glissmann had himself, without any authority written on the bottom of it: "W. A. Mott has a lease that Expires Mar 1 - 1952." Despite such attitude, however, defendants requested and were again granted an extension to April 1, 1951, but were unable to raise the money. They then offered to pay $28,500 on or before May 15, 1951, if an extension was granted until that date and release all claims to the $1,500 paid as earnest money if such purchase price was not then forthcoming. However, on May 1, 1951, defendants' counsel requested in writing an extension to July 1, 1951, proposing that on failure then to perform defendants would forfeit their $1,500 earnest money. In such letter also defendants stated that the rights of tenants would be respected.

Plaintiffs then agreed to such proposal but in the meantime defendants changed their minds, and on May 11, 1951, made a new proposal to pay $28,500 if consummation were extended to August 1, 1951, and to forfeit the $1,500 if not then consummated. Plaintiffs then accepted that offer and their counsel reduced it to writing, but defendants refused to sign the same as agreed. On June 12, 1951, defendants were again given until June 19, 1951, to complete the transaction, or plaintiffs would declare the agreement to purchase canceled and the earnest money forfeited as of that date. Thereafter, on June 18, 1951, defendants by letter requested a personal conference with plaintiffs' counsel, who replied by letter requesting that defendants sign the proposal to extend to August 1, 1951, and such extension would be made. However, such letter was never answered by defendants and their then counsel withdrew his representation of them. As late as July 10, 1951, plaintiffs' agent called upon defendant Henry C. Glissmann to inquire why the transaction had not been completed and he was informed by said defendant that he did not have the money and could not arrange for a loan, but he proposed that permission be given him by plain-

tiffs to sell the property and pay the purchase price from the proceeds. Unable to obtain performance, plaintiffs then elected to cancel the contract as of August 1, 1951, and retain the $1,500 as liquidated damages. They so notified defendants. However, no more was heard from them until August 15, 1951, when other counsel representing defendants sent a letter demanding that proceeds of the fire insurance policy, concededly $10,000, should be deducted from the purchase price, and then defendants would be ready to complete the transaction. The record conclusively establishes that defendants never tendered or offered to pay any of the purchase price or that they were every ready, willing, and able to do so, although they wrongfully assumed even to take possession of the property and have the right to sell part of the equipment on the premises, and even advertised the premises for sale without having any right or title thereto.

The record discloses that plaintiffs performed all conditions precedent and were able and willing at all times prior to August 1, 1951, to convey the property to defendants, but that defendants failed, neglected, and refused to perform. It also discloses that the agreement was canceled by plaintiffs as of that date for failure of defendants to perform. The general rule is as argued by defendants that where performance of a contract is delayed through the fault of the vendor, he is liable for the deterioration or destruction of the property and in such a situation the loss by fire would be that of the vendor. However, the rule has no application under the facts heretofore set forth in this case.

In O'Brien v. Fricke, 148 Neb. 369, 27 N. W. 2d 403, this court said, citing numerous cases: "The specific performance of a contract by a court of equity is not generally demandable or awarded as a matter of absolute legal right but is directed to and governed by the sound legal discretion of the court, dependent upon the facts and circumstances of each particular case. It will

not be granted where enforcement would be unjust, and may be denied where the party seeking it has failed to perform." We also said in that opinion: "He is bound by the rule that a party who comes into equity, seeking specific performance, must show not only that he has a valid legally enforceable contract, but also that he has substantially complied with its terms by performing or offering to perform on his part the acts which formed the consideration of the undertaking on the part of defendant, or that he is ready, able, and willing to perform his obligations under the contract and do whatever has been made a condition precedent on his part or show a valid excuse for non-performance of the covenants incumbent upon him. 49 Am. Jur., Specific Performance, § 40, p. 53. As appropriately stated in the latter citation: 'A proposed purchaser is not able to perform when he is depending upon third persons for the funds to make the purchase, which funds such persons are in no way bound to furnish.'" See, also, Johnson v. Norton, 152 Neb. 714, 42 N. W. 2d 622, and Sopcich v. Tangeman, 153 Neb. 506, 45 N. W. 2d 478, wherein this court said: "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 con-

duct 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.' * * * 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.' " Such rules are applicable and controlling here. We therefore conclude that defendants were not entitled to specific performance.

It is generally the rule that where a plaintiff, who has himself been ready, willing, and able to perform has repeatedly requested a defendant to perform a recorded contract for the purchase of real property by defendant, and such defendant has failed to tender or pay the purchase price or otherwise perform according to the terms of his agreement, then defendant is not entitled to specific performance but plaintiff is entitled to have title quieted in him. Wiiest v. Pounds, 142 Neb. 882, 8 N. W. 2d 211; Kear v. Hausmann, 152 Neb. 512, 41 N. W. 2d 850; Johnson v. Norton, *supra*. See, also, § 25-21,112, R. R. S. 1943. We conclude that the decree quieting title in plaintiffs was proper in every respect.

We turn then to the question of liquidated damages and the propriety of the allowance thereof to plaintiffs. In that connection we call attention to the fact that the agreement specifically provided that upon the failure or refusal of the purchaser to consummate the purchase according to the terms thereof, the vendor could retain the earnest money paid as liquidated damages for such failure. The money so paid in this case was $1,500, and not $500 as claimed by defendants. Their own evidence belies the contention. They always realized and conceded that they stood to lose $1,500 for failure of performance by them.

In Wilderman v. Watters, 149 Neb. 102, 30 N. W. 2d 301, this court held: "The cardinal rule in the interpretation of a contract is to ascertain the intention of the parties, and to give effect to such intention if it can be done consistently with legal principles.

"It is well established, in the interpretation of a writing which is intended to state the entire agreement, preliminary negotiations between the parties may be considered in order to determine their meaning and intention, but not to vary or contradict the plain terms of the instrument." See, also, 12 Am. Jur., Contracts, § 234, p. 757.

In Stanford Motor Co. v. Westman, 151 Neb. 850, 39 N. W. 2d 841, this court held: "If the damages arising from a breach of the contract are difficult of ascertainment or admeasurement, and if the stipulated amount is not disproportionate to the amount of damages that may be reasonably anticipated from the breach, it will usually be regarded as a provision for liquidated damages.

"As a general rule, the question of whether a sum mentioned in a contract is to be considered as liquidated damages or as a penalty is a question of law, dependent on the construction of the contract by the court." See, also, Edgar v. Anthes, 109 Neb. 546, 191 N. W. 682; Gustin & Co. v. Nebraska Building & Investment Co., 110 Neb. 241, 193 N. W. 269; Restatement, Contracts, § 339, Comment (1) c, p. 553. By analogy, such rules have application here, and we conclude that the trial court's order permitting plaintiffs to retain the $1,500 earnest money as liquidated damages was correct. As a matter of fact, the record discloses that plaintiffs actually suffered more than $1,500 as damages by reason of defendants' failure to perform their part of the agreement.

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

AFFIRMED.

MARY C. SLOAN, APPELLANT, V. IRENE T. GIBSON, APPELLEE.
57 N. W. 2d 167

Filed February 27, 1953. No. 33253.

1. **Judgments.** A judgment is rendered when the court announces its decision upon the law and the facts in controversy as ascertained by the pleadings.
2. ———. The entry of a judgment upon the records is not an integral part of the judicial act of rendering a judgment, although the entry thereof may be required before it can become available for certain purposes.
3. **Appeal and Error.** This court cannot have jurisdiction of an appeal from the district court, unless as required by section 25-1912, R. R. S. 1943, a notice of appeal is filed in the office of the clerk of the district court and the docket fee is deposited with the clerk within 1 month after rendition of the judgment, or within 1 month from the overruling of a motion for a new trial timely filed in the cause.

APPEAL from the district court for Hamilton County: HARRY D. LANDIS, JUDGE. *Appeal dismissed.*

John Adams, Sr., and *Ralph W. Adams*, for appellant.

Kirkpatrick & Dougherty, for appellee.

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

BOSLAUGH, J.

The subject matter of this litigation is the claim of appellant that she, on November 7, 1949, engaged appellee, an authorized and licensed cosmetologist and hair stylist and the owner and operator of a beauty salon in York, for a compensation, to give the hair of appellant a permanent wave treatment; that appellee accepted employment for that purpose and instructed one of her operators to administer to the hair of appellant a Zotos cold wave; that she made application of a liquid substance referred to as cold wave set to the head, hair, forehead, and face of appellant; that it caused blisters on her face, forehead, scalp, and all places where it came in contact with her flesh; that the blisters de-

veloped into sores and scabs; that she was denuded of the greater portion of her hair; that she has since been and will continue to be almost wholly without hair on her head; that she was thereby caused injuries, great pain and suffering, large expense, permanent loss of natural appearance and attractiveness; and that the proximate cause of the injuries, loss, and damage of appellant was that appellee did not in the service rendered exercise care and prudence or the degree of skill possessed and used by persons engaged in that character of work and service in that territory.

The charges made by appellant were denied by appellee, except the fact that she is a licensed cosmetologist in Nebraska, and she alleged that the work done by her for appellant was performed in a careful and prudent manner and with the degree of care and skill exercised by members of the trade in that community.

The jury found in favor of appellee. The motion of appellant for a judgment notwithstanding the verdict and judgment for appellee, or in the alternative for a new trial, was in all respects overruled on February 21, 1952. A notice of appeal was filed by appellant on July 3, 1952.

The statute, before the amendment of 1941 (Laws 1941, c. 32, § 1, p. 141), was that proceedings to obtain a reversal of a judgment rendered or a final order made by the district court should be by filing in the Supreme Court a transcript containing the judgment or final order sought to be reversed within the time therein stated from the rendition of the judgment or the making of the final order or within the time therein stated from the overruling of a motion for a new trial in the cause, and that the filing of the transcript should confer jurisdiction of the cause upon the Supreme Court. § 20-1912, Comp. St. 1929. The words "rendition of such judgment" as used therein were determined to mean entry thereof upon the record. Theisen v. Peterson, 114 Neb. 154, 211 N. W. 19. It was also established in

considering this subject that the words "'entered of record'" or "'spread upon the journal'" expressed the same thing, that is, entered on the journal. Union Central Life Ins. Co. v. Saathoff, 115 Neb. 385, 213 N. W. 342. It was repeatedly held that a litigant could not appeal from and this court could not entertain proceedings for the review of a judgment or final order of the district court until it was formally entered in or spread upon the journal of the court in which it was rendered or made, and therefore, the time for taking an appeal from the district court to the Supreme Court commenced to run when the judgment or final order was entered of record and not from the time the judgment was rendered or the final order was made. Union Central Life Ins. Co. v. Saathoff, *supra;* Dahlsten v. Libby, 104 Neb. 84, 175 N. W. 655; In re Estate of Getchell, 98 Neb. 788, 154 N. W. 537; Anderson v. Griswold, 87 Neb. 578, 127 N. W. 883. This doctrine was stated in Bickel v. Dutcher, 35 Neb. 761, 53 N. W. 663: "The time within which an appeal may be taken from a decree of the district court does not begin to run until such decree has been entered of record, so that it is within the power of the appellant to comply with the statute regulating appeals, by filing in this court a certified transcript of the proceedings in the district court." It was frequently repeated and in Union Central Life Ins. Co. v. Saathoff, *supra,* the court remarked: "To such holding we should continue to be bound until the legislature has otherwise provided."

The Legislature did that by the amendment of 1941. Laws 1941, c. 32, § 1, p. 141; § 20-1912, C. S. Supp., 1941. It was thereby provided that the proceedings to obtain a reversal of a judgment or final order made by the district court should be by filing in the office of the clerk of that court within 3 months after the "rendition of such judgment or decree, or the making of such final order, or within three months from the overruling of a motion for a new trial in said cause, a notice of intention to prosecute such appeal," and by depositing with

the clerk of the district court the docket fee required by law in appeals to the Supreme Court. The filing of the notice of appeal and the depositing of the docket fee were the acts required to vest the Supreme Court with jurisdiction of the cause. The amendment of 1947 changed the time within which the notice must be filed and the docket fee deposited from 3 months to 1 month. § 25-1912, R. R. S. 1943. The rendition of a judgment, the making of a final order, or the overruling of a motion for a new trial as contemplated and intended by this statute means the announcement by the court of the judgment, the final order, or the denial of the motion for a new trial, and not the notation thereof in any record or the entry thereof in the journal of the court. The distinction between the rendition of a judgment or order and the entry thereof as stated in Luikart v. Bredthauer, 132 Neb. 62, 271 N. W. 165, is applicable: "A judgment is rendered when the court announces its decision upon the law and the facts in controversy as ascertained by the pleadings. * * * The entry of a judgment upon the records is not an integral part of the judicial act of rendering a judgment, although the entry thereof may be required before it can become available for certain purposes." See, also, Shipley v. McNeel, 149 Neb. 793, 32 N. W. 2d 636; Maher v. State, 144 Neb. 463, 13 N. W. 2d 641.

The notice of appeal must be filed in the office of the clerk of the district court and the docket fee must be deposited with the clerk within 1 month after the rendition of the judgment, if there is no motion for a new trial, or within 1 month from the overruling of a motion for a new trial timely filed in the cause or there can be no appeal from the district court to this court. Frenchman-Cambridge Irr. Dist. v. Ferguson, 154 Neb. 20, 46 N. W. 2d 692; Molczyk v. Molczyk, 154 Neb. 163, 47 N. W. 2d 405; Harkness v. Central Nebraska Public Power & Irr. Dist., 154 Neb. 463, 48 N. W. 2d 385. This is a fundamental and mandatory rule. This court

must take judicial notice of its application in a case in which it has not acquired jurisdiction. The notice of appeal in this case was not filed until more than 4 months after the motion for a new trial was overruled. This court has no authority to entertain this appeal.

It should be and it is dismissed.

APPEAL DISMISSED.

NAOMI E. PROSSER, APPELLANT, V. ERNEST J. PROSSER, APPELLEE.

57 N. W. 2d 173

Filed February 27, 1953. No. 33287.

1. **Divorce.** Under the provisions of section 42-318, R. R. S. 1943, the earnings of a husband and his ability to earn are proper elements to be taken into consideration in determining the amount of alimony to be awarded in a suit for divorce.
2. ———. Although the statute provides that the wife shall be allowed alimony out of the husband's estate in such an amount as the court shall deem just and reasonable, having regard to the ability of the husband, his earning capacity is an element to be considered and, in a proper case, the allowance of permanent alimony may exceed the value of the husband's estate at the time the marriage is dissolved.
3. ———. The amount of alimony to be granted a wife is not to be determined alone from the property possessed by the husband. Many other factors enter into the determination such as the husband's age, health, earning capacity, future prospects, and social standing.

APPEAL from the district court for Richardson County: VIRGIL FALLOON, JUDGE. *Affirmed as modified.*

Jean B. Cain, for appellant.

Paul P. Chaney, for appellee.

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

CARTER, J.

Plaintiff, Naomi E. Prosser, brought a suit for divorce

against the defendant, Ernest J. Prosser. The trial court granted a divorce to the plaintiff, and made a division of property and an allowance of alimony to the wife. Plaintiff appeals.

The only question involved in this case is the correctness of that part of the trial court's decree dividing the property and fixing the alimony. The parties were married on April 29, 1946. The wife was 21 and the husband 23 years of age. There are no children. The wife at the time of her marriage was earning approximately $200 a month as a comptometer operator for the Missouri Pacific Railroad Company. Shortly before the marriage the husband had been discharged from the army and had worked as a filling station attendant and as a railroad employee for a matter of weeks only. On being displaced on the railroad the parties mutually agreed that the defendant husband should attend the University of Nebraska. He was graduated with honors at the end of 3 years.

The record shows that plaintiff worked at the Norden Laboratories in Lincoln during the time defendant was attending the university. She earned and contributed the following amounts to their joint support during this period: 1946, $1,528.57; 1947, $1,657.37; 1948, $1,847.66; and 1949, $1,481.14. In 1950 and 1951 her earnings and contributions were $1,158.38 and $2,949.57, respectively. In addition to this the evidence shows that she assisted the defendant in many ways with his studies and work at the university. She helped him with his job of grading papers and keeping records. She helped him with his lessons when she could, by preparing his statistics and drawing statistical maps for him.

During the same period of time the defendant earned and contributed the following to the family income: 1946, $14.80; 1947, $375.82; 1948, $874.80; 1949, $725.95; 1950, $4,120.88; and 1951, $5,856.26. He received in addition thereto $3,243 subsistence allowance under the G. I. Bill of Rights. The evidence shows that defendant

became a fourth partner in the accounting firm of Glenn, Roberts, Philpot & Prosser on October 1, 1949, and subsequently he became the owner of a one-third interest in Glenn, Roberts & Prosser. It will be noted that the major portion of defendant's earnings were made in 1950 and 1951 after his education had been completed and he had qualified as an accountant. At the time of trial defendant's annual income was estimated at $7,000 a year.

At the time of the trial the parties owned the following property: Furniture that originally cost $2,042.38; government bonds in the amount of $1,225, $925 of which belonged to plaintiff and $300 of which were purchased after the marriage; an automobile costing $3,600 upon which there was a mortgage of $1,500; the amount paid on one-third interest in partnership, $2,720; and cash on hand in savings and loan association, $2,106.03. The record does not disclose the value of the furniture, automobile, or the interest in the partnership at the time of the trial.

The evidence shows that plaintiff was called by the Missouri Pacific Railroad Company on March 26, 1952, for work in Omaha. She declined the work in order to maintain her home with her husband in Falls City. As a result of so doing she lost her seniority rights with the railroad company. At the time of trial, however, she was again employed by the Missouri Pacific Railroad Company at approximately $278 a month. That plaintiff is a competent stenographer and comptometer operator is established by the record.

The decree of the trial court awards the divorce to plaintiff and restores her maiden name, awards the furniture, silverware, dishes, bedding, and linens to plaintiff, awards the savings account of $2,103.06 to plaintiff, awards the $1,225 in government bonds to her, and finds that she is entitled to $500 as alimony. The automobile and the partnership interest are given to the defendant.

The general rule governing a division of property and the allowance of alimony in a divorce action is well set-

tled in this state. It is adequately stated in Waugh v. Waugh, 154 Neb. 325, 47 N. W. 2d 859, and McNamee v. McNamee, 154 Neb. 212, 47 N. W. 2d 383. The division of the property appears to have been made in the only practicable way possible when all the circumstances are considered. The question for determination, therefore, is the adequacy of the alimony award.

The conclusion to be drawn from the facts in the case is plain. The plaintiff had a good position at the time of the marriage. The defendant had no position or property. The parties decided that the best way to success was for the defendant to obtain a college education. This was successfully undertaken. Plaintiff worked and made the contributions hereinbefore set forth. The defendant's earning capacity was small until he finished college and secured a position and then a partnership in an accounting firm. It is clear that plaintiff made a large investment in defendant's future, with the thought no doubt that it was of joint interest to the future of both. But as the defendant's success mounted and he began to assume a higher station in the community, his interest in the plaintiff cooled and he sought the society of another. That this is true stands undisputed in this record. The evidence also shows that this plaintiff was without the semblance of fault and that the divorce was due solely to the conduct of the defendant. The latter appears to have treated the marriage as one of convenience and, when his schooling was completed and his success apparently assured, he was willing to cast her aside and bestow his affections upon one who made no contribution whatever to the success that he now enjoys. We point out that this wife had a right to expect that in the years to come she would share in the benefits derived from the training and ability of the defendant, which she literally helped to bring about. By the court's decree she receives the furniture that cost $2,042.38, the present value of which is not shown; she receives back $1,225 in government bonds, $925 of which were ad-

mittedly hers before the marriage; and lastly, she receives the savings account of $2,103.06, an account which she helped accumulate by holding a steady job. The defendant obtains the automobile in which there is an equity of $2,100 and the interest in the partnership which cannot be accurately valued. The partnership was earning defendant an annual income of $7,000 or more at the time of trial, an income towards which this plaintiff made a very substantial contribution. An allowance of alimony to the wife in the amount of $500 is, under such circumstances, wholly inadequate. It compels the wife to return to her former job to earn a livelihood, while the defendant reaps the benefits which she aided so materially in bringing about. Equitable principles require that the alimony awarded be materially increased.

The statute providing for the allowance of alimony states in part that "the court may further decree to her such part of the personal estate of the husband and such alimony out of his estate as it shall deem just and reasonable, having regard to the ability of the husband, the character and situation of the parties, and all other circumstances of the case." § 42-318, R. R. S. 1943. Clearly, under the foregoing provision the earnings of the husband, present and future, are proper elements to be considered in making an award of alimony. Mathews v. Mathews, 186 Okl. 245, 96 P. 2d 1054, 139 A. L. R. 202. This is consistent with the rule announced by this court that 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 age, condition of health, and earning ability of the parties; and all other relevant facts and circumstances are to be taken into consideration in making a just and reasonable award of alimony. Pasko v. Trela, 153 Neb. 759, 46 N. W. 2d 139; Peterson v. Peterson, 152 Neb. 571, 41 N. W. 2d 847.

Alimony is awarded for the maintenance of the wife

when the conditions exist that the statute requires. It is not an assignment of a portion of the husband's estate and it may, in fact, exceed the value of the husband's personal and real property. Nixon v. Nixon, 106 Kan. 510, 188 P. 227. It should not be allowed as a matter of sympathy to the wife or as a penalty imposed for the misconduct of the husband. It is a provision for maintenance to which she is entitled because of her former marital status out of which it grows. In determining the amount of alimony to be awarded in the present case the relative or comparative fault of the parties is a material element. The age of the parties and the duration of the marriage have evidential value. The social standing, comforts, and luxuries of life which the wife probably would have enjoyed are to be weighed in fixing the amount. The earnings of the husband and his ability to earn are particularly important in this case when viewed in the light of the contributions made thereto by the wife. We cannot overlook the fact that defendant has seen fit to treat the marriage as a matter of convenience to be cast aside when the material fruits have been realized. Justice and equity require that we, too, treat the situation from the same viewpoint when we are called upon to adjust the differences brought about by the dissolution of the marriage relation through the fault of the defendant alone. After considering all the facts as set forth in this record and the principles applicable thereto, we think that justice and right require that plaintiff be awarded alimony in the sum of $6,500 in lieu of the $500 allowed by the trial court, payable $100 per month commencing March 1, 1953. The decree of the trial court is in all other respects affirmed. An attorney's fee of $350 is allowed the plaintiff in this court.

AFFIRMED AS MODIFIED.

LON KING AND NED WAECHTER, A PARTNERSHIP, DOING BUSINESS AS ARCTIC AIR CONDITIONING, APPELLEES, v. VIOLET A. SCHMALL, APPELLANT.

57 N. W. 2d 287

Filed March 6, 1953. No. 33249.

1. **Trial.** In testing the sufficiency of evidence to support a verdict it must be considered in the light most favorable to the successful party, that is, every controverted fact must be resolved in his favor and he should have the benefit of every inference that can reasonably be deduced therefrom.
2. **Frauds, Statute of.** Where goods are furnished to a third party at the request of a promisor and with reliance on his credit, and the transaction is such that the third party or beneficiary is liable therefor to the promisee as an original undertaking on his part, and there being no joint contract the promisor's liability is collateral only as guarantor, and unless in writing is void under the statute of frauds.
3. **Contracts: Frauds, Statute of.** A consideration to support a promise, not in writing, to pay the debt of another must operate to the advantage of the promisor, and place him under a pecuniary obligation to the promisee independent of the original debt, which obligation is to be discharged by the payment of that debt.
4. **Frauds, Statute of.** In an action to recover for services rendered to a third person the general rule is that, if the person for whose benefit the promise was made is himself liable, the promise of the defendant, although made before the services were rendered, is collateral, and within the statute of frauds.

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

Clarence M. Pierson and *Elmer M. Scheele,* for appellant.

C. J. Campbell and *J. Jay Marx,* for appellees.

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

WENKE, J.

This action was brought by Lon King and Ned Waech-

ter, partners doing business as Arctic Air Conditioning, in the district court for Lancaster County against Violet A. Schmall. Therein plaintiffs seek to recover money claimed due them under an alleged oral contract. The jury returned a verdict for the plaintiffs in the sum of $1,992 on which the trial court entered judgment. Defendant thereupon filed a motion asking for either a judgment notwithstanding the verdict or a new trial and has appealed from the overruling thereof. We shall refer to the parties as they were denominated in the original suit.

Section 36-202, R. R. S. 1943, provides, insofar as here material, as follows: "In the following cases every agreement shall be void, unless such agreement, or some note or memorandum thereof, be in writing, and subscribed by the party to be charged therewith: * * * (2) every special promise to answer for the debt, default, or misdoings of another person; * * *."

The principal question raised by this appeal is, does the promise made by defendant, as testified to by Waechter, one of the partners, come within the foregoing section of this statute? This, in turn, presents the question of whether or not it was an original promise resting upon a sufficient consideration or a promise to pay the debt of Messerschmidt, as it was not in writing.

"This statutory provision has been considered on numerous occasions by this court and its meaning has not been extended or expanded by interpretation. Recent cases are Grimes v. Baker, 133 Neb. 517, 275 N. W. 860; Johnson v. Anderson, 140 Neb. 78, 299 N. W. 343." In re Estate of Allen, 147 Neb. 909, 25 N. W. 2d 757.

" 'Where goods, money or services are furnished to a third person, at the request and on the credit of the promisor, the undertaking is original and the promisor will be liable although the promise is not in writing. Peyson v. Conniff, 32 Neb. 269.' " Union Loan & Savings Assn. v. Johnson, on rehearing, 118 Neb. 24, 223 N. W. 469. See, also, Lindsey v. Heaton, 27 Neb. 662, 43

N. W. 420; Waters v. Shafer, 25 Neb. 225, 41 N. W. 181; Elson v. Nelson, 132 Neb. 532, 272 N. W. 551.

"Where, however, goods are furnished to a third party at the request of a promisor and with reliance on his credit, and the transaction is such that the third party or beneficiary is liable therefor to the promisee as an original undertaking on his part, and there being no joint contract the promisor's liability is collateral only as guarantor, and unless in writing is void under the statute of frauds." Williams v. Auten, 62 Neb. 832, 87 N. W. 1061. See, also, Union Loan & Savings Assn. v. Johnson, *supra.*

"A consideration to support a promise, not in writing, to pay the debt of another must operate to the advantage of the promisor, and place him under a pecuniary obligation to the promisee independent of the original debt, which obligation is to be discharged by the payment of that debt." In re Estate of Allen, *supra.* See, also, Johnson v. Anderson, 140 Neb. 78, 299 N. W. 343; Swayne v. Hill, 59 Neb. 652, 81 N. W. 855; Joseph v. Smith, 39 Neb. 259, 57 N. W. 1012, 42 Am. S. R. 571; Rogers v. Empkie Hardware Co., 24 Neb. 653, 39 N. W. 844; Fitzgerald v. Morrissey, 14 Neb. 198, 15 N. W. 233; 25 R. C. L., Statute of Frauds, § 79, p. 495; 49 Am. Jur., Statute of Frauds, § 75, p. 429.

"An agreement without consideration is nudum pactum and unenforceable." Grimes v. Baker, 132 Neb. 898, 273 N. W. 789.

"In an action to recover for services rendered to a third person the general rule is that, if the person for whose benefit the promise was made is himself liable, the promise of the defendant, although made before the services were rendered, is collateral, and within the statute of frauds." Swigart v. Gentert, 63 Neb. 157, 88 N. W. 159. See, also, Union Loan & Savings Assn. v. Johnson, *supra;* Morrissey v. Kinsey, 16 Neb. 17, 19 N. W. 454.

In Union Loan & Savings Assn. v. Johnson, *supra,* we

quoted with approval the following from 27 C. J., Frauds, Statute of, § 17, p. 131: "An oral promise to answer for the debt of another made before the debt is incurred is within the statute, where such promise is a collateral as distinguished from an original promise."

In reviewing the testimony to determine this question we apply the following rule: "In testing the sufficiency of evidence to support a verdict it must be considered in the light most favorable to the successful party, that is, every controverted fact must be resolved in his favor and he should have the benefit of every inference that can reasonably be deduced therefrom." Borcherding v. Eklund, *ante* p. 196, 55 N. W. 2d 643. This is the same rule that would be applicable if we were testing the evidence to determine whether or not it presented a jury question in the first instance.

The evidence discloses that on May 12, 1950, defendant was the owner of Lots 14 and 15, Block 9, Zehrung and Ames Addition to the city of Lincoln, the address of which is 2740-2746½ Garfield Street; that on said date she entered into a written contract with Arnold Messerschmidt for the construction of four duplexes on the above premises, same to be completed on or before September 15, 1950; that on May 29, 1950, Messerschmidt put up a bond guaranteeing the performance of his contract in accordance with the drawings and specifications, work to commence on June 1, 1950; that on May 17, 1950, Messerschmidt subcontracted to plaintiffs the furnishing and installation of the heating in these four duplexes, which was included in his contract with the defendant; that by this contract plaintiffs agreed to furnish and install eight T. B. Atlas gas furnaces in these four duplexes, being a separate heating plant for each unit; that Messerschmidt agreed to pay plaintiffs for furnishing and installing these eight furnaces the sum of $1,992, being $1,400 for the eight furnaces and $592 for the installation thereof; that immediately after entering into this contract plaintiffs bought the eight fur-

naces to be used for this job and placed them in storage in their warehouse; that on or about July 18, 1950, plaintiffs made and delivered to the premises eight roof jacks which the carpenters installed; that sometime in August plaintiffs furnished and installed metal boxes for the hot-air registers; that on August 30, 1950, plaintiffs delivered the eight furnaces to the premises and stored them in one of the apartments; that on the same day they sent Messerschmidt a statement therefor in the sum of $1,400 advising him he would be billed for the balance on completion of the installation; that they again billed Messerschmidt to the same effect on October 3, 1950, and on November 1, 1950; that plaintiffs completed the installation of the eight heating units on November 10, 1950; that on either November 15 or 16, 1950, plaintiffs contracted with Messerschmidt to connect the gas furnaces with the meters for a consideration of $133, this work not being a part of their original contract, and did so on November 17, 1950; that on either November 29 or 30, 1950, Messerschmidt asked plaintiffs to change some kitchen registers which they agreed to do and which they did on December 1, 1950, charging Messerschmidt therefor the sum of $37.50; that on December 6, 1950, plaintiffs sent Messerschmidt a statement in the amount of $2,162.50, being the total of the amounts due under the three separate agreements with him; that on January 18, 1951, plaintiffs filed a mechanic's lien against the premises for the full amount of $2,162.50, setting forth the defendant as owner thereof and Messerschmidt as the contractor for whom they had performed the services; that this mechanic's lien was filed out of time and did not establish a lien for the item of $1,992 for which recovery was here had; and that Messerschmidt has never paid this bill or any part thereof, he having filed a petition in bankruptcy on January 1, 1952.

Messerschmidt failed to complete the duplexes within the time as provided in his contract and because thereof

defendant defaulted his contract on December 14, 1950. This action was commenced on June 21, 1951, and seeks to hold defendant liable for the eight furnaces furnished and installed by plaintiffs in the four duplexes constructed on the premises owned by the defendant.

The evidence on which this recovery is based is as follows:

Waechter, one of the plaintiffs, testified that after the furnaces were taken out to the premises and they had billed Messerschmidt for them and received no money, that: "We did not receive any money, so we stopped work on them until we got our money for our furnaces at least." He also testified: "I thought maybe that way I could force somebody to give me some money." And, "Well, primarily we wasn't getting any money, and didn't want to proceed with the work until we could see some money coming in."

Henry Mara, plaintiffs' salesman, testified that sometime after the furnaces were taken to the premises defendant called the plaintiffs' office by telephone and talked with him stating that she wanted to get the furnaces installed as it was getting cold and she wanted to get the apartments finished and rented as soon as possible. He testified he advised her that plaintiffs would not do anything further until they received some money.

Waechter's and Mara's testimony is to the effect that sometime shortly before the middle of October defendant came to their office, located at 713 North 17th Street, in Lincoln, and talked with Waechter. This was a week or 10 days after she had called the office and talked with Mara. Waechter's testimony as to what she said on this occasion is as follows: "* * * she sat down and told me what the circumstances were pertaining to the contract, and how much trouble she was having with Messerschmidt; that he wasn't getting the job completed, and wanted to know what she could do to expedite it. She sat there and talked to me about it, and I told her

we hadn't received any money for the furnaces, and she told me, 'You don't have to worry. I have Mr. Messerschmidt bonded. I'll see you get your money.' "

Waechter testified she called the office about a week later and talked with him on the telephone. Mara corroborates this testimony, he having listened in on an extension. Waechter's testimony of what transpired is as follows: "She called up and wanted to know why we hadn't got the furnaces in. I told her we hadn't received any money yet, and we were afraid of Messerschmidt, and we weren't going to bill him for the installation until we got done, but we wanted our money for the furnaces." "She said, 'We have to have heat out there. The plasterers need it, and the painters need it, and I am supposed to have this thing done so people can move in, and I can still get them rented,' or something to that effect." "She said, 'You don't have to worry about that. I have Mr. Messerschmidt bonded, and I'll see you get your money.' " "Then I said, 'All right. We will start on them immediately.' " The work of installation was started within 2 days after this conversation.

Waechter testified he relied upon this promise and would not have installed the furnaces if it had not been made. But that fact would not enlarge or extend the scope of the agreement itself. He must recover, if at all, upon the agreement he testified they entered into.

As stated in Williams v. Auten, *supra*: "We are not dealing with a case where an agreement upon a valid consideration is entered into, whereby one obligates himself to pay for goods or services for the benefit of and furnished or rendered to a third party, such third party having no other or further interest in or connection with the transaction save that of being the recipient of the benefits thus bestowed."

Plaintiffs had entered into an agreement with Messerschmidt whereby they were to furnish and install eight furnaces in the four duplexes which Messerschmidt

had, prior thereto, contracted to construct, including these heating units, for defendant. At the time of this oral agreement plaintiffs had furnished the eight furnaces by delivering them to the premises and billing Messerschmidt therefor. This is evidenced by the fact that Waechter, when talking to the defendant, told her, "* * * we hadn't received any money yet, * * * we were afraid of Messerschmidt, * * * we wanted our money for the furnaces." In response to this defendant replied, "You don't have to worry about that. I have Mr. Messerschmidt bonded, and I'll see you get your money." The reply of defendant was clearly a promise to answer only for this obligation of Messerschmidt. That plaintiffs were not seeking to hold defendant for the installation, but were looking to Messerschmidt in regard thereto, is evidenced by the following from Waechter's testimony: "* * * we weren't going to bill him for the installation until we got done, * * *." This is further evidenced by the fact that they billed Messerschmidt for the full amount, including the installation charges, on December 6, 1950.

We think the promise made by defendant, as testified to by Waechter, is, within the principles hereinbefore set forth, a promise to answer for the debt of Messerschmidt for the eight furnaces which plaintiffs had then furnished. But even if it could be construed that her promise was also to cover the installation thereof, which we find it did not, it would not be binding on defendant, for as stated in Union Loan & Savings Assn. v. Johnson, *supra*: "Where the owner, to secure completion of the building, promised a laborer to pay him, provided he would continue work, if the contractor did not, the promise was collateral, the benefit to the owner being too remote to furnish an independent consideration. Morrissey v. Kinsey, 16 Neb. 17."

And as stated in Union Loan & Savings Assn. v. Johnson, *supra*: "'* * * The authorities appear entirely harmonious in support of the rule that, if the bene-

ficiary or person for whose use the goods are furnished is liable at all by reason thereof, any other promise by a third person to pay the same debt must be in writing, otherwise it is void by operation of the provisions of the statute of frauds.' (Williams v. Auten, 62 Neb. 832, 87 N. W. 1061.)"

Although the promise is void, can defendant be held liable for the fair and reasonable value of the furnaces solely because she is the owner of the premises and, because thereof, received the benefit of their installation? We think not. At the time the promise was made Messerschmidt was under contract to build these duplexes for a contract price, which defendant has paid. At that time plaintiffs were under contract with Messerschmidt to furnish and install the furnaces, which they did. Defendant received nothing by reason of their installation which she was not entitled to under her contract with Messerschmidt, for the performance of which she had required him to give a good and sufficient bond. Under our holdings, which have herein been set forth, it was only a collateral agreement to pay Messerschmidt's obligations. See Morrissey v. Kinsey, *supra*. She did not become liable by reason thereof. Neither will defendant be unjustly enriched by reason thereof as she has paid the contract price for the duplexes, which included the furnishing and installation of the furnaces.

In view of what we have herein held we find the trial court was in error in submitting the case to a jury, but, having done so, it should have sustained defendant's motion for judgment notwithstanding the verdict. We therefore reverse the action of the trial court and remand the cause with directions that the defendant's motion for a judgment notwithstanding the verdict be sustained.

REVERSED AND REMANDED WITH DIRECTIONS.

VIC COVER ET AL., APPELLEES, V. PLATTE VALLEY PUBLIC POWER AND IRRIGATION DISTRICT, A PUBLIC CORPORATION, APPELLANT.

57 N. W. 2d 275

Filed March 6, 1953. No. 33261.

Waters: Negligence. An action for damages against an irrigation district for negligence in delivering or failure to deliver water to users from its canals may not be maintained unless notice in writing of the negligence or failure shall, within 30 days after the acts complained of are committed, be served upon the chairman of the board of directors of the district and unless an action for the damage shall be instituted within 1 year from the time the cause of action accrued.

APPEAL from the district court for Dawson County: JOHN H. KUNS, JUDGE. *Reversed and remanded with directions.*

Crosby & Crosby, for appellant.

Smith Brothers, for appellees.

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

YEAGER, J.

This is an action for damages by Vic Cover, Jesse Henry, and Elvira Henry, plaintiffs and appellees, against Platte Valley Public Power and Irrigation District, a public corporation, defendant and appellant. The action was tried to a jury and a verdict was returned in favor of plaintiffs and against the defendant for $5,047. Judgment was rendered on the verdict. An alternative motion for judgment notwithstanding the verdict or for a new trial was duly filed. This motion was overruled. From the judgment and the order overruling the alternative motion for judgment notwithstanding verdict or for a new trial the defendant has appealed.

The background of facts which provides the basis for the action is that the plaintiffs Jesse Henry and Elvira Henry at all times of concern here were the owners

of lands in the northeast quarter of Section 9, Township 11 North, Range 23 West of the 6th P. M., Dawson County, Nebraska, and the plaintiff Vic Cover was during the year 1949 the tenant of 35 acres of these lands, on which 35 acres of land Cover planted potatoes.

The defendant was and is a public power and irrigation district. In its capacity as an irrigation district it furnished and supplied water for irrigation to lands in this area under three appropriations aggregating 295 acre-feet per second. Some water was supplied for certain acreages under permanent water-right deeds. The 35 acres involved here was entitled to no water pursuant to a permanent water-right deed. A permanent water right however did attach to some part of the land in the quarter section of which the 35 acres is a part.

The defendant by unilateral declaration established a program of furnishing water to land having no right or claim to irrigation water provided that the land is in a quarter section a part of which has a water-right deed and provided that there is water available over and above that required to supply the holders of water-right deeds. Such water is described as over-water.

The declaration provides that two waterings of over-water may be used if desired and if water is available with a limit for the two waterings of 1 acre-foot of water per acre. The declared charge is the same for one watering as for two if only one is used.

The plaintiffs, on or about July 5, 1949, requested over-water for the 35 acres and received it between that date and July 15, 1949. On or about July 26, 1949, they requested over-water for the same land.

By their petition they declared this request was not complied with until about August 8, 1949, although water was available for use upon the 35 acres of land. They charged that the potatoes which were planted on the 35 acres of land were in need of water on the day when the water was ordered, that because of the lack

of irrigation the potatoes which were grown were of such an inferior quality as to constitute a total crop failure, and that the sole and proximate cause of the crop failure was the defendant's negligence and wrongful refusal to provide water when requested, for which a judgment for damages was prayed.

To the petition the defendant filed a general demurrer which was in due course overruled.

Thereafter an answer was filed wherein, after formally responding to the allegations as to the capacity of plaintiffs to sue and the corporate capacity of the defendant, the defendant admitted that plaintiffs for the year 1949 were entitled to the delivery of over-water when the same was available. It admitted that water was available for delivery in its canal. It also admitted the delivery pursuant to the first request between July 5 and July 15, 1949.

It denied however that it failed to make delivery pursuant to the request of July 26, 1949, and said that the request was complied with by the commencement of delivery on July 29, 1949, and ending thereof about August 7, 1949, and that it made delivery to the extent that water was available. It denied that the plaintiffs suffered any damage as the result of negligence on the part of the defendant.

The plaintiffs filed a reply in the nature of a general denial.

The brief contains numerous assignments of error as grounds for reversal. However, upon a determination of the first and sixth assignments of error, which in effect are the same, will depend the question of whether or not the other assignments require consideration.

The two assignments together assert that the petition failed to state a cause of action in that action is barred by section 46-160, R. R. S. 1943, which provides there shall be no liability upon an irrigation district for damages for negligence in delivering or failure to deliver water to users unless the party suffering such damages

shall, within 30 days after the acts of negligence are committed or the district fails to deliver water, serve notice in writing on the chairman of the board of directors setting forth the acts of omission complained of, and shall commence action within 1 year from the time the cause accrued.

After the impaneling of the jury and before the introduction of any evidence the defendant objected to the introduction of any evidence. The basis of the objection was the same as that of these two assignments. The general demurrer in probability had the same basis. In any event, no question was raised on the trial as to the right of the defendant to raise the question of the limitation of the statute.

The petition on its face discloses that the action had not been instituted within 1 year from the time the cause accrued and it contains no allegation that the statutory notice was ever served. The alleged failure to deliver water occurred in July and August 1949, and the suit was not filed until November 28, 1951.

Section 46-160, R. R. S. 1943, is as follows: "Every irrigation district within the State of Nebraska shall be liable in damages for negligence in delivering or failure to deliver water to the users from its canal to the same extent as private persons and corporations; *Provided, however,* such district shall not be liable as herein provided, unless the party suffering such damages by reason of such negligence or failure shall, within thirty days after such negligent acts are committed, or such districts shall fail to deliver water, serve a notice in writing on the chairman of the board of directors of such district, setting forth particularly the acts committed or the omissions of duties to be performed on the part of the district, which it is claimed to constitute such negligence or omission and that he expects to hold such district liable for whatever damages may result; *provided, further,* such action shall be brought within one year from the time the cause has accrued."

The petition by its terms is grounded on negligence and the case was tried on the theory of negligent failure of the defendant to deliver water. If this theory is to be controlling in the determination herein then it must be said that right of action by the plaintiffs has been barred by the statute.

In a comment on the force and effect of the statute in a case which presented the question of whether or not this statute had application, this court said: " 'Every irrigation district within the state of Nebraska,' says the statute, 'shall be liable in damages for negligence in delivering or failure to deliver water to the users from its canal to the same extent as private persons and corporations.' This language from the text quoted needs no construction. Its plain import is that it is legislation on damages for negligence. It does not apply to damages for violation of the appropriation for water and for breach of the contract to furnish water for irrigation. There is no reason for stretching the language beyond its terms. Written notice is limited to damages for negligence. Negligence of defendant is not involved herein." Ledingham v. Farmers Irr. Dist., 135 Neb. 276, 281 N. W. 20.

The plaintiffs however say that this statute is not controlling. They say that the action is for damages for violation of an appropriation for water and for a breach of contract for irrigation. They rely for support of their position on Ledingham v. Farmers Irr. Dist., *supra*.

Substantially they insist that when they ordered water on July 5, 1949, which order was accepted and fulfilled by the defendant, that thereby an appropriation and contract for a second watering, if water was available, came into being, and that for failure of delivery there was a breach of an appropriation and of contract on the part of the defendant within the meaning of Ledingham v. Farmers Irr. Dist., *supra*.

With this contention we cannot agree. The clear im-

port of the opinion in that case was to remove from the application of the statute only appropriations and executed contracts to furnish water for irrigation. In the opinion, in fact, it is pointed out that the subject being considered was a vested right.

Here there was no appropriation and no vested right. There was no antecedent contract to deliver water.

The most that can be said is that on July 5, 1949, and again on July 27, 1949, an agreement came into being on the part of defendant to deliver water from its canals to plaintiffs as water users, and that it negligently, as plaintiffs contend, failed to make delivery.

If any meaning is to be given to the statute it is evident that it embraces situations such as this one. Otherwise it is difficult to conceive of a situation wherein it would have application. We think it does have application.

The plaintiffs urge further that the provision has no application for the reason that the provision is a part of the chapter dealing with irrigation districts whereas the defendant is a public power and irrigation district. In this connection they rely on the rule announced in Faught v. Platte Valley Public Power & Irr. Dist., 155 Neb. 141, 51 N. W. 2d 253, as follows: "A contract with an irrigation corporation for the use of water is executed with reference to the statutes and laws prescribing its authority, which become a part of the contract. The subsequent purchase of such corporation by a public power and irrigation district does not of itself, without appropriate legislative action or consent of the consumer, actual or implied, make the statutes and laws under which it was authorized to organize and operate a part of the original contract made with the irrigation corporation."

As an abstract statement of principle no fault may be found with this pronouncement but it can have no force or effect here. The provision now appears as a section of the chapter dealing with irrigation districts

for convenience. It was enacted originally as an independent act. Laws 1911, c. 164, § 1, p. 538. By its terms and title it attaches to all irrigation districts in the State of Nebraska.

It must be said therefore that plaintiffs' petition disclosed on its face that action was barred by the limitation contained in section 46-160, R. R. S. 1943. Accordingly, the defendant having filed a motion for a directed verdict or for dismissal at the close of plaintiffs' evidence, which was overruled, and having renewed the motion at the close of all the evidence, which was again overruled, the motion for judgment notwithstanding the verdict should have been sustained.

The judgment of the district court is therefore reversed and the cause remanded with directions to render judgment notwithstanding the verdict in favor of defendant.

REVERSED AND REMANDED WITH DIRECTIONS.

CITY OF OMAHA, A MUNICIPAL CORPORATION, APPELLANT, V. LEWIS & SMITH DRUG COMPANY, INC., A CORPORATION, APPELLEE.

57 N. W. 2d 269

Filed March 6, 1953. No. 33264.

1. **Trial: Judgments.** The issue to be tried on a motion for summary judgment is whether or not there is a genuine issue as to any material fact, and not how that issue should be determined.
2. ———: ———. A summary judgment is authorized only when the moving party is entitled to a judgment as a matter of law. If there is a genuine issue of fact to be determined, a summary judgment may not be properly entered.
3. ———: ———. The court examines the evidence on motion for summary judgment, not to decide any issue of fact presented, but to discover if any real issue of fact exists.
4. **Municipal Corporations.** Ordinance 9805 of the city of Omaha requires that any store where groceries, fruits, or vegetables are sold shall be closed on Sunday, or under the proviso, shall be closed on Saturday. It makes illegal the keeping open of the store on Sunday, or Saturday under the proviso, even though

groceries, fruits, or vegetables are not sold therein on that day.

5. ———. Ordinance 9805 of the city of Omaha contains no arbitrary discrimination between drug stores.
6. **Constitutional Law.** To establish arbitrary discrimination inimical to constitutional equality, there must be more than a showing that a law or ordinance has not been enforced against others as it is sought to be enforced against the person claiming discrimination. The failure to consistently enforce an ordinance does not destroy it. Abuse in its enforcement does not affect its validity.
7. **Trial: Parties.** In a declaratory judgment proceeding where the question is one of construction of an ordinance to determine whether or not an operator of a business is violating the ordinance, other business operators are not necessary parties to the action.

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

Edward F. Fogarty, Herbert M. Fitle, James M. Paxson, and *Bernard E. Vinardi,* for appellant.

Swarr, May, Royce, Smith & Story, for appellee.

White, Lipp & Simon, Amicus Curiae.

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

SIMMONS, C. J.

This is an action brought by the plaintiff to secure a declaratory judgment as to whether or not the defendant was violating a Sunday-closing ordinance. Issues were made. Each party moved for a summary judgment. The trial court denied the motion of the plaintiff and sustained that of the defendant. Plaintiff appeals. We reverse the judgment of the trial court and remand the cause with directions.

Defendant operates a retail store in downtown Omaha under the name of "Smith Drugs." It sells drugs, medicines, pharmaceuticals, surgical supplies, appliances, and other articles not material to this litigation. It has also

what we shall call a grocery department which occupies about 13 percent of its retail floor space and is in the same room with the other retail activities.

The pleadings admit that defendant sells fresh fruits, canned fruits, vegetables, and packaged foods; eggs, packaged cheese, and canned meats; packaged coffee, tea, and canned condensed milk; and shortening, spices, and relishes. These articles are sold from its grocery "corner" on all days of the week except Sunday. They will be referred to herein as class 1 articles or as groceries.

Defendant also sells soaps, cleansers, and wash-day supplies; carbonated beverages, ice cream, and candies; tobacco and smokers' supplies; and toilet tissue, insecticides, housekeeping supplies, and many personal items. Among the soaps are specially prepared germicidal soaps, etc. It also sells specially prepared foods for babies and persons suffering from stomach disorders. These items, including others not mentioned, are offered for sale outside the grocery "corner." They are sold on week days and Sundays. These articles will be referred to herein as class 2 articles.

The ordinance involved, No. 9805, was adopted November 20, 1917. It was before this court for consideration in State v. Somberg, 113 Neb. 761, 204 N. W. 788. It provides: "It shall be unlawful for any person or persons within the corporate limits of the City of Omaha on the 1st day of the week, commonly called Sunday, to open to the public, or to sell, or offer to sell, give away or dispose of in any way, from any store, establishment or location where groceries, fruits, or vegetables are sold, any groceries, fruits, vegetables, or articles ordinarily sold from a grocery, fruit, or vegetable store or stand, or to open any meat market, sell, offer to sell, or give away from any such meat market, any meats or other products ordinarily sold or handled in meat markets, and all such stores, establishments and meat markets shall be closed on said day. PROVIDED, HOW-

EVER, that nothing herein contained shall extend to those who conscientiously observe the seventh day of the week as the Sabbath and in pursuance of such observation shall close and keep closed their store or meat market on the seventh day of the week, commonly known as Saturday." It also provides a misdemeanor penalty provision.

Each party offered affidavits in support of their motions for summary judgment.

The parties submit the fact issues here as to the nature of a grocery business or store as of the date of the passage of the ordinance in 1917. The pleadings and the affidavits are in agreement that the class 1 items were groceries in 1917 and since. There is disagreement as to whether the class 2 articles were "ordinarily sold from a grocery * * * store" at that time. The trial court found that "since before" 1917 the class 2 items were "ordinarily sold in drug stores."

The plaintiff contends here that the ordinance prohibits opening a store where groceries are sold on the Sabbath as well as selling or offering to sell them; that courts should take judicial notice of what are groceries; that class 2 items are in whole or in part groceries; and that breach of the ordinance by others does not justify defendant's breach. In this connection defendant offered its affidavit to the effect that the ordinance, if construed as plaintiff urges, is being openly violated by other business houses in the city of Omaha.

The defendant contends here that the ordinance properly construed does not require that a drug store, which on week days sells some groceries, be closed and sell nothing on Sundays and that if so construed, an ordinance which requires a "drug store," which sells some groceries on week days, to close up and sell nothing on Sundays, while other drug stores are permitted to remain open, or which puts restrictions on the kind of merchandise such drug store may sell on Sundays, while not similarly restricting other drug stores, is unconstitu-

tional and invalid as violative of the due-process and equal-protection clauses of the federal and state Constitutions.

It is to be remembered that this appeal comes here from an order entered under the summary judgment act. §§ 25-1330 to 25-1336, R. S. Supp., 1951.

The rules are: "The issue to be tried on a motion for summary judgment is whether or not there is a genuine issue as to any material fact, and not how that issue should be determined." Illian v. McManaman, *ante* p. 12, 54 N. W. 2d 244. "A summary judgment is authorized only when the moving party is entitled to a judgment as a matter of law. If there is a genuine issue of fact to be determined, a summary judgment may not be properly entered. * * * The court examines the evidence on motion for summary judgment, not to decide any issue of fact presented, but to discover if any real issue of fact exists." Dennis v. Berens, *ante* p. 41, 54 N. W. 2d 259.

The question of what items are within the language of "articles ordinarily sold from a grocery * * * store" is a question of fact. Where in dispute, as it is here, that fact cannot be properly determined in summary judgment proceeding. Accordingly, we must put aside any consideration here of those items which generally are within the class 2 items and likewise not determine the issues here presented as to those items.

We have then for consideration the fact that the defendant sells groceries, fruits, and vegetables in its store 6 days a week and refrains from such sales on Sunday. The question then is, is the defendant required by law to keep its store closed on Sunday?

The ordinance is in the disjunctive. The provisions applicable to the situation which we determine are as follows: "It shall be unlawful * * * on the 1st day of the week, commonly called Sunday, to open to the public * * * any store * * * where groceries, fruits, or vegetables are sold * * * and all such stores * * * shall

be closed on said day." The proviso reinforces the language of the above-quoted provision for in the case of observance of the seventh day as the Sabbath such a store "shall close" and be kept "closed" on Saturday.

The ordinance provides that any store where groceries, fruits, or vegetables are sold shall be closed on Sunday, or under the proviso shall be closed on Saturday. The ordinance makes illegal the keeping open of the store on Sunday (or Saturday) even though groceries, fruits, or vegetables are not sold therein on that day. See City of Pascagoula v. Henley, 169 Miss. 278, 153 So. 392. The trial court erred in decreeing otherwise.

This brings us to defendant's contention that if the ordinance is construed (1) so as to require it to keep its store closed on Sunday, or (2) so as to prohibit it from selling articles in class 2 on Sunday, it then is arbitrary and discriminatory between the defendant's drug store and other drug stores and thus violates the due-process and equal-protection clauses of the federal and state Constitutions.

For the reasons hereinbefore stated we limit our consideration here to the requirement of the ordinance that defendant close its store on Sunday because of its selling of class 1 articles on days other than Sunday. We find in the ordinance no discrimination between drug stores. The fallacy of defendant's argument is that it assumes the premise that it is within the classification of a drug store solely. Defendant operates a store which on 6 days a week engages in the drug store business, in the grocery store business, and perhaps other lines of business. On Sunday it seeks the classification of solely conducting a drug store business. The passage of time from Saturday night to Sunday morning does not change the nature of the business it conducts.

Defendant further contends there is discrimination in the enforcement of the ordinance in that other stores are permitted to sell principally the class 2 items and some of the class 1 items without prosecution or inter-

ference. That contention is answered in Arrigo v. City of Lincoln, 154 Neb. 537, 48 N. W. 2d 643, where we held: "To establish arbitrary discrimination inimical to constitutional equality, there must be more than a showing that a law or ordinance has not been enforced against others as it is sought to be enforced against the person claiming discrimination. * * * The failure to consistently enforce an ordinance does not destroy it. Abuse in its enforcement does not affect its validity."

Defendant further contends that if it be held that its operations are violative of the ordinance, it is a declaration which affects other stores and hence there is a lack of necessary parties under section 25-21,159, R. R. S. 1943, which provides in part: "When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding." Here the controversy is between the city and the defendant. Of course other store operators are interested but not in the issue as to whether or not the defendant has violated the ordinance, any more than they would be interested in the same issue if presented in a prosecution for a violation. See City of Independence v. Hindenach, 144 Kan. 414, 61 P. 2d 124, 107 A. L. R. 645.

The judgment of the trial court is reversed and the cause remanded with directions for further proceedings consistent with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

ANNA PAUL ET AL., APPELLANTS, V. BRYAN T. MCGAHAN ET AL., APPELLEES.

57 N. W. 2d 283

Filed March 13, 1953. No. 33226.

1. **Appeal and Error.** Where an equity case is appealed it is required that this court shall consider it de novo and reach an

independent conclusion, 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 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 one in opposition thereto.

2. **Deeds: Evidence.** When the evidence to set aside a deed is in parol such evidence, in order to be sufficient to overcome the presumption arising from the express terms of the deed, must be clear, unequivocal, and convincing.

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

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

V. H. Halligan, for appellees.

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

YEAGER, J.

This case was before this court on an earlier occasion in which an opinion was adopted which is reported as Paul v. McGahan, 152 Neb. 578, 42 N. W. 2d 172. The decree was reversed and the cause was remanded for further proceedings. The first seven paragraphs of the former opinion will be quoted herein and adopted as the statement of the case and of the issues submitted for determination. The eighth paragraph contains the determination made by the district court which formed the basis for decision made on the former appeal.

The eight paragraphs in the sequence of appearance in the former opinion are the following:

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

a testamentary trustee to carry out the provisions of the will of William McGahan, deceased.

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

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

"The answer of the defendant Bryan T. McGahan generally denied the allegations of the amended petition relating to the oral contract as set forth therein, and pleaded facts as to the agreement made by the heirs of William McGahan, deceased, wherein the real estate

was conveyed to him for his use absolutely. The answer of the defendant John C. McGahan was to the same effect.

"The plaintiffs' reply was a general denial of the allegations of the answers of the defendants with respect to defendants' contentions as to the oral agreement.

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

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

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

It will be observed from an examination of the former opinion that the decree was reversed and the cause remanded for a new trial. The effect of this was, on the new trial, to permit the plaintiffs to reintroduce their evidence and to permit the defendants to present such evidence as they had in defense of plaintiffs' cause of

action. The issues on the second trial were the same as on the first.

On the second trial the plaintiffs pursuant to stipulation put in evidence to support their cause of action a transcript of the evidence taken at the first trial and then rested. Thereupon the defendants adduced their evidence, after which the plaintiffs adduced rebuttal evidence.

At the conclusion of all of the evidence the court found upon the issues in favor of defendants.

A motion for new trial was duly filed and overruled. From the decree and the order overruling the motion for new trial the plaintiffs have appealed.

There are five assignments of error but collectively they present the question of whether or not the court erred in its finding and conclusion that the evidence was insufficient to sustain the contention of plaintiffs that the conveyance by which the defendant Bryan T. McGahan held title to the lands in question was obtained by fraud and misrepresentation in consequence of which he held the same in trust for himself and the plaintiffs.

As when the case was here before, it comes for trial de novo but unlike at that time it comes here at this time on the evidence of the opposing parties which requires this court to reach an independent conclusion on the evidence, 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 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 one in opposition thereto. McCormick v. McCormick, 150 Neb. 192, 33 N. W. 2d 543; Sopcich v. Tangeman, 153 Neb. 506, 45 N. W. 2d 478; Wiskocil v. Kliment, 155 Neb. 103, 50 N. W. 2d 786; Johnston v. Johnston, 155 Neb. 222, 51 N. W. 2d 332.

This being an action to set aside a deed it comes

under the rule that parol evidence to overcome the presumption arising from the express terms of a deed and to set aside such deed must be clear, unequivocal, and convincing. Holbein v. Holbein, 149 Neb. 281, 30 N. W. 2d 899; McCormick v. McCormick, *supra;* Parrott v. Hofmann, 151 Neb. 249, 37 N. W. 2d 199; Johnston v. Johnston, *supra.*

As has been already pointed out the evidence in chief of the plaintiffs here is the same as was adduced on the former trial. The former opinion contains a fair summary of that evidence. It will be adopted for the purposes of this opinion but not repeated herein.

The opinion also contains conclusions of fact which of course can have no effect upon the determination here since there the case was considered on the evidence of the plaintiffs alone thereby making applicable the rule that when a defendant moves to dismiss plaintiff's action at the close of plaintiff's evidence, the defendant admits the plaintiff's testimony to be true, together with every reasonable conclusion which may fairly be drawn therefrom. Paul v. McGahan, *supra.*

The question of whether or not the parol evidence of plaintiffs was sufficiently clear, unequivocal, and convincing in and of itself to overcome the presumption arising from the express terms of the deed to the defendant Bryan T. McGahan was effectually decided in favor of the plaintiffs in the former opinion. We are not disposed to interfere in any wise with that decision herein.

This conclusion leaves for consideration only the question of whether or not in this trial the evidence, considered de novo, sustains the decree of the district court.

As against the evidence of the plaintiffs the defendant Bryan T. McGahan denied categorically and specifically all of the evidence of the plaintiffs the effect of which evidence was to say that the deed was not intended as an absolute conveyance.

Affirmatively he pleaded that it was agreed and understood that by the deed he was to receive absolute title to the land subject to the encumbrances. The details of his evidence in this connection will not be set out here. His evidence in this regard is corroborated by a series of circumstances which reflect materially upon the credibility of the claims of plaintiffs that the deed was not intended to represent an absolute conveyance.

The action was originally instituted in the name of two brothers and two sisters of the defendant Bryan T. McGahan and the spouses of two of them. It was done however by Matt J. McGahan without the knowledge or consent of the brother, John C. McGahan, and the two sisters.

On being apprised of the commencement of the action the three executed formal dismissals of the action with prejudice. In connection with the dismissal plaintiff Anna Paul made affidavit in part as follows: "* * * that she does not have and does not claim any interests in or to the real estate involved therein or any of the rents, profits, revenue or income therefrom; that when she executed the deed to said property dated April 10, 1941, * * * she intended to transfer all of her right, title and interest therein to Bryan T. McGahan * * *." The defendant Mayme Baker made a like affidavit. These affidavits were made at the instance of the defendant Bryan T. McGahan.

Both of these witnesses on the trial denied that the affidavits reflected their intention and purpose when the deed was executed. They seek to avoid their effect by saying that they did not read them before they signed and swore to them, though ample opportunity was afforded to do so. They do not contend that their brother did anything the effect of which was to induce them not to read the affidavits.

John C. McGahan testified that it was his intention at the time he signed the deed as well as at all times

thereafter to convey absolute title to the land.

Matt J. McGahan, the plaintiff who in actuality and without the knowledge or consent of the other named plaintiffs commenced this action, testified that it was not the intention that the deed should be an absolute conveyance but that it was the intention that title should pass to Bryan T. McGahan in trust for all of the heirs of William McGahan. His evidence in this respect is controverted by the testimony of Bryan T. McGahan and other witnesses as to contrary statements made at about the time the deed was executed.

A matter of significance in this respect is that though the deed was executed in 1941 Matt McGahan manifested no interest in Bryan T. McGahan's handling of the subject matter until about 5 years later when it is reasonable from the record to assume that the land had considerably appreciated in value.

Bryan T. McGahan testified substantially that at the time the deed was executed the parties considered that there was no value in the land over and above the charges against it and that they would turn it over to Bryan T. McGahan so as to afford him an opportunity to save it for himself.

Such a conclusion, if it was in fact arrived at, was consistent with the facts as they were at the time and with the conduct of Bryan T. McGahan. The total value of the land in 1941 according to the best evidence appearing in the bill of exceptions was $7,320. There are 488 acres involved. Two witnesses who were well informed as to the values of land in that area testified that it was worth about $15 an acre. Matt McGahan, without any qualification to testify as to values except that based upon claimed part ownership in the land, testified that it was of a value of $30 an acre. There was no other evidence on the subject. The loans and charges against the land were refinanced by Bryan T. McGahan and after refinancing amounted on January 1, 1942, to $6,994.15. The charges against the land at

the time the deed was executed are not exactly ascertainable but they were very close to this amount.

There was no personal property in the estate of William McGahan but at the time the estate was closed the charges against it amounted to $1,393.53. Bryan T. McGahan paid these charges without any contribution or agreement for contribution by any of the other heirs. This left him without any hope of reimbursement except as it might be realized in some manner out of this land.

Thus Bryan T. McGahan burdened himself to the extent of $8,387.68 on the basis of receiving title to the land of the value of $7,320.

Taking into consideration the evidence in its entirety in the light of the rules hereinbefore set forth the conclusion is that the plaintiffs are not entitled to any of the relief prayed.

The decree of the district court is affirmed.

AFFIRMED.

JO ANN LEES, APPELLEE, V. DEANE HERVEY LEES, APPELLANT.

57 N. W. 2d 279

Filed March 13, 1953. No. 33271.

Divorce. A divorce may not be decreed on the uncorroborated testimony of a party to the action.

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

Mothersead, Wright & Simmons, for appellant.

W. H. Kirwin, for appellee.

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

YEAGER, J.

This is an action for divorce by Jo Ann Lees, plain-

tiff and appellee, against Deane Hervey Lees, defendant and appellant.

The action was tried to the court at the conclusion of which a decree was entered granting the plaintiff a divorce, custody of the two minor children of the parties, certain allowances for the support of the children, and attorney's fees and costs. By the decree a division of property was also made.

A motion for new trial was filed which was overruled. From the decree and the order overruling the motion for new trial the defendant has appealed.

Five assignments of error are set forth as grounds for reversal. The first assignment is as follows: "The district court erred in granting divorce to plaintiff without sufficient grounds therefor." The second is as follows: "The district court erred in granting divorce without corroboration."

The grounds for divorce as they appear in the petition are: "* * * the defendant, disregarding his duties as a husband, has been guilty of extreme cruelty towards the plaintiff; that he has struck and beaten the plaintiff, quarreled with and nagged at the plaintiff, and generally has been guilty of a course of conduct of a cruel and abusive nature towards the plaintiff."

The defendant denied these allegations and prayed for dismissal of the petition.

The plaintiff testified in her own behalf in support of the allegations of cruelty contained in the petition. Her testimony tended generally to support her allegations. Whether or not it would be regarded as sufficient to sustain a decree of divorce, if corroborated, which is doubtful, we are not required to and accordingly do not decide for the reason that it stands wholly without corroboration.

The only other witness called by plaintiff was her father. All that he said bearing on this subject appears in the following from the bill of exceptions: "Q With particular reference to your visits in Austin, Texas, what

did you notice about the treatment of your daughter by Mr. Lees? Just state to the Court what you observed. A Well, I know they wasn't getting along, and I could lay—while I was laying in bed I could listen to the conversation, that was pretty tough to lay there and take, but I put up with it because I wanted to see my grandchildren. Q What was said and what was the attitude of the Defendant, Deane Hervey Lees, toward your daughter at that time? Just describe to the Court what was going on. A Well, they were very unhappy, that I could see. That's—They tried to put up a front to me that they were happy together, but you could see that they weren't, and listening to the conversations I knew that there was something wrong, but I wouldn't interfere. Q What did you notice about his attitude toward your daughter during that time? A Well it was very cool I would say."

This evidence of course on its face fails to corroborate any special or general charge of cruelty against defendant. Under the rule that a divorce may not be decreed on the declarations of a party alone the district court erred in granting a divorce to the plaintiff. § 42-335, R. R. S. 1943; Nuss v. Nuss, 148 Neb. 417, 27 N. W. 2d 624; Kroger v. Kroger, 153 Neb. 265, 44 N. W. 2d 475; Kuta v. Kuta, 154 Neb. 263, 47 N. W. 2d 558.

This conclusion renders unnecessary any consideration of the other assignments of error.

The decree of the district court is reversed and the action dismissed.

REVERSED AND DISMISSED.

ELDON MEIER, APPELLEE, v. N. CHRIS NELSEN, APPELLANT.
57 N. W. 2d 273

Filed March 13, 1953. No. 33275.

Judgments. After the final adjournment of the term of court at which a judgment has been rendered the court has no author-

ity or power to modify the judgment except for the reasons stated and within the time limited in section 25-2001, R. R. S. 1943.

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

Sidner, Lee & Gunderson, for appellant.

Richards, Yost & Schafersman, for appellee.

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

WENKE, J.

This is an appeal from the district court for Dodge County by N. Chris Nelsen, defendant below. Defendant had been served with an order to show cause why he should not be adjudged in contempt of court for failure to comply with the court's decree of August 4, 1950, in favor of Eldon Meier. Hearing was held and judgment rendered. After judgment had been rendered the defendant filed a motion for new trial and has perfected this appeal from the overruling thereof. We shall herein refer to the respective parties as they appeared in the original action; that is, Eldon Meier as plaintiff and N. Chris Nelsen as defendant.

On August 4, 1950, the district court for Dodge County granted plaintiff the following relief: "IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the ditch involved in this action, constructed by the defendant N. Chris Nelsen, be immediately filled in such manner as to prevent the draining of the water from the depression on defendant's land into the road ditch along the south side thereof and thence onto the land of the Plaintiff Meier, and that unless this order is complied with within 15 days from date hereof that a warrant issue out of this court directing the sheriff of Dodge County, Nebraska, to close said ditch in a sufficient manner to prevent the flow of water therein."

Thereafter, on June 18, 1952, plaintiff filed a verified motion wherein, after setting forth the foregoing provisions of the decree, he stated: "That the defendant has wilfully, wantonly and without any good cause failed, neglected and refused to comply with the provisions of said decree." Because thereof he asked: "* * * that an order of the court be granted directing the defendant to appear in the Courtroom in the District Court of Dodge County, Nebraska, to show cause if any there be, why he should not be adjudged guilty of contempt of court for failure to comply with the provisions of said decree * * *." Authority for such procedure is provided by sections 25-1072 and 25-2121, R. R. S. 1943.

This relief was granted and defendant was accordingly cited to appear. In response to the citation defendant filed a "Showing" to the effect that he had fully complied with the provisions of the decree.

A hearing thereon was had on June 30, 1952. At this hearing defendant sought to prove that he had fully complied with the court's decree of August 4, 1950, but in some respects the court prevented him from doing so by sustaining objections to the evidence offered. All evidence was admissible which tended to show full compliance with the court's order of August 4, 1950, as full compliance therewith is a complete defense to the charges made. We shall consider all the evidence received or offered which tends to prove that defendant complied with the court's decree.

Simply stated defendant's evidence shows that after the decree of August 4, 1950, was rendered he dammed the lower, or east end of the ditch located on his land. He also put a dam or dike along the south edge of his land at this location. This dam and dike effectively kept all water flowing in the ditch located on his land from getting into the road ditch and by that means onto plaintiff's land. It is true that water collecting on defendant's land can still flow east in the ditch located thereon. This ditch cuts through some slightly higher

ground which is just east of where the water collects. However, because of the change made by defendant it cannot now flow south into the road ditch and onto plaintiff's land as it did before the decree of August 4, 1950, was rendered. Now, when it reaches the east end of the ditch on defendant's land, it flows to the northeast through a depression. This depression, which is on defendant's land, has been cleaned out to permit a better flow.

After this evidence had been adduced the trial court made the following order:

"It is therefor ordered that defendant Nelsen plug said ditch by filling it level with the banks on either side at some point west of the high point in the ridge through which it is cut, and that said plug or dam be not less than six feet thick from east to west, within ten days from this date.

"It is further ordered that said plug or dam be maintained in substantially the same size and condition. That upon failure to comply with this order the defendant is found to be in contempt of court and fined the sum of $300 and costs. If defendant complies herewith he will be assessed only the costs of this hearing.

"It is further ordered that if the defendant fails to comply with this order in plugging said ditch that the Sheriff of Dodge County, Nebraska is hereby ordered and directed to dam said ditch as above provided."

The first question presented is raised by plaintiff's "Motion to Dismiss Appeal." This motion is based on the proposition that defendant could only bring this matter here by error proceedings.

We have held: "A conviction under contempt proceedings can only be reviewed in the supreme court by the filing of a petition in error as in a criminal case." Gentle v. Pantel Realty Co., 120 Neb. 630, 234 N. W. 574.

If the trial court had actually passed on defendant's guilt or innocence of the charge made against him this contention would have merit. But such is not the

situation before us. What the court did was not to pass upon that question but to materially enlarge the extent of the relief which it had granted plaintiff by its decree of August 4, 1950. The question of whether or not the court had jurisdiction to do so defendant had a right to have reviewed by appeal. We find this contention of plaintiff to be without merit and the motion to dismiss the appeal is overruled.

The order of June 30, 1952, was made in a term subsequent to the one in which the decree of August 4, 1950, had been rendered. It materially modified the decree of August 4, 1950, by enlarging the relief granted plaintiff therein.

We very recently held in Gasper v. Mazur, 155 Neb. 856, 54 N. W. 2d 66:

"In this jurisdiction the law is established that courts of general jurisdiction possess inherent power to vacate or modify their own judgments at any time during the term at which they were pronounced. See, Bradley v. Slater, 58 Neb. 554, 78 N. W. 1069; Lyman v. Dunn, 125 Neb. 770, 252 N. W. 197.

"After the final adjournment of the term of court at which a judgment has been rendered, the court has no authority or power to vacate the judgment except for the reasons stated and within the time limited in what is now Chapter 25, article 20, R. R. S. 1943, § 25-2001, contained therein. See, Lyman v. Dunn, *supra;* Cronkleton v. Lane, 130 Neb. 17, 263 N. W. 388; State v. State Journal Co., 77 Neb. 771, 111 N. W. 118; Schuyler Building and Loan Assn. v. Fulmer, 61 Neb. 68, 84 N. W. 609; Feldt v. Wanek, 134 Neb. 334, 278 N. W. 557."

The same is true of the power to modify. See § 25-2001, R. R. S. 1943. This is generally true in other jurisdictions. See 49 C. J. S., Judgments, § 238, p. 451.

We find the trial court was without power in this proceeding to materially modify its judgment rendered at a former term. We therefore reverse the judgment of

the trial court and remand the cause with directions to enter judgment in accordance herewith.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA EX REL. LOREN H. LAUGHLIN, RELATOR, v. RAY C. JOHNSON, AS AUDITOR OF PUBLIC ACCOUNTS OF THE STATE OF NEBRASKA, RESPONDENT.

57 N. W. 2d 531

Filed March 13, 1953. No. 33277.

1. **Officers: Constitutional Law.** The Director of Insurance is an executive officer within the purview of Article IV, section 25, of the Constitution providing that such an officer shall receive such salary as may be provided by law, but that the salary of no officer shall be changed more than once in 8 years.
2. ———: ———. The constitutional provision contained in Article IV, section 25, of the Constitution, to the effect that the salary of no executive officer shall be changed more than once in 8 years, is a prohibition against legislative action on the subject for the period stated.
3. ———: ———. The salary of the Director of Insurance having been properly increased in 1941, the attempt of the Legislature to again increase it by Chapter 223, Laws 1945, and its reenactment in Chapter 309, Laws 1947, are unconstitutional and void.
4. ———: ———. The Director of Insurance is an executive officer having a fixed and definite term within the purview of Article III, section 19, of the Constitution, providing that the compensation of a public officer shall not be increased or diminished during his term of office.
5. ———: ———. The term of an office is distinct from the tenure of an officer. The latter has no application to the question whether or not an office has a fixed and definite term, within the meaning of Article III, section 19, of the Constitution.
6. **Officers.** A holding over is an encroachment upon the term of the successor. It does not change the length of the term, but merely shortens the tenure of the successor.
7. ———. Statutory provisions providing that the Director of Insurance may be removed from office by the Governor, that the office might be discontinued by the Governor, and that such Director shall serve until a fixed date and until his successor is

appointed and qualified, do not make the office one without a fixed and definite term. Such provisions bear upon the tenure of the officer rather than the term of the office.

Original action by the state, on the relation of Loren H. Laughlin, against Ray C. Johnson, as Auditor of Public Accounts. *Writ of mandamus denied.*

Loren H. Laughlin, pro se, and *Perry & Perry,* for relator.

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

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

CARTER, J.

This is an original action in mandamus by Loren H. Laughlin, Director of Insurance, the relator, to compel Ray C. Johnson, Auditor of Public Accounts, the respondent, to approve relator's salary vouchers for May 1952, and the months subsequent thereto, at the rate of $6,500 per annum as authorized by the Governor under the provisions of section 81-103, R. S. Supp., 1951. The question presented is whether or not the increase in salary as fixed by the Governor contravenes constitutional prohibitions relative to the increasing of salaries of public officers.

The relator was appointed Director of Insurance for the Department of Insurance on December 31, 1951, by the Governor. The Governor fixed the annual salary of the office at $6,500 as authorized by section 81-103, R. S. Supp., 1951. This statute provides in part: "The Governor shall have authority to establish the salaries of all persons connected with the various departments, including the heads thereof. In no case shall the annual salaries of the following heads of departments exceed the amounts set forth herein, each payable in monthly installments: * * * (5) the Director of Insurance, sixty-five hundred dollars."

It is the contention of the Attorney General that relator is not entitled to be paid at the annual rate of $6,500 because of Article IV, section 25, of the Constitution of Nebraska, which provides in part: "The officers provided for in this article shall receive such salaries as may be provided by law, but the salary of no officer shall be changed more than once in eight years." The Director of Insurance is an executive officer within the purview of this provision of the Constitution and is therefore bound by its terms. Clark v. Lincoln Liberty Life Ins. Co., 139 Neb. 65, 296 N. W. 449; State ex rel. Howard v. Marsh, 146 Neb. 750, 21 N. W. 2d 503. The question for determination is whether or not the salary of the Director of Insurance has been changed within 8 years from the effective date of the claimed increase. This requires an historical examination of the salary changes made which affect this office.

This statute, section 81-103, R. S. Supp., 1951, was first enacted in substantially its present form in 1933. Laws 1933, c. 149, § 3, p. 571. The maximum salary of the Director of Insurance was therein fixed at $3,200. Salary changes were enacted into the statute without otherwise materially changing its language in 1937, 1941, 1943, 1945, 1947, and 1951. The salary of the office of Director of Insurance was changed only in the years 1941, 1945, and 1951, although the 1945 change was carried into the 1947 amendment. In 1941 the maximum salary of the Director of Insurance was fixed at $4,500. In 1945 it was increased to $5,000, and in 1951 it was increased to $6,500 as hereinbefore stated. It is clear that the increase to $4,500 in 1941 was not within the constitutional prohibition cited. The 1945 amendment to the statute became effective on August 10, 1945, approximately 4 years and 3 months after the enactment of the 1941 amendment. The 1951 amendment became effective on April 27, 1951. It is the contention of the relator that the amendment of 1945, so far as it purports to apply to the Director of Insurance, is violative

of Article IV, section 25, of the Constitution, prohibiting the changing of the salaries more than once in 8 years. Assuming the validity of this argument he contends that the 1951 amendment was validly enacted more than 8 years after the amendment of 1941 became effective and, consequently, the increase in salary to $6,500 as fixed by the Governor is the only valid increase since 1941.

It is the position of the Attorney General that the amendment of 1945 as it pertains to the office of the Director of Insurance is not unconstitutional for the reason that the salary of that office is fixed by the Governor and not the Legislature. For that reason, he argues, the constitutional prohibition against a change in the salary of the Director of Insurance more than once in 8 years has no application to the legislative enactment, but only as to the Governor in authorizing an increase. It will be noted that Article IV, section 25, of the Constitution provides that executive officers shall receive such salaries as may be provided by law, but that it shall not be changed more than once in 8 years. The Legislature being the lawmaking body, a provision that the salaries shall be fixed by law enjoins that duty upon the Legislature and, necessarily, the restriction that the salaries of executive officers shall not be changed more than once in 8 years is a restriction upon legislative action. It appearing that as the 1941 amendment made a valid increase in the salary of the Director of Insurance, no change therein could be made by the Legislature for a period of 8 years. Consequently, the attempted change in the salary of the Director of Insurance by the Legislature in 1945 and its reenactment in 1947 was prohibited by Article IV, section 25, of the Constitution; and Chapter 223, Laws 1945, and Chapter 309, Laws 1947, are wholly void as to the Director of Insurance. If this is not so, a holding would be required that the salaries of executive officers were fixed by the Governor and not by the Legislature. Such a holding would contravene Article IV, section 25, of the

Constitution, which charges the Legislature with the duty of fixing the salaries of officers falling within Article IV of the Constitution. We think that section 81-103, R. S. Supp., 1951, constitutes a fixing of salaries of executive officers by the Legislature within the meaning of Article IV, section 25, of the Constitution. The fact that the Legislature, after fixing the maximum salaries that could be paid to the officers named therein, empowered the Governor to determine such salaries within the prescribed limits does not alter the fact that such salaries were actually fixed by the Legislature within the purview of this provision of the Constitution. The requirements of the constitutional provision have been met when maximum salaries have been fixed and the determination of the amount to be paid has been delegated to the Governor. We conclude, therefore, that the Legislature could change the salary of the Director of Insurance at any time after 8 years elapsed following the enactment of the 1941 amendment. In other words, the Legislature was authorized to change the salary of the Director of Insurance in 1949 or any time subsequent thereto. It did so in 1951 in compliance with Article IV, section 25, of the Constitution.

The Attorney General contends, however, that relator was filling a part of a term commencing on the first Thursday after the first Monday in 1951 and ending on the first Thursday after the first Monday in 1953, and that an increase in salary during such term was prohibited by Article III, section 19, of the Constitution. This section provides in part: "The Legislature shall never grant any extra compensation to any public officer, * * * nor shall the compensation of any public officer, including any officer whose compensation is fixed by the Legislature subsequent to the adoption hereof be increased or diminished during his term of office."

We think that applicable statutes conclusively establish that the office of Director of Insurance is an office

with a fixed and definite term. Section 81-109, R. R. S. 1943, provides: "Each head of a department shall serve from his appointment and qualification until the first Thursday after the first Monday next succeeding the next election of the Governor, and until his successor is appointed and qualified, unless sooner removed by the Governor." The foregoing statute as originally passed provided: "Each secretary whose office is created by this act shall hold office for a term of two years from the first Thursday after the first Monday in January next after the election of the governor and until his successor is appointed and qualified unless sooner removed by the governor." Laws 1919, c. 190, t. I, a. I, § 8, p. 438. It is clear from the language used that the intent of the Legislature was to establish a definite and fixed term. The controlling rule is that since the term of an office is distinct from the tenure of an officer, the term of office is not affected by the holding over of an incumbent beyond the expiration of the term for which he was appointed. A holding over does not change the length of the term, but merely shortens the tenure of his successor. 67 C. J. S., Officers, § 48, p. 206. See, State v. Moores, 61 Neb. 9, 84 N. W. 399; State v. Galusha, 74 Neb. 188, 104 N. W. 197. Consequently, it is immaterial to the issue that relator's predecessor in office held over until December 31, 1951. It affected the tenure of the relator but not the term of the office that he was filling.

The record shows that the Legislature, during its 1951 session, increased the maximum salary of the Director of Insurance and authorized the Governor to determine the amount to be paid. It contained an emergency clause and became effective at the time the Governor approved it on April 27, 1951. This increase was therefore authorized after the commencement of the term of the Director of Insurance, it having commenced on the first Thursday after the first Monday in 1951, to wit: January 4, 1951. The fact that relator was not

appointed until December 31, 1951, does not affect the term of office of the Director of Insurance insofar as the application of Article III, section 19, of the Constitution is concerned.

It is the position of the relator that as the Director of Insurance may be removed from office by the Governor, as provided in section 81-109, R. R. S. 1943, that as the office might be discontinued by the Governor, as provided in section 81-107, R. S. Supp., 1951, and that as the Director of Insurance serves until the first Thursday after the first Monday in January following the election of the Governor, and until his successor is appointed and qualified, as required by section 81-109, R. R. S. 1943, it makes the appointment one for an indefinite period of time and does not constitute it a term of office as that expression is used in Article III, section 19, of the Constitution. We do not think the contingencies set forth in the foregoing statutes can have the effect that the relator claims for them. It is true that each may have some effect upon his tenure, but they do not change the fact that the appointment is for a fixed and definite period of time. The term of an office and the tenure of an officer are distinct matters which must be disassociated in dealing with Article III, section 19, of the Constitution. The term of office to which relator was appointed commenced on the first Thursday after the first Monday in January 1951, which was January 4 of that year, and ended on the first Thursday after the first Monday in January 1953, which was January 8 of that year. While it is true that for some purposes a holding over the term is considered a part of the term to which the holdover was appointed, it is, nevertheless, an encroachment upon the term of his successor. His successor, at whatever time in the term he may be appointed to the office, takes it under the same conditions as if he had been appointed at the commencement of the term insofar as Article III, section 19, of the Constitution is concerned. If the possi-

bility of removal, discontinuance of the office, or of holding over until a successor is appointed and qualified, has the effect of making the period for which appointed indefinite and unfixed, and therefore not a term, there could be no such thing as a fixed and definite term of office. The contingencies mentioned in the cited statutes, and the legislative provisions providing procedures to be followed in the event of their happening, does not have the effect of making the term of office of the Director of Insurance any the less fixed and definite.

It necessarily follows that the Legislature was authorized to change the salary of the Director of Insurance from the amount fixed in 1941 at any time after 1949. Since no valid change was authorized until 1951, it could not become effective as to the relator until the commencement of the next term of office of the Director of Insurance, which would be on January 8, 1953, because of the constitutional provision against increasing or diminishing the compensation of a public officer during his term.

The prayer of relator's petition for a peremptory writ of mandamus compelling respondent to approve his claim for compensation at the rate of $6,500 per annum is therefore denied.

WRIT OF MANDAMUS DENIED.

STATE OF NEBRASKA EX REL. JOHN RAITT ET AL., APPELLANTS, V. VAL PETERSON, GOVERNOR, ET AL., APPELLEES.

57 N. W. 2d 280

Filed March 13, 1953. No. 33289.

1. **Statutes.** Where a statute is dealing with a procedure to be followed, it will ordinarily be construed as directory only where the matter to which it relates is a proper subject for the exercise of a reasonable discretion, notwithstanding the use of imperative terms.
2. **Public Lands.** The Board of Educational Lands and Funds is

vested with a discretionary power in approving or rejecting the highest bid received at a public auction of school land leases as provided by section 72-233, R. R. S. 1943. Such discretionary power must be reasonably exercised and it is only when the action of the board is arbitrary or unreasonable that relief may be had in the courts.

3. **Public Lands: Trusts.** It is the duty of the Board of Educational Lands and Funds, in its fiduciary capacity in handling school lands and funds committed to its care, to obtain a maximum return to the trust estate from trust properties under its control, subject to the taking of necessary precautions for the preservation of the trust estate.
4. **Public Lands.** Ordinarily if a public sale of a school land lease was fairly conducted and the property sold for a fair and reasonable value under the circumstances, the Board of Educational Lands and Funds would be required to approve the sale and make the lease.
5. ———. A substantially increased bid for a school land lease sold at public auction, made before the approval of the sale to the highest bidder, is sufficient evidence to sustain the Board of Educational Lands and Funds in finding that the sale price was inadequate and that a resale was required.
6. ———. Such an increased bid is relevant only to the extent that it bears upon the fairness of the sale and the adequacy of the high bid there obtained.

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

Beynon, Greenamyre & Hecht, for appellants.

Clarence S. Beck, Attorney General, and *Robert A. Nelson,* for appellees.

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

CARTER, J.

This is an action in mandamus by John Raitt and Roy D. Raitt, the highest bidders at a public sale of school land leases, the relators, to compel the Board of Educational Lands and Funds, and the members and officers thereof, the respondents, to execute and deliver to them a school land lease in accordance with the terms of the bid and the provisions of sections 72-233 and 72-234,

R. R. S. 1943. The trial court denied the issuance of a writ of mandamus and the relators have appealed.

The record shows that the Board of Educational Lands and Funds caused a school land lease to be executed and delivered to the relators on October 24, 1949, for a period of 12 years. On August 13, 1951, the Board of Educational Lands and Funds declared the lease to be void and of no force and effect under the authority of a decision of this court entitled State ex rel. Ebke v. Board of Educational Lands and Funds, 154 Neb. 244, 47 N. W. 2d 520. The correctness of the action of the board in voiding the 12-year lease is not questioned in this proceeding. Thereafter the board caused the lands involved to be reappraised and offered the lease for sale at public auction on March 21, 1952. The relators attended the sale and bid $500 for the lease in addition to the rentals reserved therein, the same being the highest bid received. Thereafter the relators made application for the lease of the school lands involved and delivered their checks for the amount of the bid and the semiannual rental for the first 6-months' period of the proposed lease. Thereafter, and on March 28, 1952, the board received an offer in writing from A. E. Schoettger and Duane Schoettger wherein they offered $1,000 for the lease in addition to the rentals reserved, which offer was accompanied by a bank draft in the amount of $1,250 to cover the bid of $1,000, the first semiannual rental payment, and expenses in connection therewith. On April 28, 1952, the board rejected the bid of relators and directed a resale of the lease at public auction. It is the contention of relators that it was the mandatory duty of the board to accept their bid, approve their application, and then execute and deliver a lease to them. It is the contention of the board that the adequacy of the bid is for its determination and where it is shown that a resale will result in a greater return to the trust fund, in which it is in the position of a trustee, it is

the duty of the board to reject the bid and order a resale of the lease.

The state holds, as trustee, the public school lands within the state, including the income therefrom. It is the duty of a trustee to obtain a maximum return to the trust estate from the trust properties under its control, subject to the taking of necessary precautions for the preservation of the trust estate. State ex rel. Ebke v. Board of Educational Lands and Funds, *supra*. In this respect, sections 72-233 and 72-234, R. R. S. 1943, providing for the selling of school land leases at public auction, are not mandatory statutes which require that a school land lease be executed and delivered to the highest bidder under any and all circumstances. The Board of Educational Lands and Funds has the right to exercise its discretion in determining if the sale was fairly conducted and whether the lease sold for a fair and reasonable value. There is no universal test by which directory provisions of a statute may be distinguished from mandatory provisions. Ordinarily, such differences must be determined by the intent of the Legislature as gleaned from the whole statute. But in the present case the Constitution requires that the property be dealt with in a manner consonant with the duties and functions of a trustee acting in a fiduciary capacity. It thus imposes upon the board the duty of obtaining a fair market value for all trust property that it may sell. A fair construction of the statutes, viewed in the light of their constitutional background, requires us to hold that the highest bidder at a public sale of school land leases is not entitled to a lease until it has been approved by the board. The board may properly exercise a reasonable discretion in determining if the sale was fairly held and if the property sold for a fair and reasonable value. In its fiduciary capacity the board is not required to approve a sale that is manifestly detrimental to the trust. Where a statute is dealing with a procedure to be followed, it will ordinarily be

construed as directory only where the matter to which it relates is a proper subject for the exercise of a judicial discretion, notwithstanding the use of imperative terms. We think the rule stated in State ex rel. Rutledge v. Eaton, 78 Neb. 202, 110 N. W. 709, is particularly applicable: "Where a lessee of school land exercises his option and makes an application to purchase, the board of educational lands and funds may, in the exercise of a reasonable discretion, reject the appraisement, if it appears that the amount of such appraisement is so much less than the actual value of the land as to lead to the conclusion that the appraisement was the result of fraud or mistake." We do not think that the statutes in question, when construed with applicable constitutional provisions, require the Board of Educational Lands and Funds to execute and deliver a school land lease to the highest bidder at a public sale of school land leases, but that the board may exercise a reasonable discretion in approving or rejecting such a bid. The question immediately arises as to whether or not a mandamus action can be maintained under such circumstances. In view of the result at which we have arrived, we shall give no consideration to that matter in this opinion.

The only remaining question is whether or not the Board of Educational Lands and Funds acted within its powers in rejecting the bid of the relators. The record shows that an upset bid of $1,000 was made 1 week after the sale. We think the rule governing upset bids at judicial sales is applicable here. If the sale was fairly conducted and the property sold for a reasonable and fair value under the circumstances, the board would ordinarily be required, in the exercise of a reasonable discretion, to approve the sale and make the lease. An upset bid, made after the sale and before the approval and acceptance of the highest bid at the public auction, is relevant only to the extent that it bears upon the fairness of the sale and the adequacy of the highest bid at the public auction. State ex rel. Sorensen v.

Denton State Bank, 126 Neb. 486, 253 N. W. 670; County of Gage v. Beatrice Nebraska Water Co., 147 Neb. 236, 22 N. W. 2d 696. Where the upset bid is substantial and material, and not merely nominal, it tends to establish the inadequacy of the highest bid procured at the sale. County of Lancaster v. Schwarz, 152 Neb. 15, 39 N. W. 2d 921. In the present case the upset bid was made within a week after the public auction. The highest bid at the public auction was $500 above the rentals reserved, and the upset bid was $1,000 above the rentals reserved. We think this evidence is sufficient for the board to determine in the exercise of a reasonable discretion that the highest bid was inadequate. Consequently it was clearly within its powers in rejecting the bid of the relators and ordering a resale of the lease. The trial court therefore properly denied a writ of mandamus.

AFFIRMED.

CARL E. SCHNEIDER, ADMINISTRATOR OF THE ESTATE OF FINIS R. HEDDEN, DECEASED, APPELLEE, V. VILLAGE OF SHICKLEY, NEBRASKA, ET AL., APPELLANTS.
57 N. W. 2d 527

Filed March 13, 1953. No. 33291.

1. **Workmen's Compensation.** On any appeal to this court in a workmen's compensation case the cause will be here considered de novo upon the record.
2. ———. The contract under which service is performed and the performance thereunder determine the relationship between the contracting parties.
3. ———. On the issue as to whether a workman is an employee as distinguished from independent contractor, his relation to his employer should be determined from all of the facts, rather than from any particular feature of the employment or service.

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

Chambers, Holland & Groth, for appellants.

Keenan & Corbitt, for appellee.

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

WENKE, J.

This appeal involves a claim made by the administrator of the estate of Finis R. Hedden, deceased, in behalf of the deceased's widow and minor daughter who were dependent upon him for their support. The claim is for benefits under the Nebraska workmen's compensation law. Both the workmen's compensation court and the district court for Fillmore County, to which the cause was appealed, allowed the claim and awarded benefits accordingly. The defendants, the Village of Shickley and Employers Mutual Casualty Company, the latter being the workmen's compensation insurance carrier for the village, filed a motion for a new trial in the district court and have taken this appeal from the overruling thereof.

The only question raised by the appeal is whether or not decedent was, at the time he was accidently killed on July 17, 1951, an employee of the village of Shickley or an independent contractor.

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

"Generally, the term 'independent contractor' signifies one who, exercising an independent employment, contracts to do a piece of work according to his own methods, and without being subject to control of his employer except as to the result of the work." Hines v. Martel Telephone Co., 127 Neb. 398, 255 N. W. 233. See, also, Nollett v. Holland Lumber Co., 141 Neb. 538, 4 N. W. 2d 554; Reeder v. Kimball Laundry, 129 Neb.

306, 261 N. W. 562; Petrow & Giannou v. Shewan, 108 Neb. 466, 187 N. W. 940.

Finis R. Hedden was a qualified and experienced electrician living in Geneva, Nebraska. There he operated his own repair shop, dealing in electrical services and supplies. Generally he performed such services for his customers as an independent contractor.

But that fact is not controlling, for as stated in In re Estate of Bingaman, 155 Neb. 24, 50 N. W. 2d 523: "The contract under which service is performed and the performance thereunder determine the relationship between the contracting parties."

The village of Shickley has owned its electrical distribution system since 1920. Until sometime in early 1947 or 1948, the record is not positive as to just when, the village had a full-time employee who performed all the services necessary to maintain it. About that time this employee quit. The village had no other employee qualified to do this work. Instead of replacing the employee who had quit with another full-time employee qualified to do this work the village board of trustees, through its light and water commissioner Gaylord Matzke, who was a member of the board, contacted decedent and made an oral agreement with him in regard thereto. This agreement was as follows: That whenever decedent was contacted by anyone for the village and asked to perform some electrical work for it he would respond by coming to Shickley as soon as it was convenient for him to do so and perform any and all work in connection with the village's distribution system that it might ask him to do. Decedent, at various times during the years that followed and up until the time of his death on July 17, 1951, performed services for the village under this agreement. The work performed included putting in several large cut-out fuses, putting in several new transformers, doing wiring in connection with new street lights, and, in general, maintaining the distribution system. When he first

started to work his rate of pay was $1 an hour but this had increased to $1.50 at the time of his death. The work he was to perform was neither fixed as to amount nor time, but was irregular as to both. This is evidenced by the fact that during 1949 the village paid decedent the sum of $440.85, during 1950 the sum of $83, and in 1951, up to July 1, the sum of $78.94. Between July 1 and July 14, 1951, both dates inclusive, decedent had worked for the village a total of 36 hours. He had also worked for the village on Monday, July 16. No bill has been submitted to the village to cover these services. He reported for work on July 17. At that time he was engaged in dismantling an old transformer bank. The village had installed a new one because of an increased demand for electricity. While so engaged he was accidentally killed by an electric shock.

"On the issue as to whether a workman is an employee as distinguished from independent contractor, his relation to his employer should be determined from all of the facts, rather than from any particular feature of the employment or service." Knuffke v. Bartholomew, 106 Neb. 763, 184 N. W. 889. See, also, Nollett v. Holland Lumber Co., *supra;* Showers v. Lund, 123 Neb. 56, 242 N. W. 258; Petrow & Giannou v. Shewan, *supra;* Barrett v. Selden-Breck Construction Co., 103 Neb. 850, 174 N. W. 866.

One indispensable element to the creation of the relationship of an independent contractor is that the party must contract to do a specified piece of work for a specified price. See, Prescher v. Baker Ice Machine Co., 132 Neb. 648, 273 N. W. 48; Reeder v. Kimball Laundry, *supra.* The services which decedent had agreed to perform for the village consisted of his doing whatever it asked him to do in connection with its furnishing the people of Shickley with electricity by and through its distribution system. He was to do it whenever need therefor occurred. The need for such services was irregular and its character and extent uncertain. It was

not an agreement to do a specified piece of work. Neither do we think the hourly rate indicative of a specified price. As stated in Peterson v. Christenson, 141 Neb. 151, 3 N. W. 2d 204: "The amount of his compensation would depend upon, not the completion of the job, but the length of time required to perform the job. This is indicative of an employee status. Showers v. Lund, *supra.*" See, also, Petrow & Giannou v. Shewan, *supra.*

The evidence establishes that either the village or decedent could have terminated the arrangement agreed to at will. We said in Cole v. Minnick, 123 Neb. 871, 244 N. W. 785: "* * * the most important feature is the right of either party to terminate the relation without liability. Where such right exists the workman is usually a servant (Industrial Commission v. Hammond, 77 Colo. 414)." See, also, Riggins v. Lincoln Tent & Awning Co., 143 Neb. 893, 11 N. W. 2d 810; Showers v. Lund, *supra;* Knuffke v. Bartholomew, *supra.* It is significant that after decedent's unfortunate accident no one was employed in his behalf to finish the work he was engaged in for the village; that is, the dismantling of the old transformer bank. Apparently this was done by the village. See, Prescher v. Baker Ice Machine Co., *supra;* Petrow & Giannou v. Shewan, *supra.* The village kept a rather complete stock of supplies. With a few small exceptions it furnished all the supplies used by decedent in connection with the work he performed. This is indicative of the existence of the relationship of employer and employee. See Prescher v. Baker Ice Machine Co., *supra.* The evidence indicates the village expected decedent to personally perform the work, although he could employ others to help him. Such is indicative of an employer-employee relationship. See, Cole v. Minnick, *supra;* Knuffke v. Bartholomew, *supra;* Barrett v. Selden-Breck Construction Co., *supra.* The fact that no definite time was fixed within which the work had to be done tends to establish decedent was an employee. As said in Riggins v. Lincoln Tent &

Awning Co., *supra:* "In this respect the following facts tend to establish that plaintiff was an employee: * * * There was no definite time fixed within which the work was to be performed * * *."

The work decedent was performing for the village was not continuous and it was permissable for him to work for others. However, as stated in Cole v. Minnick, *supra:* "It is not necessary that the services under the employment be continuous, and the fact that the contract of employment permitted and contemplated that the employee would engage in other tasks or occupations does not remove the particular contract of hire from the operation of the statute. Davis v. Lincoln County, 117 Neb. 148."

Decedent furnished his own tools, including a truck. But, as stated in Cole v. Minnick, *supra:* "Merely because an employee furnishes his own tools and equipment does not convert him from an employee into an independent contractor. Claus v. DeVere, 120 Neb. 812." See, also, Riggins v. Lincoln Tent & Awning Co., *supra.*

The village was not primarily interested in the details of how and when the work was performed, as it had no one in its employ sufficiently qualified to superintend it. It was only interested in securing a reasonably prompt and satisfactory result after advising decedent what the work was it wanted performed and showing him where it was to be performed. It left the details thereof entirely in his control. The fact that decedent could perform other tasks and do this work at his convenience has already been discussed. As stated in Barrett v. Selden-Breck Construction Co., *supra:* "The right to supervise, control, and direct the work is one of the tests for determining whether a person is an independent contractor or an employee, but it is not the sole and only test." See, also, Nollett v. Holland Lumber Co., *supra;* Petrow & Giannou v. Shewan, *supra.* But, as stated in Claus v. DeVere, 120 Neb. 812,

235 N. W. 450: "The fact that the employee must use his own judgment in the manner of performing his work does not, of itself, make him an independent contractor."

Decedent was a qualified and experienced electrician and personally known to be such by Gaylord Matzke, the light and water commissioner and a member of the board of trustees of the village of Shickley. It was Matzke, because of this acquaintanceship, who contacted decedent and made the oral agreement with him. In this regard we think the following from Peterson v. Christenson, *supra,* is applicable: "It is true that a skilled workman may be employed because of his particular ability to go ahead and do work for which he has been trained. That fact implies an understanding that he should do the work according to his skill, with less or no direction, but it does not change him from an employee to a contractor."

We think the following, taken from Showers v. Lund, *supra*, is apropos here: "Much learning has been written into the decisions of the courts on the distinctions between an employee and an independent contractor. The result is confusing. It is difficult to reconcile the diverse results derived from quite similar facts. Some apparent inconsistencies are traceable to local statutes. In writing of the diversity and confusion of opinion in the precedents in different jurisdictions, the Iowa supreme court said: 'In this state of the precedents we can only hope to maintain, if we may, consistency in our own decisions.' Burns v. Eno, 240 N. W. (Ia.) 209."

While the record contains some indicia that decedent was performing work for the village as an independent contractor we are, nevertheless, of the opinion that the indicia, taken as a whole, establishes that he was an employee of the village and performing services for it as such at the time he was accidentally killed. Such finding, under the factual situation here disclosed, is in keeping with our past holdings under comparable situations. See, Riggins v. Lincoln Tent & Awning Co.,

supra; Peterson v. Christenson, *supra*; Davis v. Lincoln County, 117 Neb. 148, 219 N. W. 899; Showers v. Lund, *supra;* Cole v. Minnick, *supra;* Knuffke v. Bartholomew, *supra.*

Comment is made by appellants as to some of the questions asked by the trial court. The complaint is that they are leading and suggestive and they could not properly make objection thereto. Trial courts should be careful in this regard. However, since the matter is here for review de novo the complaint becomes immaterial.

Appellee asks that if the cause be affirmed we allow an attorney's fee pursuant to section 48-125, R. R. S. 1943. In view of what we have hereinbefore stated, we affirm the judgment of the trial court and allow appellee an attorney's fee of $350 for the services rendered by his attorneys in this court, same to be taxed as costs.

AFFIRMED.

DU TEAU COMPANY, INC., DOING BUSINESS AS HOWARD BURNETT CO., APPELLEE, V. NEW HAMPSHIRE FIRE INSURANCE COMPANY, A CORPORATION, APPELLANT.
57 N. W. 2d 663

Filed March 20, 1953. No. 33241.

1. **Reformation of Instruments.** In an action for reformation of a written instrument, the burden rests upon the moving party of overcoming the strong presumption arising from the terms of the written instrument. If the proofs are doubtful and unsatisfactory and if there is a failure to overcome this presumption by testimony entirely plain and convincing beyond reasonable controversy, the writing will be held to express correctly the intention of the parties.
2. ———. A preponderance of evidence sufficient to justify reformation of a contract in writing on the ground of mutual mistake requires proof that is clear, convincing, and satisfactory, and must establish that the mutual mistake involved is common to both parties, each laboring under the same misconception.

3. ———. Where the evidence, in an action for reformation of a written instrument, is sharply and irreconcilably conflicting, it becomes necessary to apply the well-known rule of equity that the evidence must be clear, convincing, and satisfactory, and, in consequence, deny reformation.

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

Chambers, Holland & Groth, for appellant.

L. R. Doyle and *R. A. Vestecka,* for appellee.

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

CHAPPELL, J.

Plaintiff, Du Teau Company, Inc., doing business as Howard Burnett Co., brought this action against defendant, New Hampshire Fire Insurance Company, to reform an automobile dealer's open insurance policy issued January 3, 1949, and thus permit recovery for damages sustained when plaintiff voluntarily parted with possession of a 1947 Packard automobile on March 4, 1949, because induced to do so by a scheme, device, or fraud. Concededly, the policy involved was the third annual duplicate renewal of an original standard form which excluded any liability in such a situation.

In that connection, however, plaintiff substantially alleged in its amended petition that at the time the original policy was purchased on January 3, 1946, and at the time of renewals thereof as well, defendant's agent represented and it was mutually agreed that plaintiff would be thereby protected against any loss that occurred from larceny, robbery, or pilferage, including that resulting from loss of possession as aforesaid. It was alleged that plaintiff, relying upon such representations and agreement, purchased the policy but through inadvertence, accident, or mutual mistake, as distinguished from fraud, the terms of the policy omitted

protection against such a loss, which omission plaintiff did not discover until after the loss occurred.

Defendant's answer denied generally, but admitted issuance of the policy January 3, 1949, and alleged that on March 4, 1949, plaintiff voluntarily parted with possession of the automobile as it was induced to do by a "fraudulent scheme, trick, device or false pretense," liability for which was excluded by provisions of the policy set forth in its answer. The issues were tried as if plaintiff's reply was a general denial.

After hearing by the trial court, whereat evidence was adduced, a judgment was rendered reforming the policy to cover the loss and awarding plaintiff $1,469.13, plus $150 attorney's fees, interest, and costs. Defendant's motion for new trial was overruled, and it appealed, assigning that the judgment was contrary to the evidence and law. We sustain the assignment.

At the outset it should be noted, as disclosed by the record, that on March 5, 1949, plaintiff reported to the insurance company that the automobile had been stolen, and on March 26, 1949, plaintiff filed its original petition in the district court solely alleging theft of the same automobile on March 4, 1949, and attached thereto a copy of the same policy in order to support its alleged right to recover $2,595, the actual cash value of the automobile, upon a theory of theft for which the company was allegedly liable under the provisions of the policy as issued.

On April 25, 1949, defendant answered such original petition, alleging that plaintiff had voluntarily parted with possession of the automobile as induced to do by a "fraudulent scheme, trick, device or false pretense," liability for which was excluded by the policy.

It was thereafter, on June 4, 1949, that plaintiff filed its amended petition first alleging that its loss occurred in the manner claimed by defendant, but asserting its right to reformation of the policy and recovery of the loss. In that regard, no contention is made by defendant

that plaintiff's change of position is controlling, but only that it is a significant circumstance which this court should consider in arriving at its ultimate conclusion.

That there was a loss in the manner claimed, and the amount thereof, is not in controversy here. The question presented for trial de novo is simply plaintiff's right to reformation.

In that connection, it is true, as claimed by plaintiff, that: "When a soliciting agent of an insurance company and the insured mutually agree upon the terms and conditions of the insurance contract, and the policy, later issued by the company, omits one of the essential elements of the contract, which is not discovered by the insured until after a loss occurs, he may then have the policy reformed so as to express the real agreement of the parties, and his failure to promptly examine the policy when received and discover the departure therein from the real agreement will not defeat his right to have reformation of the policy." Mogil v. Maryland Casualty Co., 147 Neb. 1087, 26 N. W. 2d 126. See, also, Robinson v. Union Automobile Ins. Co., 112 Neb. 32, 198 N. W. 166. However, it is also true, as stated in Mogil v. Maryland Casualty Co., *supra,* quoting from Beideck v. National Fire Ins. Co., 139 Neb. 171, 296 N. W. 873: "It is true that 'In an action for reformation of a written instrument, the burden rests upon the moving party of overcoming the strong presumption arising from the terms of the written instrument. If the proofs are doubtful and unsatisfactory and if there is a failure to overcome this presumption by testimony entirely plain and convincing beyond reasonable controversy, the writing will be held to express correctly the intention of the parties.' "

Beideck v. National Fire Ins. Co., *supra,* cited numerous cases supporting such rule and also held that: "Where the evidence, in an action for reformation of a written instrument, is sharply and irreconcilably con-

flicting, it becomes necessary to apply the well-known rule of equity that the evidence must be clear, convincing and satisfactory, and, in consequence, deny a reformation." Also, in Smith v. United States Fidelity & Guaranty Co., 142 Neb. 321, 6 N. W. 2d 81, it was held: "A preponderance of evidence sufficient to justify reformation of a contract in writing on the ground of mutual mistake requires proof that is clear, convincing and satisfactory, and must establish that the mutual mistake involved is common to both parties, each laboring under the same misconception." See, also, Kear v. Hausmann, 152 Neb. 512, 41 N. W. 2d 850, wherein it was held: "In a proceeding to reform a contract on the ground of mutual mistake the burden of proof is on the party interposing that plea.

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

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

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

Also, in Lovenburg v. Justice, 155 Neb. 406, 51 N. W. 2d 895, it was held: "In order to warrant the reformation of a written instrument in any material respect, the evidence must be clear, convincing, and satisfactory, and until overcome by such proof, the terms of the instrument must stand as evidencing the intention of the parties.

"Reformation of an instrument to correct a mistake will not be accorded unless the intent and agreement which it will express as reformed were concurrent in the minds of the parties to and including the time of its execution." Such rules are controlling here. Cases relied upon by plaintiff are entirely distinguishable upon the facts. To discuss them at length herein would unduly prolong this opinion.

Bearing in mind the foregoing rules, we have ex-

amined the record. It discloses that at the trial on the merits plaintiff offered the testimony of only one witness who managed and operated the Packard establishment and purchased the policy for plaintiff. On the other hand, defendant offered the deposition testimony of only one witness, the agent who sold the policy.

Plaintiff's witness testified in substance that he did not read the policy originally purchased or the three other identical renewals thereof, but that the agent for defendant company handled all of his insurance business and in several conversations with reference thereto prior to the purchase and effective date thereof defendant's agent had represented and assured him that the policy included complete coverage for any loss that might occur, particularly the type here involved. On the other hand, defendant's agent, who at time of trial had entered other employment, testified in substance that no such representations or assurances were ever made by him but that plaintiff's manager, having been in the automobile business for some time, was conversant with, knew what the contract was, and the agent was rather sure that such manager asked for the particular policy issued, which was a standard form containing the kind of coverage for which plaintiff applied. The record discloses, and in fact plaintiff's witness conceded on direct rebuttal, that his testimony and that of defendant's witness was in conflict. As we view it, the evidence is sharply and irreconcilably conflicting.

In Beideck v. National Fire Ins. Co., *supra,* there was also an irreconcilable conflict in the evidence. In that opinion it is said: "Was this evidence in the light of the established rule of law sufficient to warrant a reformation of the policy in question? We think not. To be sufficient the proofs must not have been doubtful; they must have been satisfactory; they must have been of sufficient weight to overcome the presumption that the policy correctly expressed the intention of the parties;

they must have been so plain and convincing as to remove any reasonable controversy. From a reading of all the evidence and giving to it either its face value, or an analysis which takes into consideration implications and probabilities, we cannot say that the plaintiff's proofs are plain and convincing beyond reasonable controversy." Such statement has application and is controlling here.

For reasons heretofore stated, we conclude that the judgment should be and hereby is reversed and the cause is remanded with directions to render a judgment for defendant at plaintiff's costs.

REVERSED AND REMANDED WITH DIRECTIONS.

HERBERT A. GOGER, APPELLEE, V. HERBERT A. VOECKS ET AL., APPELLANTS, IMPLEADED WITH MILTON FREUDENBERG ET AL., APPELLEES.

57 N. W. 2d 621

Filed March 20, 1953. No. 33290.

1. **Appeal and Error.** In the absence of a bill of exceptions it will be presumed that issues of fact presented by the pleadings were established by the evidence, that they were correctly decided, and in such situation the only issue that will be considered on appeal to this court is sufficiency of the pleadings to support the judgment.
2. **Pleading.** Where an objection that a petition does not state a cause of action is interposed for the first time during the trial of a cause, the pleadings will be liberally construed in the light of the entire record and if possible sustained.
3. ———. In such case, if the general elements of plaintiff's case may be implied by reasonable intendment from the terms of the pleadings assailed, they will be regarded as sufficiently alleged.
4. **Fraud.** It is generally the rule that statements of past or present rents, income, profits, patronage, sales, or earnings of a business are material, and when positively made are representations of fact upon which a charge of fraud may be predicated if the other essential elements of fraud are present.
5. **Fraud: Cancellation of Instruments.** In a petition to cancel a

conveyance of real property alleged to have been obtained by false and fraudulent representations, an allegation that plaintiff in reliance upon such representations parted with title to the land is a sufficient plea that he was damaged by the fraud.

6. ———: ———. In an action to rescind a contract for fraud, a petition which sets out the facts from which a presumption of damage arises is sufficient to show injury to plaintiff by reason of the fraud.

7. **Fraud: Vendor and Purchaser.** A purchaser of real or personal property is entitled to the benefit of his bargain; in other words, to receive the identical property purchased; and where the vendor by fraud or false representations has conveyed to him or induced him to accept something not contemplated by his contract, he may rescind the sale and recover what he has paid without showing that he has sustained any pecuniary injury or damage thereby.

APPEAL from the district court for Pierce County: FAY H. POLLOCK, JUDGE. *Affirmed.*

Brogan & Brogan and *Bernard A. Ptak,* for appellants.

Deutsch & Jewell, for appellee Goger.

Moyer & Moyer, for appellees Freudenberg.

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

CHAPPELL, J.

Plaintiff Herbert A. Goger brought this action to rescind and cancel an exchange of his real estate and promissory note with defendant Herbert A. Voecks for a going common carrier petroleum transport business together with its equipment and state and federal operational permits. Leona E. Voecks was made a party defendant only because she was the spouse of defendant, Herbert A. Voecks, and she is not otherwise involved in this litigation.

Plaintiff substantially alleged in his petition that he was induced to make the exchange by fraudulent representations of defendant Herbert A. Voecks. Insofar as important here, plaintiff alleged that such defendant represented that he owned the petroleum transport busi-

ness together with its equipment and permits; that such business was a going business constantly operating at least two trucks; and that during 1950 it had a gross income of more than $21,000 with net earnings of $7,000 after payment of all expenses and due allowances for depreciation. Plaintiff alleged that such representations were false, the true fact being that such business had a net income for 1950 of only $336.63. He also alleged that such defendant represented that he had a wide experience and knowledge of such business and that the permits to operate the same were worth and had a value of several thousand dollars, when in fact they were mere licenses, unassignable and of no value; that plaintiff, not being otherwise advised concerning such business and relying upon said defendant and the representations aforesaid, made the exchange; and that upon discovery of the fraud about 10 days thereafter, plaintiff immediately elected to rescind, demanded transfer back of his real estate and surrender of his note to him, and offered to transfer and return all of the consideration therefor back to defendants, which was refused. This action followed.

Insofar as important here, defendants' answer denied generally, denied that any false representations were made, but alleged that defendant Herbert A. Voecks merely expressed to plaintiff his opinion, as a prospective statement, that it was possible with good operation to earn a net profit of one-third of gross revenue in such a business of transporting petroleum products for hire. It also alleged that defendants performed as agreed and did all things possible to transfer the permits and help plaintiff retain existing freight hauls for which the equipment had been used, but did not guarantee that he could retain them. It further alleged that the equipment was sold as equipment only; that the real estate exchanged by plaintiff was not worth more than the things he received therefor; and that plaintiff acted in bad faith, thus was not entitled to rescind.

Defendants did not demur to plaintiff's petition, but at the conclusion of all the evidence upon the issues presented, filed a motion for dismissal upon the ground, among others, that plaintiff's petition did not allege that he had "sustained any pecuniary loss or damages, or that the plaintiff was otherwise placed in any worse position than he would have occupied if there had been no alleged fraud." The trial court overruled such motion and found and adjudged the issues generally in favor of plaintiff and against defendants, canceled plaintiff's note, quieted title to the real estate in plaintiff, and ordered rescission and cancellation of the entire transaction, as prayed by plaintiff. Thereafter defendants filed motion for new trial wherein it was alleged, among other things, that the trial court erred in overruling their motion aforesaid made at the conclusion of all the evidence, and that "plaintiff's petition does not state a cause of action." Their motion for new trial was overruled, and defendants appealed, assigning that the trial court erred in so doing and that the judgment was contrary to law. We conclude that such assignment has no merit.

In that connection, there is no bill of exceptions, and in the absence thereof it will be presumed that issues of fact presented by the pleadings were established by the evidence, that they were correctly decided, and in such situation the only issue that will be considered on appeal to this court is the sufficiency of the pleadings to support the judgment. Jones v. City of Chadron, *ante* p. 150, 55 N. W. 2d 495.

In that situation, defendants concede that the controlling issue presented is sufficiency of the petition to allege a cause of action because, as claimed by them, such petition failed to allege that plaintiff suffered any pecuniary loss or damage as a result of the alleged misrepresentations. As hereafter observed, there are well-established rules which control the determination of such issue.

In Bradway v. Higgins, 152 Neb. 724, 42 N. W. 2d 627, this court held: "Where an objection that a petition does not state a cause of action is interposed for the first time during the trial of a cause, the pleading will be liberally construed in the light of the entire record, and, if possible, sustained.

"In such case, if the essential elements of plaintiff's case may be implied by reasonable intendment from the terms of the pleading assailed, they will be regarded as sufficiently alleged." In the light thereof and other applicable rules hereinafter set forth, we have examined the record.

The general rule is that statements as to past or present rents, income, profits, patronage, sales, or earnings of a business are material, and when positively made are representations of fact upon which a charge of fraud may be predicated if the other essential elements of fraud are present. 37 C. J. S., Fraud, § 54, p. 320; Markel v. Moudy, 11 Neb. 213, 7 N. W. 853; Musgrove v. Eskilsen, 127 Neb. 730, 256 N. W. 883. See, also, Annotation, 27 A. L. R. 2d 14.

In that regard, it is generally the rule that in seeking relief for fraud facts must be pleaded showing that the party complaining suffered injury or damages as a result of the fraud charged. However, in Rihner v. Jacobs, 79 Neb. 742, 113 N. W. 220, this court held: "In a petition to cancel a conveyance of real property alleged to have been obtained by false and fraudulent representations, an allegation that the plaintiff, in reliance upon such representations, parted with the title to the land is a sufficient plea that he was damaged by the fraud." Also, in Johnson v. Nebraska Building & Investment Co., 109 Neb. 235, 190 N. W. 590, this court held: "In an action to rescind a contract for fraud, a petition which sets out the facts from which a presumption of damage arises is sufficient to show injury to plaintiff by reason of the fraud." In that opinion it was said: "Regarding the second assignment it is claimed

the petition is faulty in not alleging in so many words that plaintiff was damaged by the false representations; but the petition sets out representations of a character which, if false, would raise a legal presumption of damage. This is sufficient in an action to rescind. Rihner v. Jacobs, 79 Neb. 742."

Again, in Cooper v. Marr, 149 Neb. 211, 30 N. W. 2d 563, following Jakway v. Proudfit, on rehearing, 76 Neb. 67, 109 N. W. 388, this court reaffirmed that: "A purchaser of real or personal property is entitled to the benefit of his bargain, in other words, to receive the identical property purchased; and where the vendor by fraud or false representations has conveyed to him or induced him to accept something not contemplated by his contract, he may rescind the sale and recover what he has paid, without showing that he has sustained any pecuniary injury or damage thereby." Contrary to defendants' contention, the second syllabus in that case has no application here. In the case at bar it will be noted plaintiff alleged that he exchanged his real estate and promissory note for a going petroleum transport business, including its equipment and permits, which business purportedly as represented had earned a net of $7,000 the previous year. In addition he alleged that such representations were false and he received a business which in fact earned a net of only $336.63 for such year. In other words, plaintiff not only alleged that he was fraudulently induced to accept something not contemplated by his contract but he also alleged facts for which a presumption arose that he was damaged thereby.

Cases relied upon by defendants are distinguishable and not controlling here.

For reasons heretofore stated, we conclude that plaintiff's petition did state a cause of action and that the judgment of the trial court should be and hereby is affirmed.

AFFIRMED.

LEE (BILL) PAULSEN, APPELLEE, V. CITY OF LINCOLN, NEBRASKA, APPELLANT.
57 N. W. 2d 666

Filed March 20, 1953. No. 33304.

Workmen's Compensation. A claimant for compensation by virtue of the provisions of section 48-121, R. S. Supp., 1949, for an injury to both hands resulting in temporary total loss of the use of them and thereafter permanent partial loss of the use of them is entitled to recover such proportion of the compensation allowed for total disability by subdivision (1) of the section as the extent of his loss would bear to the total loss of such members.

APPEAL from the district court for Lancaster County: JOHN L. POLK, JUDGE. *Affirmed.*

Cline, Williams, Wright & Johnson, for appellant.

Chambers, Holland & Groth, for appellee.

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

BOSLAUGH, J.

This is an appeal from the affirmance by the district court of an award in favor of appellee made under the Workmen's Compensation Act by the Nebraska Workmen's Compensation Court on rehearing of the case by that court.

Appellee, an employee of the city of Lincoln, was injured on November 10, 1949, by an explosion while as a fireman he was attending a fire. The accident arose out of and in the course of his employment. His hands, arms, and head were severely burned. His injuries and disabilities qualified him for benefits as provided by the Workmen's Compensation Act. He was paid the amount to which he was entitled during the period of temporary total disability. It terminated on March 23, 1951.

The permanent partial disability of appellee resulting from the accident is to his hands and consists of a 60 percent loss of the use of his right hand, and a 20

percent loss of the use of his left hand, or a disability of 40 percent. The monthly wage of appellee at the time of the accident was the equivalent of a weekly wage of $46.73.

The only issue in this case is the manner of computing the compensation for permanent partial disability. This is provided by the Workmen's Compensation Act as it was at the time of the accident. § 48-121, R. S. Supp., 1949. The parts thereof pertinent to this case are:

"(1) For the first three hundred weeks of total disability, the compensation shall be sixty-six and two-thirds per cent of the wages received at the time of injury, but such compensation shall not be more than twenty-two dollars per week, nor less than eleven dollars per week * * *. After the first three hundred weeks of total disability, for the remainder of the life of the employee, he shall receive forty-five per cent of the wages received at the time of injury, but the compensation shall not be more than sixteen dollars per week nor less than eight dollars per week * * *.

"(3) For disability resulting from permanent injury of the following classes, the compensation shall be in addition to the amount paid for temporary disability; Provided, the compensation for temporary disability shall cease as soon as the extent of the permanent disability is ascertained * * *. The loss of both hands * * * shall constitute total and permanent disability and be compensated for according to the provisions of subdivision (1) of this section. * * * In all cases involving a permanent partial loss of the use or function of any of the members mentioned in this subdivision, the compensation shall bear such relation to the amounts named in said subdivision as the disabilities bear to those produced by the injuries named therein. * * *"

Appellant contends that the compensation payable to appellee for his 40 percent two-member disability must be computed by taking 40 percent of $22 for the balance

of 300 weeks from the date of the accident (the temporary total disability period was 70 weeks), and 40 percent of $16 for each week thereafter for the balance of his life. Appellant says in support of its position that the Workmen's Compensation Act does not require or contemplate that there shall be maintained a ratio between the wages received and the compensation payable for partial disability; that the wages of the employee and the statutory limits of maximum and minimum payments are applicable only in the computation of compensation benefits for total disability; that the compensation allowable for partial disability of a member must bear the same ratio to the compensation allowable for the total loss of the member as the partial disability bears to the total loss of the member; and that the compensation allowable is determined by applying the percentage of disability to the period over which compensation is payable and not to the wages of the employee.

The arguments and conclusion of appellant are not in harmony with the provisions of the statute or the prior decisions of this court. The benefits provided by the Workmen's Compensation Act are based upon the wages of the employee. The first subdivision of the section quoted from says the compensation shall be a percent "of the wages received at the time of injury." The second subdivision designates the compensation as a percent of the difference between "the wages received at the time of the injury" and the earning power of the employee thereafter. The third subdivision speaks of compensation as a percent of the "daily wages." The statute provides as appears above that in all cases involving a permanent and partial loss by an employee of the use or function of any of the members mentioned, the compensation shall be in such proportion to the amounts named in subdivision (3) as the loss of the use of the member bears to a total loss. The compensation for the total loss by an employee of one hand is

stated therein as two-thirds of the daily wages for 175 weeks but for the total loss of his two hands he is awarded compensation on the basis of total disability under subdivision (1). The partial loss of two hands by appellee entitles him to 40 percent of what he would have received for the total loss of his two hands, or in other words 40 percent of the compensation allowed for total disability under subdivision (1).

A claimant for compensation for an injury sustained on November 10, 1949, to both of his hands resulting in temporary total loss of the use of them and thereafter followed by permanent partial loss of the use of them is entitled to recover such proportion of the compensation allowed for total disability by subdivision (1) of section 48-121, R. S. Supp., 1949, as the extent of his loss would bear to the total loss of such members. Frost v. United States Fidelity & Guaranty Co., 109 Neb. 161, 190 N. W. 208; Radford v. Smith Bros., 123 Neb. 13, 241 N. W. 753; Fallis v. Vogel, 137 Neb. 598, 290 N. W. 461; Bronson v. City of Fremont, 143 Neb. 281, 9 N. W. 2d 218. The award of the compensation court on rehearing in favor of appellee and the affirmance thereof by the district court adopted and followed this interpretation of the statute.

The judgment of the district court should be and it is affirmed. Appellee should be and is allowed an attorney fee of $200 to be taxed as costs against appellant.

AFFIRMED.

CHICAGO & NORTH WESTERN RAILWAY COMPANY, A CORPORATION, APPELLEE, V. CITY OF OMAHA ET AL., APPELLANTS.

57 N. W. 2d 753

Filed March 27, 1953. No. 33229.

1. **Municipal Corporations: Taxation.** The legislative power and authority delegated to a city to construct local improvements

and levy assessments for payment thereof is to be strictly construed and every reasonable doubt as to the extent or limitation of such power and authority is resolved against the city and in favor of the taxpayer.

2. ———: ———. When a party attacks a paving assessment for the reason that it is illegal, or for an unauthorized purpose, the burden is on him to prove the invalidity of the assessment, or that it was for an unauthorized purpose.
3. ———: ———. The provisions of section 77-1727, R. R. S. 1943, apply to special assessments as well as to taxes levied for general purposes.
4. ———: ———. Where the physical facts are such that the property was not and could not have been specially benefited in any amount or could not have benefited to any extent approaching the assessment, the levy of assessment is then arbitrary and constructively fraudulent and therefore void and subject to collateral attack.

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

Edward F. Fogarty, Herbert M. Fitle, James M. Paxson, and *Bernard E. Vinardi,* for appellants.

Neely, Otis & Cockle and *Nelsen Trottman,* for appellee.

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

MESSMORE, J.

This is a suit to enjoin the collection of a special assessment levied by the City of Omaha upon the real estate of the Chicago & North Western Railway Company, a corporation, consisting of a railroad right-of-way in street Improvement District No. 4199, which was organized for the purpose of paving and installing curbs and gutters in Redman Avenue between Thirty-third Street and Thirty-sixth Street. The amount of the special assessment levied against the plaintiff railroad's property was $4,715.53, the total amount of the assessment for improvement being $13,220.90. The plaintiff prayed that the special assessment be declared to be

void and of no force and effect as against its property and declared not to be a lien thereon; that the defendants, and each of them, be enjoined from proceeding or attempting to proceed to collect the special assessments, and be directed to cancel the tax on their records; and that title of plaintiff be quieted against said special assessments.

The trial court entered a decree declaring the assessments to be void and not a lien on the plaintiff's property, based upon a finding that said property was not benefited in any amount as a result of the paving of Redman Avenue, and that the assessment was for an illegal and unauthorized purpose.

The defendants filed a motion for new trial. Upon the overruling of the motion, defendants appeal.

For clarity and convenience we will refer to the appellants as the city, and the appellee as the railroad, or company.

The city contends that the judgment of the trial court is contrary to the evidence and the law.

The record discloses that the right-of-way of the railroad company consists of a strip of ground carrying a single track, running from the northeast to the southwest, and that part of it lying between Thirty-third Street and Thirty-sixth Street was included in Improvement District No. 4199 created for the purpose of paving Redman Avenue. Redman Avenue veers to the northwest at Thirty-fourth Street as shown by the city's exhibit No. 7, and is separated from the right-of-way by four different parcels of land on which houses are built.

A. W. Kendall, engineer for the railroad company, made a survey of the company's right-of-way between Thirty-third Street and Thirty-sixth Street. In doing so he took elevations of the track and the road, Redman Avenue, and the land between, and prepared an exhibit covering the same which is in evidence. He testified there were no open streets between Thirty-third and Thirty-sixth Streets crossing the railroad right-of-way.

The first open street to the west of Thirty-sixth Street is Thirty-seventh, where the railroad right-of-way may be crossed from north to south. This is also true at the east end, at Thirty-third Street. The elevation of the ground at the northern right-of-way line, which is the south line of Redman Avenue, is about 3 feet above the center line of the pavement at that point, and between the base of the rail of the track and the center line of the paving the elevation is 5 feet. Two hundred feet west of Thirty-third Street the track is 10 feet higher than the center line of the pavement. The separation of the railroad right-of-way and Redman Avenue starts at the west line of Thirty-fourth Street, which is halfway between Thirty-third and Thirty-sixth Streets. Between Thirty-fourth Street and Thirty-sixth Street there is a very abrupt hill. On the strip of ground south of Redman Avenue and between Redman Avenue and the railroad right-of-way are four residences between Thirty-fifth Street and Thirty-sixth Street. The right-of-way is not accessible to Redman Avenue between Thirty-fourth Street and Thirty-sixth Street from the north. The intervening streets between Thirty-third Street and Thirty-sixth Street are dead-end streets as far as crossing the track is concerned. There is a dirt road which runs parallel to the railroad track along the south side of the right-of-way which connects those streets, but does not cross the track. The elevation increases gradually proceeding west from Thirty-fourth Street, and at Thirty-fifth Street the difference between the street level and the right-of-way is 15 feet. At Thirty-sixth Street the difference in elevation between the street level and the right-of-way is almost 30 feet. Proceeding west from Thirty-third Street the track was built through a cut which was made when the track was originally constructed. The railroad right-of-way is 100 feet wide for the full length of the district, except that for about one-half block east of Thirty-sixth Street it is 160 feet wide, and for a little distance west

of Thirty-sixth Street it is 150 feet wide where the track runs through the deepest cut on the right-of-way. The extra footage of right-of-way was for the wasting of the dirt which was dipped out of the cut onto the bank and slid down onto a certain amount of land, which has changed the position of the land. This ground was acquired by the railroad company to permit grading without trespassing on the abutting property. The general nature of the area on either side of the right-of-way between Thirty-third and Thirty-sixth Streets is residential. There is nothing in the paving of Redman Avenue that would in any way be helpful to the railroad from the standpoint of drainage, for the reason that the track through this district is built at a 1 percent grade, and as to drainage the railroad is supplied by a ditch on each side of the ties. There is no place along the right-of-way that is suitable for industry. None is contemplated at this time, nor is there any evidence to show that the tract in this right-of-way will be used for any other purpose than that for which it is now used. There are no buildings of any kind at any point on the right-of-way between Thirty-third and Thirty-sixth Streets. At one point at the east end of the track leading off from what is called the main line, there are two tracks; one goes to Fort Omaha and the other to an industry located west of Thirtieth Street a little more than two city blocks east of Thirty-third Street. The extreme high point of the railroad property between the streets as heretofore designated is 20 feet above the track and 30 feet above the paving. The track is used for trainloads of freight from Elkhorn Junction to Irvington, or the Irvington Y to South Omaha. The only railroad property that could be harmed in the event of fire would probably be what ties there are under the track at Thirty-third Street. This is the only construction, in addition to the crossing, that would be harmed by fire. This witness further testified there are no bridges or viaducts within the dis-

trict, the closest viaduct being on Thirtieth Street; that there are about three locations between Elkhorn Junction, which is in Omaha, and Irvington where industries are served by spotting cars on their loading tracks; that under certain conditions, if any industry is built up near the railroad, it would be served by a spur from this line; and that there are no trestles in this vicinity that could be affected by a fire.

A civil engineer connected with the city for 20 years surveyed the district and checked the measurements and elevations. His testimony substantially corroborates that of the railroad engineer with respect to no accessibility to the railroad right-of-way from Thirty-third Street through Thirty-sixth Street, and that there was not much difference in the elevations between the paving at Thirty-third Street and the railroad property. Proceeding west the elevation of the track rises and the street depresses so that the track is considerably higher than the Redman Avenue paving, and to the extreme west end the elevation is 12 to 14 feet above the paving. There would be no necessity for the fire department to use Redman Avenue in approaching the intersection at Thirty-third Street and the railroad right-of-way. The crossing at Thirty-third Street is composed of asphalt and gravel. This witness gave as his opinion that no benefit would accrue to the railroad company by virtue of the paving of Redman Avenue for the reason that what property there is between the railroad right-of-way and Redman Avenue does not have sufficient depth to meet the requirements of industry. The only benefit would be the accessibility to the track by street network, and because of the terrain or because of the difference in elevation this would be nullified.

Another civil engineer checked the railroad property between Thirty-third and Thirty-sixth Streets. His testimony as to elevations was substantially that of the preceding witness, that the right-of-way was approximately 12 feet above the pavement at certain points. He

thought it might be possible to carry Thirty-sixth Street over the track on an overhead crossing at the west end of the district, but any other crossings would not be considered good for the purpose of crossing the tracks.

A former city engineer testified that he had examined the improvement district in question; that the property was generally residential; that the railroad right-of-way runs through a rather heavy cut between Thirty-third and Thirty-sixth Streets south of the houses in certain photographs in evidence; and that in his opinion the railroad company's property would not be benefited by the pavement laid along Redman Avenue.

The division engineer for the railroad company surveyed the district in which the paving was located. He testified that the railroad property was of such a size that it could not be used for industry; that the difference in elevation was objectionable; that it was the policy of the railroad not to permit industry to lease any portion of a normal right-of-way; that there is no industry located within the district and the surrounding territory is residential; that no industry is contemplated at the present time; that the track is used primarily as a freight line; and that no benefit could accrue to the railroad company by virtue of the paving of Redman Avenue.

The city engineer, who had been connected with the engineering department for 40 years, testified that special assessments are made under his supervision; that the benefits to the railroad property would be the same as to any other piece of real estate abutting on improved roads, for the reason that a paved street gives an all-weather roadway, good ingress and egress, and is better for fire protection; and that the railroad real estate is in the same condition as other real estate on the south side of Redman Avenue where there are four houses the owners of which petitioned for the paving, and they are benefited.

While there is some contention that the railroad com-

pany's engineer did not, by his findings, give a proper résumé of the elevations, this has been taken into consideration, together with all of the evidence.

The city raises the defense that the railroad company was not in a position to bring this action for the reason that it failed to conform to the provisions of the city charter, article III, sections 40 and 41, appearing as sections 14-343 and 14-344, R. S. 1943. Article VII, section 13, of the city charter, appearing as section 14-813, R. S. 1943, is also cited.

Article III, section 40, appearing as section 14-343, R. S. 1943, provides the remedy of appeal shall be exclusive.

Article III, section 41, appearing as section 14-344, R. S. 1943, provides any person protesting against a petition for an improvement, as provided in the city charter, shall have the right to appeal within 10 days from the finding and judgment of the city council, to the district court of the county in which the city is located, upon the filing of a good and sufficient bond in the sum of $2,000, with two or more sureties thereon, to be approved by the clerk of the city. Other provisions are made with reference to the appeal in this section which need not be stated.

Article VII, section 13, appearing as section 14-813, R. S. 1943, provides it is the duty of the claimant, or appellant, to file a petition in the district court as in the commencement of an action, within 30 days from the date of the order or award appealed from, and filing transcript before answer day.

The railroad company raises the question that under the provisions of section 14-547, R. S. 1943, the city had no right or authority to levy special assessments against part of the railroad company's right-of-way for the reason that the cited section provides for the publication of a notice, and designates how the publication should be made when the city council sits as a board of equalization; and that by virtue of the failure of the city to comply with said section of the statute the rail-

road company was denied the opportunity to file a written complaint with the city clerk and to appear before the board of equalization, as provided by law, and was denied and deprived of its constitutional right to be heard.

The city relies on article IV, section 55, of the city charter, appearing as section 14-566, R. S. 1943, to the effect that where there is an absence of an official newspaper, which was true at the time of the passing of the ordinance in question, and the amount provided for payments of publication of official notices is limited, and no bid of a newspaper which could qualify as an official newspaper was had, the city could resort to said section of the statute by posting notice on the bulletin board in the city hall. It was stipulated at the trial that the required publication was accomplished by the posting of a notice on the bulletin board in the city hall and not by a publication in a newspaper. The city's contention is that because of the failure of the railroad company to conform to the provisions of the city charter and statutory sections pertinent thereto as above summarized, the district court was not vested with jurisdiction to determine the legality of the special assessment levied by the city against the railroad's property.

The railroad company takes the position in the event such notice does not violate the procedural requirements that it has the right to collaterally attack the legality of the special assessment. In this connection, decisions of this court have settled the proposition that a taxpayer is not limited to a direct appeal from the finding of an assessing body but may in a proper case resort to collateral attack, citing section 77-1727, R. R. S. 1943, which provides: "No injunction shall be granted by any court or judge in this state to restrain the collection of any tax, or any part thereof, nor to restrain the sale of any property for the nonpayment of any such tax, nor shall any person be permitted to recover by replevin, or other process, any property taken or restrained by the county treasurer for the nonpayment of any tax, *except such*

tax or the part thereof enjoined in case of injunction, be levied or assessed for an illegal or unauthorized purpose." (Emphasis supplied.)

Section 77-1729, R. R. S. 1943, makes reference to a claim made that the tax is invalid for the reason that the property on which it was levied was not liable to taxation, or had been twice assessed, permitting the taxpayer to pay such taxes under protest to the county treasurer, or other proper authority, and obtain a receipt stating that the tax was paid under protest and the grounds of the protest.

Section 77-1735, R. R. S. 1943, provides: "If a person claim a tax, or any part thereof, to be invalid for the reason that it was levied or assessed for an illegal or unauthorized purpose, or for any other reason except as set forth in section 77-1729, when he shall have paid the same to the treasurer, or other proper authority, in all respects as though the same was legal and valid, he may, at any time within thirty days after such payment, demand the same in writing from the State Treasurer or the treasurer of the county, city, village, township, district or other subdivision, for the benefit, or under the authority, or by the request of which the same was levied, and if the same shall not be refunded within ninety days thereafter, may sue such county, city, village, township, district or other subdivision for the amount so demanded. Upon the trial, if it shall be determined that such tax, or any part thereof, was levied or assessed for an illegal or unauthorized purpose, or was for any reason invalid, judgment shall be rendered therefor with interest and the same shall be collected as in other cases."

While reference is made to sections 77-1727, 77-1729, and 77-1736, R. R. S. 1943, the purpose for so doing is to disclose that a taxpayer may establish his rights by a separate action at law or in equity thereunder, as will become evident by the following authorities deemed pertinent to this phase of the case.

In the case of City of Omaha v. Hodgskins, 70 Neb. 229, 97 N. W. 346, the tax was paid under protest. It constituted a special assessment levied by the city on claimant's real estate. The claim was that the tax was illegal. The city contended the words "any tax" in the statute which is now section 77-1729, R. R. S. 1943, did not include special assessments. The court cited Wilson v. City of Auburn, 27 Neb. 435, 43 N. W. 257, wherein it was held that the provisions of the section applied to special assessments as well as taxes for general purposes. It was argued that the plaintiff should have filed her account with the city council and, if its payment was denied, she should have prosecuted an appeal to the district court instead of bringing an original action. This question was decided against the city in Chase County v. Chicago, B. & Q. R. R. Co., 58 Neb. 274, 78 N. W. 502. The action there was brought against Chase County originally, without filing the claim with the board of county commissioners, and it was held that the statute requiring the filing of claims with the county board did not apply to claims of this nature, and that an independent action might be prosecuted against the county after the steps required by section 144 had been taken by the taxpayer. Section 144, article I, chapter 77, Comp. St. 1901, is the counterpart of section 77-1729, R. R. S. 1943.

In the Chase County case the county board levied taxes in excess of the constitutional limit. The railroad company paid the tax under protest and brought suit to recover the amount paid in excess of the constitutional limit. The court said: "But if it be claimed that the tax was imposed for an illegal or unauthorized purpose, or for other reasons not within the first class, an original action may be brought. It was also there held (Chicago, B. & Q. R. R. Co. v. Nemaha County, 50 Neb. 393, 69 N. W. 958) that taxes levied in excess of the constitutional limit are levied for an illegal and unauthorized purpose."

In Union P. R. R. Co. v. Troupe, 99 Neb. 73, 155 N. W. 230, it was held: "Injunction will lie to restrain the collection of a tax levied or assessed for an unauthorized or illegal purpose."

In the case of Hayman v. City of Grand Island, 135 Neb. 873, 284 N. W. 733, the defendant city levied a special assessment on plaintiff's property for payment of expenses and damages occasioned by the widening of a street. The plaintiff paid the tax and brought an original action to recover the same, alleging that the assessment was for an illegal purpose; that it was in excess of the benefits to said property; and that it was confiscation of property without due compensation and without due process of law. Section 77-1923, Comp. St. 1929, is cited, which conforms to section 77-1727, R. R. S. 1943, as heretofore set out. However, the cited section in the opinion covers matters that now appear in other sections of the statute heretofore cited. The opinion held that under section 77-1923, Comp. St. 1929, a bringing of an original action was authorized to recover taxes paid, where the taxpayer claims that the tax was levied or assessed for an illegal or unauthorized purpose. The following cases were cited: Chase County v. Chicago, B. & Q. R. R. Co., *supra;* City of Omaha v. Hodgskins, *supra;* and Cain v. City of Omaha, 42 Neb. 120, 60 N. W. 368. The court went on to say, quoting from Cain v. City of Omaha, *supra:* " 'The only foundation for a local assessment lies in the special benefits conferred upon the property assessed, by the improvement to pay which the assessment is made, and an assessment beyond the benefit so conferred is a taking of property for public use without compensation, and therefore illegal.' " See, also, Loup River Public Power Dist. v. County of Platte, 144 Neb. 600, 14 N. W. 2d 210.

In the case of Wead v. City of Omaha, 124 Neb. 474, 247 N. W. 24, the complaint was that the taxpayers were not benefited by the widening of certain streets in the city. No charge was made that taxes were as-

sessed for an illegal or unauthorized purpose, or were invalid for any other reason. The court recognized the exceptions to the general rule that defects and irregularities in the making of special assessments cannot be questioned in a collateral proceeding, and that an assessment grossly in excess of benefits can be attacked. The court said: "To the rule thus announced there are some apparent exceptions. For instance, where the record discloses that the physical facts are such that the property was not and could not have been specially benefited, or could not have been benefited to any extent approaching the assessment, such facts have been in some cases held to show that the levy of assessment was arbitrary and constructively fraudulent, and therefore void, and might be attacked collaterally. * * * The rule in such cases is stated in Hamilton, Law of Special Assessments, sec. 760, wherein it is said: 'Where an assessment for street improvements is arbitrary and fraudulent, and therefore void, the appeal provided by the charter is not the only remedy. The person aggrieved may have his remedy in equity, or a common-law action for damages. *Equity will enjoin the collection of a void local assessment, and taxpayers are not relegated to an appeal from an assessment.*'" (Emphasis supplied.)

"And when it is plainly and palpably manifest from the physical condition of the property involved, its locality, environment, character of the work or improvement, assessment, and from the very nature of things, that an assessment is not adapted to the purpose, and is an exaction from the property owner of a contribution which he should not be obliged to make in that capacity, the courts will interfere to prevent a consummation of the injustice." 25 R. C. L., Special or Local Assessments, § 58, p. 141.

The general rule in this state in construing applicable statutes is that the legislative power and authority delegated to a city to construct local improvements and levy

assessments for payment thereof is to be strictly construed and every reasonable doubt as to the extent or limitation of such power and authority is resolved against the city and in favor of the taxpayer. See, Besack v. City of Beatrice, 154 Neb. 142, 47 N. W. 2d 356; Chicago & N. W. Ry. Co. v. City of Omaha, 154 Neb. 442, 48 N. W. 2d 409; Cullingham v. City of Omaha, 143 Neb. 744, 10 N. W. 2d 615; State ex rel. Todd v. Thomas, 127 Neb. 891, 257 N. W. 265, 96 A. L. R. 1470.

We conclude that the railroad company had a right to resort to the remedy of injunction.

The railroad company asserts its sole interest in the right-of-way is derived from a deed which contained a provision limiting its interest to the use of the property for railroad purposes; that if this use should be abandoned by the grantee, title would revert to the grantor or her heirs and assigns; that the railroad, as presently constituted, acquired title by assignment from the original grantee and therefore its rights are subject to the same conditions; and consequently, the railroad has no title or interest to this property except as it shall be used for railroad purposes.

The railroad company contends that a naked right-of-way is not subject to a special assessment for a municipal project for the reason that by the special use to which the property is devoted, the owner thereof cannot, by the nature of things, derive any present or reasonable prospective benefit from such improvement. Several cases are cited by the railroad company from foreign jurisidictions that are in accord with its contention. We deem it unnecessary to set forth the holdings of such cases or to distinguish them from the cases of this jurisdiction touching upon the same subject. We believe this proposition has been determined by the following authorities insofar as this jurisdiction is concerned.

In Chicago & N. W. Ry. Co. v. City of Omaha, *supra,* the following authorities are set forth.

In Chicago & N. W. Ry. Co. v. City of Albion, 109 Neb. 739, 192 N. W. 233, it was concluded that a railroad company's right-of-way and other real property specially benefited by a public improvement was liable for special assessments in its general relations and apart from its particular use for railroad purposes, in the same manner and upon the same basis as other property owners in a public improvement district. See, also, Louisville & Nashville R. R. Co. v. Barber Asphalt Paving Co., 197 U. S. 430, 25 S. Ct. 466, 49 L. Ed. 819.

In 2 Elliott on Railroads (3d ed.), § 950, p. 358, it is said: "* * * there is a conflict in the adjudicated cases as to whether or not the right of way of a railroad company is subject to local assessments. The question has been discussed in a great number of instances, and different conclusions reached in apparently similar cases. The latest authorities on the subject, however, recognize what we believe to be the true rule, and that is, that, where the right of way receives a benefit from the improvement for which the assessment is levied, and there is no statute exempting the railroad company from local assessments in clear and unequivocal terms, it is subject to assessment." See, also, McQuillin, Municipal Corporations, Revised Volume 5 (2d ed.), § 2199, p. 812; 48 Am. Jur., Special or Local Assessments, § 111, p. 660; 63 C. J. S., Municipal Corporations, § 1334, p. 1070; Annotation, 82 A. L. R. 426, all of which are cited and set out in Chicago & N. W. Ry. Co. v. City of Omaha, *supra*.

We conclude that the contention of the railroad company in such respect cannot be sustained.

When a party attacks a paving assessment for the reason that it is illegal, or for an unauthorized purpose, the burden is on him to prove the invalidity of the assessment, or that it was for an unauthorized purpose. See, Munsell v. City of Hebron, 117 Neb. 251, 220 N. W. 289; Whitla v. Connor, 114 Neb. 526, 208 N. W. 670; City of Superior v. Simpson, 114 Neb. 698, 209 N. W.

505; Chicago & N. W. Ry. Co. v. City of Albion, *supra;* Chicago & N. W. Ry. Co. v. City of Omaha, *supra.*

The physical facts established by the record, coupled with the supporting testimony of the engineers who testified in behalf of the railroad company, sustain the burden of proof imposed upon it.

The city offered no evidence that would in any way indicate that under the factual situation the railroad company was in any manner benefited by the public improvement. The paving on Redman Avenue does not abut the right-of-way of the railroad except for a short distance at the east end, and there, at a different level. Leaving Thirty-third Street it veers to the northwest at an angle, and for more than half the distance of the three blocks spanned by the improvement district the pavement is entirely shut off from the railroad track by a high bank on which are located several houses, making the right-of-way wholly inaccessible from the street. The city council found that the railroad right-of-way was benefited in an amount of $4,715.53 out of a total expenditure of $13,220.90, which, under the facts adduced, would be wholly in excess of any benefits, if such existed, to the railroad right-of-way, and, in fact, constitutes an invalid assessment under the holdings of this court heretofore set out.

We make reference to the language in Wead v. City of Omaha, *supra,* and to that part thereof to the effect that where an assessment for street improvements is arbitrary and fraudulent, a person so aggrieved may have a remedy in equity to enjoin the collection of a void local assessment, and when it is plainly and palpably manifest from the condition of the property involved, its locality, environment, character of the work or improvement, assessment, and from the very nature of things, that an assessment is not adapted to the purpose, and is an exaction from the property owner of a contribution which he should not be obliged to make in

that capacity, the courts will interfere to prevent a consummation of the injustice.

We conclude, for the reasons given in this opinion, that the judgment of the trial court should be affirmed.

AFFIRMED.

DELORES BARNES, FORMERLY DELORES BRENNAN, APPELLEE, v. MABEL MORASH, APPELLANT.

57 N. W. 2d 783

Filed April 3, 1953. No. 33203.

1. **Habeas Corpus: Infants.** In general, the writ of habeas corpus has been extended to, and may be used in, controversies regarding the custody of infants. Such proceedings are governed by considerations of expediency and equity, and should not be bound by technical rules of practice.
2. **Divorce: Judgments.** A divorce decree is not conclusive in a subsequent habeas corpus proceeding where the parties to the two proceedings are not the same.
3. **Habeas Corpus: Parent and Child.** In a habeas corpus action for the custody of an infant of tender years, the court will consider the best interests of the child, and will make such order for its custody as will be for its welfare, without reference to the wishes of the parties.
4. **Parent and Child.** The natural rights of the parents are of important consideration and, in the absence of special circumstances, the child or children should be awarded to the parent, or parents, as against more distant relatives or third persons.
5. ———. Custody of a child of tender years should be awarded the mother, unless it is shown that she is unsuitable or unfit to have such custody, or through some peculiar circumstance is unable to furnish a good home.
6. ———. The right of a mother to the custody of her child is not lost beyond recall by an act of relinquishment, if such be the fact, performed under circumstances of temporary distress or discouragement.
7. **Trial: Appeal and Error.** Where the evidence on material questions of fact in a case such as the instant case 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.

APPEAL from the district court for Lincoln County: JOHN H. KUNS, JUDGE. *Affirmed.*

Maupin & Dent, for appellant.

Beatty, Clarke, Murphy & Morgan, for appellee.

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

MESSMORE, J.

This is a habeas corpus action brought by Delores Barnes, formerly Delores Brennan, as plaintiff, in the district court for Lincoln County to obtain the custody of a minor daughter, Delores Jean Brennan, sometimes referred to as Dolores Jeanne Brennan, from the defendant Mabel Morash, the paternal grandmother of the child. The basis of the action is that the minor child is unlawfully and forcibly detained by the defendant in violation of a decree of divorce rendered in the district court for Custer County. The plaintiff was granted a decree of divorce from Donald Brennan on February 7, 1950. The decree found the plaintiff to be a fit and proper person to have the care, control, and custody of the minor child.

The defendant's defense may be summarized as follows: That where an action for a divorce is predicated on constructive service, the court has no power to enter a decree determining anything other than the status of the parties, and any award of custody of the child under such a decree is void and unenforceable; that the plaintiff abandoned the minor child by her acts and conduct for a period of 3 years, from May 1947 until April 1950; and that the best interests and general welfare of the child will be served by not changing its custody or restoring its custody to the plaintiff.

The trial court heard the case on its merits and thereafter rendered a decree finding generally in favor of the plaintiff and against the defendant, and awarded the custody of the child to its mother, Delores Brennan,

now Delores Barnes. Defendant filed a motion for new trial which was overruled. The defendant appeals.

At the outset, the appellee raises the point that the divorce decree obtained by her on February 7, 1950, in the district court for Custer County from Donald Brennan, wherein she was awarded the custody of their minor child Delores Jean Brennan, is conclusive, and she is entitled to judgment on the pleadings, and this alone is sufficient to award the custody of the child in this action to her, regardless of the merits of the case. She pleads such facts in her petition.

The appellant pleads that the service obtained by the appellee on her husband was constructive service, therefore the only jurisdiction vested in the trial court was to determine the status of the parties, and such court was without jurisdiction to award the custody of the child, the subject of this litigation, to the mother.

The cases of Hanson v. Hanson, 150 Neb. 337, 34 N. W. 2d 388, and In re Application of Reed, 152 Neb. 819, 43 N. W. 2d 161, are cited by the appellant to sustain her position.

In the Hanson case this court held: "A judgment in a default divorce action affecting the custody of children, where there was no appearance by the defendant who was served by personal service in another state where she and her children are domiciled, is subject to collateral attack by habeas corpus.

"Court granting divorce decree on constructive service against nonresident defendant is without jurisdiction to fix the custody of the parties' minor children living at the time with such defendant and never within the state where the divorce proceedings were instituted."

It will be observed that in the Hanson case the childrens' domicile was with their mother in California, as distinguished from the instant case where the child is domiciled in this state and has always resided here where the divorce was obtained, which distinguishes the Hanson case from the instant case. To like effect

as the holding in the Hanson case see Kline v. Kline, 57 Iowa 386, 10 N. W. 825, 42 Am. R. 47.

In Weber v. Redding, 200 Ind. 448, 163 N. E. 269, it is said: "* * * the weight of authority is in favor of confining the jurisdiction of the court in an action for divorce, where the defendant is a non-resident and does not appear, and process upon the defendant is by substituted service only, to a determination of the status of the parties." This rule of law extends to children who are not within the jurisdiction of the court when the divorce is rendered, where the defendant is not a resident of the state of the seat of the court, and has been neither personally served with process nor appeared in the action.

In the case of In re Application of Reed, *supra*, we held: "A decree of divorce of a court of another jurisdiction, awarding the custody of the child of the parties to one of them, rendered while the child is in this jurisdiction, does not preclude the courts here from determining the question of the custody of the child; and in a habeas corpus proceeding brought to enforce such foreign decree, the full faith and credit clause of the Constitution is not involved." We believe the distinction between this cited case and the instant case is obvious.

The appellee relies on the case of Matthews v. Matthews, 247 N. Y. 32, 159 N. E. 713, and other cases of like holding to the effect that in a divorce or separation action against a nonresident defendant served by publication, the court may determine the custody of children who are within the state. See, also, Beckmann v. Beckmann, (Mo. App.), 211 S. W. 2d 536; Beckmann v. Beckmann, 358 Mo. 1029, 218 S. W. 2d 566, 9 A. L. R. 2d 428; In re Estate of Newman, 75 Cal. 213, 16 P. 887, 7 Am. S. R. 146; Wakefield v. Ives, 35 Iowa 238; Minick v. Minick, 111 Fla. 469, 149 So. 483; McGuinness v. McGuinness, 72 N. J. Eq. 381, 68 A. 768.

In 25 Am. Jur., Habeas Corpus, § 82, p. 207, it is said: "The decree rendered in a divorce suit, award-

ing custody of a child, must be recognized and given effect in a subsequent habeas corpus proceeding between the same parties, involving the right to the custody of that child, * * *."

It has also been held that a prior divorce decree determining custody, although binding as between the parents, is not a bar to a subsequent habeas corpus proceeding to determine custody, since the decree did not consider the position of the state as parens patriae and the welfare of the child. See Wear v. Wear, 130 Kan. 205, 285 P. 606, 72 A. L. R. 425. And, a divorce decree is not conclusive in a subsequent habeas corpus proceeding where the parties to the two proceedings are not the same. See 39 C. J. S., Habeas Corpus, § 46, p. 584.

In the instant case it will be observed that the parties are not the same as in the divorce proceedings. In this case the mother of the child is seeking its custody against the paternal grandmother. The husband is not a party to this action. Any relief that the husband may be entitled to must be in the court where the decree was rendered, as provided for by law. The paternal grandmother was not a party to the divorce action. She was not required to intervene in such action with reference to the custody of the child here in controversy. She is not in a position to attack the validity of the divorce decree in this action. However, as will become apparent later in the opinion, in an action in habeas corpus involving the custody of a child, she is entitled to resist and defend the right to retain the custody of the child.

"In general, the writ of habeas corpus has been extended to, and may be used in, controversies regarding the custody of infants. Such proceedings are governed by considerations of expediency and equity, and should not be bound by technical rules of practice." In re Application of Reed, *supra*.

This jurisdiction, in habeas corpus actions instituted in the courts of this state for the custody of a minor

child, has for a period of more than 60 years adhered to the following rule. In Sturtevant v. State, 15 Neb. 459, 19 N. W. 617, 48 Am. R. 349, it was held: "In such a controversy for the custody of the child the order of the court should be made with a single reference to the best interests of such child." In the opinion the court said: "But rather, taking our statute as a general guide, we will look to the particular necessities of the case and give our special attention to the best interests of the child about whom this unfortunate controversy has arisen." See, also, Giles v. Giles, 30 Neb. 624, 46 N. W. 916; State ex rel. Filbert v. Schroeder, 37 Neb. 571, 56 N. W. 307; Schroeder v. State, 41 Neb. 745, 60 N. W. 89; Norval v. Zinsmaster, 57 Neb. 158, 77 N. W. 373, 73 Am. S. R. 500; State ex rel. Thompson v. Porter, 78 Neb. 811, 112 N. W. 286; State ex rel. Britton v. Bryant, 95 Neb. 129, 145 N. W. 266; State ex rel. Edmisten v. Highberger, 103 Neb. 258, 170 N. W. 906; In re Application of Schwartzkopf, 149 Neb. 460, 31 N. W. 2d 294; Kaufmann v. Kaufmann, 140 Neb. 299, 299 N. W. 617; Hanson v. Hanson, *supra;* In re Application of Reed, *supra.*

In Steward v. Elliott, 113 Neb. 421, 203 N. W. 580, the court said: " 'In a controversy for the custody of an infant of tender years, the court will consider the best interests of the child, and will make such order for its custody as will be for its welfare, without reference to the wishes of the parties.' " See, also, Schroeder v. State, *supra.*

In Kaufmann v. Kaufmann, *supra,* the court said: "The welfare of the child being the one question of primary consideration to which all others must yield, the court must patiently examine the evidence in the light of the age of the child, its past and future. The question involves the study of the proposed home itself, and its entire surroundings, the temporal welfare of the child, as to food, clothing, discipline, and, if of tender years, careful nursing when required, and medical attention. Then the court must consider its spiritual and

religious care and upbringing, and whether it will have loving care, with understanding and affection: In which of two proposed homes will the child have the * * * better advantages for being fitted for its place in the world?"

In the case of In re Burdick, 91 Neb. 639, 136 N. W. 988, the court said that the welfare of an infant is paramount to the wishes of the parent.

The welfare of the child is considered to be the controlling question, to which any arbitrary legal right of guardianship must yield, it being the endeavor of the court to promote the child's best interest, pecuniary, social, and moral. See Kaufmann v. Kaufmann, *supra*.

We believe the foregoing cited authorities disclose the manner in which the writ of habeas corpus involving the custody of a minor child has been considered in this jurisdiction.

The record discloses that the appellee had unfortunate experience insofar as her matrimonial ventures and status were concerned. We believe it will serve no useful purpose to set it out in detail in this opinion. Suffice it is to say that in her youth she did not enjoy the privileges and advantages that the majority of young women have enjoyed. She married when she was 16 years of age. One child was born to this union. She was divorced when she was 18 years of age. She now has the custody of that child. In the latter part of October 1943, she met Donald Brennan and was married to him on November 23, 1943, at Oberlin, Kansas. He is the father of Delores Jeanne Brennan who was born on February 22, 1945, the minor child in controversy in this case. He was at that time in the Navy. They went to Virginia to live. She returned to North Platte in May 1944. She stayed with her mother for awhile, and later her parents purchased some furniture for her and she obtained an apartment and lived there with her sister. She received an allotment from her

husband in the amount of $50 a month which enabled them to get along.

In November 1945, Brennan returned on a furlough. Trouble developed between them and as a result he was arrested, fined, and released. Before he left, she believed that they had adjusted their affairs. However, after Brennan left it was his intention never to live with her again, but not to desert his minor child. The appellee believed he could not write to her but would return home. On July 16, 1946, when the baby was 14 months old, the appellee took the baby to Wellfleet where Donald's mother resided. She awaited his return. He was discharged from the Navy in July 1946. His barracks bag was returned, but he did not come back. His allotment to her ceased. She left the child with its grandmother in July 1946, concluding that she would have to obtain employment, which she did at a hotel in North Platte in the capacity of chamber maid and elevator girl. While so employed she visited the child every week or two when she could obtain leave. She worked in this capacity until May 1947. She obtained a leave of absence in October 1946, and went to Los Angeles for the purpose of locating her husband. She contacted his father there, and he informed her that he had not heard from Donald for a period of a year. Upon her return, and while visiting in Grand Island, she became acquainted with Sergeant Barnes. In a month or a little more he went to Alaska. She corresponded with him. He returned in 1947. They had fallen in love and were going together, and wanted to get married.

In May 1947, the plaintiff, her sister, a friend of hers, her little boy, her father, and Barnes went to see the baby. They asked the grandmother if they could take the baby to the lake and take some pictures. The grandmother grabbed the baby away from her and said she was never going to take her out of the house. David Brennan, her brother-in-law, said that as long as the baby was kept there, the appellee would not get her

hands on the baby, and told her to get off the place and never come back.

The grandmother's version of this affair is in subtance as follows: The appellee, her sister, a girl friend from North Platte, a soldier, and her father came to the grandmother's home. The appellee and the girls came into the house. The girls' language was not good, and her son David told them to go outside. He did not say that Delores could not come in, but said if they wanted to go to the car and have the men come in that would be all right. The men came in, and the appellee stayed about 10 minutes. The grandmother's reason for not letting the child go to the lake was because she did not like the language used by the girls, and did not believe it would be proper.

After that time the appellee did not visit the child again in the home, but on occasions would drive to Wellfleet and observe the child for a few minutes when she came out to play in the yard. She made no contribution in money to the child, but would take shoes and clothing. She also sent gifts to her father to be delivered to the grandmother, which were refused. She was not aware that her husband was contributing to his mother for the welfare of the child during that time.

The appellee testified that when the child was turned over to the grandmother it was in good health, had been checked by a pediatrician once in each 6 weeks, and that its diet required the use of syrup. At the time she left the child with the grandmother it was not her intention to relinquish its custody. However, at the time it was a more or less permanent custody for the reason that she had to obtain employment, and had no place to leave the child. She asked the defendant if she would watch over the child, and she replied: "That's what a grandmother is for."

The grandmother's testimony was that the child was in a sickly condition, afflicted with bowel trouble. She nursed it by keeping it clean and providing the proper

food for it until it regained its health. She had never seen the appellee until such time as her son Donald and the appellee came to her home when they were to be married.

The appellee went through three marriage ceremonies with Sergeant Barnes; the first one in Kelso, Washington, in January 1948; the second one in Vancouver, Washington, in April 1950; and the third one in Hot Springs, South Dakota, in August 1951. They have lived in Rapid City most of the time, where Barnes is stationed.

In July 1949, the appellee went to Broken Bow and instituted divorce proceedings against Brennan. She remained there until after she had obtained her divorce on February 7, 1950, and then returned to Rapid City. In April 1950, she went to Wellfleet to inform the grandmother that her attorney had said that she was entitled to the child. She attempted to obtain the child by physical force. The grandmother told her that she would take the child "over her dead body." The appellee was pulling on the child, and the child was pulling away. The grandmother struck the appellee on the head with a piece of pipe.

The grandmother's version of this affair is in substance as follows: In April 1950, the appellee and two men came to the house. She brought one man into the house and introduced him as her attorney. The appellee started to take the little girl outdoors. The little girl was pulling back, and the grandmother told the appellee: "Don't take her out that way." The appellee told this man, "Grab her hands and hold her." He tried to hold the grandmother and she hit his leg with a piece of tubing picked up from the porch. They were trying to take the little girl by force and she objected to it. They finally left. The grandmother heard nothing further about the matter until these proceedings were started.

Technical Sergeant Charlie Barnes testified that he was central fire-control gunner on a B-36, connected with the Strategic Recon Squadron, 28th Recon Wing;

that he had been connected with the armed services for a period of almost 11 years and intended to stay until he retired; and that his salary was $300 a month plus quarters, and in addition, flight pay of approximately $300 a month, together with $30 a month for ration allowance.

The appellee testified that the house they live in is practically new, about 3 years old. It consists of five rooms and bath. Facilities for washing are in the basement. It is close to the commissary and comfortable. There are two bedrooms, a living room, kitchen, and dining room, with steam heat, and it is entirely modern. It is close to the school. There is an eight-grade school, and there are government busses to Rapid City, a distance of 9 miles, for older children who attend high school. A new school is under construction on the base, and there are many facilities on the base for boys' and girls' recreation. The appellee further testified that she attends the Christian church at Rapid City; that her little boy attends Sunday school and belongs to the cub group of the church; and that her husband is sober, industrious, and faithful to his duties. She believed her marriage to be permanent.

Sergeant Barnes further testified that their utilities, electricity and water, are furnished free, and that the home is serviced with electrical appliances, stove, etc.; that he and his wife had talked about the custody of the little girl; that he would like nothing better than to have the little girl; that his wife arises at 6 o'clock in the morning, feeds the little boy, prepares him to go to school, and remains constantly throughout the day attending to her household duties; that he attends church with his wife; that he owns a 1950 Oldsmobile car and the furniture in the home, except the stove; and that he believes his marriage is a successful one. It is apparent that by this time a child has been born to this union. The sergeant is 28 years of age, as is also the appellee.

There are no other children in the family, and he has no other dependents.

The appellee testified also that the grandmother kept a neat and clean house and took good care of Delores Jeanne.

The owner of the Park Motel where the appellee stayed in North Platte testified that the appellee was well mannered, as was the little boy; that he was kept immaculate; and that she believed the little girl would have a good home with its mother.

The appellant testified that she was 48 years of age and had lived in Wellfleet for 20 years; that she was formerly married to Mr. Brennan; that two boys were born to this union, Donald, the father of the child in controversy being the older, the other is now in the United States Navy; and that both boys were in the Reserves and had been called back to the Navy. She and Mr. Brennan were divorced in 1929, and she married Mr. Morash, who was a paperhanger and painter. He died in September 1939. Two boys were born to this union, who were still at home. These boys have worked on a ranch and on a farm where they stayed on occasions and would come home on occasions. She further testified that when Mr. Morash was ill she was required to seek aid, and after his death she had aid for her sons; and that she owned a five-room house in Wellfleet. She did not know its age, but another witness testified it was about 35 years since it had been built. She testified as to the earnings of the boys and as to the school in Wellfleet which goes to the eighth grade. The high school is at Maywood, about 16 miles distant. During the time Donald was out of service he was employed by an aircraft factory. Her income is based upon what the boys give her. She was able to support herself and work. She further testified that the child in controversy knew no other home than hers, and that she loved the child and desired its custody. She did not believe that she had struck the appellee

in April when she came to obtain the custody of the little girl. She was informed by the county attorney that the divorce from her son was illegal and that the appellee had no right to the child.

The father, Donald Brennan, was stationed at Okinawa in the Navy. He returned for the purpose of being present at the hearing. He is 28 years old, and was on emergency leave. His status is a first-class aircraft electrician. He was released from the Navy first on July 29, 1946. He knew that his mother had the custody of the child. He provided $50 a month for support, which he believed was adequate, and on holidays gave extra money. He and his three brothers were able to support their mother. He is engaged in buying a home in Los Angeles on a contract upon which he had paid $3,000, and hoped to have his mother and brothers with him. When he returned to service after his leave in 1945, he did not intend to carry out his marriage with the appellee. He sent an allotment to her until he was released from the Navy. His mother, his brothers, and his father knew where he was at all times except perhaps for an interval of a week or so between letters. He saw his little girl in 1948 when he visited with his mother, and stayed with her for about a year until February 1949. He indicated that he knew the appellee was attempting to get the little girl, and testified that his mother was a fit and proper person to care for her and had done well, and that he did not send the appellee money, he did not believe it was necessary. He related the base pay he received and the flight pay, and stated that he was due for discharge on April 11, of the coming year. He further testified that he would have employment with good wages upon his release from the service, and that he had previously worked in the aircraft factory for $100 a week, until he was recalled by the Navy.

There is also testimony of a Methodist minister, of friends of the appellant, and of a social worker to the

effect that the appellant maintained a clean home, was a good housekeeper, was always busy, was active in church work, and that the child was a regular attendant at Sunday school, was a bright child, and now attended the grade school in Wellfleet.

The facilities of the appellant's home are not comparable to that of the appellee's home. There is nothing in the record, and as the trial court found, that would in any way indicate but that the appellant has taken good care of the child in controversy and provided for her to the best of her means.

It is apparent from an analysis of the evidence that the trial court believed that for the best interests of the child, the custody should be given to its mother, and that the mother and present husband had adequate facilities and means for its religious and educational training, substantial in character, and recognized that the evidence did not show that the mother was not a fit or proper person to have the care, control, and custody of her minor child.

In this connection, this court has held: "The natural rights of the parents are of important consideration and, in the absence of special circumstances, the child or children should be awarded to the parent, or parents, as against more distant relatives or third persons." Hanson v. Hanson, *supra.*

The custody of a child of tender years should be awarded the mother, unless it is shown that she is unsuitable or unfit to have such custody, or through some peculiar circumstance is unable to furnish a good home. See Hanson v Hanson, *supra.* See, also, Voboril v. Voboril, 115 Neb. 615, 214 N. W. 254; Norval v. Zinsmaster, *supra;* Bath v. Bath, 150 Neb. 591, 35 N. W. 2d 509; Meredith v. Meredith, 148 Neb. 845, 29 N. W. 2d 643; Hodges v. Hodges, 154 Neb. 178, 47 N. W. 2d 361.

While some claim is made that the appellee, in effect, abandoned Delores Jeanne and relinquished the custody of her to the appellant, there is no competent evidence

to sustain such claim. The appellant's contention is that the child remained with her from July 1946, to April 1950, without any claim being made for its custody until April 1950, and this constituted an abandonment and relinquishment of the custody of the child. In this respect we believe the following authorities applicable.

The right of a mother to the custody of her child is not lost beyond recall by an act of relinquishment, if such be the fact, performed under circumstances of temporary distress or discouragement. See, State ex rel. Britton v. Bryant, *supra;* Norval v. Zinsmaster, *supra.*

In any event, if there was an agreement which purported to amount to the relinquishment of the child, such, of course, would always be subject to the best interests of the child and never be enforced to the sacrifice of its interests. See, State ex rel. Thompson v. Porter, *supra;* Norval v. Zinsmaster, *supra.*

Where the evidence on material questions of fact in a case such as the instant case 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. See Lichtenberg v. Lichtenberg, 154 Neb. 278, 47 N. W. 2d 575.

From an analysis of the evidence we conclude that the judgment of the trial court should be affirmed.

AFFIRMED.

JOHN J. VANDERHEIDEN, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.

57 N. W. 2d 761

Filed April 3, 1953. No. 33250.

1. **Homicide.** A purpose to kill and malice are material elements

of murder in the second degree, and under a charge therefor both must be proved beyond a reasonable doubt.

2. **Criminal Law.** One cannot be convicted of a felony upon his own voluntary, unsupported, extra-judicial admission or confession that a crime has been committed.

3. ———. On the other hand, while a voluntary admission or confession tending to prove a crime is insufficient standing alone to prove the corpus delicti, it is competent evidence and may with slight corroborating circumstances be sufficient to warrant a conviction.

4. ———. Circumstances capable of an innocent construction may be interpreted in the light of a defendant's admission or confession, and the fact under investigation be thus given a criminal aspect.

5. **Appeal and Error.** It is not the province of this court to resolve conflicts in the evidence in law actions, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Those matters are for the jury.

6. **Criminal Law: Appeal and Error.** In a criminal case, this court will not interfere with a verdict of guilty based upon the 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. **Homicide.** In a prosecution for second degree murder, the unlawful killing constitutes the principal fact, but the condition of the mind or attendant circumstances determine the degree or grade of the offense, that is, whether it is second degree murder or the lesser degree, manslaughter, and where the evidence and circumstances of the killing are such that different inferences may properly be drawn therefrom as to the degrees, it becomes the duty of the court to submit the different degrees to the jury for them to draw the inferences.

8. **Evidence.** The general rule in this state is that a death certificate as such may be admissible under appropriate circumstances for the purpose of impeachment, but it is not a public record and is incompetent when offered as proof of the cause of death in a controversy where the cause of death is a material issue.

9. ———. A photograph proved to be a true representation of the person, place, or thing which it purports to represent, is competent evidence of anything of which it is competent and relevant for a witness to give a verbal description.

10. ———. Where a photograph illustrates or makes clear some controverted issue in the case, a proper foundation having otherwise been laid for its reception in evidence, it may properly be

received, even though it may present a gruesome spectacle.

11. ———. Photographs of the person or body of a deceased, proper foundation having been laid, may ordinarily be received in evidence for purpose of identification, to show the condition of the body, or to indicate the nature or extent of wounds or injuries thereon.

12. **Witnesses.** The opinion of a medical expert may rest upon any one or more of three bases, namely (1) acquaintance with the party under investigation, (2) medical examination made by the expert, or (3) a hypothetical case stated to the expert in court.

13. **Witnesses: Evidence.** In propounding hypothetical questions to expert witnesses, it is allowable for each party to the controversy to submit such questions upon the theory of the case contended for by the side propounding them. A question is not improper simply because it includes only a part of the facts testified to. If facts are testified to which are not believed to be true, or which are believed to be immaterial to the issue, there is no rule of law requiring that they be included in the question.

14. ———: ———. In propounding a hypothetical question, a party may assume the existence of facts in accordance with his theory, if there is evidence in the record to sustain it, notwithstanding there may be a conflict of evidence on the point raised.

15. **Criminal Law: Evidence.** The fact that a prisoner does not testify in his own behalf will not operate to his disadvantage; but if he testify, and fail to controvert in any way what has been said by witnesses against him, concerning a fact within his own personal knowledge, it will be taken as an admission that their testimony is true.

16. **Trial: Appeal and Error.** Instructions are to be considered together, to the end that they may be properly understood, and, when so construed, if as a whole they fairly state the law applicable to the evidence, error cannot be predicated on the giving of the same.

17. ———: ———. Where the charge to the jury, considered as a whole, correctly states the law, the verdict will not be reversed merely because a single instruction, when considered separately, is incomplete.

ERROR to the district court for Cedar County: SIDNEY T. FRUM, JUDGE. *Affirmed.*

Mark J. Ryan and *Clarence E. Haley,* for plaintiff in error.

Clarence S. Beck, Attorney General, and *Charles Thone,* for defendant in error.

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

CHAPPELL, J.

An information charged John J. Vanderheiden, hereinafter called defendant, with second degree murder of his wife. He pleaded not guilty, but upon trial to a jury he was found guilty. Thereafter his motion for new trial was overruled, and the trial court imposed a minimum sentence of 10 years in the State Penitentiary, whereupon defendant prosecuted error to this court.

His brief assigned numerous errors, but some of them were not discussed therein so they will be considered waived and will not be examined by this court. Smith v. State, 153 Neb. 308, 44 N. W. 2d 497. Those errors discussed were that the trial court erred: (1) In overruling defendant's motion to dismiss made at conculsion of the State's evidence and renewed at conclusion of all the evidence; (2) in submitting second degree murder to the jury; (3) in excluding, admitting, and refusing to strike certain evidence; (4) in giving instructions Nos. 12 and 17, and failing to instruct upon proximate cause and the effect of intervening cause; (5) that he was prevented from having a fair trial by misconduct of a witness; and (6) that the verdict was contrary to law and instructions of the court. We conclude that the assignments should not be sustained.

Section 28-402, R. R. S. 1943, provides: "Whoever shall purposely and maliciously, but without deliberation and premeditation, kill another, every such person shall be deemed guilty of murder in the second degree; and upon conviction thereof shall be imprisoned in the penitentiary not less than ten years, or during life."

The general rule is that: "A purpose to kill and malice are material elements of murder in the second degree and, under a charge therefor, both must be

proved beyond a reasonable doubt." Whitehead v. State, 115 Neb. 143, 212 N. W. 35. See, also, Runyan v. State, 116 Neb. 191, 216 N. W. 656; Childs v. State, 120 Neb. 310, 232 N. W. 575. The trial court so instructed the jury in the case at bar. There is a qualification of the foregoing rule, but in our view it requires no discussion here.

It is also the rule that one cannot be convicted of a felony upon his own voluntary, unsupported, extrajudicial admission or confession that a crime has been committed. On the other hand, while a voluntary admission or confession tending to prove a crime is insufficient standing alone to prove the corpus delicti, it is competent evidence and may with slight corroborating circumstances be sufficient to warrant a conviction. This court has also held that: "Circumstances capable of an innocent construction may be interpreted in the light of the defendant's admissions, and the fact under investigation be thus given a criminal aspect." Egbert v. State, 113 Neb. 790, 205 N. W. 252. See, also, Clark v. State, 151 Neb. 348, 37 N. W. 2d 601.

In Spreitzer v. State, 155 Neb. 70, 50 N. W. 2d 516, this court held that: "It is not the province of this court to resolve conflicts in the evidence in law actions, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Those matters are for the jury.

"In a criminal case, this court will not interfere with a verdict of guilty based upon the 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." See, also, Phillips v. State, 154 Neb. 790, 49 N. W. 2d 698; Kitts v. State, 153 Neb. 784, 46 N. W. 2d 158.

Furthermore, this court has held that: "The credibility of witnesses and the weight of their testimony are for the jury to determine in a criminal case, and the conclusion of the jury cannot be disturbed unless it is

clearly wrong." Fisher v. State, 154 Neb. 166, 47 N. W. 2d 349.

In a case such as that at bar, the unlawful killing constitutes the principal fact, but the condition of the mind or attendant circumstances determine the degree or grade of the offense, that is, whether it is second degree murder or the lesser degree, manslaughter, and where the evidence and circumstances of the killing are such that different inferences may properly be drawn therefrom as to the degrees, it becomes the duty of the court to submit the different degrees to the jury for them to draw the inferences. Moore v. State, 148 Neb. 747, 29 N. W. 2d 366; § 29-2027, R. R. S. 1943. In that connection, the trial court submitted both second degree murder and manslaughter to the jury for its determination under appropriate instructions respectively relating thereto.

We turn then to the record, bearing in mind the foregoing rules and section 29-2308, R. R. S. 1943, as approved and applied in Bassinger v. State, 142 Neb. 93, 5 N. W. 2d 222. In that connection the State offered the testimony of: (1) Two physicians who saw or attended defendant's wife after she was injured but while still living, and a neighbor who called them; (2) the sheriff who saw defendant's wife after injury but while still living, took a photograph of her which appears in the evidence, and talked with defendant both before and after his wife's death; (3) city and state law enforcement officers to whom defendant made incriminating admissions or who took incriminating written statements made by defendant after his wife's death; (4) an undertaker who took defendant's wife by ambulance to a hospital in Sioux City, and cared for her body after death; (5) a photographer who took photographs of the body after death, which photographs were received in evidence; (6) an eminent pathologist who performed an autopsy upon the body, related what he found, gave his opinion of the cause of death based thereon, and

testified hypothetically as an expert; (7) the county coroner, a physician in Sioux City, who examined the body, pronounced her dead, was present at the autopsy, made out a death certificate, and corroborated the direct testimony of the pathologist in some respects with relation to what the autopsy disclosed and the cause of death; and (8) an eminent pathologist who testified hypothetically as an expert, the effect of which was to corroborate the testimony of the pathologist who performed the autopsy. Some of such witnesses related oral admissions voluntarily made by defendant both before and after his wife's death, and also laid the foundation for the admission of two voluntary written statements made and signed by defendant after his wife's death.

An examination of the record discloses that from evidence thus adduced the jury could reasonably have concluded, and it evidently did, that defendant purposely and maliciously killed his wife under the circumstances and in the manner as follows: Defendant, a farmer, had been having marital difficulties with his wife for about 2 years, and in the spring of 1951 he broke her nose in such manner as to require hospitalization. On Saturday, November 10, 1951, he cuffed, slapped, and roughed her up. The next day, Sunday, November 11, 1951, he went to town, had a few beers, and came home about 5 p. m., when they had an argument, after which he went out to do the chores, but returned in about an hour and the argument started again. Thereupon he bumped her against the kitchen cabinets, took her by the throat, and banged her head against the kitchen wall at least 3 or 4 times, maybe 9 or 10 times, struck her in the stomach with his fists, slapped her, and kicked her feet and legs as she lay on the davenport. He ordered her to bed and when she refused to go he picked her up, threw her on the bed, and slapped her a few more times. She then tried to get up, so he kicked her on the feet and legs some more and pushed her back on

the bed, where she lay still and stayed until about 6:30 a. m. Monday, when she got up around the house until about 5:30 or 6 p. m., when she fell to the kitchen floor unconscious. Such attacks by defendant left bruises over all her body, hemorrhages between the ribs on both sides, fractured the inner side of the petrous portion of her right temporal bone, produced 3 internal linear scalp tears 1½ to 2 inches in length, with large contusions on the left side of her head, including a black and swollen left eye. There were no hemorrhage, scalp, or brain injuries on the right side of her head. However, the injuries to her head heretofore set forth produced a slowly-developing hemorrhage in the left side of her brain which caused her to become unconscious about 5:30 or 6 p. m. on Monday. Although there was a functioning telephone in his house, and defendant well knew that she was then unconscious and that she thereafter continued to be so, he failed and neglected to obtain any medical care for her from that time until about 12:30 or 1 a. m., Wednesday, November 14, 1951, when two physicians were obtained by a neighbor. She was then immediately removed to a hospital where she died the next day from such slowly developing brain hemorrhage which had then become a massive blood clot ¼ to ½ inch thick over the entire left hemisphere of her brain.

Defendant testified in his own behalf, without denying a single circumstance, act, or blow, or disputing his admissions and statements which recited the same at length, except to say that he never hit his wife on the head with an instrument of any kind. His testimony and that of other defense witnesses, including his two older children, a neighboring farmer, and a surgeon who testified hypothetically by deposition, was in substance that defendant's wife seemed to walk and talk as usual on Monday, at least until after 2 p. m., but that about 5:30 or 6 p. m. on that date she appeared to be intoxicated and slipped on wet linoleum, or fell,

striking the right side of her head on a cast iron kitchen sink which stood about 28 inches above the floor, whereat she became unconscious. Their evidence was offered to establish that such fall caused the hemorrhage and death rather than the blows concededly struck by defendant.

In the light of the foregoing evidence and rules of law heretofore stated, we conclude that the State adduced ample competent evidence to support a conviction of second degree murder, therefore the trial court properly overruled defendant's motion to dismiss at conclusion of the State's evidence. We may assume also that defendant adduced some evidence which, if true, would be inconsistent with his guilt. However, as stated in Kitts v. State, *supra:* "'But the jury had the right to reject and disregard, as it evidently did, the testimony as improbable and untrue.'" Therefore, we conclude that the trial court properly overruled defendant's motion to dismiss at conclusion of all the evidence and did not err in submitting second degree murder to the jury for its determination.

Citing but one authority, In re Estate of Olson, 176 Minn. 360, 223 N. W. 677, defendant complained that the trial court erred in refusing to admit a photostatic copy of the death certificate to show the cause of death and for purposes of impeachment. In that connection, such case is distinguishable from that at bar upon the basis of a statute which made a certified copy of a death certificate kept as required by statute "'prima facie evidence of the fact therein stated in all courts in this state.'" We have no such statute in this state, and while there is some contrary authority, this court has in at least three civil cases concluded that a death certificate as such is not a public record and is incompetent when offered as proof of the cause of death in a controversy where the cause of death is a material issue. Sovereign Camp, W. O. W. v. Grandon, 64 Neb. 39, 89 N. W. 448; Omaha & C. B. St. Ry. Co. v. Johnson, 109 Neb.

526, 191 N. W. 691, 42 A. L. R. 1455; McNaught v. New York Life Ins. Co., 145 Neb. 694, 18 N. W. 2d 56. See, also, 16 Am. Jur., Death, § 318, p. 215; 17 C. J., Death, § 169, p. 1306; 25 C. J. S., Death, § 82, p. 1212. To apply a different rule in a criminal case could be gravely unjust to a defendant and deprive him of his constitutional right "to meet the witnesses against him face to face" (Art. I, § 11, Constitution of Nebraska), since death certificates are made ex parte without a hearing and without the right of cross-examination. Therefore, we conclude that the certificate was not admissible as such to prove the cause of death.

With regard to its admission for purpose of impeachment, we may assume that it would be admissible for such purpose under appropriate circumstances, but the record discloses that everything contained in the certificate upon which defendant relied was orally recited and testified about at length and without dispute by pathologists who testified for the State when cross-examined by defendant in an effort to impeach their testimony or change conclusions, so that its material substance was before the jury and its exclusion as such when offered for the purpose of impeachment could not have been prejudicial to defendant. In that connection also, the certificate could not have impeached the testimony of the pathologists because they did not make the certificate, and the coroner who did make it gave no testimony which could have been impeached by the certificate.

Defendant complains that the admission of certain photographs of deceased taken after death was prejudicial error. In that regard, the information charged defendant with second degree murder of his wife in that he did "assault, strike, beat and wound" her and that as a result thereof she died. The question of the number and severity of such attacks or blows was a material inquiry with relation not only to the cause of death but also to the purpose and malice of defendant. Proper

foundation was laid for introduction of the photographs. They identified deceased, graphically illustrated the condition of her body, and portrayed the location, nature, and extent of the numerous wounds and the gravity of the numerous injuries inflicted upon her by defendant. In Turpit v. State, 154 Neb. 385, 48 N. W. 2d 83, this court held: "A photograph proved to be a true representation of the person, place, or thing which it purports to represent, is competent evidence of anything of which it is competent and relevant for a witness to give a verbal description.

"Where a photograph illustrates or makes clear some controverted issue in the case, a proper foundation having otherwise been laid for its reception in evidence, it may properly be received, even though it may present a gruesome spectacle.

"Photographs of the person or body of a deceased, proper foundation having been laid, may ordinarily be received in evidence for purposes of identification, or to show the condition of the body, or to indicate the nature or extent of wounds or injuries thereon." See, also, Vaca v. State, 150 Neb. 516, 34 N. W. 2d 873; Mulder v. State, 152 Neb. 795, 42 N. W. 2d 858. Such rules are controlling here. Cases relied upon by defendant are distinguishable upon the facts, and we conclude that admission of such photographs was not prejudicially erroneous.

Defendant contended that the trial court erred in permitting the pathologist who performed the autopsy and qualified as an expert to express his opinions and conclusions with regard to the cause of various changes and conditions found by him, erred in permitting him to answer hypothetical questions which did not embrace all of the facts appearing in the evidence, and thereafter erred in refusing to strike such testimony. Defendant also contended that the trial court erred in permitting the other pathologist who qualified as an expert to answer a hypothetical question with regard to the cause

of death based upon the findings and conclusions of an autopsy performed by another, upon photographs of the body taken thereafter, and upon an assumed state of facts, some of which were contrary to the evidence, primarily because there allegedly was no evidence in the record of force in any degree having been applied to the left side of the head. Defendant also contended that the trial court erred in refusing to strike such answer. In that connection, an examination of the record discloses that there was ample evidence therein to sustain a conclusion that there was force applied by defendant to the left side of the head. We find in the question no assumption of facts contrary to the evidence.

There are well-established rules of law applicable to such situations. In Tvrz v. State, 154 Neb. 641, 48 N. W. 2d 761, this court held: "The opinion of a medical expert may rest upon any one or more of three bases, namely (1) acquaintance with the party under investigation, (2) medical examination made by the expert, or (3) a hypothetical case stated to the expert in court." As early as Curry v. State, 5 Neb. 412, this court said: "It seems well settled as a rule of law that physicians and surgeons may be allowed to say, upon a state of facts testified either by themselves or other witnesses, whether in their opinion a particular wound or blow described, would be adequate to cause death, or even whether such wound was, in their opinion, the cause of death. In a prosecution for murder, the object of such evidence relates to the inquiry of fact, whether the killing was or was not with a felonious or malicious intent. And why shall not the rule apply to prosecutions like the one under consideration? In either case the fact sought to be proved is the intent; and we find no reason why all evidence which legitimately reflects light upon the subject of inquiry, should not be admitted." See, also, 26 Am. Jur., Homicide, § 463, p. 477; 40 C. J. S., Homicide, § 257, p. 1202.

With relation to hypothetical questions, this court has

held that: "In propounding hypothetical questions to expert witnesses, it is allowable for each party to the controversy to submit such questions upon the theory of the case contended for by the side propounding them. A question is not improper simply because it includes only a part of the facts testified to. If facts are testified to which are not believed to be true, or which are believed to be immaterial to the issue, there is no rule of law requiring that they be included in the question." Hamblin v. State, 81 Neb. 148, 115 N. W. 850. Such rule was reaffirmed in Sandall v. Otto, 100 Neb. 263, 159 N. W. 406, wherein it was held: "In propounding a hypothetical question, a party may assume the existence of facts in accordance with his theory, if there is evidence in the record to sustain it, notwithstanding there may be a conflict of evidence on the point raised." In the light of such rules and the record before us, we conclude that defendant's contentions aforesaid have no merit.

Defendant testified in his own behalf, and instruction No. 12 with relation thereto, substantially instructed the jury that defendant was presumed to be innocent until proven guilty by the evidence beyond a reasonable doubt, and that in arriving at a verdict they should fully, fairly, and impartially consider his testimony together with all other evidence adduced. Defendant complains because such instruction concluded by telling the jury that it might, in connection with such instruction, consider defendant's testimony or failure thereof to controvert what had been testified to against him concerning facts which were within his own personal knowledge. In that connection defendant cites no authority to sustain his contention that such instruction was prejudicially erroneous, and we have found none. On the other hand, as early as Comstock v. State, 14 Neb. 205, 15 N. W. 355, this court held that: "The fact that a prisoner does not testify in his own behalf will not operate to his disadvantage; but if he testify, and fail

to controvert in any way what has been said by witnesses against him, concerning a fact within his own personal knowledge, it will be taken as an admission that their testimony is true." See, also, Heldt v. State, 20 Neb. 492, 30 N. W. 626, 57 Am. R. 835. Both such cases are cited with approval in Brown v. State, 111 Neb. 486, 196 N. W. 926. We have examined the instruction in the light thereof and other instructions given, and conclude that it was not prejudicially erroneous.

With regard to instruction No. 17 given by the trial court, defendant complains that the words "either upon a sudden quarrel" were omitted from the statutory definition of manslaughter set forth therein. In that connection related instruction No. 18, which set forth the material elements necessary to be established by the State beyond a reasonable doubt before defendant could be convicted of the crime of manslaughter, did contain the words aforesaid, which doubtless were inadvertently omitted from instruction No. 17. It is elementary that: "Instructions are to be considered together, to the end that they may be properly understood, and, when so construed, if as a whole they fairly state the law applicable to the evidence, error cannot be predicated on the giving of the same." Pauli v. State, 151 Neb. 385, 37 N. W. 2d 717. As held in Kirkendall v. State, 152 Neb. 691, 42 N. W. 2d 374: "Where instructions, considered as a whole, state the law fully and correctly, error will not be predicated therein merely because a separate instruction, considered by itself, might be subject to criticism.

"Where the charge to the jury, considered as a whole, correctly states the law, the verdict will not be reversed merely because a single instruction, when considered separately, is incomplete."

In Luster v. State, 148 Neb. 743, 29 N. W. 2d 364, it was held: "The court's entire charge to the jury should be considered in determining whether a slight

inaccuracy in the language of a particular instruction is prejudicial. If the instructions to the jury, taken as a whole, correctly state the law, that is sufficient." In that case, defendant complained that instruction No. 14, dealing with the elements of manslaughter, left out the words "or unintentionally." However, related instruction No. 13 contained such element. In the opinion, it was said: "In the case of Chadek v. State, 138 Neb. 626, 294 N. W. 384, instruction No. 8 also omitted the word 'unintentional,' and we said there that the defendant had tendered no instruction and that instructions Nos. 7 and 8 adequately covered the offense of manslaughter, and the same is true in the case at bar, where the jury would clearly understand that instructions Nos. 13 and 14, taken together, covered manslaughter." In the case at bar we have a comparable situation wherein related instructions Nos. 17 and 18 taken together adequately covered manslaughter without any error prejudicial to defendant.

Defendant complains of alleged misconduct of a witness. The assignment is not supported by any authority or by the testimony given by such witness. It has no merit.

Without citing any authority, defendant argued that the trial court should have instructed the jury upon proximate cause and the effect of intervening cause in conformity with his defense that his wife's death was caused by an accident. No requests for such instructions were made by defendant. An examination of the record discloses that the trial court fully, fairly, and impartially submitted the issues to the jury. In that connection, after defining "feloniously" the jury was clearly instructed that in order to find defendant guilty it was necessary to find beyond a reasonable doubt that defendant's wife "came to her death feloniously and not accidentally." The contention has no merit.

In the light of the foregoing, we have carefully examined the record and conclude that there are no er-

rors prejudicial to defendant, and that the judgment of the trial court should be and hereby is affirmed.

AFFIRMED.

WILLIAM MARION GILBERT, APPELLANT, V. METROPOLITAN UTILITIES DISTRICT OF OMAHA, A MUNICIPAL CORPORATION, APPELLEE.

57 N. W. 2d 770

Filed April 3, 1953. No. 33281.

1. **Workmen's Compensation: Appeal and Error.** On appeal to this court in a workmen's compensation case the cause will be here considered de novo upon the record.
2. **Workmen's Compensation.** The word "accident" as used in the Workmen's Compensation Act, unless a different meaning is clearly indicated by the context, means an unexpected or unforeseen event happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury.
3. ———. The burden of proof is upon the claimant in a compensation case to establish by a preponderance of the evidence that personal injury was sustained by the employee by an accident arising out of and in the course of his employment.
4. ———. Where a claimant for compensation under the Workmen's Compensation Act contacted his superiors as soon as practicable and informed them that he suffered an accident arising out of and in the course of his employment, and requested medical services which were accorded to him by his employer and he was sent to the employer's recommended doctors and the employer paid for such services, held to be sufficient within the contemplation of section 48-133, R. R. S. 1943, to give notice to the employer that the employee suffered an injury arising out of and in the course of his employment, and was also sufficient to constitute a demand for compensation under the Workmen's Compensation Act.

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

Warren C. Schrempp, David S. Lathrop, and *E. D. O'Sullivan, Jr.,* for appellant.

George C. Pardee, G. H. Seig, and *Harry H. Foulks, Jr.,* for appellee.

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

MESSMORE, J.

This is an action under the Nebraska Workmen's Compensation Act. The case was first tried before a judge of the Nebraska Workmen's Compensation Court where an award was entered in favor of the claimant, William Gilbert, and against his employer, the Metropolitan Utilities District. The award was that the claimant suffered a 25 percent permanent partial disability for which he was entitled to compensation at the rate of $9.54 a week for a period of 300 weeks from and after the date of the accident. His salary at the time of the accident was $57.24 a week. The defendant, Metropolitan Utilities District, filed a waiver of rehearing before the three members of the workmen's compensation court, and appealed directly to the district court for Douglas County. The case was tried in the district court, which found generally in favor of the defendant and against the plaintiff; that the plaintiff failed to establish that his claim for compensation with respect to an alleged injury of June 9, 1950, was made in accordance with statutory requirements; and that the plaintiff failed to prove by a preponderance of the evidence that he was injured in an accident as that term is defined in the Nebraska Workmen's Compensation Act. The award of the workmen's compensation court was reversed and vacated. The plaintiff filed a motion for new trial which was overruled, and plaintiff appealed.

The appellant assigns as error (1) that the trial court erred in finding that the plaintiff had failed to make claim for compensation within 6 months from the date of the injury as provided for by law; (2) that the trial court erred in finding that the plaintiff had not sus-

tained an accident as that word is defined by the Nebraska Workmen's Compensation Act; and (3) that the trial court erred in finding that the plaintiff failed to establish by a preponderance of the evidence that personal injury was sustained by him as an employee of the defendant by an accident arising out of and in the course of his employment.

For convenience we will refer to the appellant as Gilbert or claimant, and the appellee, Metropolitan Utilities District, as district.

With reference to the first assignment of error, section 48-133, R. R. S. 1943, provides: "No proceeding for compensation for an injury under this act shall be maintained unless a notice of the injury shall have been given to the employer as soon as practicable after the happening thereof, and unless the claim for compensation with respect to such injury shall have been made within six months after the occurrence of the same, * * *."

Section 48-137, R. R. S. 1943, provides: "In case of personal injury, all claim for compensation shall be forever barred unless, within one year after the accident, the parties shall have agreed upon the compensation payable under this act, or unless, within one year after the accident, one of the parties shall have filed a petition as provided in section 48-173."

The claimant filed a petition in the Nebraska Workmen's Compensation Court within a year, as provided for in the above section.

The requirement of section 48-133, R. R. S. 1943, that a claim for compensation must be made within 6 months after the occurrence of an injury, has been held to be a condition precedent to a right of action under the workmen's compensation law. Park v. School District, 127 Neb. 767, 257 N. W. 219.

The claimant relies on Schmidt v. City of Lincoln, 137 Neb. 546, 290 N. W. 250, wherein it was said: "Medical expenses are compensation rights within the meaning

of the workmen's compensation law (Baade v. Omaha Flour Mills Co., 118 Neb. 445, 225 N. W. 117), and a demand for payment of medical expenses is necessarily a claim for compensation, where it is made under such circumstances as to manifest an intention to claim the benefits of the statute. Giving to the compensation law the liberal construction to which it is entitled, we must accordingly hold that, where a claim for any compensation benefits is made within six months after the occurrence of an injury, this is sufficient to support the employee's right to institute proceedings within a year, to recover every benefit which has then accrued under the law." See, also, New Staunton Coal Co. v. Industrial Commission, 304 Ill. 613, 136 N. E. 782; Aiello v. Ford Motor Co., 273 Mich. 15, 262 N. W. 726.

In the instant case the claimant testified that he was involved in an accident arising out of and in the course of his employment on Friday, June 9, 1950. He worked on Saturday, and was off work Sunday and Monday, Monday being his regular day off. When he returned to work, and on about June 15, 1950, he notified Mr. Laushman, assistant supervisor of the service department in which claimant was employed, informed him of the manner in which he was injured, and requested the services of a doctor. This request was delayed until the safety engineer, Earl Frederickson, could be contacted. He was contacted and noticed that the claimant was suffering some physical difficulty and sent him to Dr. Swenson. At that time Frederickson took an oral statement from the claimant, summed up what the claimant had told him, and this was reduced to writing as follows: "We were going to bring an old heavy Roper Stove into the shop. The stove was in a dinning room at 1024 Edwards Street. Mueller and Krammer were with me. We were starting to lift the stove when it seemed that the end I had a hold of went up too quick. A pain shot down from my left hip down through

my leg. I said, 'Blank - Blank that hurts'. It felt like my leg was torn.

"This accident happened Friday, June 9th, about 2:30 or 3:00 P. M. Saturday it bothered me a little but I didn't pay any attention to it. Sunday and Monday I stayed in bed and put hot packs on it. I reported the accident Tuesday to Mr. B. Schulte. Tuesday and Wednesday nights I could hardly sleep. This morning I reported to Mr. Laushman who sent me to the Personnel Office." This statement was dated June 15, 1950, and was unsigned. It appears that B. Schulte was an employee in the office.

Dr. Swenson, a district-recommended doctor, was contacted at Clarkson Hospital, and after an examination and treatment, he recommended that the claimant contact Drs. Keegan and Finlayson, district-recommended doctors, which the claimant did and was examined by Dr. Finlayson. The details of the examination of the doctors will be more fully covered later in the opinion.

The district contends that the claimant never made a claim for compensation, and that the claimant so testified in the compensation court.

In Schmidt v. City of Lincoln, *supra,* the employee Schmidt made a demand upon the city within 3 weeks after the accident that the city pay a doctor bill for services rendered the employee by his family physician. This was the only claim made by Schmidt for compensation, and the action was not commenced until nearly a year after the accident. The court said: "It is not necessary for the employee to specify the extent of the benefits to which he thinks himself entitled, and unless he attempts to conceal the scope of his rights for the purpose of misleading the employer, and the employer is in fact prejudiced thereby, the requirement of the statute is sufficiently met by a claim or demand for any compensation right, sufficient to advise the employer of his intention to bring the injury under the statute and to avail himself of its provisions."

The assistant supervisor of the department in which the claimant worked and the safety engineer, as disclosed by the record, were the proper parties to whom the necessary claim or demand for compensation should be made. The claimant so notified his superior officers of the accident and his demand for medical services. The claimant was under treatment for more than 6 months, and the injury at that time had not reached its maximum effect upon his body.

The distinction between the case of Schmidt v. City of Lincoln, *supra,* and the instant case is that in the cited case the employee made a demand that the services of his family doctor rendered for him be paid by the city, while in the instant case the claimant was treated by district-recommended doctors who were paid by the district.

The record shows that the claimant gave notice to his immediate superiors as soon as practicable after the accident occurred, and made demand for medical attention, which he received. In this connection the following authorities are applicable, insofar as giving notice of injury to the employer and making claim for compensation is concerned, as provided for by section 48-133, R. R. S. 1943.

In the case of Aiello v. Ford Motor Co., *supra,* it was held that where an employee complained of an eye injury to his foreman and was sent to his company doctor who sent him to company hospital, this was sufficient evidence of notice of injury to comply with the statute, and sufficient to sustain a finding of the department of labor and industry that the employer received unequivocal claim for compensation.

In Royal Indemnity Co. v. Industrial Commission, 88 Colo. 113, 293 P. 342, it was held that payment for medical treatment of an accidental injury of an employee by his employer makes the giving of notice of the accident within the statutory 6 months unnecessary. The court said: "The day after the accident the em-

ployer engaged a doctor to examine and treat the claimant's left eye, and for nearly two weeks the claimant received medical treatment at the expense of the employer. This constituted the receipt of compensation within the meaning of the statute, and dispensed with the necessity of giving notice within six months. Industrial Commission v. Globe Indemnity Co., 74 Colo. 52, 218 Pac. 910."

In Seaman Body Corp. v. Industrial Commission, 209 Wis. 321, 245 N. W. 68, it was held that where an employee claimed to have suffered injuries as a result of an accident arising out of and in the course of his employment and requested the employer's doctor for medical aid within 30 days from the date of the injury, such request constituted actual notice of injury to the employer. See, also, Oklahoma Furniture Mfg. Co. v. Nolen, 164 Okl. 213, 23 P. 2d 381; Pittman v. Glencliff Dairy Products Co., 154 Kan. 516, 119 P. 2d 470, 144 A. L. R. 600; Annotation, 144 A. L. R. 617.

Baade v. Omaha Flour Mills Co., 118 Neb. 445, 225 N. W. 117, is cited, which held: "Where an employer furnishes medical, surgical, and hospital services to an employee, * * * the payments therefor constitute payment of compensation within the meaning of the employers' liability act."

We hold that the claimant made sufficient compliance with section 48-133, R. R. S. 1943, to warrant this court in holding that a claim for compensation was made within 6 months after the occurrence of the accident, as contemplated by said statute.

This brings us to the question of whether or not the plaintiff sustained an "accident" as that word is defined in subdivision (2) of section 48-151, R. R. S. 1943, reading as follows: "The word 'accident' as used in this act shall, unless a different meaning is clearly indicated by the context, be construed to mean an unexpected or unforeseen event happening suddenly and violently, with or without human fault, and producing at the time ob-

jective symptoms of an injury." See, also, Tucker v. Paxton & Gallagher Co., 153 Neb. 1, 43 N. W. 2d 522; Foster v. Atlas Lumber Co., 155 Neb. 129, 50 N. W. 2d 637.

In conjunction with the foregoing, the burden of proof is upon the claimant in a compensation case to establish by a preponderance of the evidence that personal injury was sustained by the employee by an accident arising out of and in the course of his employment. See, Beam v. Goodyear Tire & Rubber Co., 152 Neb. 663, 42 N. W. 2d 293; McCoy v. Gooch Milling & Elevator Co., *ante* p. 95, 54 N. W. 2d 373.

"On any appeal to this court in a workmen's compensation case the cause will be here considered de novo upon the record." Beam v. Goodyear Tire & Rubber Co., *supra*. See, also, McCoy v. Gooch Milling & Elevator Co., *supra*.

With the foregoing authorities in mind, we proceed to the record to determine whether or not the claimant has made a case under the Workmen's Compensation Act.

The record discloses that William Gilbert has been employed by the district for a period of more than 10 years. At the time of trial he was classified as senior mechanic-fitter. His duties included everything in the service line, such as installing gas ranges, refrigerators, heaters, and commercial heaters. On June 9, 1950, he and two other employees of the district, Mueller and Kramer, were engaged in delivering a new gas range to 1024 Edwards Street in Omaha. The old range, which weighed about 300 pounds, was disconnected and shoved into another room. The new range was brought from the truck into the house and connected. In handling and lifting ranges, when about to lift the range those engaged in lifting would generally state when they were ready. In lifting the old range to carry it to the truck, Mueller and Kramer were on the heavier end of the range and Gilbert was on the lighter end. When they started to lift this range Gilbert was in a stooped posi-

tion, and when the range was being lifted straight up his feet were placed solidly on the floor and he had his hands on the range. He could not estimate how far off the floor it was when it wabbled and gave a lurch, or a jerk, sidewise and caught him over-balanced. He felt a sharp, severe pain run down through his left leg.

Mueller testified that in picking up the old range either he or Kramer lifted it too much, one of them lagged a little, and the weight shifted to one side on Gilbert. The range had been lifted from 6 inches to a foot from the floor when Gilbert complained of a pain in his back and left leg, and this was when the range gave a lurch.

Kramer testified that "in the process of lifting up the stove it seemed to wabble around. * * * It must have been off balance, or something was wrong and it wabbled." He further testified that he believed Gilbert had the same weight to support as the other two. Gilbert made an outcry and exclaimed "Oh, my back." They continued to carry the range to the truck which was 25 to 30 feet distant from where they lifted the range and in such a position that all that was necessary was to slide the range onto the truck. Gilbert and Kramer took the range to the storehouse at Nineteenth and Center Streets. Gilbert drove the truck. When they arrived at the storehouse the truck was backed up to the dock. Kramer got on the outside and lifted the range up onto the dock where they slid it along. Kramer estimated that he lifted it not quite a foot off the truck, and testified that Gilbert helped to lift it a little. Kramer observed Gilbert's appearance; he seemed to be suffering and experiencing pain.

Gilbert testified that his pain was so severe when they got to the shop that he was unable to lift his end of the range, and had to let it down; that, in fact, the range only had to be lifted 3 or 4 inches; and that Kramer had to lift the range and shove it out of the truck onto the dock.

Gilbert and the other two witnesses testified that they endeavored to lift and move the range as they ordinarily and customarily would do by lifting it bodily.

This happened on Friday, June 9, 1950. Gilbert worked on Saturday, but did no lifting. He was off work Sunday, and Monday was his regular day off. He felt that the pain would leave, but he took care of himself Sunday and Monday by applying hot packs to his injuries, and when he returned after the weekend he notified Laushman, assistant supervisor of the service department, and told him he had to see a doctor. A report was made out by Mr. Frederickson, the safety engineer. He was sent to contact Frederickson because he insisted upon seeing a doctor. Frederickson noticed that he had some trouble with his leg, and arrangements were made to send him to Dr. Swenson who was contacted at the Clarkson Hospital. When Gilbert arrived at the hospital, Dr. Swenson turned him around and struck him in the small of the back, took him into an emergency room, and applied other tests. He taped Gilbert's back and said he could not do much, but wanted to see him in a day or two. The pain did not leave, and when Gilbert next saw Dr. Swenson, he was sent to Drs. Keegan and Finlayson.

Dr. Swenson saw Gilbert on June 15, 1950, at which time Gilbert gave him a history that 6 or 8 years previously he was installing a heater at Thirtieth and Dodge Streets. At the time he was lifting the heater he had severe pain, was almost paralyzed, and was off work for 3 or 4 days. He had no more trouble with his back until June 9, 1950, when lifting a stove at 1024 Edwards Street, the stove slipped, twisting his back. He had pain in the left low back region going down the back of his left leg. At that time the doctor taped his back. It was recommended that he go to Drs. Keegan and Finlayson.

Dr. Finlayson examined the claimant on June 16, 1950,

at which time Gilbert gave him the following history, in substance: That 6 or 8 years previously, while he was putting up a unit heater weighing about 500 pounds, he twisted his neck, developing pain in his neck and down his back. He was hospitalized, and was off work 3 or 4 days. Since that time he has had some low back pain whenever he performed lifting. On June 9, 1950, while lifting an old, heavy, Roper stove, he developed sudden sharp pain in the left side of the low back radiating down the hip, posterior thigh and into the calf. He noticed no tingling or numbness in the leg or foot. He stated that he was unable to find any comfortable position in bed except to lie face down with his legs out straight, and that he felt more comfortable walking than he did sitting. Examination revealed his back to be taped with adhesive tape, limited three plus in flexion but extension free. The doctor applied certain tests, and his impression was that "Mr. Gilbert has an acute lumbo-sacral disc herniation with compression of the left first sacral nerve root, which is probably surgical. The patient was not willing to consider surgery at that time and x-rays were not obtained. These should be obtained if he decides in favor of surgery, but re-examination would also be required. Good prospect of relief seems reasonable to expect."

After Gilbert left the offices of Drs. Keegan and Finlayson, he called on his family physician, Dr. Thomas D. Bolar, who had attended him in 1944, when he complained of an injury to his neck, at which time X-rays were taken and found negative. Dr. Bolar was consulted by Gilbert with reference to the injury of June 9, 1950. Dr. Bolar, not being engaged in that kind of medical work, referred him to Dr. Joseph F. Gross.

Dr. Joseph F. Gross testified that he first saw Gilbert on June 19, 1950. At that time Gilbert gave him the history that he was lifting a stove and someone slipped. He sustained severe pain in the back which radiated down the left leg. The examination disclosed marked

muscle spasm in the back. There was approximately 75 percent limitation of motion of the back in all directions. He had a flat lumbar curve. His back was not normally kinked the way it should be, but due to the muscle spasm was straight up and down. His straight-leg test, which was used for the determination of the presence or absence of disk pathology, was positive on his left side, indicating that he had a lesion which was irritating the sciatic nerve at one of its nerve roots. He also had a dermatome in the area of numbness of one limb, which would localize a local lesion in the back affecting a nerve root. He also had a weak ankle jerk on the left side, again indicating nerve root or disk pathology. Since this lesion was acute and severe, the doctor chose to treat him conservatively, putting a brace on him, some light, and heat. However, after a sufficient length of time, probably 2 or 3 months, he still had a positive disk finding. He was not any better. Surgery was advised, but the patient did not desire it. The doctor followed him along intermittently from then until August 15, 1951. His examination at that time was essentially the same as the first time. Gilbert still had a muscle spasm and the neurological findings indicating a disk. The doctor reiterated his diagnosis made the first time, that he did have a disk on his left side between the fourth and fifth lumbar vertebra. He fixed the disability equation at 30 percent, and concluded the accident in lifting the stove was the cause of the herniation of the disk.

Dr. Swenson saw Gilbert again on February 23, 1951, when Gilbert gave the same history, and the doctor was under the impression that Gilbert's condition was caused by a ruptured disk. He made out a regular form report to the district in which he stated that Gilbert's condition was due to an injury, and wholly to an accident; that the injury was not aggravated by any cause or chronic condition, which means previous con-

dition; and that he based his conclusion upon the history furnished by Gilbert.

It appears also that Dr. James F. Kelly made a report to Dr. Gross with reference to X-rays taken of Gilbert, in which report he stated: "There is anterior lipping about the body of the 4th lumbar vertebra indicative of early localized arthritic change. No other significant changes are noted in the lumbar spine, sacroiliac or hip areas."

Dr. Gross testified it was not unusual to find localized lipping of adjacent vertebra at the level of a ruptured disk, and such condition as found by Dr. Kelly was not of sufficient importance to cause pain in the back. He further testified: "Anterior lipping of the body of the vertebra is the solid spot upon which the spine is built, and on which the disks are placed, and we have lipping, we have little spurs, the new bone forms, coming off of the front of it." He further testified that while Gilbert complained of pain in his left leg, that is where it hurts, but his disability comes from his back and is projected to his leg through his nervous system; that he would feel a herniated disk immediately, as was found in this case; and that it was possible that under the circumtances he could have continued to help carry the old range to the truck.

Dr. W. R. Hamsa first saw Gilbert on July 23, 1951, at the request of the district, to make an examination. Gilbert gave him a history in substance as follows: In June 1950, while lifting a stove he experienced immediate pain in the back of his left leg which lasted 2 or 3 weeks, and was aggravated by coughing or sneezing. He saw Dr. Swenson the second or third day, had his back taped, and was then subsequently referred to Drs. Keegan and Finlayson for opinion. He stated that in 1944, while lifting a ceiling heater he experienced a paralyzing sensation, described it in his arms and legs, at which time he was seen by Dr. Bolar, who kept him in St. Catherines Hospital for 1 day, and from which

condition he seemed to recover in 4 or 5 days' time. Dr. Hamsa's examination showed muscle pull posteriorly with a somewhat obese abdomen, prominent. He was wearing a chairback type of brace which fitted well. The legs were of equal length. The right calf was ½ inch larger, as would be expected in a right handed individual. The spine muscles showed one-third normal flexion; extension, that is bending forward and backward, causing sacrolumbar pain. Side bending and twisting was 50 percent normal, and each caused the same low back pain. Chest expansion was 2½ inches; the arms and legs were free. Straight leg raising was possible to 60 degrees on the right side, caused him low back pain and sciatic pain in the left side. The same straight leg could only be brought up 30 degrees on the left side, causing the same pain. He had definite decrease in pain sensation over the left hip, thigh, and calf, running into the outer border of the foot. There was no muscle spasm. His reflexes were normal. Tenderness to pressure was present only over the sacrolumbar joint and over both sides of that joint, as well as over the long back muscles on either side of the spine. He saw Gilbert again on January 8, 1952. His history at that time was that the pain in his left leg was the same. It was worse if he was sitting, if he lifted, or coughed. His back, if he was standing, had numbness down the leg into the calf, and ached if he sat too long. The brace was used and relieved him. He had no particular back pain. His general condition was good. His weight was 200 pounds. As to the disability equation to the body as a whole it would be 15 percent, and if proper treatment was applied there could be further recovery. The 15 percent would include disability, if any, that he might have had as a result of his previous injury in 1944. With reference to the X-ray pictures taken by Dr. Kelly, an old injury was indicated. This would cause some back pain, but no sensation of pain in the left leg. This doctor felt that Gilbert had a definite

first sacrum nerve root pressure on the left side, possibly due to a disk protrusion between the fifth lumbar and first sacrum. In answer to a hypothetical question involving the lifting of the stove, its weight, and the pain endured, his opinion would be that there was a herniated disk, and it was recommended that he should do no heavy lifting.

An employee of the district was with Gilbert at the time of the injury received by Gilbert in 1944. His testimony was to the effect that Gilbert complained of pain in his back at different times due to this injury which occurred when he was putting up a ceiling heater with the assistance of four employees. Gilbert slipped off a box and hurt his back. He was off work for a few days, and complained of pain when he came back to work.

It appears from the testimony that the injury received by Gilbert in 1944 was not a back injury, but rather an injury to his neck. This fact developed in the history given to Dr. Finlayson by Gilbert, and also from the testimony of Dr. Bolar who treated him for that injury and testified that it was a neck injury. It is apparent from the evidence that the previous injury suffered by Gilbert in 1944 was not aggravated or accelerated by the injury which he received on June 9, 1950, and, in fact, had no connection with the latter injury. Gilbert's claim for compensation in the instant case is based on the injury he received on June 9, 1950, and no other injury.

Other testimony is to the effect that one of Gilbert's superiors talked to him about employment other than that which he was engaged in, where no heavy lifting would have to be done by him. However, Gilbert preferred to do the kind of work he was accustomed to, and thought he could do it with the aid and assistance of a helper. He has been working at the same kind of employment ever since except that he does no heavy lifting and has not been required to do heavy lifting

since the accident. He is furnished a helper. He lost no time from work by virtue of the injury received on June 9, 1950. He has been continuously employed by the district, and received the benefit of two wage raises the same as other employees of the district. At the time of trial he still felt some pain in his left leg.

The district contends that the evidence was insufficient to show by a preponderance thereof, or with reasonable certainty, that Gilbert sustained an accident which arose out of and in the course of his employment, but, contra, shows that the range was moved in the ordinary and customary manner, and the exertion on the part of Gilbert was that which was ordinarily incident to his employment. We are not in accord with the district's contention in such respect.

We conclude, from an analysis of the record, that the claimant Gilbert was injured in an accident which arose out of and in the course of his employment as the term "accident" is defined in section 48-151, R. R. S. 1943, and by virtue thereof, suffered a 25 percent permanent partial disability and is entitled to compensation at the rate of $9.54 a week for a period of 300 weeks from and after June 9, 1950, to be paid by his employer, the Metropolitan Utilities District.

The district contends that in the event the claimant would be entitled to compensation for disability, such disability is confined entirely to his left leg, and compensation would be limited to specific loss of use of his left leg under subdivision (3) of section 48-121, R. R. S. 1943. It is true that the claimant complained of pain in his left leg. However, as disclosed by the testimony of Dr. Gross and as indicated by the testimony of other doctors, while he complained of pain in his left leg, the disability was to the back and is projected through his nervous system which caused the pain in the left leg. The contention of the district in this respect is without merit.

We conclude that the judgment of the trial court

should be reversed and the cause remanded with directions to enter judgment in conformity with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

T. S. MCSHANE CO., INC., APPELLEE, V. GREAT LAKES PIPE LINE COMPANY, A CORPORATION, APPELLANT.

57 N. W. 2d 778

Filed April 10, 1953. No. 33237.

1. **Principal and Agent.** The burden of proof is upon the person seeking to bind a principal for the acts of his agent to establish an implied, apparent, or ostensible authority greater than the actual authority of the agent.
2. ———. Where a principal has voluntarily placed an agent in such a situation that a reasonable and prudent person, familiar with the business usages and customs of the particular business, is justified in presuming that such agent had authority to perform a particular act, the principal is estopped, as against an innocent third person, from denying the authority of the agent to perform it.
3. ———. The performance of similar acts by an agent on the authority, approval, or acquiescence of the principal is ordinarily sufficient to establish the apparent or ostensible authority of the agent in the absence of actual knowledge to the contrary on the part of the person seeking to hold the principal.
4. ———. Evidence of apparent or ostensible authority is not restricted to proof of general customs and usages in the business, or to proof that the agent has previously performed similar acts by the authority, approval, or acquiescence of the principal. The nature of the business, practices, and usages not general and uniform, and other facts and circumstances peculiar to the particular transaction, might under proper evidence be sufficient to create an apparent or ostensible authority sufficient to bind the principal.
5. ———. Where the evidence is insufficient on any ground to sustain a finding that an agent was clothed with actual, implied, apparent, or ostensible authority, a principal sought to be held for the act of the agent is entitled to a directed verdict in his favor when a timely motion is made therefor.

APPEAL from the district court for Douglas County: ARTHUR C. THOMSEN, JUDGE. *Reversed and remanded with directions.*

Smith & Smith, for appellant.

Finlayson, McKie & Kuhns, for appellee.

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

CARTER, J.

This is an action at law upon two contracts alleged to have been entered into by the defendant, Great Lakes Pipe Line Company, with the plaintiff, T. S. McShane Co., Inc., for the rental of a dragline and a clamshell bucket. The jury returned a verdict for $1,887.50 for rentals found to be due under the provisions of the dragline contract and for $222 for the rentals due under the clamshell-bucket contract. Judgment was entered for these amounts and the defendant appeals.

The evidence shows that the defendant undertook to extend and enlarge its pipe-line terminal in Omaha at an estimated cost of more than $2,000,000. The construction work was being performed by three prime contractors and subcontractors to whom portions of the work were sublet. The evidence also shows that all ordinary and usual construction materials were provided by the contractors. Certain technical equipment and materials, including pipe used in the construction of pipe lines, were provided by the defendant and stockpiled in its material yard at the terminal for use by contractors when needed. It was necessary when this material arrived that it be unloaded from freight or gondola cars into defendant's material yard. This unloading was handled by short-form contracts made from time to time by the defendant as the material arrived. The general construction headquarters of the defendant were in Kansas City, Missouri, from which point the

general direction and supervision of the Omaha project, and many others as well, were handled. One R. D. Williamson was supervisor of construction of stations and terminals, which designation included the Omaha project which is here involved. The record shows that Williamson directed and supervised the construction of the terminal at Omaha, insofar as the interests of the defendant were concerned, through a subordinate located at that point, who was designated as resident engineer. Prior to June 12, 1950, the resident engineer had no authority to contract on behalf of the defendant except upon approval by Williamson, or certain officers superior to him who were located in Kansas City. After June 12, 1950, the resident engineer was authorized to enter into contracts on behalf of the defendant without specific approval where the amount did not exceed $100.

The position of resident engineer on the Omaha terminal project was held by one W. J. Lank, Jr., from November 16, 1949, to September 8, 1950. He occupied a temporary building on the property and was the highest officer of the defendant on the ground insofar as construction was concerned. It was his duty to assist the contractors in the interpretation of plans and specifications and see to it that the construction work was performed in accordance therewith. He also entered into contracts for additional work resulting from changes in plans and specifications and for the unloading and handling of technical materials and pipe from railroad cars into defendant's material yard, ordinarily with approval by telephone or letter from Kansas City. For this purpose he was supplied with two forms of contract blanks, one a mimeographed form, the other a printed form bound together in lots of 50 and 100. When contracts involving $100 or less were required, Lank would execute the appropriate form contract with which he was supplied. If more than $100 was involved he could execute the contract only on approval from Kansas City, but the forms were left in his pos-

session in order that the proposed work could be promptly contracted without the necessity of sending them in to Kansas City for formal approval. It is important to note here that all construction work being performed on the Omaha terminal project was being done by contract with one exception. The defendant did employ from one to five men as the need required, to work in defendant's material yard to maintain materials and equipment there stockpiled, and to handle them in and out of the yard as the work progressed. At no time did the defendant own, rent, or purchase heavy construction equipment for its use on this project.

In the latter part of May 1950, Lank called Hugh M. Saxton, the manager of the contractor's equipment department of the plaintiff company, and inquired if his company had a dragline to rent. The conversation resulted in a meeting of the two at plaintiff's equipment yard the next morning. Terms of the rental were agreed upon and Saxton was requested to prepare the rental agreement and bring it to Lank's office where he said he would sign it on behalf of the defendant company. Under date of June 1, 1950, the agreement was executed, Lank signing as the authorized agent of the defendant company. The contract was made up on the forms used by the plaintiff company and it provided generally for the rental of the dragline for a minimum of 3 months for $943.75 per month. Purchase order agreements were made out on forms provided by the Great Lakes Pipe Line Company for each monthly payment as it became due. This was necessary, according to Lank, in order that a copy could be attached to the invoice for the monthly rental payment. While the rental contract provided for the payment of rentals in advance, plaintiff agreed to bill the defendant at the end of the month to meet the alleged requirements of the defendant company. All billings were sent to the Omaha post-office box of the defendant, which was under the control of Lank. No invoice was ever sent to the office at Kansas

City. The rental for June was paid on July 20, 1950, by a check drawn on the Valley Coal Company. No other payments were made on the dragline contract.

The evidence further shows that on or about June 1, 1950, the dragline was hauled by a carrying company from plaintiff's equipment yard to 18th and Vinton Streets in Omaha upon Lank's order. It was consigned to one Forst, a contractor, who used it in constructing a Safeway Store at 21st or 22nd and Vinton Streets under a rental agreement with Lank. A week or 10 days later it was used on 13th Street in loading trucks with dirt. A salesman for the plaintiff company, one John M. Fruhwirth, reported that 2 or 3 days after it left plaintiff's equipment yard the dragline was working at the Safeway Store site. Some days later Saxton saw it working on the 13th Street job. Saxton inquired of Lank why the dragline was working so far from the terminal and was told that, because of plaintiff's delay in getting the dragline serviced for use, he had lost the dirt he intended to use and had to come to 13th Street to get the dirt for the fill to be made in the terminal area. No further inquiry was made of anyone concerning the use of the dragline, or the authority of Lank to make the rental agreement. There is evidence that Forst later obtained contracts on the terminal project and used the dragline there. He received his pay, for the use of the dragline in this work, from the defendant in the ordinary manner. Saxton and other employees of the plaintiff saw the dragline working at the terminal during this period. They testified that they had no knowledge that the dragline had been rented to Forst by Lank. On September 8, 1950, Williamson discovered the nature of the transactions made by Lank with the plaintiff. Plaintiff was immediately notified and the employment of Lank terminated. Plaintiff repossessed its dragline from a dredging contractor at Plattsmouth, Nebraska, to whom it had been leased by Lank.

In the latter part of June 1950, Lank made inquiry of the plaintiff concerning the rental of a clamshell bucket. This resulted in a written contract under date of July 1, 1950, on the forms used by the plaintiff for the rental of a clamshell bucket at the rate of $111 per month. Lank signed the contract as the purported authorized agent of the defendant. The monthly rental of the clamshell bucket was thereafter included in the purchase order agreements made each month upon the forms provided Lank by the defendant company. The situation thereafter was no different as to the clamshell-bucket contract than that existing as to the dragline agreement.

We think the record clearly shows that Lank did not have actual authority to enter into the two contracts involved in this action. The primary question for determination is whether or not Lank had implied, apparent, or ostensible authority to execute the contracts and bind the defendant in so doing. The question of agency and the authority of an agent to bind his principal is ordinarily a question of fact. Unless there is no evidence in the record to warrant the submission of this issue to a jury, the verdict must be sustained. In other words, the question before us is whether or not the trial court erred in failing to direct a verdict for the defendant at the close of plaintiff's evidence and at the close of all the evidence, or in failing to sustain the motion for judgment notwithstanding the verdict after the verdict was returned.

We think the controlling rule is correctly stated in Johnston v. Milwaukee & Wyoming Inv. Co., 46 Neb. 480, 64 N. W. 1100, as follows: "That where a principal has by his voluntary act placed an agent in such a situation that a person of ordinary prudence, conversant with business usages and the nature of the particular business, is justified in presuming that such agent has authority to perform on behalf of his principal a particular act, such particular act having been performed, the principal is estopped, as against such innocent third

person, from denying the agent's authority to perform it. We do not think that in order to bring a case within this principle it is in all cases necessary to show that by general custom, as defined in the former opinion of the court, such agents have such authority; nor do we think that it is necessary in all cases to show that the same agent had previously performed similar acts; that such acts were known to the principal; that the third person also knew of them, and relied on them in the transaction, or even that similar agents had in the past performed such acts. A number of elements may influence the solution of the question." See, also, Nebraska Tractor & Equipment Co. v. Great Lakes Pipe Line Co., *ante* p. 366, 56 N. W. 2d 288, and the authorities therein cited.

It is clear from this record that Lank had no actual authority to execute the contracts in question. As resident engineer he was an agent of the defendant company with certain duties to perform. All of the construction work at the terminal was being performed by contractors. Lank was the agent of the owner charged with the duty of checking the work being done against the plans and specifications, making progress reports to the Kansas City office, and the making of contracts for extra work not covered by the prime contracts when authorized by his superior officers in the Kansas City office. He was not a superintendent in charge of construction charged with the duty of completing the project as quickly and expeditiously as possible. We fail to find any satisfactory evidence in the record that a resident engineer charged with such duties is empowered by custom and usage to make contracts for equipment for use in the construction of a project. Custom or usage in a trade or business may be shown in establishing the apparent or ostensible authority of an agent only when it is known by the party sought to be charged thereby, or when it is so well settled and so uniformly acted upon as to create a reasonable presumption that it

was known to both contracting parties and that they contracted with reference to it. Milwaukee & Wyoming Inv. Co. v. Johnston, 35 Neb. 554, 53 N. W. 475. We cannot say that the evidence is sufficient to support a finding that Lank was authorized by usage and custom as above defined to make the contracts in question.

The evidence does not show that the defendant ever authorized approval or acquiesced in the performance of similar acts on the part of Lank. Not a single instance has been pointed out where Lank had purchased, rented, or used heavy construction equipment at the instance of or in the furtherance of the work of the defendant. The fact was that defendant was a common carrier of petroleum products by pipe line. All of the construction work at the Omaha terminal was performed by contractors and no deviation from this policy on the part of the defendant has been shown. Consequently it cannot be said that plaintiff relied upon previous acts of a similar nature performed by Lank which were approved or acquiesced in by the defendant. It follows that apparent or ostensible authority was not created by knowledge on the part of the plaintiff that Lank had been permitted to perform similar acts in the past which were sufficient to estop defendant from denying his authority to act.

The controlling rule, however, does not require that apparent or ostensible authority be grounded on custom and usage or the performance of similar acts by the agent in the past in order to establish apparent or ostensible authority. The nature of the business, usages peculiar to the business, or the natural necessities inherent in the duties of the agent, might create an apparent or ostensible authority upon which those dealing with the agent might safely rely. But we find no such circumstances here from which a jury could properly infer that Lank was clothed with apparent or ostensible authority to sign the contracts in question. It is evident that plaintiff and its officers assumed that Lank

had authority to bind the defendant. Their failure to make inquiry of anyone other than Lank concerning the use of the dragline and clamshell bucket at points distant from defendant's terminal, their failure to bill the defendant other than through Lank, and their failure to take note of the fact that the first and only payment was made by a concern other than the defendant, gives credence to the statement that they were lulled into such a sense of security by Lank that they threw all caution to the winds. The negligence of the plaintiff in not knowing or discovering the extent of Lank's authority is so great and the evidence of any conduct on the part of the defendant which could be construed as an estoppel to deny his authority is so lacking that a finding for the plaintiff cannot stand. The fact that form contract blanks used by the defendant were left with Lank for use when authorized is not proof of apparent or ostensible authority to enter into contracts generally. The possession of form contract blanks is not evidence of the extent of the authority of an agent, although it is a circumstance that might be considered in some cases. The evidence is not sufficient to sustain a verdict and a verdict for the defendant should have been directed. The judgment of the district court is reversed and the cause remanded with directions to enter a judgment notwithstanding the verdict for the defendant.

REVERSED AND REMANDED WITH DIRECTIONS.

JOHN M. SPRAY, APPELLANT, V. LEILA MAE SPRAY, APPELLEE.
57 N. W. 2d 926

Filed April 10, 1953. No. 33255.

Divorce. The statutory rule that no decree of divorce and of nullity of a marriage shall be made solely on the declaration, confessions, or admissions of parties, but the court shall, in all cases, require other satisfactory evidence of the facts alleged in the petition for that purpose has application alike in default and contested cases.

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

Max Kier, for appellant.

Van Pelt, Marti & O'Gara, Robert D. McNutt, and *Johnston & Grossman,* for appellee.

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

YEAGER, J.

This action as instituted was one for divorce by John M. Spray, plaintiff and appellant, against Leila Mae Spray, defendant and appellee. The defendant filed an answer and cross-petition. By the cross-petition she asked for a decree of separate maintenance. A trial was had and during the trial the defendant amended the prayer of her cross-petition and asked that a decree of divorce be granted to her.

At the conclusion of the trial a decree of divorce in favor of plaintiff was denied. The defendant was granted a divorce from the plaintiff. A division of property was decreed and there was an award of alimony. Also, there being minor children of the parties, the custody of the children was awarded to the defendant and an award was made for their support.

A motion for new trial was filed by the plaintiff which was duly overruled. From the decree and the order overruling the motion for new trial he has appealed.

One of the assignments of error is that the court erred in failing to grant the relief prayed in plaintiff's petition and another is that the court erred in awarding the defendant an absolute divorce. A third is that the court erred in finding that there was sufficient corroboration to sustain a decree for the defendant. There are numerous other assignments but these require first consideration.

The grounds for divorce as set forth in the petition

are acts of cruelty practiced upon the plaintiff by the defendant. The grounds of the cross-petition are acts of cruelty practiced upon defendant by the plaintiff.

To sustain his petition the plaintiff testified at great length in his own behalf. In this testimony he related a large number of instances which if supported and accepted as true, and assuming that he was free from fault, might be regarded as sufficient upon which to base a decree in his behalf. However in the light of the record they may not be accepted as sufficient.

Nothing of consequence to which he testified stands corroborated.

Section 42-335, R. R. S. 1943, provides: "No decree of divorce and of the nullity of a marriage shall be made solely on the declaration, confessions or admissions of the parties, but the court shall, in all cases, require other satisfactory evidence of the facts alleged in the petition for that purpose."

This provision of statute has been approved and applied by this court on numerous occasions. See, Haines v. Haines, 79 Neb. 684, 113 N. W. 125; Christensen v. Christensen, 144 Neb. 763, 14 N. W. 2d 613; Nuss v. Nuss, 148 Neb. 417, 27 N. W. 2d 624; Parker v. Parker, 155 Neb. 325, 51 N. W. 2d 753.

The record here contains admissions by the defendant of some of the acts of cruelty charged against her by the plaintiff, but within the meaning of the statute and in line with interpretations made by this court these admissions may not be regarded as corroboration. O'Reilly v. O'Reilly, 120 Neb. 720, 234 N. W. 916; Hudson v. Hudson, 151 Neb. 210, 36 N. W. 2d 851; Kroger v. Kroger, 153 Neb. 265, 44 N. W. 2d 475; Peterson v. Peterson, 153 Neb. 727, 46 N. W. 2d 126.

It is urged that interpretative observations contained in opinions of this court such as, that it is impossible to lay down a general rule as to the degree of corroboration required as each case must be decided on its own facts and circumstances, imply that a more liberal attitude

should be taken toward the matter of corroboration in a contested case than one wherein there is no contest. See, Brown v. Brown, 146 Neb. 908, 22 N. W. 2d 148; Green v. Green, 148 Neb. 19, 26 N. W. 2d 299; Kroger v. Kroger, *supra*. We are not convinced that any such implications may reasonably be said to flow from previous expression. If they do they are in conflict with the evident purpose of the statute.

One purpose was to place a check upon the integrity of a person ex parte seeking relief from the obligations of the marriage relation. The other was to prevent two people dissatisfied with the burdens of their marriage relation, by agreement and connivance and without legal reason, from obtaining relief from their circumstances through the courts.

In any event no warrant is found in decision or statute for this court, in a contested divorce case, to disregard and render for naught the statute requiring that the evidence of a party shall be corroborated by other satisfactory evidence.

It follows therefore that the court did not err in failing to grant the relief prayed in plaintiff's petition.

On the same theory on which it has been concluded that the plaintiff was not entitled to a decree in his favor it must be said that the defendant is not entitled to a decree in her favor. The testimony of none of her witnesses corroborates any act of cruelty charged against the plaintiff. The testimony of these witnesses extolls the virtues of the defendant but at no point does any witness relate any incident or incidents which could if proved be regarded as cruelty sufficient upon which to warrant the granting of a decree of divorce.

Clearly the decree in favor of defendant cannot be sustained.

This conclusion renders unnecessary a consideration of the other assignments of error.

The decree insofar as it denies a decree of divorce to plaintiff is affirmed. To the extent that it grants a

divorce to defendant and to the extent that it awards a division of property, child support, and custody, it is reversed. To the extent that it awards a fee for the attorney for the defendant, it is affirmed. An additional fee in the amount of $500 is allowed for services in this court for the attorney for defendant. The costs in the district court and in this court are taxed to the plaintiff.

The cause is remanded to the district court with directions to decree accordingly, without prejudice however to the right of the defendant, on appropriate pleadings, to proceed as for separate maintenance.

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

J. STERLING ADAMS, APPELLANT, V. WILSON T. ADAMS ET AL., APPELLEES.

58 N. W. 2d 172

Filed April 10, 1953. No. 33282.

1. **Equity: Trial.** If a defendant in a suit in equity moves at the close of the evidence of the plaintiff for a dismissal of the suit for want of proof to support a judgment, he admits the truth of the evidence and any reasonable conclusions deducible from it.
2. **Injunctions: Damages.** Injunction is a proper remedy to prevent violation of a valid restrictive covenant not to establish a competitive business and a provision therein for liquidated damages for a breach thereof does not make the remedy unavailable.
3. ———: ———. In such an action the plaintiff may recover as an incident of it any damages he is legally entitled to because of default in performance of the obligation of the covenant.
4. **Equity.** The test of equity jurisdiction is generally the absence of an adequate remedy at law.
5. ———. An adequate remedy at law is one that is practicable and efficient to the ends of justice and its administration as the remedy in equity.
6. ———. A remedy at law is not adequate if the situation requires and the law permits preventative relief as preventing the repetition or continuance of wrongful acts.
7. **Contracts.** A contract restraining a person from establishing a business competitive with that of the other party to it is

strictly construed and doubts are resolved against a latitudinarian construction thereof.

8. ———. The party bound by a contract not to establish a business in competition with the other party to it is not precluded from loaning money to others though they may use it to engage in business in competition with the person for whose benefit the restriction was made.

9. ———. The negative provision of a contract that a party thereto will not set up or establish a competitive business contemplates a business in which he has a proprietary interest, a right of control, or a right of management.

10. ———. The words in a contract that a party will not set up or establish a business competitive with the other party thereto means that the covenantor will not create or bring into being and operate a new business of the character of that operated by the person in whose favor the prohibition is made. The words set up and establish therein are intended to describe something not in existence.

11. **Attorney and Client.** An attorney is not barred from representing a subsequent client against a former client if the duties required of him do not conflict with those involved in the first employment.

APPEAL from the district court for Lincoln County: JOHN H. KUNS, JUDGE. *Affirmed.*

Baskins & Baskins and *V. H. Halligan.* for appellant.

Beatty, Clarke, Murphy & Morgan, for appellees.

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

BOSLAUGH, J.

The object of this suit in equity brought by appellant is to prevent appellees Wilson T. Adams and Adams-Swanson Funeral Home, a copartnership, from violating the obligation of a written contract prohibiting Wilson T. Adams from setting up and establishing for a stated time and within a limited area a business competitive with the business of appellant.

The basis for the relief as pleaded by appellant is that he and Wilson T. Adams, one of the appellees, were from July 14, 1947, until February 3, 1951, members

of the Adams Funeral Home, a copartnership; that the partnership agreement provided that if appellee ceased to be a member of the partnership that he would not set up or establish a new or competitive business in North Platte for 10 years thereafter, directly or indirectly, for himself or in association with others; that if he violated the agreement in this regard it was agreed the damages to appellant would be $10,000 which he could recover by an appropriate action; that appellee caused the Adams-Swanson Funeral Home to be organized with Gladys Adams, the wife of appellee, and Kenneth A. Swanson as the nominal partners; that he financed it, put it in the undertaking and funeral business, has participated in the conduct of its business, and has been active in all of its engagements and activities; that it is a subterfuge employed by appellee to engage in the undertaking and funeral business and to attempt to avoid the terms and effect of the noncompetitive provision of his contract with appellant; and that he has by this instrumentality been conducting that kind of business since July 7, 1951, in competition with the Adams Funeral Home of North Platte, owned and operated by appellant, but he has not paid or offered to pay appellant the $10,000 named in the covenant involved in this case.

Appellees deny the claims of appellant except they admit the restrictive covenant including the provisions thereof for damages and nonpayment of any amount by appellee to appellant, and they allege that Gladys Adams and Kenneth A. Swanson are the members and only members of the Adams-Swanson Funeral Home.

Appellees moved at the conclusion of the introduction of the evidence in chief of appellant that the petition be dismissed. The district court sustained the motion, and dismissed the petition and the suit. A motion of appellant for new trial was denied and he has prosecuted this appeal.

The issue is whether or not the evidence accepted as

true and all reasonable conclusions deducible therefrom are sufficient to sustain a judgment for appellant. This must be decided as a question of law by a trial de novo on the record. Busteed v. Sheffield, 153 Neb. 253, 44 N. W. 2d 471.

Appellant has been in the undertaking business in North Platte since 1934. He was a partner of Fred Hutchins until September of 1939. They operated as Hutchins-Adams Funeral Home. Hutchins retired and appellant continued as Adams Funeral Home until July 14, 1947, when he and his brother Wilson T. Adams, herein identified as appellee, became partners and carried on the business by the name Adams Funeral Home. Appellee had taken instruction in embalming and mortuary work and he on occasions assisted at the Hutchins-Adams Funeral Home when its business required additional help. He was employed by appellant for full-time work at the Adams Funeral Home in July 1945. He continued in that capacity until he and appellant became partners. Appellee withdrew from the partnership on February 3, 1951. He took his license and personal belongings, left the place of business without warning or notice when appellant was absent, and he did not return to it or offer to participate in its activities thereafter.

The contract of July 14, 1947, between appellant and appellee in reference to the Adams Funeral Home contains this provision: "It is further agreed that as part of the consideration of this agreement that if at any time in the future the second party (appellee) shall sever relations with this co-partnership that he will not set up and establish any new or competitive business in the city of North Platte and within three miles thereof for a period of ten years from and after the termination of said co-partnership, either directly, indirectly, for himself or in association with other persons, and in the event that the second party does so set himself up any business and compete with the first party, then it is

agreed that the damages inuring to the first party shall be in the sum of Ten Thousand Dollars, which the first party may recover by appropriate action for the breach of this Agreement."

About mid-year of 1950, appellee and Mr. Benson, an employee for several years of the Adams Funeral Home who assisted in the conduct of its undertaking business, considered going into business in Kimball. About January 1, 1951, appellee proposed to Benson that they establish a funeral home in North Platte. They talked about it on numerous occasions, sometimes at the Adams Funeral Home, and sometimes at the Adams home in the presence of Mrs. Adams and Mrs. Benson. They considered two locations. Appellee before February 3, 1951, presented Benson a floor plan of a home in North Platte and discussed the prospect of establishing a funeral home there. The place under consideration afterwards became the place of business of the Adams-Swanson Funeral Home. The last conversation between appellee and Benson concerning the matter of starting a funeral home was in March or April, 1951, when Benson advised appellee he could not engage in the venture because he could not secure the necessary funds. Benson knew of the restrictive covenant in the contract involved in this case. He and appellee discussed it in the presence of Mrs. Adams, and appellee stated "that the contract had been broken and that it didn't mean a thing."

Appellee or his wife by telephone solicited Kenneth A. Swanson in March 1951, soon after Easter that year, to come from York to North Platte for the purpose of considering engaging in the funeral home business in that city. He had not met or had knowledge of appellee or his wife. Swanson and his wife came to North Platte, met appellee and Mrs. Adams, and had a general discussion of matters. He stayed a day and a half, reached no decision, and made no commitment.

About 2 weeks thereafter Swanson was advised by

appellee or his wife by telephone about property that "we could possibly get hold of" and they would like to have him come up and look at it. He came, examined the property, and decided to go into business with Gladys Adams if they could buy the property; if Mr. Trego, her brother-in-law, who Swanson met on his first trip to North Platte would loan the money required for a down payment; and if Swanson could sell his home in York.

Swanson later came to North Platte when "they said the papers were ready to be executed or signed." The articles of copartnership of the Adams-Swanson Funeral Home were signed on May 1, 1951. The purchase agreement for the property where the funeral home is located named Gladys Adams as purchaser, was made on April 8, 1951, and the persons present during the transaction were the real estate man, appellee, Gladys Adams, and Mr. Trego. The deed of the property from Keith Neville and his wife to Gladys Adams is dated April 16, 1951. The purchase price was $21,500. It was paid with the proceeds of a loan of $11,800 made by a loan association of Cozad, Nebraska, and secured by a first mortgage on the property, and a loan of $10,000 made to Gladys Adams by Mose Trego secured by a second mortgage on the property. The first mortgage and the note secured by it were executed by Gladys Adams and appellee. The note to Trego was signed by Gladys Adams and Kenneth A. Swanson and the mortgage securing it was signed by them and appellee. J. L. Case, the father of Gladys Adams, loaned her $7,000 evidenced by a note signed by her and her husband and secured by a second mortgage on their home. Swanson borrowed $6,000 from Mr. Case and invested it in the funeral home. Gladys Adams on May 1, 1951, conveyed one-half of the property purchased from Neville where the Adams-Swanson Funeral Home is located to Swanson and he assumed payment of one-half of the indebtedness secured thereon. Trego knew that appellee could not "open a business; that he couldn't operate it."

Appellee has assisted and participated in the work of the Adams-Swanson Funeral Home since it has existed. He has been at its place of business for this purpose practically every day. The home of appellee is connected by telephone with the funeral home so that a call to it can be answered at his home, and he has received and answered calls there. He is a licensed embalmer, has done embalming, and assisted in it for the funeral home. He has answered ambulance calls. He has shown and sold merchandise including caskets at the place of business. He has taken or gone with the members of the family or friends of a deceased to the cemetery and made arrangements for the purchase of a cemetery lot, for preparing the place of burial, and for the service at the cemetery. He acted in this respect on the occasion of the first undertaking and funeral engagement the funeral home had in July 1951, and the last one it had before this case was tried in June 1952. The home had 44 funerals in which interments were made in the North Platte cemetery during that period and appellee acted for the home in these matters in about three-fourths of them. He has done the things usually performed by a funeral director at more than half of the funerals conducted by the home and has had some part in many more than that. He has had no other business or employment and no income.

In the latter part of 1951 in a conversation between the superintendent of the cemetery and the appellee, he stated to the superintendent that business was good and he was busy. At another time when appellee, Swanson, and the superintendent were at the cemetery the superintendent advised them of the decision of the cemetery board to discourage Sunday funerals, and that it desired the cooperation of the undertakers to discontinue Sunday services as much as they could. Appellee stated that they could not discourage Sunday funerals even if "the board had passed on that and made a regulation to that effect." In June 1952, when

Mrs. Moulton was at the cemetery and purchased a lot incident to the death of her husband, she inquired if she should pay the purchase price of the lot to the superintendent of the cemetery and appellee answered her: " 'No. You can pay us and we will take care of it all in one bill.' "

The business of the Adams Funeral Home has had a decrease of 25 to 30 funerals a year since the Adams-Swanson Funeral Home started and a large percent of the funerals conducted by it were for members of families previously served by the Adams Funeral Home.

Gladys Adams has operated a nursery school and this has engaged her time a part of 3 days each week. She was not educated, trained, or experienced in mortuary work or in conducting funerals. Swanson knew this before he made any commitment in North Platte. During the time she was at the place of business she did some book work, acted as hostess, helped with the arrangement and removal of flowers, and directed people when funerals were conducted at the home. She also did some arranging of hair and manicuring of fingernails in preparing bodies for burial.

Swanson and Gladys Adams each knew of the noncompetitive provision of the contract involved in this case before they did anything in reference to the Adams-Swanson Funeral Home.

Appellee has not contributed or invested any money in the funeral home and has not made to it any contribution of property, equipment, or anything of value except the voluntary, gratuitous assistance he has furnished as above stated. There has been no agreement or understanding of any kind between him and the Adams-Swanson Funeral Home or between him or either of the members thereof. He has no ownership of the property or the business of the partnership or any part thereof, and no right of management, control, or direction of its affairs or any of them. It is not shown that he has attempted to exercise any such right; that he has in any

way held himself out as a party interested in its property, business, or affairs; or that he has solicited patronage for the home. He has received no compensation or money from the partnership and there is no showing that he has or claims the right to do so. The individual withdrawals from its funds have been by Swanson and Gladys Adams.

Appellees present as a defense that this suit is not cognizable in equity; that appellant has an adequate remedy at law; that he and the appellee by their contract agreed that in the event of a breach of the negative provision thereof prohibiting appellee from competing in business with appellant the damages to him would be $10,000 and could be recovered in an appropriate action by him; and that if this restriction has been violated appellant may by an action at law recover the amount as stipulated by the parties.

The case of Tarry v. Johnston, 114 Neb. 496, 208 N. W. 615, was a suit in equity involving the violation of a contract for the sale of property and a business in which it was provided that a violation of the contract by the purchaser obligated him not to practice medicine for a stated time within a radius of 150 miles of Omaha, and permitted the sellers to retain as liquidated damages all payments made on the purchase price of $40,000 and 10 percent of the net profits of the business for a period of 5 years. There had been paid thereon about $25,000. Violations of the contract were alleged and plaintiffs sought an adjudication permitting a retention by them of all payments of purchase money as liquidated damages, and an injunction to prevent the purchaser Johnston from practicing medicine and surgery during the time and in the area provided by the contract. A defense was that the suit in equity was not maintainable because if the contract had been breached the plaintiffs had an adequate remedy at law. The decree therein permitted the plaintiffs to retain the money paid to them as liquidated damages and enjoined

Johnston from practicing medicine and surgery for the time and within the area stated above. In affirming the judgment of the district court it was said by this court: "The first question for consideration is the jurisdiction of a court of equity to grant the relief sought by plaintiffs. On this point defendants insist there is a total lack of proof that they are insolvent or that they are unable to respond in damages or that they cannot pay their notes. They argue, therefore, that the suit in equity is not maintainable. In this connection reference is made to evidence tending to show that defendants at various times paid in money items aggregating $24,724.26 on the purchase price. They take the position that a court of equity cannot properly forfeit that sum and at the same time restore the sanitarium and business to plaintiffs and enjoin Johnston from practicing his profession. This point, though ably presented, does not seem to be conclusive. Whether the case is one of equitable cognizance depends upon the peculiar facts disclosed by the record. If the contract is valid in all its parts equity is clearly a proper remedy."

In Personal Finance Co. v. Hynes, 130 Neb. 547, 265 N. W. 541, it is said: "A contract restricting employment in a competitive business for one year within the city, or the environs or trade territory, imposes reasonable conditions and is valid and enforceable. * * * In such a case a court of equity has jurisdiction to protect the plaintiff's right, notwithstanding the fact that the contract provides for liquidated damages." The court in the opinion noted the inadequacy of an action at law in such a situation by the use of this language: "The remedy at law thus provided is not adequate. The defendant, within the first year after the termination of his employment, is capable of doing irreparable damage. At that time, his relation with the customers of the plaintiff is close and unbroken. An action at law would furnish only partial relief."

Hickey v. Brinkley, 88 Neb. 356, 129 N. W. 553, was

a suit in equity to enjoin the sellers of real estate and a business located thereon from violating the provisions of an agreement made at the time of the transaction in the form of a bond with a penalty in the sum of $500 which after reciting the fact of the sale provided that the sellers would not engage in competition with the business sold or permit anyone under their control to do so in a described area for a period of 10 years from the date of the sale. A violation by the sellers of the provisions of the agreement was alleged. A permanent injunction was granted plaintiffs. This court said: "The defendants urged that there is no equity in the bill, for the reason that plaintiffs have an adequate remedy at law by an action on the bond, that the amount of money named therein as a penalty was intended as liquidated damages, and that since no insolvency has been shown the only right of action for a violation of the contract is one at law for the amount named in the bond. We think this position is untenable." See, also, Gable v. Carpenter, 136 Neb. 669, 287 N. W. 70.

The test of equity jurisdiction is generally the absence of an adequate remedy at law. An adequate remedy at law is one that is practicable and efficient to the ends of justice and its prompt administration as the remedy in equity. The remedy at law is not adequate if the situation requires and the law permits preventative relief, as preventing the repetition or continuance of wrongful acts. Richardson Drug Co. v. Meyer, 54 Neb. 319, 74 N. W. 575; Nebraska Telephone Co. v. Cornell, 58 Neb. 823, 80 N. W. 43; 19 Am. Jur., Equity, § 110, p. 115; 30 C. J. S., Equity, § 25, p. 347.

An action for an injunction may be maintained to prevent a breach of a valid restrictive covenant not to engage in a competing business without regard to the presence of a provision for liquidated damages in the event of a breach of the covenant, and the injured party may recover in the action as an incident of it any damages he is legally entitled to because of default in

performance of the obligations of the covenant. See, Brchan v. Crete Mills, 155 Neb. 505, 52 N. W. 2d 333; Gable v. Carpenter, *supra.*

Appellees urge the belief that the noncompetitive provision involved was intended to and does mean that Wilson T. Adams could, if he ceased to be a member of the Adams Funeral Home, set up, establish, and operate a new or competitive business by paying to appellant before he engaged therein the amount stated in the covenant or if he did not make the payment appellant could recover that amount from him; and that the restrictive covenant was not intended to and does not obligate him not to acquire and operate in North Platte an undertaking and funeral business, but was only intended to and does bind him to pay the amount stated if he does that. This is not a logical, natural, or permissible interpretation. The very essence of the covenant is "that he (Wilson T. Adams) will not set up and establish any new or competitive business in * * * North Platte * * * after the termination of said co-partnership * * *." The matter of damages is incidental to the prohibition imposed. Appellee attempts to use as a shield the very provision appellant obtained for his protection. A reading of the entire covenant in connection with the situation of the parties to it at the time it was made convinces that the intention was what the plain language expresses, that is, that the terms of it should be performed and not that the covenantor should only become liable for damages upon a violation and that he was not obligated to desist from competition with appellant. A somewhat similar situation and contention was appropriately and convincingly discussed in Hickey v. Brinkley, *supra,* as follows: "We are further of the opinion that the very purpose of this contract would be defeated if the person selling the business was allowed to pay the sum named in the bond as a penalty and then be at liberty to destroy the business which he sold and take away the good will of the vendee. The intention

of the parties was to guard against the property sold becoming valueless to the purchaser by reason of the seller again resuming business in that locality. It is not reasonable to suppose that the purchaser of the business intended that if the seller would pay him $500 he would be at liberty at any time to break his contract and enter into competition with him in the same business." See, also, Tarry v. Johnston, *supra;* Personal Finance Co. v. Hynes, *supra;* A. Finkenberg's Sons, Inc. v. Adest, 203 App. Div. 631, 197 N. Y. S. 246.

A contract which imposes partial restraint upon the exercise of a trade, business, or occupation is not unreasonable when it is ancillary to an actual transaction involving property, business, or employment made in good faith and is necessary or appropriate to afford fair protection to the one in whose favor the restriction is made. Such a contract will be respected and enforced. C. W. Swingle & Co. v. Reynolds, 140 Neb. 693, 1 N. W. 2d 307; Stanford Motor Co. v. Westman, 151 Neb. 850, 39 N. W. 2d 841. However the law does not look with favor upon restrictions against competition, and an agreement which limits the right of a person to engage in a business or occupation will be strictly construed and will not be extended by implication or construction beyond the fair or natural import of the language used. Courts are inclined to resolve doubts concerning violation of a covenant of this class in favor of the party upon whom the restraint is imposed. Ream v. Callahan, 136 F. 2d 194; Love v. Miami Laundry Co., 118 Fla. 137, 160 So. 32; Saddlery Hardware Mfg. Co. v. Mills, 68 N. H. 216, 44 A. 300, 73 Am. S. R. 569; Tarr v. Stearman, 264 Ill. 110, 105 N. E. 957; Streichen v. Fehleisen, 112 Iowa 612, 84 N. W. 715, 51 L. R. A. 412; Simmons v. Johnson (La. App.), 11 So. 2d 710; Schlossbach v. Francis-Smith, 3 N. J. Super. 368, 65 A. 2d 560; Arthur Murray Dance Studios v. Witter, 62 Ohio L. Abs. 17, 105 N. E. 2d 685; Annotation, L. R. A. 1918E 666; 36 Am. Jur., Monopolies, Combinations, etc., § 57, p. 537.

The charges of appellant that appellee organized and set up the Adams-Swanson Funeral Home; that he furnished money and credit for the establishment of it; that it was financed solely by his credit and money; that Swanson furnished no finances in the establishment of it; and that it was furnished for the purpose of appellee engaging in the undertaking business in violation of the contract with appellant constitute indispensable elements of the cause of action alleged by appellant. Evidence is lacking to support a finding of their truth. There is no evidence of any fact justifying the conclusion that appellee had anything to do with organizing or putting the partnership in business. Contrary to what appellant says, the fact appears without dispute that Swanson put $6,000 into the partnership and bound himself for the payment of one-half of the indebtedness or $10,750 secured on the real estate bought for and used as a place of business of the funeral home. There is no showing that the partnership was formed or that its property is used for the purpose of permitting appellee to violate his contract by setting up and establishing a prohibited business. There is no evidence that appellee financed the business in whole or in part. The fact that Gladys Adams borrowed money and appellee signed with her papers necessary to permit her to secure the money when the loans were made to her does not support the claim that appellee financed the partnership. If he had furnished financial assistance to his wife that would not have constituted setting up and establishing a new or competitive business within the provisions here under consideration. In Gallup Electric Light Co. v. Pacific Improvement Co., 16 N. M. 86, 113 P. 848, the court said: "Under a contract not to engage in business in competition with the purchaser of property, the party bound is not precluded from loaning money to others, even though they may use it to embark in business in competition with the purchaser." See, also, McKeighan Wachter Co. v. Swanson, 138 Wash. 682, 245 P. 10; Simmons v. Johnson,

supra; Sineath v. Katzis, 218 N. C. 740, 12 S. E. 2d 671; Annotation, 93 A. L. R. 139; 36 Am. Jur., Monopolies, Combinations, etc., § 73, p. 550.

It was lawful for Gladys Adams to use her name in organizing and engaging in the undertaking business as an individual or as part owner if she did it in good faith. She could identify herself as Gladys Adams or Mrs. Adams or simply as Adams. If by the use of her name she injured the business of appellant more than if she adopted some other name she committed no wrong. She or Swanson was not bound by any covenant not to commence or acquire a competitive business. § 42-203, R. R. S. 1943; Plattsmouth State Bank v. Bauer & Co., 133 Neb. 35, 274 N. W. 204; Fleckenstein Bros. Co. v. Fleckenstein, 66 N. J. Eq. 252, 57 A. 1025.

Owen v. Willis (Tex. Civ. App.), 20 S. W. 2d 338, concerned a contract by which Clyde Owen sold an undertaking business including physical assets and good will to Willis and the seller agreed not to engage in such business for a stated time in a described area and not to be employed directly or indirectly in a like business by any person during that time. Thereafter the wife of the seller was instrumental in opening a competitive business in the name of a brother of Clyde Owen. He employed the wife of Clyde Owen as an assistant in the conduct of the business. It was claimed by the purchaser that Clyde Owen was the real owner of the new business, and that it was commenced and operated as a fraud and a subterfuge. The court said: "Since Mrs. Owen was not a party to the contract between her husband and appellee, her employment by her brother-in-law is in no sense a violation of the contract unless the conduct of the business by Bill Owen and her employment as an assistant are shown to be a fraud and a subterfuge. No evidence was introduced sustaining the allegation of fraud * * *. She therefore had the right to accept personal employment from her brother-in-law, and an injunction should not be granted in the absence

of evidence sustaining the allegations in the bill."

The obligation of appellee was that he would not set up or establish a business competitive with appellant. This may not be construed as including or prohibiting voluntary, gratuitous services rendered by him to his wife in her similar business carried on in her name and that of another. The words set up and establish import a proprietary interest and right of control or right of management. Fleckenstein Bros. Co. v. Fleckenstein, *supra*. Appellee did not contract that he would not engage in, enter into, or have anything to do with an undertaking business in North Platte. He only bound himself not to set up or establish a competing business in that city.

In General Baking Co. v. Soles, 18 Del. Ch. 343, 162 A. 58, the court said: "Salesman's agreement not to 'accept employment' from competitive concern in same territory, held not to preclude engaging in competitive business as principal." The obligation of the salesman was that he would not accept employment from or for any competitive concern or product for 1 year after the termination of his services for General Baking Company. Within that time he sold the same class of products produced by a competitor of the General Baking Company, his former employer, to its customers on the route served by him when he was in its employment, and he solicited its customers generally to buy from him. He was then engaged in business for himself as proprietor. The question the court decided was whether his act in going into and conducting a business for himself constituted a breach of the covenant not to accept employment from or for a competitive concern or product. This language was used in deciding there was not a breach of the obligation of the contract: "If the contract in question prevented the defendant from engaging in the business directly or indirectly, it may be conceded without deciding that the injunction should issue. Such however is certainly not its express language. * * * This defendant

is not however engaged as an employee. The question here is whether the agreement does not by its language limit the restraint upon the defendant solely to his working as an employee for another. If so, there can be no justification for restraining him from acting as the proprietor of the business. Certainly it is competent for the parties to restrict their agreement to a prohibition that the former employee shall not act as employee for another, leaving him free to act on his own behalf as principal. In examining the contract with the view of ascertaining its meaning, I know of no rule of construction which would allow the court to conjure up a purpose to be served by the contract, and then, having imagined the purpose, twist the plain import of the language actually employed into serving that purpose * * *. What the complainant seeks to have the court do is to assume first, that the purpose of this agreement was to protect the complainant from all competitive conduct on the part of the defendant * * * and then hold that the language * * * expresses an intent as broad as the assumed purpose. This ignores the fact that the language used may have been expressly designed to protect the complainant from the competition of the defendant in only a restricted degree."

Railway Audit & Inspection Co. v. Pendleton, 175 La. 4, 142 So. 781, concerned an alleged breach of a provision that restrained defendant from engaging in a competitive line of business in a named territory for a stated time after he left the employ of plaintiff. The court made this observation: "Contracts such as the present should be strictly construed, since they have a tendency, at best, to interfere with one in earning a livelihood, even when they do not exceed legal bounds. There is a difference between entering into a line of business similar to another and in competition with it and accepting employment from a person or corporation conducting such business. Viewing the contract strictly, it does not prohibit plaintiff (defendant) from accepting

employment in a competing business as general manager, and therefore plaintiff has not the right to complain of defendant's act. May v. Johnson, 13 La. App. 521, 128 So. 540." See, also, Haley Grocery Co. v. Haley, 8 Wash. 75, 35 P. 595; Cool v. McDill, 38 Ind. App. 621, 78 N. E. 679; Annotation, 93 A. L. R. 125.

The words set up and establish are substantially synonymous and the ordinary meaning of them is to bring into being, to create, to originate, or to set up. They do not usually refer to something that already exists. 30 C. J. S., Establish, p. 1229, says this in reference to the word establish: "In its primary sense, it has been defined as meaning to bring into being, create, or originate; * * * to set up; but not to acquire something which has already been brought into existence." See, also, People ex rel. Gill v. Devine Realty Trust, 366 Ill. 418, 9 N. E. 2d 251; Commonwealth v. Cohen, 169 Pa. Super. 84, 82 A. 2d 325; Temple v. City of Petersburg, 182 Va. 418, 29 S. E. 2d 357; 15 Words and Phrases (Perm. ed.), p. 261.

The record in this case does not justify a finding that the covenant, the subject of this inquiry, is operative in the particular circumstances of the alleged disobedience of appellee.

The cross-appeal challenges the correctness of the action of the trial court in disallowing the objection of Wilson T. Adams, appellee, to the participation of the attorneys of appellant in the trial of this case because of a consultation of appellee with C. L. Baskins on February 6, 1950.

The showing in reference to the objection is that appellee consulted C. L. Baskins on that date in reference to the partnership contract between appellant and appellee. He told Mr. Baskins of the contentions between them concerning the rights of appellee because of the contract. It was present and was examined. It is not definitely disclosed what the matter in controversy was at that time except that Mr. Baskins dictated and there

was written on the last sheet of the contract an acknowledgement that on October 1, 1949, appellee had paid to appellant $3,492.40 on the agreed value of the undivided one-third interest of appellee in the business provided for in the contract, and that as of October 1, 1950, the parties to the contract would again make settlement of partnership matters under the contract and the amount of the interest of appellee would be evidenced by another writing attached to the contract. Any matter in issue in this case was not in any way involved in the consultation. Appellee paid Mr. Baskins for his services.

It is a rigid rule necessary to be strictly observed and religiously enforced that when an attorney has once been retained and received the confidence of a client, he may not accept and receive a retainer from or enter the service of another whose interest is adverse to his client in the same controversy or in a matter so closely related thereto as to be in fact a part thereof. It is an inherent virtue of the profession of law that its fidelity to its client can safely be assumed. Any member who proves false to this and places himself in a position to betray any information or facts obtained while employed on one side is guilty of the grossest breach of trust. The lawyer must in all things be true to the trust accepted when he was received into the profession or failing it he must leave the profession or be promptly separated from it. Zimmer v. Gudmundsen, 142 Neb. 260, 5 N. W. 2d 707; State ex rel. Nebraska State Bar Assn. v. Price, 144 Neb. 542, 13 N. W. 2d 714.

The fact that an attorney was incidentally connected with an adverse interest does not of itself disqualify him. He may act for a new client if his interest is not necessarily adverse to those of the former client, and if the attorney is not called upon to use or take advantage of the confidential communications of the former client for the benefit of the new one. The test of inconsistency is not whether the attorney has ever been re-

tained by the party against whom he proposes to appear, but whether the acceptance of a new retainer will make it necessary or convenient in advancing the cause of his new client to do anything which will injuriously affect his former client, and whether he will be obligated in the new relationship to use against his first client information received because of the former employment. An attorney is not barred from representing a subsequent client against a former client where the duties required of him do not conflict with those involved in the former employment. Musselman v. Barker, 26 Neb. 737, 42 N. W. 759; 5 Am. Jur., Attorneys at Law, § 66, p. 297; 7 C. J. S., Attorney and Client, § 48, p. 827; Annotation, 51 A. L. R. 1312; 1 Thornton on Attorneys at Law, § 175, p. 311, § 176, p. 314.

The judgment of the district court should be and it is affirmed. The cross-appeal should be and it is denied.

AFFIRMED.

JOSEPH E. STRAWN, APPELLEE, V. COUNTY OF SARPY, NEBRASKA, APPELLANT, SCHOOL DISTRICT NO. 1, SARPY COUNTY, NEBRASKA, ET AL., INTERVENERS-APPELLEES.

58 N. W. 2d 168

Filed April 10, 1953. No. 33292.

1. **Costs: Attorney and Client.** Only when provided for by statute can attorney fees be allowed and taxed as costs.
2. ———: ———. When provided for by statute the attorney fee is payable to the party the statute designates.
3. ———: ———. Where a statute provides in part that attorney fees equal to 10 percent of the amount found due in tax foreclosure actions shall be taxed as part of the costs in the action and apportioned equitably as other costs, such fees may be awarded to a county as plaintiff upon failure of attorneys representing the county by contract in tax foreclosure proceedings to file their claim with the county as provided for by section 23-135, R. S. 1943.
4. **Attorney and Client: Judgments.** Where attorney fees have been awarded to a county as indicated by syllabus No. 3 and an

attorney's claim thereto has been denied and his cause of action dismissed in accordance with a mandate of the Supreme Court, and thereafter interveners in the case file a motion to require the county treasurer to distribute such attorney fees as tax revenue to the subdivisions of government in the county, no such issue having been raised by the interveners until after judgment of dismissal, held, the trial court's order sustaining interveners' motion was erroneous and cannot be sustained.

5. **Dismissal and Nonsuit.** The general rule is that where a suit is dismissed, or a nonsuit ordered, it carries the parties and the entire cause of action out of court, and all further proceedings in the action are unauthorized, until the judgment of dismissal or nonsuit is vacated and the cause reinstated, except to render a judgment or decree for costs or to make such order or decree in the cause as may be necessary to effectuate the judgment terminating the cause, and except on appeal.

APPEAL from the district court for Sarpy County: STANLEY BARTOS, JUDGE. *Reversed and remanded with directions.*

Orville Entenman, for appellant.

William R. Patrick, for interveners-appellees.

Joseph E. Strawn, pro se.

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

MESSMORE, J.

This appeal arises from certain proceedings had in the case of Strawn v. County of Sarpy, 154 Neb. 844, 49 N. W. 2d 677. The action as it was tried in the district court was in five causes of action. The plaintiff Strawn sought to recover $6,510.93, which constituted one-half of the attorney fees claimed by him from Sarpy County by virtue of a contract entered into by the plaintiff and one Ralph J. Nickerson, practicing attorneys in Sarpy County, with the board of county commissioners of said county to conduct tax foreclosure proceedings and to receive as attorney fees 10 percent of the amount found due in such actions. The trial court denied

the claim. An appeal was taken to this court. This court held that county boards have exclusive original jurisdiction in the examination and allowance of claims against the county arising ex contractu; that the jurisdiction of the district court as to claims against a county arising on a contract was appellate only; and that a judgment of the district court entered in an original action in that court as to claims against a county for legal services rendered to the county was void for want of jurisdiction. The court further held that all questions raised in this case had been previously determined.

A brief résumé of a part of the litigation between the same parties might be appropriate at this point. In this connection we make reference to the case of County of Sarpy v. Gasper, 149 Neb. 51, 30 N. W. 2d 67. Joseph E. Strawn and the executrix of the estate of Ralph J. Nickerson, deceased, filed a petition of intervention in the cited case to which the County of Sarpy, plaintiff-appellee, and School District No. 1 of Sarpy County, and the City of Bellevue, Nebraska, interveners-appellees, demurred to the petition of intervention of Strawn and the executrix. The district court sustained these demurrers. Such interveners elected to stand on their petition. The district court dismissed the same. From this ruling an appeal was taken.

The contention of the interveners, Strawn and the executrix of the estate of Nickerson, on appeal in that case was that by reason of the contract entered into by Strawn and Nickerson with the board of county commissioners of Sarpy County and the finding and judgment of the district court, the 10 percent charged in each cause of action constituting attorney fees became their property and should be paid to them by the clerk of the district court; that the costs were not a part of the judgment and were subject to the order of the court; and that the judgment awarding attorney fees was res judicata.

The position of the appellees was that Sarpy County was a body politic and corporate; that it could only exercise such powers as were granted by statute, and could only act in such manner as by statute provided; that section 23-135, R. S. 1943, provided the exclusive method of payment of appellants for their services in the tax foreclosure actions; that appellants should have filed their claims for compensation with the county clerk for audit and allowance by the board of county commissioners; and that the district court had no jurisdiction to determine and allow fees to be paid special attorneys and, lacking that jurisdiction, the judgment allowing such fees was a nullity.

Section 77-2043, Comp. St. 1929, then in force, provided in part: "* * * shall award to the plaintiff an attorney's fee equal to ten per cent of the amount found due, which shall be taxed as part of the costs in the action and apportioned equitably as other costs."

This court held that the county board had original jurisdiction in the examination and allowance of claims against the county arising ex contractu; that the jurisdiction of the district court as to a claim arising on a contract was in the capacity of an appellate court; and that a judgment of the district court entered in an original action in that court as to a claim for legal services rendered to the county was void for want of jurisdiction, which is precisely the same holding as in the instant case. This court also held in the above-cited case that in this state attorney fees are allowed only in such cases as are provided for by statute. Higgins v. Case Threshing Machine Co., 95 Neb. 3, 144 N. W. 1037. When such attorney fees are allowed they can be awarded only as provided by statute, in this case to the plaintiff, Sarpy County.

In the instant case the interveners, School District No. 1 of Sarpy County, and the City of Bellevue, Nebraska, filed petitions in intervention claiming a present beneficial interest in the subject matter of the action. Inso-

far as the attorney fees in question are concerned, interveners pleaded the same were barred for failure of the claimants to file their claims for attorney fees in conformity with section 23-135, R. S. 1943. Each of the interveners prayed that the plaintiff's appeal and petition be dismissed and interveners recover their costs expended.

The interveners joined with the county in an answer to the third amended petition which contained five causes of action upon which the plaintiff sought to recover. The answer, in addition to denying generally the allegations of the third amended petition not admitted, interposed the defense of res judicata, and that the claim for attorney fees was barred for failure to comply with section 23-135, R. S. 1943. Sarpy County and the interveners prayed for dismissal of the appeal and of the plaintiff's petition, and to recover costs expended.

The trial court dismissed the appeal and plaintiff's petition. On December 27, 1951, mandate issued out of the Supreme Court wherein the judgment of the district court was affirmed in the instant case. On February 5, 1952, the district court entered judgment on the mandate dismissing the plaintiff's case at plaintiff's costs.

Thereafter, on or about June 5, 1952, School District No. 1 of Sarpy County, and the City of Bellevue, Nebraska, the interveners, filed a motion in the district court in the instant case to require the county treasurer of Sarpy County to distribute the proceeds, both principal and interest, of the tax foreclosure actions known as the Bellevue tax foreclosures, in his hands, to the several municipal subdivisions of government by, or for whom, said taxes were levied. Sarpy County filed objections to the effect that the district court was without jurisdiction to hear and determine the matter for the reason that the cause of action in the instant case was dismissed in accordance with the mandate of the Supreme Court. The county further objected to the jurisdiction of the district court for the reason that the funds

referred to in said motion were not a part of, or the proper subject matter of the action therein, said action being an appeal of a claim filed by the plaintiff against the County of Sarpy; for the further reason that the county treasurer of Sarpy County was not a party to the action and was not made a party to the motion filed by the interveners; for the further reason that the law provided that the funds referred to were taxed as costs and awarded to the defendant, Sarpy County, in the individual tax foreclosure actions; and that the county treasurer of Sarpy County had distributed the proceeds to the several municipal subdivisions as required by law.

The district court sustained the interveners' motion. The board of county commissioners of Sarpy County by resolution authorized the county attorney to appeal from this order. Motion for new trial was filed by Sarpy County. Thereafter it requested leave to introduce evidence. This request was denied for the reason that no issue of fact was presented in the original motion of the interveners. Leave was then granted the county to refile its motion for new trial, which was overruled and Sarpy County perfected appeal to this court.

The appellant, County of Sarpy, sets forth several assignments of error which may be summarized as follows: That the district court erred in determining that the 10 percent constituting the attorney fees taxed as costs in the tax foreclosure actions could be awarded to the governmental subdivisions; and that the order sustaining the motion of the interveners was contrary to law.

The instant case involved the right of Strawn to recover attorney fees from Sarpy County based on a contract with the county, and a claim against the county seeking payment of the fees. The interveners were not parties to the contract. As shown by the pleadings, they resisted the payment of the attorney fees for the same legal reasons as did the county, and joined with the

county in its defense against paying the same. The pleadings of the interveners fail to raise the issue that the attorney fees here in question should be distributed to the subdivisions of government as tax revenue, as now contended for by them as heretofore indicated. The issue was not in this case.

The following sets forth the manner of distribution of the proceeds in tax foreclosure actions.

Section 77-2039, C. S. Supp., 1939, provided in part: "From the proceeds of the sale of any separate parcel the costs charged thereto shall first be paid. The balance thereof, or so much as is necessary, shall be paid to the governmental subdivisions entitled thereto to discharge of their claims. If a surplus remains after satisfying all costs and taxes against any particular parcel it shall be paid by the clerk of the court to the person entitled thereto. If the proceeds are insufficient to pay the costs and taxes, the amount remaining shall be pro-rated among the governmental subdivisions."

In the case of County of Sarpy v. Gasper, *supra*, the 10 percent attorney fees taxed as costs in the tax foreclosure actions were awarded to Sarpy County. Therefore, insofar as the attorney fees are concerned, there has been an adjudication the effect of which is that they are not considered as tax revenue for the purpose of distribution to the subdivisions of government as contended for by the interveners.

The following is also applicable. The general rule is that where a suit is dismissed, or a nonsuit ordered, it carries the parties and the entire cause of action out of court, and all further proceedings in the action are unauthorized, until the judgment of dismissal or nonsuit is vacated and the cause reinstated, except to render a judgment or decree for costs or to make such order or decree in the cause as may be necessary to effectuate the judgment terminating the cause, and except on appeal. See, 27 C. J. S., Dismissal and Nonsuit, § 77, p. 261; Schroeder v. Bartlett, 129 Neb. 645, 262 N. W. 447.

We conclude the district court erred in sustaining the interveners' motion and in entering an order directing distribution of the attorney fees taxed as costs in the tax foreclosure actions to the subdivisions of government as tax revenue.

For the reasons given herein, the judgment is reversed and the cause remanded with directions to enter judgment in conformity with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

JOHN J. RUDOLF ET AL., APPELLEES, V. J. M. ATKINSON, FIRST REAL NAME UNKNOWN, APPELLANT.
58 N. W. 2d 216

Filed April 24, 1953. No. 33242.

1. **Waters.** An owner of land has the right, in the interest of good husbandry, to drain ponds or basins thereon of a temporary character, 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, provided this is done in a reasonable and careful manner and without negligence.
2. ———. By virtue of section 31-201, R. R. S. 1943, an owner of land may, without liability in damages, drain the same in the general course of natural drainage by constructing and maintaining in a reasonable and proper manner, and wholly on his own land, an open ditch or tile drain, discharging a reasonable quantity of water therefrom into a natural watercourse upon his own land or into a natural drainway thereon, whereby such water may be carried into some natural watercourse.
3. ———. Where water is impounded upon land by natural conditions whereby a pond is formed, the owner of such land has no lawful right to remove an impediment to its flowage and thereby cause such water to flow upon the land of another to his damage.
4. **Injunctions: Waters.** For such an injury injunction is the proper remedy, and 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.

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

Hugh Stuart, for appellant.

Cook & Ross, for appellees.

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

WENKE, J.

John J. Rudolf and Alice L. Rudolf, husband and wife, brought this action in the district court for Dawson County against J. M. Atkinson. The purpose of the action is to compel the defendant to fill a ditch that he has constructed on his land; to permanently enjoin him from constructing or maintaining a ditch or doing anything else on his land that will cause the water from a large pond located thereon to drain onto plaintiffs' land; and to recover for damages which their crops and land have suffered as a result of this ditch flowing the water from this pond thereon. The trial court permanently enjoined defendant from maintaining the ditch he had constructed on his land and ordered him to fill it. It also awarded plaintiffs a judgment for damages in the amount of $7.50. After his motion for new trial had been overruled, the defendant perfected this appeal.

Based on the facts adduced and the law applicable thereto appellant contends the trial court was in error in holding as it did.

Appellees are the owners and in possession of the southeast quarter of Section 32, Township 9 North, Range 19 West of the 6th P. M., in Dawson County, Nebraska, having purchased the same in January 1949, and moved thereon shortly thereafter. Appellant is the owner of the southwest quarter of the same section, having purchased it and moved thereon in March 1950.

These lands lie in the valley of the Platte River, which is located about three-quarters of a mile south of the south side of appellees' land. The general drainage in this area is toward the southeast. Located on the quarter section just south of appellees' land is the Elm Creek irrigation ditch. This irrigation ditch runs across this quarter from the southwest to the northeast, being only a short distance from the southeast corner of appellees' land as it passes that point. There is a county road along the south edge of Section 32, which will hereinafter be referred to as the road. The buildings on appellees' land are located near the south edge and at a point just west of the center thereof. There is a schoolhouse located on appellant's land. It is near the south edge thereof at a point about 1,000 feet west of the southeast corner.

There is a low area located in the southeast part of appellees' land which we will refer to as a lagoon. The lagoon is situated in a pasture. Surface waters falling on the land in this immediate area drain into this lagoon, although the extent of the area which it drains is not shown. When sufficient surface waters have collected in this lagoon to cause it to overflow it drains into the road ditch running along the north side of the road and from there into and through a 2-foot steel tube culvert under the road. This culvert is located at a point somewhere between 100 and 200 yards west of the southeast corner of appellees' land. After this overflow water passes through the culvert it flows toward the south for a distance of about 100 yards in a shallow swale or slight depression until it reaches the Elm Creek irrigation ditch, which we will herein refer to as the ditch. When this ditch was rebuilt in 1926 there was placed thereunder at this point an 18-inch tube to carry the water. This 18-inch tube apparently became clogged or plugged and was replaced in 1950 with a 24-inch tube. The latter was so placed that the water has to rise to a considerable height before it can flow into and through

it. When the overflow water that reached the ditch resulted from an average rain the 18-inch tube would ordinarily carry it but if it resulted from a heavy or excessive rain it would not, the result being that it would cause this overflow to back up onto appellees' pasture located in the southeast part of their land, this underpass being the only outlet for this water. After the water passed under the ditch it drained to the east into a wet or swampy area referred to as a slough or swale. Just what eventually happened to the water or where it flowed to is not shown as the evidence does not show that it ever reached the Platte River or any other stream. Ted Mattson, who has, since 1939, owned and lived on the quarter section just south of appellees' land constructed a ditch on his land south from the point where this water flows under the ditch to the Platte River. This ditch now apparently carries all the water flowing under the Elm Creek ditch. Just when this latter ditch was constructed is not shown but it was apparently done in recent years.

There is another low area located in the southwest part of appellees' land, which we will refer to as a slough. This slough covered an area of about 4.5 acres although water did not stand therein at all times. The upper or northwest corner of this slough extends over onto appellant's land. This slough normally receives the surface water draining from somewhere between 30 and 60 acres of appellees' and appellant's lands. The area draining into the slough is in the form of an elongated horseshoe, being surrounded by a ridge of higher ground. This ridge extends in a north-northwest direction from a point in the road just west of appellees' farm buildings to a point on appellees' land somewhat north of the slough, then generally to the west onto appellant's land until it reaches a point some 400 to 500 feet west from the east edge thereof, then it runs south-southwest to a point just east of the schoolhouse. The amount of water in the slough varies but when suf-

ficient has collected therein from rains or other sources it overflows in a slight depression or swale toward the road. The slough overflows when the water therein gets about a foot deep. Some 50 years ago the road had not been graded and then, when the slough filled up and overflowed, it would run across the road and onto the land immediately to the south. Its flow across this land was toward the south and southeast until it flowed into an irrigation canal. This canal was situated in about the same location as the present ditch. The water draining across this land flowed in a slight depression or swale. Later, when the road was graded, a culvert was put in and the water thereafter flowed through this culvert instead of over the road. The date when this culvert was put in is not shown. In either the fall of 1931 or the spring of 1932 this road was again graded and at that time the culvert was either taken out or covered up. To take care of any overflow water coming from this slough Ray Hughey, then owner of this land, cleaned out and deepened the ditch running along the north side of the road. He did so with permission of the county commissioners of Dawson County. After this ditch was deepened the water overflowing from the slough would then flow east therein until it reached the culvert in the road, which culvert has already been referred to. After it reached this point the water would then either flow under the culvert and under the ditch or back up onto the pasture in the southeast part of appellees' land, depending upon whether or not the flow was more than the underpass could carry.

There is located near the south center of the north half of appellant's land a large shallow pond in which surface waters collect from a considerable area to the west and northwest thereof, although the extent of the area draining into this pond is not shown. This pond had no natural outlet but, when filled to a certain point, it would overflow. It would first overflow to the south

and west into a natural watercourse which flows across the southwest part of appellant's land. This watercourse flows in a southeasterly direction passing under a bridge located at a point in the road some 500 feet west of the schoolhouse. A former owner of this land had sought to drain the pond into this watercourse by constructing a ditch but, because the bottom of this watercourse is higher than the bottom of the pond, was not able to do so, although considerable of the water collecting in the pond would drain out in this manner. The water collecting in the pond, after reaching a certain height, would also overflow to the north and east into a natural watercourse running from northwest to southeast across the northeast quarter of Section 32. Appellant, in the spring of 1950, attempted to drain the pond into this watercourse but, because the bottom of the pond was lower than the bottom of this watercourse, was not able to do so. When the rain is heavy enough, as it was in 1947 and 1949, the overflow from the pond will go in both of these directions and also over the ridge to the southeast. When it does so the water flowing over this ridge empties into the slough.

On July 1, 1950, appellant cut a ditch about 600 feet long, 2 to 3 feet deep, and 2 feet wide across the ridge which normally prevented the waters collecting in the pond from flowing into the slough. The east end of this ditch is about 200 feet from the east edge of appellant's land. The water flowing through this ditch empties out onto appellant's land and then flows into the slough where it extends onto his land. Since the bottom of the slough is lower than the bottom of the pond this ditch completely drains the pond. Appellant placed a 24-inch steel tube, with a control gate, in this ditch. This culvert was placed in the ditch to enable appellant to cross it with an irrigation canal.

The result of opening this ditch was to permit a flow of all the water collecting in the pond into the slough. This would cause the slough to overflow and result in the

overflow draining into the road ditch and backing up onto the southeast part of appellees' land as the water coming down the ditch would be more than the underpass under the ditch could carry. To prevent this flooding of the pasture on the southeast part of their land appellees, with permission of the county commissioners of Dawson County, put a plug in the road ditch at a point just west of their farm buildings. It is located where the high ground or ridge comes down to meet the road. This confined the water flowing into the slough to the southwest part of appellees' land and forced it to seek an outlet to the south. At about the time appellant put in this ditch he also put in a 24-inch steel tube under the road just east of the southwest corner of appellees' land at a point where it would empty into the ditch located along the east side of Mattson's private driveway. This private driveway is located on the extreme west side of his land. This culvert is placed at a point where the ground is higher than that of appellees' land and, as a result, the overflow does not pass on south through this culvert until there has been a considerable backing up of water on appellees' land. The water did back up thereon until it covered about 14 acres. After all that would do so had drained through this culvert there was still water standing on about 10 acres. As of September 5, 1950, this water still covered about 7.7 acres or 3.2 acres more than the normal area covered by the slough. The balance had evaporated or seeped away. It is this condition that appellees seek to have corrected.

"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, and provided that this is done in a reasonable and careful manner and without negligence." Pospisil v. Jessen, 153 Neb. 346, 44 N. W. 2d 600. See, also, Aldritt v. Fleischauer, 74 Neb. 66, 103 N. W. 1084, 70 L. R. A. 301; Arthur v. Glover, 82 Neb. 528, 118 N. W. 111; Skolil v. Kokes, 151 Neb. 392, 37 N. W. 2d 616.

"By virtue of section 31-201, R. S. 1943, an owner of land may, without liability in damages, drain the same in the general course of natural drainage by constructing and maintaining in a reasonable and proper manner, and wholly on his own land, an open ditch or tile drain, discharging a reasonable quantity of water therefrom into a natural watercourse upon his own land or into a natural drainway thereon, whereby such water may be carried into some natural watercourse." Skolil v. Kokes, *supra.* See, also, Halligan v. Elander, 147 Neb. 709, 25 N. W. 2d 13.

"Where water is impounded upon land by natural conditions whereby a pond is formed, the owner of such land has no lawful right to remove an impediment to its flowage and thereby cause such water to flow upon the land of another to his damage." Skolil v. Kokes, *supra.*

Applying these principles to the facts of this case, which we have fully set forth, we find appellant did not have the right to do what he did and the court was correct in so finding and then entering the order that it did. As stated in Skolil v. Kokes, *supra:* "For such an injury injunction is the proper remedy, and 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."

The small amount allowed for damages is fully supported by the evidence adduced relating thereto.

For the reasons stated we affirm the order and judgment of the trial court.

AFFIRMED.

AGNES T. BUDDE ET AL., APPELLEES, V. RAY ANDERSON, ALSO KNOWN AS RAY A. ANDERSON, APPELLANT, IMPLEADED WITH JOHN R. CHALOUD ET AL., APPELLEES.

58 N. W. 2d 204

Filed April 24, 1953. No. 33274.

Appeal and Error: Equity. In an action in equity it is the duty of this court to try the case de novo and reach an independent conclusion as to what findings are required under the pleadings and evidence, however, where the evidence 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.

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

Shackelford, Spittler & Emmert, for appellant.

Paul J. Garrotto and *James A. Nanfito,* for appellees Budde.

John C. Mullen, for appellee Chaloud.

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

YEAGER, J.

This is an action by Agnes T. Budde and Richard H. Budde, husband and wife, plaintiffs, against Ray Anderson, also known as Ray A. Anderson, John R. Chaloud, Frank Haney, Jr., Harold Jespersen, Haney-Jespersen, Inc., a corporation, and G. C. Hall, first and real name unknown, defendants, to quiet title in plaintiffs to the west 15.9 feet of Lot 6 and all of Lot 7 in Block 8 in Gramercy Park Addition to the City of Omaha, Doug-

las County, Nebraska. The defendants Chaloud and Anderson filed answers but the other defendants did not. Further reference herein to the defendants not answering is not required. John R. Chaloud died September 6, 1952, and the action as to him was revived in the name of Delmer L. Chaloud, executor, on December 20, 1952.

A trial was had to the court and a decree was rendered quieting title in the plaintiffs as prayed. The defendant Anderson filed a motion for new trial which was overruled. From the decree and the order overruling the motion for new trial the defendant Anderson has appealed. The plaintiffs and the defendant Chaloud are appellees herein. Hereinafter the plaintiffs will be referred to as plaintiffs; Anderson as appellant; and the appellee Chaloud by name.

By their petition the plaintiffs alleged that they purchased the real estate described from Chaloud on March 26, 1946, and received a warranty deed which was duly recorded; that the appellant claimed some interest in the real estate by virtue of a lease and option to purchase from Chaloud; but that there was no such lease or option.

To the petition the appellant filed a general denial. He did not pray for any affirmative relief.

Chaloud filed an answer in which he substantially admitted the allegations of plaintiffs' petition. In addition thereto he specifically denied that he ever gave the appellant an option to purchase the real estate. He prayed for no affirmative relief.

The question for first consideration is that of whether or not there was in existence a valid option. That matter was given due consideration by the district court and there it was specifically determined that no valid option existed. That determination is of course not binding on this court. This being a suit in equity it is the duty of this court to try the case de novo and reach an independent conclusion as to what findings are re-

quired under the pleadings and evidence, however, where the evidence 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. § 25-1925, R. R. S. 1943; Kear v. Hausmann, 152 Neb. 512, 41 N. W. 2d 850; Cain v. Killian, *ante* p. 132, 54 N. W. 2d 368.

There is in evidence an instrument claimed by the appellant to have been signed by Chaloud by the terms of which the appellant was granted an option to purchase the real estate. The execution of this instrument is denied by Chaloud and the plaintiffs.

On October 28, 1931, Chaloud leased this real estate and other real estate immediately to the east to appellant for a term of 10 years. This lease of course expired on October 28, 1941.

The questioned option was purportedly executed on September 3, 1941, which was before the expiration of the 10-year lease. It is as follows:

"LEASE RENEWAL AGREEMENT WITH OPTION TO BUY.

"It is mutually understood and agreed between John Chaloud, his heirs, and assigns (Owners of lots 5. 6 and 7 of block 8 Gramercy Park addition to the City of Omaha, County of Douglas, State of Nebraska.) and Ray Anderson, his heirs and assigns that lease agreement entered into on the 28th day of October, 1931 shall be renewed for another equal term of time and for as manny future terms of time that xxxx Ray Anderson, his heirs, and assigns shall wish to have the same in force and effect. It is further agreed that Ray Anderson, his heirs and assigns shall have the option of buying all of lots 5, 6 and 7 of Block 8 Gramercy Park addition to the City of Omaha, County of Douglas, State of Nebraska at any time for the sum of $10,000.

Dated: September 3rd, 1941. Signed: J. R. Chaloud"

It is to be observed that this instrument has been

neither witnessed nor acknowledged.

The appellant testified that the instrument was drawn by him personally; that he typed it in duplicate in the presence of Chaloud who signed this copy; that the other copy was not signed by Chaloud; and that appellant did not sign the other copy on the line for signature but at another place thereon he accepted it in writing and delivered it to Chaloud.

Chaloud does not deny that the handwriting on the instrument is his but he says that he never knowingly or intentionally signed the completed instrument.

The contention of plaintiffs and Chaloud in this connection is that the instrument as presented was written after the signature was appended and therefore amounts to a forgery. This of course is denied by appellant.

No fact or circumstance is disclosed in the evidence except the bare fact of the signature on the instrument and the testimony of appellant to discredit the testimony of Chaloud.

On the other hand there is much in the record to cast a shadow upon the veracity of the appellant. In 1931 when the lease was drawn Chaloud insisted that it be drawn by a lawyer. Appellant had it so drawn. It was acknowledged. Is it reasonable to assume that Chaloud at this time would have been willing to enter into this larger engagement with this lack of formality and legal guidance?

There is evidence directly and by inference that appellant after 1941 occupied certain of this property not under a written lease but under a month to month tenancy. In this connection it should be pointed out that appellant never did occupy all of the property. Appellant gave testimony as to a discussion with Chaloud regarding the rate of rent he was paying for the portion occupied by him as compared with the rate Chaloud exacted from other tenants. This of course is inconsistent with the claim that he was lessee of the entire property.

Then there is the circumstance that though the alleged option was taken in September 1941 no legal effort had been made to exercise it even as late as the time of trial in this case. It is true that appellant by letter to plaintiffs stated that he was exercising his option to purchase that portion of the real estate described in the so-called option which is the subject of this action and he tendered a check in the amount of $727.27 which was refused. He proposed with the tender conditions not included in the so-called option which were also refused. He however has never unconditionally tendered the purchase price of $10,000. This record fails to disclose that any kind or character of demand has been made upon Chaloud, the other alleged contracting party, for performance under the option. Though Chaloud is a party to this action and the legal existence of the instrument is the basis of the controversy here the appellant seeks no affirmative relief in connection therewith either against the plaintiffs or Chaloud.

These circumstances are discussed here not for the purpose of determining, if appellant had a valid option, whether or not he has taken the proper and necessary steps to preserve and protect it, but for the bearing which they have upon the credence to be given the testimony that the alleged option is a valid instrument. Is it not reasonable to infer that if appellant sincerely considered this a valid instrument he would have been willing to submit that issue and all of his right thereunder for determination in this case? This, it is apparent, he has been unwilling to do.

An examination of the instrument itself discloses at least one matter of considerable significance. Under the signature appears a line evidently made by the typewriter. Some portions of the signature extend below this line. An expert in the examination of questioned documents gave testimony that the line was placed on the document after the signature since the line is over and not under those portions of the letters extending

beneath it. An expert called by appellant testified to the contrary. Our examination convinces us that the testimony in behalf of plaintiffs in this respect is entitled to greater weight than that in opposition thereto.

A reasonable inference to be drawn from this is that the typewritten portion of the instrument was placed thereon after the signature of J. R. Chaloud had been written thereon. If this is true then the instrument is fraudulent and a forgery.

Taking into consideration all of the evidence and the reasonable inferences to be drawn therefrom we conclude, as did the district court, that it has been shown preponderantly that the instrument whereby appellant claims a renewal lease and option to purchase the real estate in question is a nullity and of no force and effect.

This conclusion renders unnecessary a consideration of any other questions raised by the appeal.

The decree of the district court is affirmed.

AFFIRMED.

CAROLINE ANDREWS, APPELLEE, V. CHARLES H. HALL ET AL., APPELLEES, IMPLEADED WITH HILDA B. ROBINSON, APPELLANT.

58 N. W. 2d 201

Filed April 24, 1953. No. 33276.

1. Estates. Where an estate in fee simple is devised, an attempt by the testator to prevent alienation is ineffective and void for the reason that it is repugnant to the estate thus created.
2. Statutes. The intent statute, section 76-205, R. R. S. 1943, relates only to rules of construction and does not have the effect of enlarging, limiting, or modifying any rule of substantive law that existed at the time of its passage or that has thereafter been created.
3. Estates. The rule permitting reasonable restrictions on alienation of an estate in fee simple, as announced in Peters v. Northwestern Mutual Life Ins. Co., 119 Neb. 161, 227 N. W. 917, 67 A. L. R. 1311, is hereby disapproved and the case overruled.

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

Ernest L. Reeker and *R. J. Shurtleff,* for appellant.

F. J. Schroeder, for appellee Andrews.

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

CARTER, J.

This is a suit for the partition of real estate devised to the plaintiff by her father, N. J. Hall. The appellant, Hilda B. Robinson, is the widow of Frank B. Hall, a son of the testator, N. J. Hall. The only question for determination is whether or not Frank B. Hall, who was devised a one-ninth interest in the real estate here involved, forfeited such interest when he attempted to sell, mortgage, and dispose of his interest in such real estate contrary to the provisions of the will of his father, N. J. Hall. The trial court held that Frank B. Hall had forfeited the interest in the real estate devised to him under the will of his father, N. J. Hall, and consequently that the appellant, the former wife of Frank B. Hall, acquired no interest therein under a deed from her husband. From a decree so holding, Hilda B. Robinson appeals.

The record shows that N. J. Hall died testate on January 28, 1930. By his will the real estate here involved could not be sold during the life of his wife, Minta A. Hall, the owner of the life estate. The will then provided: "After the death of my wife Minta A. Hall I wish all of my property both personal and real estate devided (divided) share and share alike with my children, with the following understanding that should any of my children during the life of my wife Minta A. Hall attempt to break this will or change the terms stated therein or attempt to sell, mortgage or dispose of their interest in my estate before the death of my wife Minta

A. Hall, it is my will that such heir shall forfeit all of his or her share except ten dollars, and that the balance of their share shall be divided share and share alike with the other children."

The answer discloses that Frank B. Hall, during his lifetime and prior to the death of Minta A. Hall, widow of the testator, conveyed his interest in the real estate to his wife, Hilda B. Hall, now Hilda B. Robinson, the appellant. It is the contention of appellant that the provision of the will herein quoted devised an undivided one-ninth interest in and to the real estate involved, in fee simple absolute, which interest vested in said Frank B. Hall upon the death of his father, subject to the life estate of his mother. It is then urged that the restriction imposed by the will against selling, mortgaging, or disposing of such interest in the real estate before the death of testator's widow, Minta A. Hall, is invalid and ineffectual for that purpose, and null, void, and repugnant to the fee simple estate devised.

The widow of the testator had a life estate in the property here involved. The will contained a general provision to the effect that none of the real estate devised to testator's children could be sold during the lifetime of the owner of the life estate. In view of the specific restrictions against alienation directed to his children in the portion of the will hereinbefore quoted, we assume that testator intended this general provision to restrict the partition of the real estate subject to the life tenancy of testator's widow. If this assumption is not the correct one, the restraint against alienation therein imposed would be subject to the same rules of law as those set forth heretofore in the quoted provision of the will. We are not here concerned with provisions intended to preserve the life estate of the widow. The sole question is the validity of the restriction against selling, mortgaging, or disposing of the fee simple estate granted by the testator to his children.

The intent of the testator is clear in the present case.

He gave a life estate to his widow and the remainder in fee simple to his children, share and share alike. It is clear, also, that testator intended to restrict the alienation of the vested remainders he had devised to his children. The question is whether or not his plainly expressed intent against alienation can properly be given effect under controlling rules of law.

The appellee contends that the intent of the testator must be ascertained from the four corners of the will and, when once ascertained, it must be given effect under the intent statute, section 76-205, R. R. S. 1943. As a general proposition the foregoing states the correct rule. We reiterate, however, that this intent statute does not have the effect of changing substantive law and is, in fact, declaratory of a rule of construction long adopted by the courts. We have held that it relates only to rules of construction and does not enlarge or limit, or in any way modify, any rule of substantive law that existed at the time of its passage or that thereafter has been created. Stuehm v. Mikulski, 139 Neb. 374, 297 N. W. 595, 137 A. L. R. 327; Majerus v. Santo, 143 Neb. 774, 10 N. W. 2d 608. We adhere to these holdings.

The children of the testator were devised a fee simple title to the remainder. It was alienable and devisable by the remaindermen, unless the restriction in question prevents. The will of the testator was effective at the death of the testator and it devised the entire interest of the testator to his wife and children. It is the general rule that a grant or devise of real estate to a designated person in fee simple, with provisions therein that are inconsistent or repugnant thereto such as a restriction against the power to sell, mortgage, or otherwise encumber, conveys an absolute fee and such restrictions are void. Watson v. Dalton, on rehearing, 146 Neb. 86, 20 N. W. 2d 610; State Bank of Jansen v. Thiessen, 137 Neb. 426, 289 N. W. 791. One of the primary incidents of ownership of property in fee simple is the right to convey or encumber it. It is the general rule that a

testator may not create a fee simple estate to vest at his death and at the same time restrict alienation thereof. Restatement, Property, § 406, subd. e, p. 2397.

Appellee cites the case of Peters v. Northwestern Mutual Life Ins. Co., 119 Neb. 161, 227 N. W. 917, 67 A. L. R. 1311. There can be no question that it supports the position taken by appellee. The rule therein cited does not conform to the general rule applicable to restrictions upon alienation of fee simple estates. We do not agree that there has been a judicial relaxation of rules governing the creation and vesting of fee simple estates. The validity or extent of one's title to real estate ought not to rest upon considerations of reasonableness in the imposing of restrictions. Such a relaxation by judicial interpretation can only bring confusion where certainty ought to exist. We think the case of Peters v. Northwestern Mutual Life Ins. Co., *supra*, is unsound in its reasoning on this question and that it should be overruled. The general rule that restrictions against alienation of real estate vested in fee simple are against public policy and void is a rule of substantive law which remains unaffected by the intent statute. It is a rule to be applied in all cases falling within it.

We do not say that a testator may not create a vested fee simple estate subject to a condition subsequent, or a determinable or defeasible fee. What we do say is that a restriction against alienation of a vested fee simple estate is not any one of these, nor, since it is void, can it be used as the sole basis for the creation of any of these estates. A restraint on alienation in the form of a condition subsequent, forfeiting or terminating the fee simple estate, or providing for a limitation over upon breach of the condition, is void. 41 Am. Jur., Perpetuities and Restraints on Alienation, § 70, p. 111; 31 C. J. S., Estates, § 8, p. 20. The right of alienation is inherent in the vested fee simple estate and it arises by virtue of the fact that such an estate is created. The nature of estates in fee simple determinable, estates in fee simple

subject to a condition subsequent, and estates in fee simple defeasible upon a condition subsequent, are fully discussed in Ohm v. Clear Creek Drainage Dist., 153 Neb. 428, 45 N. W. 2d 117. A perusal of that case will demonstrate that a restriction against alienation of a vested estate in fee simple is no part of, nor incidental to, any one of these estates. Consequently, cases dealing with the creation of recognized common-law estates have no application to a restriction against alienation of a vested fee simple estate. The rules announced in Sandberg v. Heirs of Champlin, 152 Neb. 161, 40 N. W. 2d 411, Watson v. Dalton, *supra,* State Bank of Jansen v. Thiessen, *supra,* and Myers v. Myers, 109 Neb. 230, 190 N. W. 491, control in the present case and require a holding that Frank B. Hall was the owner in fee simple of a one-ninth interest in the real estate in question and that the purported restriction against alienation contained in the will is against public policy and void. This being so, the conveyance made by him to Hilda B. Robinson was valid and operated to convey his interest in the real estate to her.

The judgment of the district court is reversed and the cause remanded with directions to enter a decree in conformity with the holdings of this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

IN RE REVIEW OF THE ASSESSMENT OF PERSONAL PROPERTY OF T. W. JONES GRAIN CO. STATE OF NEBRASKA, APPELLANT, V. T. W. JONES GRAIN CO., APPELLEE.

58 N. W. 2d 212

Filed April 24, 1953. No. 33286.

1. **Sales.** A grain broker in Nebraska is anyone engaged in buying and selling grain for profit.
2. **Taxation.** The law of the state intends that all property therein of every nature not expressly exempt therefrom shall be in some

manner valued for taxation and that it bear its share of the public burden.

3. ———. The law requires that the tangible property of a grain broker be returned for taxation and that it be assessed and taxed in precisely the same manner as like property employed in other ways.

4. ———. A grain broker in this state is 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.

5. ———. The words real estate and other tangible property as used in section 77-1223, R. R. S. 1943, mean all tangible property including real estate used in the business of the grain broker.

6. ———. A grain broker should return for taxation all property belonging to or used in the business including real estate and grain on hand. He should ascertain, in the manner provided in section 77-1224, R. R. S. 1943, if the average capital invested in the business during the preceding year was greater than the value of the tangible property returned separately for taxation, and if it was greater then he should add to his statement of property for taxation such excess of the average capital invested.

7. **Commerce: Taxation.** The denial to the states of the power to tax property actually moving in interstate commerce rests upon the supremacy of the federal power to regulate commerce, and its postulate is necessary freedom of commerce from the burden of local taxation.

8. ———: ———. Goods do not cease to be part of the general mass of property in the state, subject as such to its jurisdiction and to taxation in the usual way, until they have been shipped or entered with a common carrier for transportation to another state or have started upon such transportation in a continuous route or journey.

9. ———: ———. The fact that property is intended or destined for removal from a state into another state does not impress it with the character of interstate commerce so as to render it immune from state taxation by virtue of the operation of the commerce clause of the federal Constitution.

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

Clarence S. Beck, Attorney General, and *Dean G. Kratz,* for appellant.

Charles M. Bosley, for appellee.

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

BOSLAUGH, J.

This appeal contests the accuracy of the judgment of the district court approving the return of personal property for taxation made in 1951 by appellee.

Appellee was engaged in buying and selling grain for profit. Its place of business was in Trenton and it owned and operated a grain elevator. Appellee had in the elevator about 20,000 bushels of wheat on February 2, 1951, and it on that date by contract in writing obligated itself to sell to Klecan Grain Company, Kansas City, Missouri, 10 capacity boxcars of No. 1 hard wheat of stated grades and specified prices to be delivered within 60 days to the purchaser f. o. b. at Kansas City, Missouri. The contract contained these conditions: That the cars should be loaded to the capacity required by the railroad; that delivery of the grain in satisfaction of the contract would not be complete until it reached destination and was inspected and weighed at the expense of the seller; and that if the grain shipped did not comply with the terms of the contract it would be, if fit for use, applied on the contract at the market difference on the day of inspection, but if unfit for use it would be sold for the account of the shipper and no credit would be given for it on the contract.

Appellee during the period from the date of the contract to and including March 6, 1951, shipped to the purchaser 5 cars of the wheat in the elevator when the contract was made. The balance of the wheat, the exact amount of which cannot be ascertained from the record but is referred to therein as "about" or "approximately" 10,000 bushels, was in the elevator in Trenton on March 10, 1951, the tax date. § 77-1201, R. R. S. 1943. The seller had not been able to secure railroad cars in which to transport it to the purchaser though he had made all

possible efforts to do so. This wheat was shipped to the purchaser in Kansas City commencing on March 12, and ending on March 22, 1951. The grain tendered by appellee to the purchaser in fulfillment of the contract complied with the requirements of it and was accepted by the purchaser with that effect.

The wheat in the elevator on March 10, 1951, and thereafter delivered to the purchaser was not included in the 1951 amended personal property schedule made by appellee.

Appellee at the time important to this controversy was a grain broker. § 77-1222, R. R. S. 1943. The law contemplates that all property in the state of every nature, not expressly exempt therefrom, shall be in some manner valued for taxation and be required to bear its share of the public burden. Art. VIII, § 1, Constitution of Nebraska; § 77-201, R. R. S. 1943. This requires that the tangible property of a grain broker be returned for taxation and that it be assessed in precisely the same manner as like property employed in other ways is returned and taxed. In addition thereto a grain broker is 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." § 77-1223, R. R. S. 1943. The words "real estate and other tangible property" as used in the statute obviously mean all other tangible property including real estate. Any excess of the average total investment is required to be separately listed and taxed at the same rate as the tangible property. § 77-1224, R. R. S. 1943.

Central Granaries Co. v. Lancaster County, 77 Neb. 319, 113 N. W. 199, on rehearing 77 Neb. 327, 113 N. W. 543, determined a situation in which a grain broker omitted from its statement of property for taxation $10,000 worth of grain in its elevator. The assessor added the grain to the schedule of the owner and his action was the subject of the contest. The court in deciding that the grain was required to be returned for

taxation said: "If this is the true interpretation of the statute, then the assessor should value for taxation all of the property of the person, company or corporation engaged in the buying and selling of grain for profit, including real estate and grain on hand, and should then ascertain, in the manner that the statute points out, whether the average capital invested in the business during the preceding tax year was greater than the capital which he has so assessed, and, if he finds that it was greater, then he should add to his assessment such excess of the average capital invested. In this case the plaintiff omitted from its statement of property for taxation the amount of its grain on hand, and the assessor properly added this amount to the assessment. By its judgment the district court approved of this action on the part of the assessor and was right in so doing." See, also, Richards v. Harlan County, 79 Neb. 665, 113 N. W. 194.

The fact that appellee attempted to determine the average amount of its total investment in the grain business for the preceding year; that by the method used it was found that it was in excess of the value of the tangible property of the business; and that the excess so arrived at was listed and returned by appellee for taxation did not excuse it from including in its statement of property for taxation the amount of grain owned by it on March 10, 1951. The correct amount of the excess of the average amount of the capital invested, if any, could not be ascertained until the grain on hand on March 10, 1951, was included as tangible property in the 1951 tax schedule.

Appellee justifies its omission of the grain from its statement of property for taxation by the assertion that the wheat in its elevator was the subject of the contract between it and the Klecan Grain Company of February 2, 1951, and that from that date until the grain was delivered in Kansas City, as the contract required, it was interstate commerce and as such the State of Ne-

braska was powerless to impose a tax upon it. If the premise of appellee in this regard is true the conclusion is indisputable. The Congress has power, by virtue of constitutional grant, to regulate commerce among the states. Any state tax that tends to prohibit such commerce or place it at a disadvantage as compared or in competition with instrastate commerce and any state tax which discriminates against commerce among the states is the exercise of state taxing power in an unconstitutional manner because of its obvious and inherent regulatory effect. In Bacon v. Illinois, 227 U. S. 504, 33 S. Ct. 299, 57 L. Ed. 615, it is said: "The denial to the States of the power to tax articles actually moving in interstate commerce rests upon the supremacy of the Federal power to regulate that commerce, and its postulate is necessary freedom of that commerce from the burden of local taxation." See, also, Champlain Realty Co. v. Brattleboro, 260 U. S. 366, 43 S. Ct. 146, 67 L. Ed. 309, 25 A. L. R. 1195; McGoldrick v. Berwind-White Co., 309 U. S. 33, 60 S. Ct. 388, 84 L. Ed. 565, 128 A. L. R. 876; Adams Mfg. Co. v. Storen, 304 U. S. 307, 58 S. Ct. 913, 82 L. Ed. 1365, 117 A. L. R. 429; Archer-Daniels-Midland Co. v. Board of Equalization, 154 Neb. 632, 48 N. W. 2d 756; 51 Am. Jur., Taxation, § 203, p. 262.

The grain in question was owned by appellee and was in its elevator in Trenton as early as February 2, 1951. It was not selected, identified, or set apart as the wheat or any part of the wheat contracted to be sold and delivered to the Klecan Grain Company of Kansas City, Missouri. It could not have been because the contract designated that city as the place for determination of the grain that would be acceptable in satisfaction of the contract. Any grain tendered by appellee in fulfillment of its contract obligations with the purchaser had to be transported to the destination named. It had to be within the grades specified in the contract. It had to be weighed and inspected, and all charges of transportation, weighing, and inspection had to be paid

by the shipper. The purchaser was not bound to accept any grain from appellee until these requirements were satisfied. The grain or any part of it was not surrendered to any carrier for interstate transportation until March 12, 1951. This is the earliest date any of the grain, under the circumstances shown, constituted interstate commerce.

In Coe v. Errol, 116 U. S. 517, 6 S. Ct. 475, 29 L. Ed. 715, the court stated what is there characterized as the true rule on this subject: "* * * goods do not cease to be part of the general mass of property in the State, subject, as such, to its jurisdiction, and to taxation in the usual way, until they have been shipped, or entered with a common carrier for transportation to another State, or have been started upon such transportation in a continuous route or journey." The doctrine of that case influenced the decision of this court in Tredway v. Riley, 32 Neb. 495, 49 N. W. 268, 29 Am. S. R. 447. It is therein stated: "The liquors were manufactured in Iowa, and at the time of their sale were not in process of transportation to this or any other state. They had not yet become interstate commerce. * * * The fact that it was the intention of the defendant to ship the liquors to this state is quite immaterial. Such intention and purpose could not alone have the effect to make the liquors interstate commerce. They did not become such until received by the carrier for shipment. Until then they were under state jurisdiction and control." See, also, Empresa Siderurgica v. County of Merced, 337 U. S. 154, 69 S. Ct. 995, 93 L. Ed. 1276; Annotation, 11 A. L. R. 2d 938.

The intention of appellee when the contract was made with Klecan Grain Company and thereafter to transport the grain from its elevator to the purchaser at Kansas City, Missouri, is vigorously stressed and emphasized. Its intention in this regard is clearly established. It is shown that this grain would have been transported to the agreed destination before March 10,

1951, if the railroad had been able to respond to the entreaties of appellee for boxcars in which to make shipment of it. However the fact that property is intended or destined for removal from a state does not impress it with the character of interstate commerce so as to render it immune from state taxation by virtue of the operation of the commerce clause of the federal Constitution. Art. I, § 8, Constitution of United States. The immunity attaches when, but not until, the property has been started towards its destination outside the state in a movement intended to be continuous, except for such delays as are incidental to the kind of transit selected. If the interstate movement has not begun the mere fact that such a one is contemplated or that the property has been partially prepared for the purpose does not withdraw it from the power of the state to tax it. It is not enough that there is an intent to move it interstate or a plan that involves exportation from the state of its situs to another state or that there are an integrated series of events that will end with it. The tax immunity runs to the process of interstate transportation. It requires commerce among states. Empresa Siderurgica v. County of Merced, *supra:* Independent Warehouses, Inc. v. Scheele, 331 U. S. 70, 67 S. Ct. 1062, 91 L. Ed. 1346; Minnesota v. Blasius, 290 U. S. 1, 54 S. Ct. 34, 78 L. Ed. 131; Heisler v. Thomas Colliery Co., 260 U. S. 245, 43 S. Ct. 83, 67 L. Ed. 237; Champlain Realty Co. v. Brattleboro, *supra;* Bacon v. Illinois, *supra;* Coe v. Errol, *supra;* Tredway v. Riley, *supra.*

The wheat in the elevator of appellee on March 10, 1951, that was thereafter delivered to the Klecan Grain Company in Kansas City, Missouri, was not on that date interstate commerce. It was not immune to or exempt from local taxation. It was required to be and should have been included in the 1951 statement of property made by appellee for taxation purposes.

The judgment should be and it is reversed and the cause is remanded to the district court for Hitchcock

County for further proceedings in harmony with this opinion.

REVERSED AND REMANDED.

CARROLL BISHOP, A MINOR, BY AND THROUGH HIS FATHER AND NEXT FRIEND, E. A. BISHOP, APPELLEE, V. HOWARD D. SCHOFIELD, APPELLANT.

58 N. W. 2d 207

Filed April 24, 1953. No. 33306.

1. **Trial.** A motion for directed verdict or its equivalent must, for purpose of decision thereon, be treated as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence.
2. ———. In an action where there is any evidence which will support a finding for a party having the burden of proof, the trial court cannot disregard it and direct a verdict against him.
3. **Automobiles.** Generally speaking the question of whether a person riding in a motor vehicle is or is not a guest depends for its determination upon the facts of each case.
4. ———. It must be ascertained from the facts establishing the identity of the persons advantaged by the carriage, the relationship between the parties, and the purposes to which the transportation is incident. To these facts we then apply logical constructions of statutory words and phrases approved by definitum-precedent.
5. **Trial.** If the evidence is undisputed, or such that minds of men could not reasonably arrive at any other conclusion, the question is one for decision by the court as a matter of law; otherwise, it is a question for the jury to decide as other issuable facts in the case.
6. **Automobiles.** A person riding in a motor vehicle is a guest if his carriage confers only a benefit upon himself and no benefit upon the owner or operator except such as is incidental to hospitality, social relations, companionship, or the like, as a mere gratuity.
7. **Negligence.** Gross negligence means great or excessive negligence; that is, negligence in a very high degree. It indicates

the absence of even slight care in the performance of a duty.

8. ———. What amounts to gross negligence in any given case must depend upon the facts and circumstances of that case.

9. Trial. A verdict should only be directed where the court can clearly say that it fails to approach the level of negligence in a very high degree under the circumstances.

APPEAL from the district court for Saunders County: HARRY D. LANDIS, JUDGE. *Reversed and remanded with directions.*

H. V. Kanouff, for appellant.

Chambers, Holland & Groth and *Clyde R. Worrall*, for appellee.

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

WENKE, J.

Carroll Bishop, a minor, by and through his father and next friend, E. A. Bishop, brought this action in the district court for Saunders County against Howard D. Schofield. It is a tort action based on the conduct of defendant while driving his automobile, which conduct it is alleged was negligent and which it is alleged resulted in the automobile being hit by a Chicago, Burlington and Quincy Railroad Company train, and severely injuring the plaintiff. The purpose of the action is to recover damages for disability and pain which plaintiff suffered as a result thereof.

Trial was had on March 18 and 19, 1952. After plaintiff had adduced all of his evidence, defendant moved for a directed verdict in his favor, basing his motion on the following grounds:

"First: There is no proof or evidence that the plaintiff, at the time of the accident, had any other relationship to the defendant other than a guest in his automobile, and that there is no evidence of gross negligence upon the part of the defendant.

"Second: That the plaintiff has failed to prove any

negligence against defendant, and that if the evidence taken in its most favorable light for the plaintiff shows negligence, the evidence of plaintiff conclusively shows the plaintiff to have been guilty of contributory negligence, guilty of contributory negligence more than slight."

The trial court sustained this motion and dismissed the case. On March 26, 1952, plaintiff filed a motion for new trial. This motion the trial court sustained. It is from this ruling that defendant has appealed.

The appeal raises the question of whether or not, in the first instance, the court was correct in sustaining defendant's motion for a directed verdict. In determining whether or not appellee made a prima facie case the following basic principles are applicable:

"A motion for directed verdict or its equivalent must, for purpose of decision thereon, be treated as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence." Davis v. Spindler, *ante* p. 276, 56 N. W. 2d 107.

"In an action where there is any evidence which will support a finding for a party having the burden of proof, the trial court cannot disregard it and direct a verdict against him." Davis v. Spindler, *supra*. See, also, Kuska v. Nichols Construction Co., 154 Neb. 580, 48 N. W. 2d 682; Gunn v. Coca-Cola Bottling Co., 154 Neb. 150, 47 N. W. 2d 397; Komma v. Kreifels, 144 Neb. 745, 14 N. W. 2d 591.

Appellee is a nephew of appellant and was living with his parents on their farm located some 5 miles northwest of Gretna. He was 17 years of age and a graduate of Gretna High School. Appellant and his wife were living on a farm some 3½ to 4 miles north of Ashland. He had been suffering with the flu and because

thereof was unable to do all of his farm work. Consequently, on May 30, 1951, his wife went to appellee's home and there, with the approval of appellee's father, employed appellee to work for appellant as a farm laborer, agreeing to pay him the going wages for this class of work plus board and room. Appellee thereupon accompanied appellant's wife and immediately began his employment. It should here be stated that these two families were not only related but on friendly social relations, frequently visiting back and forth in each other's homes.

Appellee continued in appellant's employ until the time of the accident, doing the chores and such other work as the weather permitted. On June 6, 1951, the appellant and appellee spent most of the day mounting a mower on the back of a tractor. After they had done so they took the tractor to Vern Stuart's farm, which is located about three-fourths of a mile away. The Stuarts are appellant's in-laws. They drove the tractor to the Stuart farm to put some air in a rear tire, the Stuarts having an air compressor. They returned from the Stuart place some time between 4:15 and 4:30 p. m. Upon their return appellee did the chores and then ate supper. Supper had been prepared early so appellant's wife could get the dishes washed and put away as she was expecting company, she having invited appellee's parents to come over and spend the evening. Appellee was not at that time aware of this arrangement.

After eating his supper appellee retired to another room to watch television. While appellee was watching television appellant came into the room and asked him to go over to his father-in-law's with him, saying, "Come on, go over to the Stuarts with me." Appellee got up and went along not knowing what appellant wanted him for, although he later learned it was to get some pies that Mrs. Stuart had prepared as dessert for the company they were having that evening.

Located some 150 to 200 yards west of appellant's

farm home is the right-of-way of the Chicago, Burlington and Quincy Railroad Company. It traverses appellant's farm from north to south. Running west from appellant's home is his private driveway which crosses this railroad right-of-way on his farm. Extending east from the right-of-way, at a point some 300 to 350 yards north of where the driveway crosses it, is a row of trees. Although there is a slight rise in the driveway just west of the house the crossing is visible from the house and, after crossing this ridge, the right-of-way north of the crossing is visible from all points on the driveway, the only obstruction being the trees already referred to. Appellee was familiar with this situation as he had passed over this private driveway and crossing many times both as a driver and passenger.

Appellant and appellee got into appellant's car, a 1950 Chevrolet sedan. It was parked in front of the house at a point about 150 yards from the track. Appellant drove and appellee sat on the right-hand side of the front seat. The car was in good condition. The time was about 6 p. m., it was still daylight, and, although it was cloudy, visibility was good. They first traveled over the slight rise, then around the south side of a small mud hole located some 100 feet from the track, and then straight toward the track. Appellee was sitting sideways facing appellant and visiting with him. He did not at any time watch the tracks or look to the north except as he may have looked straight ahead. Appellant, after passing the mud hole, was driving in second gear at a speed of about 6 or 7 miles an hour. Just as the front wheels of the car crossed the first rail of the tracks appellee looked to the right and saw the front of a train engine some 50 feet away. Upon sight of the engine he passed out. Appellant did not testify.

The engine hit the car on the right side near its center and, after carrying it some 900 to 1,000 feet down the track toward the south, dropped it on the right side of the right-of-way. The train continued until it was

able to stop at a point where the engine was about 1,500 feet south of the place where the accident occurred. At the time of the impact the train was going about 33 miles an hour. The appellee was severely injured.

Was appellee riding in appellant's car as a guest? We have often said that generally speaking the question of whether a person riding in a motor vehicle is or is not a guest depends for its determination upon the facts of each case. See, Hansen v. Lawrence, 149 Neb. 26, 30 N. W. 2d 63; Van Auker v. Steckley's Hybrid Seed Corn Co., 143 Neb. 24, 8 N. W. 2d 451.

As stated in Van Auker v. Steckley's Hybrid Seed Corn Co., *supra:* "It must be ascertained from the facts establishing the identity of the persons advantaged by the carriage, the relationship between the parties, and the purposes to which the transportation is incident. To these facts we then apply logical construction of statutory words and phrases approved by definitum-precedent." See, also, Hansen v. Lawrence, *supra.*

In this regard: "If the evidence is undisputed, or such that minds of men could not reasonably arrive at any other conclusion, the question is one for decision by the court as a matter of law; otherwise, it is a question for the jury to decide as other issuable facts in the case. 64 C. J. 549; Mick v. Oberle, 124 Neb. 433, 246 N. W. 869." Van Auker v. Steckley's Hybrid Seed Corn Co., *supra.*

Section 39-740, R. R. S. 1943, insofar as here material, provides: "For the purpose of this section, the term 'guest' is hereby defined as being a person who accepts a ride in any motor vehicle without giving compensation therefor, * * *."

In Van Auker v. Steckley's Hybrid Seed Corn Co., *supra,* we said of this provision: "The phrase 'without giving compensation therefor' (Comp. St. Supp. 1939, sec. 39-1129) indicates an intention not to limit compensation to persons specifically paying for transportation

in cash or equivalent, or to require that it pass exclusively from the passenger to the driver."

And therein we went on to say: "A person riding in a motor vehicle is a guest if his carriage confers only a benefit upon himself and no benefit upon the owner or operator except such as is incidental to hospitality, social relations, companionship, or the like, as a mere gratuity. However, if his carriage contributes such tangible and substantial benefits as to promote the mutual interests of both the passenger and the owner or operator, or is primarily for the attainment of some tangible and substantial objective or business purpose of the owner or operator, he is not a guest." See, also, Hansen v. Lawrence, *supra.*

We find the evidence here adduced, without dispute, establishes appellee was riding as a guest in appellant's car.

Since appellee was riding as a guest he cannot recover unless the evidence adduced is sufficient to support a finding that appellant was guilty of "gross negligence." See § 39-740, R. R. S. 1943.

"Gross negligence means great or excessive negligence; that is, negligence in a very high degree. It indicates the absence of even slight care in the performance of a duty." Komma v. Kreifels, *supra.*

"What amounts to gross negligence in any given case must depend upon the facts and circumstances. What would amount to gross negligence under certain circumstances might, under different circumstances, be even slight negligence." Komma v. Kreifels, *supra.*

"As in so many other instances of negligence law, the question whether an operator of an automobile involved in an accident at a railroad crossing was guilty of gross negligence, recklessness, etc., within the meaning of a guest statute, depends upon the facts involved in each case. Accordingly, it is impossible to state any general rule on the question, other than to point out that the general principles laid down by the courts

under the guest statutes * * * apply with equal force, of course, in cases involving railroad crossing accidents." Annotation, 143 A. L. R. 1144.

"* * * a verdict should only be directed where the court can clearly say that it fails to approach the level of negligence in a very high degree under the circumstances." Thompson v. Edler, 138 Neb. 179, 292 N. W. 236.

"A verdict should not be directed nor a cause of action dismissed unless a court can definitely determine that the evidence of defendant's negligence, when taken as a whole, fails to reach that degree of negligence that is considered gross." Komma v. Kreifels, *supra.*

"Broadly and generally speaking, the question of negligence or contributory negligence vel non is a question of fact for the jury, but, as we have hereinbefore pointed out, if it is a matter of declaring a standard of conduct or of applying such standard to a set of undisputed conduct facts which are of such a nature that reasonable men could not differ in opinion as to whether or not the exhibited conduct conforms to the established standard, then the matter is for the court." Ulrikson v. Chicago, M., St. P. & P. Ry. Co., 64 S. D. 476, 268 N. W. 369.

There is a reasonable inference arising from the evidence adduced that appellant was guilty of negligence in failing to maintain a proper lookout for trains as he approached this private crossing and, as a result thereof, drove onto it without seeing the train approaching from the north which caused the accident. However, in view of the standards which this court has applied in guest cases, we do not think his negligence in this regard arises to the degree of gross negligence within the meaning of the statute.

In view of the fact that we find appellee did not make a prima facie case we find it unnecessary to discuss the second ground for the motion; that is, that appellee was guilty of conduct constituting contributory negligence

of such a character that it would defeat his rights to recover under section 25-1151, R. R. S. 1943.

Having come to the conclusion that the trial court was right in the first instance, we set aside its order granting appellee a new trial and direct it to re-enter the original order sustaining appellant's motion for a directed verdict and dismissing the action.

REVERSED AND REMANDED WITH DIRECTIONS.

FRANCIS C. HARBERT, APPELLANT, V. VICTOR MUELLER, APPELLEE.

58 N. W. 2d 221

Filed April 24, 1953. No. 33323.

1. **Actions: Set-off and Counterclaim.** The practice in this state is that an action including a counterclaim shall be tried as an entirety, and not as separate suits.
2. ———: ———. If for any reason the defendant does not desire to have his counterclaim disposed of in the action wherein it is pleaded, he should move to withdraw it before final submission of the case.
3. ———: ———. Defendant pleaded a counterclaim and, upon the conclusion of the plaintiff's evidence, moved for and procured an order of the court directing a verdict for defendant upon plaintiff's cause of action. *Held,* that defendant, by moving for a directed verdict and obtaining a favorable ruling thereon, waived a hearing on his counterclaim when the counterclaim was not withdrawn by him before final submission of the cause as required by statute.

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

Kirkpatrick & Dougherty and *Davis, Healey, Davies & Wilson,* for appellant.

Chambers, Holland & Groth, for appellee.

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

MESSMORE, J.

The record shows that Francis C. Harbert as plaintiff filed suit in the district court for Lancaster County on March 15, 1952, to recover damages for personal injuries and damage to his automobile alleged to have been sustained by him, caused by the negligence of Victor Mueller as defendant when the defendant drove his automobile into the rear of the plaintiff's automobile. The defendant Mueller, in answer to the plaintiff Harbert's petition, denied generally the allegations of negligence set forth therein, and alleged that any injuries or property damage alleged to have been sustained by the plaintiff were due to the plaintiff's negligence and not through any negligence on the part of this defendant. In addition, the defendant Mueller alleged in his answer, in substance, the following as constituting res judicata to the instant action: Previous to the filing of the instant case by Harbert, the defendant Mueller filed an action for damages in the district court for Lancaster County charging Harbert with negligence in driving his automobile in such a manner as to cause damage to Mueller. In this previous action Harbert (the plaintiff in the present action) filed an answer and a cross-petition. In his cross-petition he alleged the identical items of negligence with which he charged Mueller (the defendant in the instant case), and the identical cause of action was set forth in his cross-petition as is now set forth in his petition in the instant action. The case was tried on November 29, 1948, in the district court for Lancaster County. At the close of plaintiff Mueller's evidence in the previous case Harbert, the defendant and cross-petitioner in said action, moved for a directed verdict as follows: "* * * that the court dismiss the plaintiff's cause of action for one or more of the following reasons, to-wit: 1. That the evidence is insufficient to sustain a verdict in favor of the plaintiff and against this defendant. 2. For the reason that the evidence discloses as a matter of law that the plaintiff was guilty of

contributory negligence in a degree more than slight. 3. That the evidence discloses that the plaintiff was guilty as a matter of law of contributory negligence, which, in a degree more than slight, proximately contributed to the accident and damage, if any, suffered by him; and 4. That the evidence fails to disclose the defendant to be guilty of negligence proximately causing the accident in question."

Said motion was argued on November 30, 1948. The court announced that he was going to direct a verdict and dismiss both the plaintiff's petition in said action and the cross-petition. Thereupon, after some discussion between the court and counsel, defendant in said action (plaintiff here) made a motion which was identical with the motion heretofore set out with the exception that the following was added: "And said defendant further reserves the right to withdraw the counter-claims and docket and index action therefor in the event that said motion be sustained." Thereupon the court stated: "I am going to dismiss the counter-claim and let you back to your remedies whereever (wherever) they are. I am going to dismiss the cross-petition." The court further said: "I don't think you are entitled to your cross-petition, as far as I am concerned. I am going to wipe the whole thing off." The court further said: "The court having decided to sustain and does sustain the motion of the defendant for a directed verdict so far as it refers to the plaintiff's case; however, the court is not of the opinion that it can recognize any reservation on the cross-petition, so a juror was withdrawn and the court now directs a verdict for the defendant and dismisses plaintiff's cause of action and also dismisses the cross-petition of defendant."

The answer of defendant further alleged that defendant in said action (plaintiff herein) did not file any motion for new trial in said action, and that time for appeal had passed and said judgment and order as above set forth had become final. The defendant prayed that

plaintiff's petition be dismissed, and defendant go hence without day and recover his costs expended.

The reply admitted the foregoing proceedings had by the court with reference to directing a verdict against the plaintiff and dismissing the defendant's cross-petition.

The defendant Victor Mueller filed a motion for judgment on the pleadings. The trial court considered whether or not the defendant was entitled to judgment because of facts alleged by defendant in his answer and admitted in plaintiff's reply. The defendant's motion for judgment on the pleadings was sustained and the court entered judgment dismissing plaintiff's petition. From the judgment of the trial court so rendered, the plaintiff Francis Harbert appealed.

The appellant assigns as error (1) that the district court erred in sustaining defendant Victor Mueller's motion for judgment on the pleadings and in dismissing the plaintiff's petition; and (2) that the trial court erred in holding that dismissal of a defendant's cross-petition at the close of plaintiff's case is a dismissal on the merits.

In determining this appeal, section 25-834, R. R. S. 1943, is pertinent. It provides: "The court, at any time *before the final submission of the cause,* on motion of the defendant, may allow a counterclaim or set-off, set up in the answer, to be withdrawn, and the same may become the subject of another action. On motion of either party, to be made at the time such counterclaim or set-off is withdrawn, an action on the same shall be docketed and proceeded in as in like cases after process served; and the court shall direct the time and manner of pleading therein. If an action be not so docketed, it may afterwards be commenced in the ordinary way." (Emphasis supplied.)

As we analyze section 25-834, R. R. S. 1943, it requires the defendant to make his motion to withdraw the counterclaim before the case is finally submitted. The implication to be drawn from this statute is that

after the case is finally submitted, it is then too late to withdraw the counterclaim.

The question then arises, did Harbert, the plaintiff in the instant case, withdraw his counterclaim when he was the defendant in the previous case before the final submission of the cause as required by section 25-834, R. R. S. 1943? He moved for a directed verdict in the previous case against the then plaintiff Mueller, giving the reasons why he was entitled to prevail. The trial court then announced what his ruling would be, that is, just how he intended to rule, which is previously set out. Thereafter, the motion for a directed verdict was renewed, giving the same reasons, and adding: "And said defendant further reserves the right to withdraw the counter-claims and docket and index action therefor in the event that said motion be sustained." It is apparent by the reservation made to withdraw the counterclaim there was no compliance with section 25-834, R. R. S. 1943. The counterclaim was not withdrawn before the final submission of the cause.

In the case of Miller v. McGannon, 79 Neb. 609, 113 N. W. 170, at the conclusion of plaintiffs' evidence, defendant moved the court to direct a verdict in his favor. Upon this motion being sustained by the court, defendant, without first withdrawing his request for an instructed verdict, called witnesses and asked that they be sworn. The request was denied, and the court thereupon instructed the jury to return a verdict for defendant. Defendant filed a motion objecting to the form thereof, and asked that it be set aside, and for a new trial on his counterclaim. This motion was overruled, and judgment entered that plaintiffs' petition and defendant's counterclaim be dismissed. The pertinent language from this opinion, which has not been departed from, as the same applies in the instant case is as follows: "It is a well-established rule of procedure in this state that, when the plaintiff's evidence is insufficient to entitle him to recover, the court should, on motion of the de-

fendant, direct a verdict for the defendant. * * * It is also the practice that issues presented in an action shall be tried as an entirety, and not as separate suits. * * * If for any reason the defendant does not wish to have his counterclaim tried in the pending action, he should move to withdraw it before the final submission of the cause, when, under the provisions of section 126 of the code, the same may be entered as a separate cause, or an independent action subsequently maintained." The section of the code referred to is similar to section 25-834, R. R. S. 1943. The court further said: "The proceedings requested by the defendant are not authorized by the practice in this state. By moving for an instructed verdict and obtaining a favorable ruling, he waived his counterclaim and terminated the trial. * * * Having procured a ruling, which, under the practice, terminated the trial, defendant cannot complain of the only judgment which could be rendered upon the verdict he requested. Upon granting the defendant's motion for a directed verdict, the only thing remaining to be done was the formal entry of the verdict and judgment. Defendant, being instrumental in bringing this about, cannot predicate error in the proceeding."

The above language indicates that when the defendant in the instant case moved for a directed verdict and the trial court sustained the motion, it was then too late to withdraw the counterclaim, and a hearing thereon was waived.

We make reference to Lucas v. Lucas, 138 Neb. 252, 292 N. W. 729, an equity case. Insofar as applicable here, the following language is noted: "It appears that the defendants each filed a counterclaim. Plaintiff contends for the rule stated in Miller v. McGannon, 79 Neb. 609, 113 N. W. 170, wherein this court said: 'Defendant pleaded a counterclaim, and upon the conclusion of the plaintiff's evidence moved for and procured an order of the court directing a verdict for defendant upon the plaintiff's cause of action. *Held,* That defendant was not

entitled thereafter to introduce evidence to prove his counterclaim, that the order directing the verdict concluded the trial, and that defendant by moving for a directed verdict and obtaining a favorable ruling thereon waived a hearing on his counterclaim.' We think this is the correct rule where defendant moves for and obtains a proper dismissal of the suit at the close of plaintiff's evidence. By so doing, he is held to have waived his counterclaim and accepted a judgment of dismissal." It becomes apparent that the holding in Miller v. McGannon, *supra,* so far as above indicated, has been adhered to.

Section 25-601, R. R. S. 1943, provides in part: "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, * * *." While this statute does not deal with the dismissal of a counterclaim before final submission of the cause as does section 25-834, R. R. S. 1943, the language therein contained, as follows, "before the final submission of the case to the jury," and the language of cases wherein said statute was involved bears out what constitutes a final submission of the case, and is applicable in that sense to the instant case.

In Bee Building Co. v. Dalton, 68 Neb. 38, 93 N. W. 930, 4 Ann. Cas. 508, a personal injury case, the plaintiff submitted his evidence and rested his case. The defendant moved for a directed verdict. The motion was sustained, but before the court could give the peremptory instruction to the jury the plaintiff asked that the case be dismissed without prejudice. The request was granted. Section 430 of the Code of Civil Procedure, which is analagous to section 25-601, R. R. S. 1943, as set out above, was under consideration. Plaintiff's contention was that the trial was to the jury, and there could be no submission of the case until the jury had complete authority to deal with it. The court said: "This argument is plausible, but we can not believe

that it is sound. * * * The case was submitted upon an issue of law, and the determination of that issue eliminated the jury and ended the controversy. After it had been adjudged that the plaintiff had no case, and that there was no issue of fact to be decided, the direction, reception and recording of a verdict would have been mere ceremonial acts. These acts would, we know, be in accordance with conventional procedure; they would satisfy the requirements of judicial formalism, but they would be as useless and idle, and almost as absurd as the archaic practice of withdrawing a juror in order to secure a continuance. To direct the jury to return a verdict in favor of the defendant would have been to command the triers of fact to ratify a decision already made by the court upon a question of law. When the legislature, in section 430, spoke of 'the final submission of the case to the jury,' it must have had in mind the submission of an issue of fact—the submission of a disputed question, which might be resolved by the jury in favor of either party. In this case there was no issue of fact—the court so decided; and if a verdict had been rendered in obedience to a peremptory instruction, it would have no legal significance; it would not furnish the basis for a judgment in favor of defendant. In every such case the judgment rests, not on the decision of a question of fact, but wholly and exclusively upon the decision of a question of law. When it was determined that the plaintiff had failed to make a case the court might, without taking from the jury a meaningless verdict, have proceeded at once to render judgment in favor of defendant." See, also, Fronk v. Evans City Steam Laundry Co., 70 Neb. 75, 96 N. W. 1053.

In Spies v. Union P. R. R. Co., 250 F. 434, the court said: "It is too late for a plaintiff to dismiss or to move to dismiss his case without prejudice to a subsequent action for the same cause, after a motion for a directed verdict has been made and submitted, or after such a motion has been made and argued, and the court has

expressed its opinion upon it." Bee Building Co. v. Dalton, *supra,* and Fronk v. Evans City Steam Laundry Co., *supra,* are cited. The section of the statutes discussed in this case provided in substance that an action may be dismissed without prejudice to a future action: First, by the plaintiff, before the final submission of the case to the jury.

In Rhode v. Duff, 208 F. 115, the court held: "Under the Nebraska practice, a motion by plaintiff to dismiss, made after he has rested his case and a motion for a directed verdict has been argued, comes too late." Bee Building Co. v. Dalton, *supra,* is cited.

In the case of Stungis v. Wavecrest Realty Co., 124 Neb. 769, 248 N. W. 78, section 20-601, Comp. St. 1929, now section 25-601, R. R. S. 1943, was under consideration. When the plaintiff rested, the defendant moved that the jury be discharged and cause dismissed, or that the court direct the jury to return a verdict in favor of the defendant. The trial court then indicated what his ruling would be, viz., that he would sustain the defendant's motion and discharge the jury, and that he had sent the bailiff to bring in the jury. The plaintiff insisted that there had been no final submission of the case to the jury as set out in the statute, that he had a right to dismiss his case without prejudice because the court had not definitely and expressly announced his decision, and that the plaintiff made the motion before the jury was so informed. This court said: "This is determined, not alone by the statute, but by the practice. In the case at bar, the court had listened to the arguments upon the defendant's motion to dismiss the jury, and having decided that it was well founded, had stated to counsel that he would sustain the motion. That being the case, the merits of the controversy were not to be submitted to the jury, for, when the court announced the action it would take, the jury were, to all intents, discharged by that statement."

We believe the language used in the above-cited cases

determines what constitutes final submission of a cause as that language is used in section 25-834, R. R. S. 1943, and, in the instant case the counterclaim was not withdrawn before final submission of the cause.

Several cases are cited by the appellant which hold that where a counterclaim is pleaded, and at the end of plaintiff's case a verdict is directed in favor of the defendant on plaintiff's cause of action, defendant is not precluded thereafter from maintaining an action upon the demand that he had interposed as a counterclaim. These cases are from foreign jurisdictions. It would serve no useful purpose to set such cases forth. The law announced therein is contrary to the rule announced in Miller v. McGannon, *supra.*

We conclude, in view of the foregoing authorities and for the reasons given in this opinion, the judgment of the trial court should be, and is, affirmed.

AFFIRMED.

CHAPPELL, J., dissents.

JAMES PARSONS, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.

58 N. W. 2d 182

Filed April 24, 1953. No. 33335.

1. **Criminal Law.** If the punishment of a crime created by statute is committed to the discretion of a court to be exercised within prescribed limits, a sentence within the limits will not be reduced unless there was an abuse of discretion by the court imposing the sentence.
2. **Criminal Law: Appeal and Error.** The Supreme Court has authority to reduce a sentence imposed for the commission of a crime but it will not often do so if the crime involves violence and moral turpitude.

ERROR to the district court for Lancaster County: JOHN L. POLK, JUDGE. *Affirmed.*

David John Thomas, for plaintiff in error.

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

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

BOSLAUGH, J.

The accused, James Parsons, was charged with having unlawfully and feloniously assaulted Sim Ballard with intent to inflict upon him great bodily injury. He pleaded guilty and was adjudged to be confined in the penitentiary in this state for a period of 5 years commencing with the expiration of the term of imprisonment which he was then serving. He has brought the case here by petition in error. The complaint made is that the sentence, under the circumstances of the case, is excessive.

The accused entered the State Penitentiary on April 29, 1952, to serve 2 concurrent sentences of 3 years each imposed upon him because of burglaries committed by him. He was then 18 years of age. Within 2 months thereafter he and 3 other prisoners worked out a plan for an attempt to escape from their confinement. They armed themselves with crude but dangerous weapons made by them from utensils collected within the prison. During a part of May and all of June 1952, the accused had been taking dope, a white powder in capsule. He thinks it was called "Efederin." During June "he was taking this heavy." The 4 prisoners had collected from some source about 60 pills. The attempt to escape was on June 28, 1952. Many of the pills were consumed by the prisoners before and during the break for liberty. These gave them courage. Sim Ballard, a guard at the prison, was during the attempted escape assaulted and wounded. This was the basis of the prosecution resulting in the sentence challenged by this appeal.

If the punishment of a crime created by statute is committed to the discretion of a court to be exercised within prescribed limits, a sentence within the limits will not be reduced unless it is found that there was

an abuse of discretion by the court imposing the sentence. Onstott v. State, *ante* p. 55, 54 N. W. 2d 380.

The crime of the accused was one of violence perpetrated as a part of a deliberate attempt to escape from penal confinement by whatever force, means, or tragedy necessary to accomplish it. The prisoners had deadly weapons they had fashioned for the occasion. They captured a guard as a hostage and forced other guards to dispose of their weapons to save the life of the hostage. They stabbed and cut the hostage. The accused struck and floored a guard with a blackjack he had improvised by putting a "cake of Bon-Ami in a sock." The plan was to use the guards to assist in the escape, and for protection thereafter until they got to North Platte. There the prisoners intended to break into the National Guard Armory and take guns. The accused after the break said that if it had been successful there would have been "hell to pay for someone" and "I just had one thing in mind, to kill * * * (two officers) from Red Cloud." He had a history of crimes committed by him beginning when he was 13 years of age and repeatedly thereafter until the one involved herein. He has been confined in the Boys' Training School, the State Reformatory, and the State Penitentiary. Each offense was graver than the preceding one.

The punishment for felonious assault is imprisonment in the State Penitentiary for not less than 1 year nor more than 5 years. § 28-413, R. R. S. 1943. The record prevents a conclusion that the discretion of the district court was abused by imposing upon the defendant the maximum permitted. This court has authority to reduce a sentence imposed for the commission of a crime but it will not often do so if the crime is one of violence and involves moral turpitude. Sundahl v. State, 154 Neb. 550, 48 N. W. 2d 689.

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

AFFIRMED.

JOSEPH ANGSTADT, BY WARREN C. ANGSTADT, HIS FATHER AND NEXT FRIEND, APPELLEE, V. RALPH COLEMAN, APPELLANT.

58 N. W. 2d 507

Filed May 8, 1953. No. 33254.

1. **Trial.** A motion for directed verdict or its equivalent must, for purpose of decision thereon, be treated as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence.
2. **Evidence.** An extrajudicial admission appearing in the deposition of a party taken before trial is not ordinarily final and conclusive upon him, but it may be competent and admissible as evidence in contradiction and impeachment of his present claim and his other evidence given at the trial, to be given such weight as the trier of fact deems it entitled.
3. **Highways: Automobiles.** A person traveling a favored street protected by a traffic signal, of which he has knowledge, may properly assume that oncoming traffic will obey it.
4. ———: ———. A user of the highways may assume, unless and until he has warning, notice, or knowledge to the contrary, that other users of the highways will use them in a lawful manner, and until he has such warning, notice, or knowledge, he is entitled to govern his actions in accordance with such assumption.
5. ———: ———. A violation of the statutes regulating the use and operation of motor vehicles upon the highways is not negligence per se, but is evidence of negligence which may be taken into consideration with all the other facts and circumstances in determining whether or not negligence is established thereby.
6. **Trial: Appeal and Error.** An instruction which sets out a state of facts, and authorizes a verdict for one of the parties upon a finding of such facts, is erroneous, unless it includes every fact necessary to sustain a verdict in favor of such party, or unless the omitted facts are conclusively established.
7. ———: ———. Where the instructions as a whole clearly present to the jury the issues of fact and the law applicable thereto, harmless error in instructions separately criticized on appeal does not require a reversal of the judgment on the verdict.

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

Pilcher & Haney, for appellant.

Mecham, Stoehr, Moore, Mecham & Hills, for appellee.

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

MESSMORE, J.

The plaintiff Joseph Angstadt, a minor, by Warren C. Angstadt, his father and next friend, brought this action in the district court for Douglas County to recover damages for personal injuries sustained by him due to the negligence of the defendant Ralph Coleman in driving his automobile in such a manner as to collide with the motor scooter driven by the plaintiff. The case was tried to a jury resulting in a verdict for the plaintiff. Judgment was entered thereon. Defendant's motion for judgment notwithstanding the verdict, or in the alternative for a new trial, was overruled. The defendant appeals.

The plaintiff's petition alleged that he was a minor 16 years of age; that about 8:45 p. m., May 13, 1950, he was driving his motor scooter west on L Street in the city of Omaha; that after completing a left turn to enter a filling station on the south side of L Street a short distance east of Forty-second Street, the defendant, who was approaching from the west in his automobile, collided with the motor scooter; and that in so doing the defendant was guilty of negligence in the following respects: (1) that he failed to keep a proper lookout; (2) that he failed to heed a red traffic signal at the intersection; (3) that he failed to slow down or stop his automobile and thus avoid the collision; and (4) that he was negligent in failing to observe the plaintiff in a position of danger and to use ordinary care in such situation to avoid the accident. The petition further set forth certain ordinances of the city of Omaha as to restrictions on speed as the same applied to the vicinity and place where the accident occurred. The petition further set forth the injuries sustained by the plain-

tiff; alleged the medical and hospital expenses; and prayed judgment for damages.

The defendant's answer admitted the minority of the plaintiff and the occurrence of the accident; denied generally the allegations of negligence charged to the defendant; and affirmatively alleged that the contributory negligence of the plaintiff was more than slight and was the direct and proximate cause of the accident, and sufficient to bar recovery. The reply was a general denial.

It was stipulated that the district where the accident occurred would be considered a residential district. The speed limit was 35 miles an hour.

L Street is a through highway running east and west. It is 54 feet wide where the accident occurred and provides passing, driving, and parking lanes for east and west-bound traffic. On the southeast corner of the intersection of Forty-second and L Streets is the Peers Filling Station, east of it is the Village Bar, and east of the bar is the West L Variety Store. It is 40 feet from the east curb line of Forty-second Street to the west edge of the driveway into the filling station. The filling station driveway is 47 feet wide. On each corner of the intersection of Forty-second and L Streets are traffic signals. These signals consist of a green light which indicates to proceed through the intersection, a yellow light, referred to by some witnesses as amber, to indicate caution, and a red light to indicate a stop and not to proceed through the intersection until the traffic light turns green. While there is conflict in the evidence as to whether the lights in the filling station were on or off, there is no question but that the intersection and the place where the accident occurred were well lighted.

There is much dispute in the record as to the color of the defendant's automobile. Suffice it is to say that it was a 1941 Ford V-8 four-door sedan and, it being admitted that the defendant's automobile was involved in the accident, reference to its color will be omitted.

When we refer to the intersection in the opinion, it

is the intersection of Forty-second and L Streets in the city of Omaha.

While most of the witnesses testified to the position of the defendant's car and the plaintiff's motor scooter and where the plaintiff was lying immediately after the accident, we will not set forth this testimony except that of the detective sergeant who made the official investigation.

We refer to the parties as designated in the district court.

The plaintiff testified that at the time the accident occurred he was 16 years old and a junior in South High School. On the evening of May 13, 1950, he was driving his motor scooter west on L Street at a speed of from 10 to 15 miles an hour in the driving lane for west-bound traffic. As he approached the Variety Store he turned into the passing lane, looked back over his left shoulder, and gave a signal for a left turn into Peers Filling Station. He noticed a car behind him. He looked to the west for oncoming traffic. The view to the west was clear, and the traffic lights at the intersection were amber. When he was even with the driveway of the filling station the traffic lights at the intersection turned red. He noticed two cars right at, or near, the traffic lights. He believed they would stop. One car came through the red traffic light signal. This was the defendant's car. He endeavored to avoid being struck by this car but was unable to do so. It collided with his motor scooter, striking it directly on the side. At that time he was about in the middle of the driveway, in the driving lane of east-bound traffic. The next thing he knew he was waking up at St. Catherine's Hospital.

Sergeant Manna was driving his automobile east on L Street at about 35 to 40 miles an hour. When in the block west of the intersection and within 100 feet of the traffic lights, the lights turned amber. He started to slow down, and when he was within 55 to 60 feet

of the intersection the traffic lights turned red. He was in the right-hand lane. He noticed a car pull up to his left, in the left-hand lane of traffic, at an estimated rate of speed of 50 miles an hour. After passing his car, this car proceeded into the right-hand lane of traffic, through the red light. He watched it, and right after it ran through the red light he heard a crash east of Forty-second Street.

Richard Knight (Knipe) was in the front seat with Sergeant Manna. He testified that when they were about 90 feet from the intersection the traffic light was amber. When they were about 50 feet from the intersection a car passed to their left. After it passed, the traffic light turned red and this car proceeded through the intersection on the red light. He heard a crash east of the intersection.

Alma Ruth Short was riding with her brother, Master Sergeant Mullins, in his car traveling west on L Street in the driving lane. Upon approaching the intersection she saw a motor scooter traveling west. It was east of the Variety Store in the driving lane which is the north lane of west-bound traffic. They passed the scooter, and she looked back through the back window and saw the driver of the scooter give a left-turn signal into the filling station. At that time they were making a right turn to go north on Forty-second Street. She saw a car come through the intersection from the west, going east. The traffic lights for east and west-bound traffic were amber. Immediately after turning north she noticed the traffic light at the intersection turn red. She heard a noise, but did not see the impact between the car and the motor scooter. Her brother stopped the car and they went to the scene of the accident.

Sergeant Mullins testified that he was driving his car west on L Street. Between Forty-first and Forty-second Streets he saw a motor scooter in the west-bound traffic lane traveling at a speed of about 15 miles an hour. He passed the scooter in that block. The traffic

lights at the intersection were green. As he approached close to the intersection they turned amber. He made a right turn at that time. As he did so he noticed a car approaching the intersection from the west going east at a rate of speed of from 45 to 50 miles an hour. He did not see the traffic light turn red. He heard a crash behind him and went to the scene of the accident. He endeavored to thin out the crowd so that his wife, a registered nurse, could administer to the injured boy, the plaintiff. He notified the boy's parents, having been handed the boy's drivers license by his wife.

Sherry Mullins testified that she was riding with her husband, Sergeant Mullins, and her sister-in-law, and was in the back seat of the car. She recalled passing the motor scooter, and afterwards she looked back and noticed the driver of the motor scooter give a signal for a left turn. As they approached the intersection, the traffic lights turned yellow. As they turned north on Forty-second Street she saw a car coming from the west. When they had completed the turn she looked out the back window and saw this car go through the intersection on a red light. She heard a crash but did not see the impact, but did see sparks, like metal striking metal. She went to the scene of the accident, administered to the plaintiff, and accompanied him to the Douglas County Hospital in an ambulance. He was in a semicomatose condition.

Robert Byers testified that he was sitting on some steps on the northwest corner of the intersection. He saw a motor scooter about a block east of him coming west on L Street with its lights on. He believed it was going to turn into the filling station. At that time the lights at the intersection turned yellow. Shortly thereafter he noticed traffic from the west going east. He saw the defendant's car when it was 50 to 60 feet west of the intersection. His attention was attracted to a car going north. After looking at that car, he heard a crash and saw the defendant's car and the motor scooter

collide. This was the same car he saw approaching on the yellow light. It struck the scooter on the side and the boy "went flying." He estimated the speed of the defendant's car to be 40 to 50 miles an hour and the speed of the motor scooter about 10 miles an hour. Defendant's car stopped on the east side of the driveway into the filling station.

The defendant Ralph Coleman testified that he was driving his 1941 Ford which was in good mechanical condition and had good tires and brakes. He had his lights on low beam. On the evening in question he was driving in his east-bound driving lane at 35 miles an hour, and when about half a block from the intersection of Forty-second and L Streets, the traffic lights were green. As he approached the intersection he lifted his foot from the gas lever. He went through the intersection in the driving lane and did not change his position. When he went into and through the intersection the traffic light was still green. His windshield was clean. He noticed two cars proceeding west about half a block east of the intersection, and there was a car parked in front of the Variety Store. He was 30 to 35 feet east of the intersection going directly east when he first saw the scooter 15 feet in front of him going in a southwesterly direction. There was no light on the front of the scooter, and it did not slow down. He was driving 30 to 35 miles an hour, and he jammed on his brakes. When the two vehicles came together he was going 5 miles an hour. The scooter struck his car at an angle, spun around, and was thrown back in the direction from which it came on its own momentum. The boy was still on it, and when about 30 feet distant he fell to the south and the scooter skidded in the same direction. The front part of the scooter, or the fork, struck the defendant's car a little bit left of center on the left side. The left end of the bumper of his car was torn off and the right end was flattened. The hood was pushed to the right, and the grille on the right side was pushed to the right. He

did not stop at Forty-second and L Streets. He did not sound his horn, and did not swerve his car to the left or right. The scooter was well within the area of his headlights, and was just entering the driving lane. The street lights on the southeast corner of the intersection were on.

Louis Bystrom testified that he was riding with John Groth in the right-front seat of Groth's car. They were proceeding west on L Street in the driving lane about 20 miles an hour. When they got to Forty-first Street there was a motor scooter about 50 feet in front of them near the edge of the lane going west. Half a block east of Forty-second Street the scooter turned into the passing lane. Groth's car was about 25 feet behind the scooter at that time. When the scooter was just about to the Variety Store, the driver turned his head and looked to the left and made a left turn. Groth's car passed him at that time. Bystrom further testified that he saw the defendant's car right in the intersection or close to it, and the traffic light was green. Likewise, the car in which this witness was riding went through the intersection on a green light. He further testified that the boy on the scooter did not look in front of him at oncoming traffic as he was making the turn. He was positive that the traffic light was green when the defendant's car went through the intersection proceeding east. He did not notice whether the boy on the scooter signaled a left turn, nor how fast the defendant was driving.

John Groth testified that he was driving his 1939 Dodge, proceeding west on L Street. He first noticed the scooter between Forty-first and Forty-second Streets. It was about a quarter of a block ahead of him and three-quarters of a block east of Forty-second Street. He was driving 20 to 25 miles an hour with his lights on, and was in his own right-hand driving lane. He did not notice whether the lights on the scooter were on or not. He continued west, and noticed the scooter start to turn,

about the middle of the block. It was going about the same speed that he was driving, and was 35 to 40 feet in front of him. The driver of the scooter was making a gradual turn to the left. He did not notice whether a signal for a left turn was given or not. The traffic lights at the intersection of Forty-second and L Streets were green. He heard the crash, but did not see the impact. He was 45 or 50 feet from the intersection at that time, and the traffic lights were still green. He crossed the intersection when the traffic lights were green. He parked his car and went to the scene of the accident.

Detective Sergeant Gates testified that he arrived at the scene of the accident to make an investigation at about 8:57 p. m. He noticed a light colored 1941 Ford car sitting in the east-bound driving lane on L Street, that is, the south lane of traffic on L Street, facing the east. It was at the driveway of the filling station which is located on the southeast corner of Forty-second and L Streets. It was sitting with the rear wheels approximately even with the west entrance, or west curb break, of the driveway of the filling station. A young man was lying a little distance from the 1941 Ford. He was 46 feet from the point of impact, 20 feet 6 inches from the south curb of L Street, and 7 feet 4 inches from the center line of L Street. He would be approximately on a line between the two east-bound lanes of traffic, the driving lane and the passing lane, possibly a little more in the passing lane. The scooter was 72 feet 6 inches from the determined point of impact, east and north of the point of impact on the north side of L Street. There were skid marks which led from the front wheels of the Ford to a point 31 feet 9 inches west of where the Ford stopped. The west end of the skid marks were 28 feet 3 inches east of the extension of the curb line of Forty-second Street, in the east-bound driving lane. The front end of the Ford was east of the east curb line of Forty-second Street about 60 feet. The Ford traveled 5 feet from the point of

impact. There was debris in front of the Ford. The light on the front of the scooter was broken, as was one light on the defendant's car.

A witness engaged in the traffic and safety engineering business testified that the average reaction time of a driver in applying brakes to stop a car when confronted with a dangerous condition is five-eighths of a second; that at 35 miles an hour a car travels 53 feet a second; that at the reaction time of five-eighths of a second, a car traveling at 35 miles an hour would travel approximately 32 feet before any brakes could be applied; and that the driver of a car traveling 35 miles an hour seeing a motor scooter some 12 to 14 feet ahead of his car (and there is evidence to the effect that the defendant saw the motor scooter that distance ahead of his car) and attempting to apply his brakes before the accident would go 15 feet beyond the object before he had a chance to apply his brakes.

Dr. James Ryder testified that he first saw the plaintiff May 13, 1950, at the Douglas County Hospital. The patient was unconscious and delirious, not able to answer questions, screaming, and almost uncontrollable. He was either in the second or third degree of unconsciousness. His condition was serious and dangerous. He began to respond from his condition when he was transferred to St. Catherine's Hospital on May 18, 1950. His condition remained serious up to June 6, 1950, when other treatment was accorded him for his severe injuries. He was hospitalized for 32 days.

Dr. Frank Iwersen, a specialist in orthopedic surgery, examined the plaintiff on May 13, 1950, at Douglas County Hospital. He detailed the injuries received by the plaintiff and testified that he had a serious brain injury at that time.

We deem it unnecessary to set out all the injuries and the examinations made by the doctors with respect thereto as the extent of the injuries received by the plain-

tiff and the medical and hospital expenses are not questioned, except as appears in the opinion.

The defendant contends that the trial court erred in overruling his motion for judgment notwithstanding the verdict, or in the alternative for a new trial. The following rule of law becomes pertinent in considering this assignment of error: "A motion for directed verdict or its equivalent must, for purpose of decision thereon, be treated as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence." Davis v. Spindler, *ante* p. 276, 56 N. W. 2d 107. See, also, Bank of Keystone v. Kayton, 155 Neb. 79, 50 N. W. 2d 511.

In support of this assignment of error the defendant argues that the accident occurred about 8:30 p. m., May 13, 1950; that on January 5, 1951, approximately 8 months thereafter, the plaintiff's deposition was taken; and that in his deposition he testified that prior to the accident he did not see the defendant's car, had no recollection of it, and did not remember any of the events with reference to the accident. At the time of trial he was able to recall the events as to what happened prior to and at the time of the accident.

The testimony of plaintiff's attending physician and Dr. Iwersen is of assistance on this phase of the case. We summarize that part that is applicable. When Dr. Ryder examined the plaintiff immediately after the accident he was in a second or third degree of unconsciousness, was unable to respond or to answer questions, was hysterical and excitable, was suffering from traumatic shock, and had a serious brain injury of such a type that there is sometimes loss of memory as to events immediately prior to the accident, which condition is usual and possible, and it would take several months for his memory to return so that he would be able to recollect all

events that occurred prior to and at the time of the accident. Dr. Iwersen testified that he had general knowledge as to traumatic amnesia from brain injury; that loss of memory is a frequent occurrence; and that some months thereafter the patient may regain memory. The defendant does not refute this testimony. He merely states that there was no testimony to the effect of loss of memory on the part of the plaintiff, and that the hospital records refute such a condition.

The defendant relies on the cases of Gohlinghorst v. Ruess, 146 Neb. 470, 20 N. W. 2d 381, Peterson v. Omaha & C. B. St. Ry. Co., 134 Neb. 322, 278 N. W. 561, and Rahfeldt v. Swanson, 155 Neb. 482, 52 N. W. 2d 261.

There is a distinction between the cited cases and the case at bar. The case of Kipf v. Bitner, 150 Neb. 155, 33 N. W. 2d 518, distinguishes the cited cases, and this distinction applies to the instant case. In that case the court said, in substance, that the cases cited were cases where the plaintiff pleaded and testified to one story in one or more actions or trials, and after obtaining a benefit therefrom, or imposing a detriment thereby, it was found that they could not thus substantiate their claim, in which event they materially and substantially changed their testimony or pleadings and testimony in another trial, manifestly with a fraudulent motive for the purpose of obviating objections pointed out by the court in a former trial, or to meet the exigencies of their case, and, by thus experimenting and toying with litigants in courts, they vainly sought to obtain a recovery. The cases relied upon by the defendant were all in the final analysis grounded upon elements of estoppel. The case at bar contains none of such elements which could make plaintiff's testimony, given in his deposition, conclusive upon him or discredit, as a matter of law, all his testimony given at the trial. Rather, plaintiff's testimony, about which defendant complained, must be classified in the field of admissions. In the law of evidence, admissions are concessions or voluntary acknowledgments

made by a party of the existence of certain facts, and they are designated generally as extrajudicial or quasi admissions, and judicial or true admissions.

The deposition was not used by the plaintiff for his own purposes or benefit to the detriment of the defendant. It was not inconsistent with or contrary to any allegation of the plaintiff's petition. It was taken by the defendant for his own purposes and benefit, and rightly used by him as such on cross-examination, simply to contradict and impeach the plaintiff's present claim and his other evidence given at the trial.

Next, in considering this assignment of error, the defendant contends that the evidence discloses contributory negligence on the part of the plaintiff which was more than slight, and sufficient to bar recovery in this case.

The defendant relies on Petersen v. Schneider, 153 Neb. 815, 46 N. W. 2d 355, as follows: "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 defendant also cites Whitaker v. Keogh, 144 Neb. 790, 14 N. W. 2d 596, and Dale v. Omaha & C. B. St. Ry. Co., 154 Neb. 434, 48 N. W. 2d 380, as also governing, to the effect that when the operator of a vehicle turning across the street between intersections sees an approaching car and tests an obvious danger by moving from a place of safety into the path of the oncoming vehicle and is struck, he is guilty of contributory negligence

sufficient to bar a recovery as a matter of law.

It appears from the evidence that this is not a case where the plaintiff left a position of safety and attempted to test obvious danger. Rather, it is a case where he had reason to believe, by relying on the red traffic light at the intersection, he could make the left turn in safety and that the defendant would obey the traffic signal. It is true that when the defendant came through the red traffic light and was straight ahead of the plaintiff, the plaintiff was in a position of danger and endeavored to avoid the accident and injuries sustained by him.

A person traveling a favored street protected by a stop sign, of which he has knowledge, may properly assume that oncoming traffic will obey it. See, Riekes v. Schantz, 144 Neb. 150, 12 N. W. 2d 766. The same is true with reference to a traffic signal. See, Dale v. Omaha & C. B. St. Ry. Co., *supra.*

"A user of the highways may assume, unless and until he has warning, notice, or knowledge to the contrary, that other users of the highways will use them in a lawful manner, and until he has such warning, notice, or knowledge, he is entitled to govern his actions in accord with such assumption." Plumb v. Burnham, 151 Neb. 129, 36 N. W. 2d 612.

We conclude that the trial court did not err in overruling the defendant's motion for judgment notwithstanding the verdict, or in the alternative a motion for new trial.

The defendant contends that the trial court in its instructions informed the jury that it might take into consideration whether or not the defendant sounded his horn, and by so doing committed prejudicial error for the reason that the plaintiff's pleadings did not contain such element of negligence and the same did not attach to the defendant under the circumstances of this case. The plaintiff's petition was sufficient in that it did state in effect that the defendant failed to sound a warning.

There was also evidence that the defendant failed to sound his horn, and if he had sounded it the plaintiff would have heard it. While it is questionable under the evidence what effect the sounding of the defendant's horn would have had with reference to the accident, we believe that the trial court did not commit prejudicial error as contended for by the defendant.

The defendant contends that the trial court erred in refusing to submit to the jury his requested instructions Nos. 2 and 5, as follows: Instruction No. 2. "If you find that plaintiff turned to the left between intersections into the path of defendant's automobile and did not look for defendant's automobile, or if you find that plaintiff looked and failed to see defendant's automobile, and that in either case, defendant's automobile was plainly in sight, then plaintiff is not entitled to recover in this action and your verdict should be for the defendant."

Instruction No. 5. "The driver of a vehicle who makes a left turn between intersections on a public street is required to keep a constant look out for other vehicles approaching from the opposite direction."

In support of this contention the defendant relies upon the cases of Kristufek v. Rapp, 154 Neb. 343, 47 N. W. 2d 923, Trumbley v. Moore, 151 Neb. 780, 39 N. W. 2d 613, and Ficke v. Gibson, 153 Neb. 478, 45 N. W. 2d 436. The cited cases relate to a pedestrian crossing between intersections, and impose upon a pedestrian in doing so the following, as set forth in Trumbley v. Moore, *supra*: "A pedestrian crossing a street at a place other than a street intersection or crosswalk in direct violation of a city ordinance is required to keep a constant lookout for his own safety in all directions of anticipated danger."

And, as stated in Ficke v. Gibson, *supra*: "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."

The case at bar is distinguishable from the cited cases in that it involves a left turn made by a vehicle between intersections into a driveway. In this connection, the trial court in instruction No. 11 instructed the jury that it was not a violation of a city ordinance or the statutes to make a left turn between intersections, nor was it negligence as a matter of law to do so. Then the instruction set forth the manner in which the driver of the vehicle should make the left turn, the care that should be used in doing so, and that making a left turn between intersections is an unusual occurrence and the driver must do so in the exercise of ordinary care for his own safety. We need not set out the entire instruction, except to say that it followed the law as stated in Dickman v. Hackney, 149 Neb. 367, 31 N. W. 2d 232, which involved a situation where a driver of a vehicle, in the nighttime, made a left turn into her driveway without giving the proper signal to indicate that fact. This court said that while she admittedly violated the statute, a violation of the statutes regulating the use and operation of motor vehicles upon the highways is not negligence per se, but is evidence of negligence which may be taken into consideration with all the other facts and circumstances in determining whether or not negligence is established thereby. See, also, Landrum v. Roddy, 143 Neb. 934, 12 N. W. 2d 82, 149 A. L. R. 1041; Gleason v. Baack, 137 Neb. 272, 289 N. W. 349; Armer v. Omaha & C. B. St. Ry. Co., 151 Neb. 431, 37 N. W. 2d 607.

We make reference to instruction No. 13 given by the trial court, upon which the defendant predicates error, in that he contends it assumed a fact which was in dispute, that being that the plaintiff, in his deposition testified that he did not see the defendant's automobile prior to, or at the time of, the accident, and later testified as we have set out the facts with reference to

seeing the defendant's automobile. From an examination of this instruction, the court stated: "If you find from a preponderance of the evidence, the burden of which is upon the plaintiff to establish, that when he looked to the west before he entered the eastbound lanes of L Street * * *," then it made reference to the signal lights. It will be observed that the trial court did not say specifically that the plaintiff looked to the west. He said that this must be shown by a preponderance of the evidence, and must be established. The instruction is pertinent further for the reason that it required the plaintiff, in the exercise of ordinary care, as explained in other instructions, to look and observe, so that if an automobile came toward him he could reasonably place himself in a position to escape, and that matter was for the jury to determine.

Making reference to the defendant's requested instruction No. 2, and without reviewing the evidence, it is apparent that the cases cited by the defendant in support thereof are inapplicable, and also that the instruction is tantamount to instructing a verdict for the defendant.

In addition, the following rule is applicable: "An instruction which sets out a state of facts, and authorizes a verdict for one of the parties upon a finding of such facts, is erroneous, unless it includes every fact necessary to sustain a verdict in favor of such party, unless the omitted facts are conclusively established." Sanders v. Chicago, B. & Q. R. R. Co., 138 Neb. 67, 292 N. W. 35. See, also, In re Estate of House, 145 Neb. 670, 17 N. W. 2d 883.

We conclude this assignment of error is without merit.

The defendant predicates error upon the trial court giving instruction No. 12. This instruction has to do with the condition of the lights at the time the defendant came through the intersection, that is, whether the traffic light was red or green, and thereafter, the ordinary care that he should use in so doing, and then placed

a certain burden upon the plaintiff in signaling his intention to turn to the left, and that the headlight on his motor scooter was lighted. There is no prejudicial error in this instruction, and the defendant's contention in such respect is without merit.

The rule is: "Where the instructions as a whole clearly present to the jury the issues of fact and the law applicable thereto, harmless error in instructions separately criticized on appeal do not require a reversal of the judgment on the verdict." Interstate Airlines, Inc. v. Arnold, 127 Neb. 665, 256 N. W. 513.

The issues of fact and the law applicable thereto were clearly submitted by the entire charge and the jury was permitted to find for the plaintiff on the evidence adduced.

For reasons given in this opinion, the judgment entered on the verdict by the trial court is affirmed.

AFFIRMED.

CATHERINE A. WALSH, APPELLANT, V. JOHN R. WALSH ET AL., APPELLEES, IMPLEADED WITH CALVIN R. MCCOY ET AL., INTERVENERS-APPELLEES.

58 N. W. 2d 337

Filed May 8, 1953. No. 33288.

1. **Highways.** The permissive use of a road, however long continued, cannot ripen into a prescriptive right.
2. ———. A prescriptive right to property being used by permission cannot arise until 10 years after it has been brought home to the owner in some plain and unequivocal manner that the person in possession is claiming adversely to him.
3. **Adverse Possession.** Where a grantor of real estate remains in possession of a part or all of the property after the conveyance, the possession of the grantor is presumed to be permissive and subject to the rights of the grantee. In such case the possession cannot be adverse until notice of the adverse claim is brought home to the other party.

APPEAL from the district court for Otoe County: VIRGIL FALLOON, JUDGE. *Affirmed.*

Chambers, Holland & Groth, for appellant.

Sterling F. Mutz, for interveners-appellees.

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

CARTER, J.

This is a suit for an injunction brought by Catherine A. Walsh, plaintiff, against John R. Walsh and William V. Walsh, defendants, praying that the defendants be perpetually enjoined from depriving plaintiff of the use of a road situated on the east side of the west half of Section 34, Township 8, Range 9, in Otoe County, Nebraska. Calvin R. McCoy and Katie R. McCoy intervened in the suit, alleging that they acquired title to the land involved which formerly belonged to John R. Walsh, and praying for an order quieting title in them and enjoining plaintiff from trespassing upon or claiming any right, title, or interest in such land. The trial court found for the interveners and against the plaintiff and defendants, and entered a decree quieting the title to the real estate brought into question in interveners, free from all claims of the plaintiff and defendants. The plaintiff appeals.

The record shows that Thomas B. Walsh was the owner of the northeast quarter, the southwest quarter, and south half of the northwest quarter, all in Section 34, Township 8, Range 9 East of the 6th P. M., in Otoe County, Nebraska, at the time of his death. The land was devised to his ten children to be divided equally among them. Five of the children sold and conveyed their interests in the real estate to the other five children. The latter group included the plaintiff and the two defendants. By a partition deed plaintiff became the owner of the south half of the northeast quarter and John R. Walsh became the owner of the south half of the northwest quarter. No reservations were made with reference to the road that brought about this liti-

gation. The partition deed was executed on February 28, 1924. As to the south half of the northwest quarter, which was conveyed to John R. Walsh, the plaintiff was one of the grantors. It will be observed, also, that the west line of plaintiff's land was the east line of the John R. Walsh land. On March 7, 1944, John R. Walsh sold and conveyed his land to interveners McCoy. This deed contained no reservation of a road, nor the grant of an easement. The defendant William V. Walsh owned the east 80 acres immediately south of the McCoys. He appears to have no interest in this litigation.

The evidence shows that this action was commenced on January 27, 1944, before the McCoys became the owners of the land. A restraining order was issued which was kept in force until the case was heard on the merits by virtue of a stipulation of the parties to that effect made in open court. The interveners McCoy were not parties to the suit when it was originally filed. They assert that they never heard of the suit until 1950. The abstract of title failed to disclose the pendency of the suit.

It is the contention of the plaintiff that for many years she has used a road from the north along the quarter section line as a means of ingress and egress to the building on her 80 acres. The road follows the north and south quarter section line very closely until it reaches a point about 600 feet north of the south boundary of the McCoy land. At that point it follows an irregular course, veering onto the McCoy land as much as 73 feet. The plaintiff claims to be the owner of this road and the land between it and her 80 acres.

The record shows that the old family home of Thomas B. Walsh was located on the line of these two 80-acre tracts. In fact the old house which burned more than 20 years ago extended over onto the McCoy land. An old cave is shown to exist on what is now the McCoy land. The barn, a corn crib, and what is described as a shed, are located on plaintiff's land. It is quite evident that when

the two tracts were under common ownership the farm yard extended onto the McCoy land to some extent. A row of mulberry trees in a north and south line approximately 45 feet over on the McCoy land are still evident and indicate the boundaries of an orchard that once existed. The road in question passes to the west of these trees and constitutes the point of maximum encroachment upon the McCoy land.

The evidence shows that the road north had been used for more than 50 years as a roadway into the old farm improvements. The road out to the east has not been used since automobiles and trucks became a common mode of transportation, because of a slough running through plaintiff's land. The road to the south is open but rough and unusable for all practicable purposes. The disputed road is not one of necessity, as plaintiff can get out to the north on her own land. John R. Walsh, the former owner of the McCoy land, testifies that he grubbed out the orchard on the disputed land when he obtained title. He testifies, also, that he took a part off the old house and moved it onto the disputed ground by permission from plaintiff, and that he paid all expenses in connection therewith. The McCoys testify that this shack was not occupied from the time they purchased the land until the time of the trial and that their tenant used it in which to store hay for cattle. This evidence is disputed by plaintiff, but the evidence of use by her is very fragmentary. The evidence of John R. Walsh is that all the family were to use the road and that it was understood and agreed that all members of the family, including the plaintiff, could use it. Parts of the evidence of plaintiff and interveners are uncorroborated and in irreconcilable conflict. Under such circumstances we invoke the rule that in an equity case tried de novo on appeal we will consider the fact that the trial judge saw and heard the witnesses and believed one version of the facts rather than the other. Killip v. Killip, *ante* p. 573, 57 N. W. 2d 147.

We think the trial court was correct in construing the evidence of plaintiff and John R. Walsh, the former owner, with regard to the use of the road to the north as being a permissive use. Plaintiff testifed: "Q He consented that you use that when you needed to while you and he were on the adjacent properties, didn't he? A We agreed when we made the deal that we would use the north road— Q Wait a minute! Didn't he consent to let you use that as long as you wanted to as long as he owned it? A Why, sure he consented; he never stopped me." The language in Bone v. James, 82 Neb. 442, 118 N. W. 83, is particularly applicable to the situation presented. We there said: "It is quite apparent from the whole testimony that the use of this road or way was commenced and continued by Meredith under license or permission from the plaintiff, and that no claim of right was ever asserted until made by the defendant a short time prior to commencement of this action. As stated in Atchison, T. & S. F. R. Co. v. Conlon, 62 Kan. 416, 53 L. R. A. 781: 'Mere use under a naked license, however long continued, cannot ripen into a prescriptive right.' " There is no evidence in this record that plaintiff ever repudiated the verbal understanding had with John R. Walsh, or asserted a claim of title thereto until after the McCoys bought the John R. Walsh land on March 7, 1944. It is plain that the 10-year period has not expired in order to give plaintiff a prescriptive interest in the road since that date. Consequently, plaintiff has not acquired a prescriptive right to the property involved in this litigation.

An interest in real estate may be obtained in the land of another by open, notorious, peaceable, uninterrupted, adverse possession for the statutory period of 10 years. But where it appears that such possession was permissive until a date which excludes any possibility of the running of the statutory period of 10 years, no easement or other interest therein can be obtained by prescription. Such proof destroys any presumption

that the possession was adverse for the statutory period. No such presumption can exist for another reason. As a former grantor, who claims to have remained in possession after a conveyance of the property, she subjects herself to the rule that after such conveyance and retention of possession her possession is presumed to be permissive and subject to the rights of the grantee, and in such case the possession cannot be adverse until notice of the adverse claim is brought home to the other party. Schields v. Horbach, 49 Neb. 262, 68 N. W. 524; Ross v. McManigal, 61 Neb. 90, 84 N. W. 610; Walter v. Walter, 117 Neb. 671, 222 N. W. 49; Gramann v. Beatty, 134 Neb. 568, 279 N. W. 204. We submit that any view of the evidence reveals that as late as March 7, 1944, plaintiff's possession of the lands in controversy was not adverse to John R. Walsh, nor to the interveners McCoy, the grantees of John R. Walsh. The decree of the district court must, therefore, be affirmed.

AFFIRMED.

LEE (BILL) PAULSEN, APPELLEE, V. CITY OF LINCOLN, NEBRASKA, APPELLANT.

58 N. W. 2d 336

Filed May 8, 1953. No. 33304.

SUPPLEMENTAL OPINION

APPEAL from the district court for Lancaster County: JOHN L. POLK, JUDGE. *Motion for rehearing denied.*

Cline, Williams, Wright & Johnson, for appellant.

Chambers, Holland & Groth, for appellee.

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

BOSLAUGH, J.

A motion for rehearing has been argued and sub-

mitted by appellant. It asserts that the opinion in this case finds that the 40 percent disability of appellee should be applied to the compensation allowed for total disability by subdivision (1) of section 48-121, R. S. Supp., 1949, and appellant says that the compensation recoverable by appellee by virtue of his 40 percent two-member disability is 40 percent of $22 for the balance of 300 weeks from the date of the accident or for 230 weeks, temporary total disability having been 70 weeks, and 40 percent of $16 for the remainder of his life. The appellant from these considerations concludes that the opinion precisely supports the rule of law for which it is contending in this case.

The compensation award for total disability is 66⅔ percent of the wages received at the time of the injury for the first 300 weeks, and thereafter for the remainder of the life of the employee 45 percent of the wages, subject however, to the maximums and minimums stated in the law.

The claimant for compensation for a two-member injury resulting in temporary total loss of the use of the members followed by permanent partial loss of them is entitled to recover such proportion of the compensation allowed for total disability by the statute, and specifically by the provisions thereof quoted in the opinion, as the extent of his loss would bear to the total loss of the members. This means that the compensation for a two-member permanent partial disability is determined by applying the percentage of disability to the wage rate and then taking 66⅔ percent of that figure for the first 300 weeks, or the remaining part thereof if it has been preceded by temporary total disability, and 45 percent of that figure for the remainder of the life of the employee, subject to the condition that the maximum and minimum provisions of the act must be observed. This is what the opinion in this case says. This is the interpretation that has been given to, and the application that has been made of, subdivisions (1) and (3) of sec-

tion 48-121 of the Workmen's Compensation Act. Frost v. United States Fidelity & Guaranty Co., 109 Neb. 161, 190 N. W. 208; Schlesselman v. Travelers Ins. Co., 112 Neb. 332, 199 N. W. 498; Ashton v. Blue River Power Co., 117 Neb. 661, 222 N. W. 42; Radford v. Smith Bros., Inc., 123 Neb. 13, 241 N. W. 753; Fallis v. Vogel, 137 Neb. 598, 290 N. W. 461; Bronson v. City of Fremont, 143 Neb. 281, 9 N. W. 2d 218.

It follows therefore that the recovery of appellee for the permanent partial disability resulting from the injury of both his hands should be 66⅔ percent of 40 percent of his weekly wage of $46.73 or $12.46 a week for 230 weeks, the balance of the first 300 weeks after the accident, and 45 percent of 40 percent of his weekly wage or $8.41 a week for the remainder of his life. This interpretation and application was respected and followed by the compensation court on the rehearing of the case and by the judgment of affirmance of the award by the district court.

The correct rule for computing the compensation for permanent partial disability occasioned by a two-member injury is stated in Johnson v. David Cole Creamery Co., 109 Neb. 707, 192 N. W. 127, but it was obviously departed from and violated in the computation and award made in the last paragraph of the opinion. Both arms of the employee seeking recovery in that case were injured. The resulting disability was 30 percent. The weekly wage was $37.50. The award as computed by this court was 30 percent of $15 or $4.50 a week for 271 weeks, the balance of the 300-week period, and 30 percent of $12 or $3.60 a week thereafter. It should have been two-thirds of 30 percent of the weekly wage or $7.50 a week for the first period and 45 percent of 30 percent of the wage or $5.06 a week for the balance of the life of the employee. That case is disapproved to the extent it departs from the interpretation given to the statute in the opinion and this supplemental opinion in this case.

The motion for rehearing should be and it is denied.
MOTION FOR REHEARING DENIED.

REUBEN MONTGOMERY, APPELLANT, V. LEROY ROSS, APPELLEE.
58 N. W. 2d 340

Filed May 8, 1953. No. 33321.

1. **Trial.** A motion for directed verdict or its equivalent must, for purpose of decision thereon, be treated as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence.
2. **Negligence: Trial.** A verdict should not be directed nor a cause of action dismissed unless a court can definitely determine that the evidence of defendant's negligence, when taken as a whole, fails to reach that degree of negligence that is considered gross.
3. **Negligence.** Gross negligence means great or excessive negligence; that is, negligence in a very high degree. It indicates the absence of even slight care in the performance of a duty.
4. ———. What amounts to gross negligence in any given case must depend upon the facts and circumstances of each case.
5. ———. A series of acts of ordinary negligence may, under certain circumstances, operate to produce gross negligence but not necessarily so.

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

Ginsburg & Ginsburg, for appellant.

Davis, Healey, Davies & Wilson and *Robert A. Barlow, Jr.,* for appellee.

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

WENKE, J.

Reuben Montgomery brought this action in the dis-

trict court for Lancaster County against Leroy Ross. It is a tort action based on alleged negligent conduct of defendant in driving his car while plaintiff was a guest therein, which conduct, it is alleged, caused the car to be in an accident and resulted in plaintiff being seriously injured. After both parties had rested defendant moved the court to dismiss plaintiff's cause of action. This motion was based on several grounds, including the following: "That the evidence is insufficient to establish gross negligence upon the part of the defendant." The trial court sustained this motion and dismissed the action. Plaintiff filed a motion for new trial and, from the overruling thereof, perfected this appeal.

Since appellant was riding as a guest the question raised by this appeal is, is the evidence adduced sufficient to support a finding that appellee was guilty of gross negligence? § 39-740, R. R. S. 1943. In determining whether or not appellant made a prima facie case the following basic principles are applicable:

"A motion for directed verdict or its equivalent must, for purpose of decision thereon, be treated as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence." Davis v. Spindler, *ante* p. 276, 56 N. W. 2d 107.

"* * * a verdict should only be directed where the court can clearly say that it fails to approach the level of negligence in a very high degree under the circumstances." Thompson v. Edler, 138 Neb. 179, 292 N. W. 236.

"A verdict should not be directed nor a cause of action dismissed unless a court can definitely determine that the evidence of defendant's negligence, when taken as a whole, fails to reach that degree of negligence that is considered gross." Komma v. Kreifels, 144 Neb. 745, 14 N. W. 2d 591.

Appellant was a truck driver for the Burlington Truck Lines. Appellee worked for the same company. They had been working together for about 3 years and while well-acquainted were not particularly close friends. Neither was working on Saturday, February 17, 1951, the day of the accident. By chance they met that morning in a tavern in Lincoln. There they visited for about a half hour during which time they drank a beer or two. They then went to Union Hall located in the 200 block on South Ninth Street in the city of Lincoln. Both men belonged to the same union and they went to the hall to obtain some information about insurance their employer was supposed to furnish. After obtaining the information they left Union Hall about 11:30 a. m. They went to the Ellsworth Cafe which is located immediately underneath the hall. They stayed in the cafe for about an hour and while there ate a couple of sandwiches and maybe drank a couple of beers. After this lunch they decided to go to Bennet, Nebraska, to play cards, appellant having previously played there. Bennet is located southeast of Lincoln in Lancaster County. They went to Bennet in appellee's car, a 1947 Chevrolet tudor sedan, arriving at Bennet about 1:30 p. m. They went to the Bennet cafe and tavern where they stayed and played cards. While there appellee drank a glass of beer. About 3:30 p. m. they decided to start for Lincoln with the intention of stopping at Roca on the way. They arrived at Roca shortly after 4 p. m. and stopped there, going to a tavern. Here they again played cards. They stayed in this tavern for over an hour and while there playing cards appellee drank a glass of beer. They left Roca for Lincoln sometime after 5:30 p. m. It was still daylight. Appellee drove his car and appellant sat on the right-hand side of the front seat. They proceeded west out of Roca on the highway. Shortly after leaving Roca appellant made the remark, "I believe I'll stretch out until we get into Lincoln." Apparently he fell asleep very quickly after making this remark for he testified

he remembers nothing of what happened thereafter.

The first half mile of the highway west from Roca was paved. Thereafter it was graded and graveled. The accident happened about eight-tenths of a mile west of Roca. At that point the graveled highway is level and straight and at the time was dry, smooth, and in good traveling condition. Along the north edge of the traveled portion was a windrow of gravel about 2 feet wide and approximately 1 foot high.

From the evidence adduced a jury could find that as appellee drove his car west on the traveled portion of the graveled highway he permitted it, at a time when there was no oncoming traffic, to drift from where it was traveling, which was about 4 feet south of the windrow, toward the southwest for a distance of some 75 to 100 feet until it left the traveled portion of the highway and passed onto and across the shoulder thereof and into the ditch located along the south side; that the ditch at this point was about 2 feet deep, but of sufficient width to permit a car to travel therein; that the slope of the shoulder was sufficiently gentle to permit the car to travel from the road and into the ditch without tipping over; that the bottom of the ditch was muddy and soft with some undergrowth; that appellee, after his car had gotten into the ditch, drove it therein toward the west unaware of an embankment at the south end of a cement culvert located in this highway some 100 feet west of where his car had entered the ditch; that he continued to drive his car in the ditch with sufficient speed that as he reached a point near the culvert where the road ditch had reached a depth of about 4 feet he tore out a piece of the fence located along the south edge of the ditch; that when he got to the culvert the front end of the car hit the west embankment of a ditch located there in connection with the drain under the culvert, the force of the blow pushing back the grill and front fenders of his car; that before the forward movement of the car had stopped the front wheels thereof had crossed this

embankment, which was between 1 and 1½ feet high; and that the car stopped, after doing so, with the rear wheels in this ditch. The car, when it came to a stop, was still facing west.

There is no direct evidence as to what speed the car was traveling while on the road or in the ditch. Appellant received serious injuries.

There is no contention made that appellee was driving while under the influence of intoxicating liquor within the meaning of section 39-740, R. R. S. 1943. In fact, appellant testified appellee was normal when they left the tavern at Roca and was driving normal just before he, appellant, went to sleep and did not, at that time, appear to be under the influence of intoxicating liquor. The evidence as to his drinking beer is just a circumstance which the jury could consider when passing upon the question of whether or not the appellee was guilty of gross negligence, provided the evidence adduced established facts sufficient to present that as an issue to a jury. See Howard v. Gerjevic, 128 Neb. 795, 260 N. W. 273.

"Gross negligence means great or excessive negligence; that is, negligence in a very high degree. It indicates the absence of even slight care in the performance of a duty." Komma v. Kreifels, *supra.*

"What amounts to gross negligence in any given case must depend upon the facts and circumstances. What would amount to gross negligence under certain circumstances might, under different circumstances, be even slight negligence." Komma v. Kreifels, *supra.*

Both sides cite many cases in support of their contentions; that is, appellant that he has made a prima facie case and appellee that appellant has not. We will not discuss these cases individually for, as stated in Thompson v. Edler, *supra:* "It must be borne in mind, always, that no decision on gross negligence can constitute an absolute precedent in any other case. Each case necessarily differs somewhat in its particular facts and cir-

cumstances, and in the composite which results from them. A dissection of the individual facts may, therefore, be misleading, because, in the attempted segregation, part of their real significance may become lost. While it may be regrettable that no perfect yardstick for measuring gross negligence has ever been devised, the numerous decisions, which the guest statutes have produced, seem rather clearly to demonstrate that this is as close as it is possible to come to a judicial solution. If the tapeline of past decisions seems at times to be somewhat inaccurately applied, and the processes of logic to be a bit variable in their result, this may be largely because the observer is looking at the facts in isolation and not in context."

However, since appellant seems to rely more on Thompson v. Edler, *supra,* than any other case, we will briefly refer thereto. While there is some similarity in the two cases up to a certain point, thereafter the picture changes rather abruptly. In Thompson v. Edler, *supra,* the driver of the car, who was then driving about 40 miles an hour, saw the guard rail of a bridge some 10 or 20 feet ahead of his car. Upon seeing the guard rail he decided to crash through it, in apparent complete disregard of consequences, and for that purpose pressed the gas accelerator down to the floor board and plowed into the guard rail with all the speed his car had. As a result he completely sheared off the guard rail, which was 62 feet long and 3 feet high, and made of lumber 2 by 6 inches and 2 by 8 inches. The impact caused some of this lumber to be thrown as far as 60 to 70 feet beyond the bridge and caused one of the pieces to be driven through the floorboard of his car. The car ultimately landed in the creek near the south end of the bridge, it having approached the bridge from the north. It had turned upside down.

There is no question but what a jury could find appellee was guilty of several different acts of negligence while operating his car.

"We have held that a series of acts of ordinary negligence may, under certain circumstances, operate to produce gross negligence but not necessarily so." Pavlicek v. Cacak, 155 Neb. 454, 52 N. W. 2d 310. See, also, Komma v. Kreifels, *supra;* Thompson v. Edler, *supra.*

However, in view of the standards which this court has applied in guest cases we do not think appellee's negligence here rises to the degree of gross negligence within the meaning of the statute. In view of the fact that we have found appellant did not make a prima facie case of gross negligence, we affirm the judgment of the trial court.

AFFIRMED.

GEORGE L. MUELLER, ADMINISTRATOR OF THE ESTATE OF GAYLYN FAE MUELLER, DECEASED, APPELLANT, V. H. P. SHACKLETT, ADMINISTRATOR OF THE ESTATE OF RAY H. SHACKLETT, DECEASED, APPELLEE.

58 N. W. 2d 344

Filed May 8, 1953. No. 33337.

1. **Courts.** Where exclusive jurisdiction of a subject matter is constitutionally conferred on county courts, and where relief sought in an action pertaining thereto but instituted in a district court is such that the county court, under powers so conferred, is authorized to grant it, the district court will be deemed to have no original jurisdiction in the premises.
2. **Executors and Administrators.** The word "claim" includes every species of liability which an executor or an administrator of an estate can be called upon to pay, or provide for payment, out of the general fund of the estate.
3. ———. A contingent claim against an estate is one where the liability depends upon some future event or contingency which may or may not ever occur, and which therefore makes it wholly uncertain whether or not there ever will be a liability. Such contingency does not relate simply to the amount which may be recovered but to the uncertainty of whether or not the future event will ever occur to thereby effect a right of action or liability.

4. **Torts: Executors and Administrators.** Liability upon an unliquidated claim for damages arising out of a tort does not depend for its creation upon the occurrence of some uncertain event in the future, and is not a contingent claim, since of necessity such a claim must be based upon the theory that the event, the tort giving rise to liability, has already occurred, and that a cause of action has already accrued and is in existence.
5. **Abatement and Revival: Executors and Administrators.** A cause of action for personal injuries alleged to have been proximately caused by negligence of a decedent during his lifetime survives, and when no action was brought thereon during his lifetime, it must be prosecuted by a claim filed against the estate of decedent in the county court which has exclusive original jurisdiction thereof.
6. **Trial: Evidence.** The provisions of section 25-1267.41, R. S. Supp., 1951, are not merely directory, but substantial compliance therewith is required. However, they are not self-executing, and the party claiming admissions for failure to deny must prove service of a proper request in compliance therewith and failure to appropriately respond thereto.
7. ———: ———. In that connection, the rule is that where a party properly serves a request for admissions of relevant matters of fact or the genuineness of relevant documents, and all objections thereto are heard and appropriately denied by the court, and the other party has been ordered to respond thereto, his failure to do so within the time allotted constitutes an admission of the facts sought to be elicited.
8. **Trial: Judgments.** In such situation, a motion for summary judgment is appropriate and may be granted if admissions made or failure to deny as required by the statute, together with the pleadings, show that there is no genuine issue as to any material fact or that the court is without jurisdiction of the subject matter.

APPEAL from the district court for Pierce County: FAY H. POLLOCK, JUDGE. *Affirmed.*

John W. Blezek and *Free & Free,* for appellant.

Deutsch & Jewell, for appellee.

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

CHAPPELL, J.

On November 28, 1951, plaintiff George L. Mueller,

administrator of the estate of Gaylyn Fae Mueller, deceased, brought this action against defendant H. P. Shacklett, administrator of the estate of Ray H. Shacklett, deceased, to recover damages for the death of plaintiff's son, Gaylyn Fae Mueller, in an automobile accident alleged to have been proximately caused by the negligence of Ray H. Shacklett during his lifetime.

Defendant's motion to dismiss said cause of action for want of original jurisdiction of such a claim or demand against the estate of a deceased person, and defendant's demurrer to plaintiff's petition upon like grounds, were both overruled. Thereafter, defendant answered, denying generally, preserving his contentions as aforesaid with reference to jurisdiction, and praying for dismissal. Plaintiff's motion to strike such allegations was thereafter overruled and defendant subsequently filed request for admissions in accord with the provisions of section 25-1267.41, R. S. Supp., 1951. Such requests for admissions, insofar as important here, were: (1) That Ray H. Shacklett died August 12, 1951; (2) that plaintiff's son died on the same date but survived Ray H. Shacklett; (3) that on October 17, 1951, a petition for appointment of an administrator upon the estate of Ray H. Shacklett, deceased, was duly filed in the county court of Pierce County, Nebraska; (4) that order for hearing upon such petition was duly made by said court on October 17, 1951; (5) that notice of such hearing was duly given by publication; (6) that November 10, 1951, was fixed in such order for hearing and notice as the date of hearing upon said petition; (7) that on November 10, 1951, H. P. Shacklett was duly and regularly appointed administrator of the estate of said Ray H. Shacklett, deceased; (8) that he thereafter qualified as such administrator; (9) that letters of administration were issued out of said court to H. P. Shacklett on November 13, 1951; "10. That on November 13, 1951 said court duly and regularly entered its order on claims, fixing March 17, 1952 as the last day for filing claims

against said estate. 11. That notice to creditors was thereafter duly and regularly published in accordance with said order. * * * 18. That said plaintiff has never filed a claim of any kind, either contingent or otherwise, in the County Court of Pierce County, Nebraska against the estate of said Ray H. Shacklett, deceased. * * *."

Thereafter plaintiff answered defendant's request, admitting paragraphs 1 to 9 inclusive thereof, but objecting and refusing to either admit or deny paragraphs 10, 11, and 18 among others, for the alleged reason that they were incompetent and irrelevant to the issues in the case and for the further reason that the court theretofore, by ruling upon defendant's motion to dismiss and demurrer, had established the law of the case, which precluded defendant's request. After hearing upon the issues made by defendant's request and plaintiff's objections, the trial court appropriately ordered plaintiff to admit or deny under oath each and every provision of defendant's request for admissions within 10 days, or the facts therein listed should stand admitted. With that order plaintiff failed and refused to comply.

Thereafter defendant moved for summary judgment in accord with sections 25-1330 to 25-1336, inclusive, R. S. Supp., 1951, for the reason that the pleadings, together with defendant's request for admissions and plaintiff's response or failure to respond thereto, demonstrated that the court had no original jurisdiction of the cause. After hearing thereon, whereat sufficient competent and relevant evidence was adduced by defendant, the trial court entered judgment sustaining defendant's motion for summary judgment, dismissing plaintiff's action for want of original jurisdiction of the subject matter, and taxing costs to plaintiff. Plaintiff's motion for new trial was overruled, and he appealed to this court, assigning that the trial court erred in concluding that it had no jurisdiction in sustaining defendant's motion for summary judgment, and in dismissing plaintiff's action.

Under the circumstances presented, the sole issue, as

we view it, is whether or not the trial court had original jurisdiction. We conclude that it did not, and that the judgment of the trial court was proper in every respect. In that connection plaintiff cites Comstock v. Matthews, 55 Minn. 111, 56 N. W. 583, to sustain his contention. An examination of the opinion in such case discloses that it is entirely distinguishable from that at bar upon the basis of a statute which authorized presentation to the probate court of only claims arising upon contract as distinguished from tort. On the other hand, our statutes make no such distinction. In that regard, section 24-503, R. R. S. 1943, provides in part: "The county court shall have exclusive jurisdiction of the probate of wills, the administration of estates of deceased persons, * * *." Section 24-504, R. R. S. 1943, provides in part: "The county court shall have power (1) to hear and determine claims and set-offs in the matter of estates of deceased persons; * * *." Section 30-601, R. R. S. 1943, provides in part: "When letters testamentary or of administration, or of special administration shall be granted by any court of probate, or during any appeal from such order, it shall be the duty of the judge of the court to receive, examine, adjust and allow all lawful claims and demands of all persons against the deceased; * * *." And section 30-801, R. R. S. 1943, provides in part: "No action shall be commenced against the executor or administrator except actions to recover the possession of real or personal property, and actions for relief other than for the recovery of money only, and such actions as are permitted in sections 30-704, 30-705, 30-706 and 30-714; * * *."

In that connection, the cited sections contained in section 30-801, R. R. S. 1943, deal with contingent claims. However, the claim at bar is not included in that class.

Contrary to plaintiff's contention, every issue raised in the case at bar was settled in Rehn v. Bingaman, 151 Neb. 196, 36 N. W. 2d 856, wherein this court held:

"Where exclusive jurisdiction of a subject matter is constitutionally conferred on county courts, and where relief sought in an action pertaining thereto but instituted in a district court is such that the county court, under powers so conferred, is authorized to grant it, the district court will be deemed to have no original jurisdiction in the premises.

"The word 'claim' includes every species of liability which an executor or an administrator of an estate can be called upon to pay, or provide for payment, out of the general fund of the estate.

"A contingent claim against an estate is one where the liability depends upon some future event or contingency which may or may not ever occur, and which therefore makes it wholly uncertain whether or not there ever will be a liability. Such contingency does not relate simply to the amount which may be recovered but to the uncertainty of whether or not the future event will ever occur to thereby effect a right of action or liability.

"Liability upon an unliquidated claim for damages arising out of a tort does not depend for its creation upon the occurrence of some uncertain event in the future, and is not a contingent claim, since of necessity such a claim must be based upon the theory that the event, the tort giving rise to liability, has already occurred, and that a cause of action has already accrued and is in existence.

"A cause of action for personal injuries alleged to have been proximately caused by negligence of a decedent during his lifetime survives, and when no action was brought thereon during his lifetime, it must be prosecuted by a claim filed against the estate of decedent in the county court which has exclusive original jurisdiction thereof."

Such opinion cites numerous cases sustaining the aforesaid conclusions, and was cited with approval as late as Flessner v. Wenquist, *ante* p. 378, 56 N. W. 2d 294.

Section 25-1267.41, R. S. Supp., 1951, is identical with Rule 36 of the Federal Rules of Civil Procedure. Its provisions are not merely directory, but substantial compliance therewith is required. However, they are not self-executing, and the party claiming admissions for failure to deny must prove service of a proper request in compliance therewith and failure to appropriately respond thereto. In that connection, the applicable rule here is that where a party properly serves a request for admissions of relevant matters of fact or the genuineness of relevant documents, and all objections thereto are heard and appropriately denied by the court, and the other party has been ordered to respond thereto, his failure to do so within the time alloted constitutes an admission of the facts sought to be elicited. In such situation a motion for summary judgment is appropriate and may be granted if admissions made or failure to deny as required by the statute, together with the pleadings, show that there is no genuine issue as to any material fact or that the court is without jurisdiction of the subject matter. See, 2 Barron and Holtzoff, Federal Practice and Procedure, ch. 9, p. 534, and 4 Moore's Federal Practice (2d ed.), ch. 36, p. 2701, in both of which texts numerous supporting cases are cited. See, also, Mecham v. Colby, *ante* p. 386, 56 N. W. 2d 299; § 25-1332, R. S. Supp., 1951.

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

AFFIRMED.

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4. Several causes of action may be joined in the same petition if they arise out of the same transaction. *Dinkel v. Hagedorn* 419
5. Under the practice in this state, an action that includes a counterclaim is tried as an entirety. Separate suits are not required. *Harbert v. Mueller* 838
6. If for any reason the defendant does not desire to have his counterclaim disposed of in the action wherein it is pleaded, he should move to withdraw it before final submission of the case. *Harbert v. Mueller* 838
7. Defendant, by moving for a directed verdict upon plaintiff's cause of action and obtaining a favorable ruling thereon, waived a hearing on a pleaded counterclaim when the counterclaim was not withdrawn by him before final submission of the cause. *Harbert v. Mueller* 838

Adverse Possession.

1. A prescriptive right to property being used by per-

mission cannot arise until 10 years after it has been brought home to the owner in some plain and unequivocal manner that the person in possession is claiming adversely to him. *Walsh v. Walsh* 867

2. Where a grantor of real estate remains in possession of property after a conveyance, the possession of the grantor is presumed to be permissive and subject to the rights of the grantee. In such case the possession cannot be adverse until notice of the adverse claim is brought home to the other party. *Walsh v. Walsh* 867

Appeal and Error.

1. Issues not presented in the trial court may not be raised for the first time in the Supreme Court. *Gatchell v. Henderson* 1
2. Rule for trial of equity case de novo is stated. *Gatchell v. Henderson* 1
   Cain v. Killian 132
3. Jurors are the judges of credibility of witnesses. Their verdict will not be set aside unless clearly wrong. *Onstott v. State* 55
4. Where jury is waived, findings of court in a law action have the effect of verdict of a jury, and judgment entered thereon will not be disturbed unless clearly wrong. *Scottsbluff Nat. Bank v. Blue J Feeds, Inc.* 65
   Snyder v. Lincoln 190
5. On any appeal to the Supreme Court in a workmen's compensation case, the cause will be considered de novo upon the record. *McCoy v. Gooch Milling & Elevator Co.* 95
   Gilbert v. Metropolitan Utilities Dist. 750
6. In the absence of an extension of time, the bill of exceptions in a civil case must be allowed and settled not later than 70 days from the date of the filing of the notice of appeal in the district court. *Jones v. City of Chadron* 150
7. In the absence of a bill of exceptions, it is presumed that an issue of fact presented by the pleadings was established by the evidence and that it was correctly decided. The only issue that will be considered on appeal is the sufficiency of the pleadings to support the judgment. *Jones v. City of Chadron* 150
   Goger v. Voecks 696
8. An order affecting a substantial right, when made in a special proceeding, is a final order and is

appealable, even though it does not terminate the action, nor constitute a final disposition of the case. *Sullivan v. Storz* 177

9. A substantial right is an essential legal right as distinguished from a mere technical one. *Sullivan v. Storz* 177

10. A proceeding may be special, within the meaning of the statute governing appeals, although connected with a pending action. *Sullivan v. Storz*.... 177

11. When the Supreme Court determines the law of the case on appeal, the trial court is bound thereby and its judgment in accordance therewith will not ordinarily be disturbed on a subsequent appeal. *Snyder v. Lincoln* 190

12. The legal effect of evidence once determined will not be reconsidered on a second appeal where there has been no material change in the evidence on the second trial. *Snyder v. Lincoln* 190

13. The admission of incompetent evidence in a law case tried to the court without a jury is immaterial if the judgment is supported by sufficient competent evidence. *Snyder v. Lincoln* 190

14. A party may not complain of an error which he has invited. *Pierce v. Fontenelle* 235

15. In a case tried to the court, the presumption obtains that the trial court in arriving at decision considered only such evidence as was competent and relevant. The Supreme Court will not reverse a case so tried because other evidence was admitted, if there is sufficient competent and relevant evidence in the record to sustain the judgment. *Pierce v. Fontenelle* 235

16. It is error for a trial court to sustain a motion for a directed verdict unless the motion contains the specific grounds therefor. *Segebart v. Gregory*.... 261

17. It is prejudicial error for a trial court to sustain a motion for a directed verdict which fails to contain the specific grounds of the motion except where from an examination of the entire record it appears that a verdict would lack evidence to support it. *Segebart v. Gregory* 261

18. If the matter of variance has not in some appropriate manner been brought to the attention of the trial court, a court of review may decline to consider it. *Segebart v. Gregory* 261

19. An appeal is not a remedy to cure an error in matter

of law only but is a retrial of the whole case upon the pleadings and proofs. *From v. Sutton* 411

20. To obtain redress by appeal, the right thereto must exist at the time. It is not a common law right. *From v. Sutton* 411

21. The right of appeal is purely statutory and, unless the statute provides for an appeal from the decision of a quasi-judicial tribunal, such right does not exist. *From v. Sutton* 411

22. The mode and manner of appeal is statutory. Jurisdiction can only be conferred in the manner provided by statute. *From v. Sutton* 411

23. One cannot be denied his right of review in the appellate courts. Proceedings in error can always be resorted to where no other method is provided. *From v. Sutton* 411

24. A petition in error in the district court to review a judgment or order of an inferior tribunal is an independent proceeding, having for its immediate object a reversal of the judgment or order of which complaint is made. *From v. Sutton* 411

25. An appeal is authorized to the Supreme Court from any final decision of the State Board of Equalization and Assessment by a person affected thereby. Where it is shown that a kind or class of property in a county was not valued in accordance with law or that it was not valued uniformly or proportionately among the various counties of the state, a taxpayer in such county is a person affected within the meaning of the statute. *Laflin v. State Board of Equalization and Assessment* 427

26. Ordinarily an appeal removes a cause entirely to the appellate court, subjecting the facts as well as the law to a review. *Laflin v. State Board of Equalization and Assessment* 427

27. On appeal from a final order of an administrative board, however, the review by the appellate court is ordinarily limited to questions of law and whether or not the evidence is sufficient, if believed, to sustain the order. The sole question is whether such order was arbitrarily made. *Laflin v. State Board of Equalization and Assessment* 427

28. In testing the sufficiency of evidence to sustain a verdict it must be considered in the light most favorable to the successful party. *Taylor v. J. M. McDonald Co.* 437

29. A verdict and judgment will not be reversed when the record discloses that there was competent evidence to sustain the finding of the jury. *Taylor v. J. M. McDonald Co.* 437

30. In a suit in equity the presumption obtains that the trial court, in arriving at decision, considered such evidence only as was competent and relevant. The Supreme Court will not reverse a case so tried because other evidence was admitted, if there is sufficient competent and relevant evidence in the record to sustain the judgment. *Rohn v. Kelley* 463

31. An order of the district court requiring a petition to be made more definite and certain will be sustained on appeal unless it clearly appears that the court abused its discretion to the prejudice of the plaintiff. *Schuster v. Douglas* 484

32. Assignments of error relied upon for reversal and intended to be urged in the brief should be separately numbered and paragraphed. Consideration of the cause will be limited to errors assigned and discussed. The Supreme Court may, at its option, notice a plain error not assigned. *Linder v. State*.... 504

33. Under specific rule of the Supreme Court, propositions of law are to be presented in connection with questions argued which are raised by the assignments of error. The rule requires discussion of the assignments of error. *Linder v. State* 504

34. Remarks made by the trial court are not ground for reversal where confined to orderly procedure, to the proper ascertainment of issuable facts, to the exclusion of inadmissible or unnecessary testimony, and to the observance by counsel of recognized rules of evidence and procedure. *Linder v. State* 504

35. In determining the sufficiency of evidence to sustain a verdict the successful party is entitled to most favorable consideration of evidence, to have any controverted fact resolved in his favor, and to have the benefit of inferences reasonably deducible from the evidence. *Dyer v. Ilg* 568

36. 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 in conflict and is such that reasonable minds may draw different conclusions therefrom, the verdict will not be set aside. *Dyer v. Ilg* 568

37. Where there is no prejudicial error found in the record and the verdict of a jury has sufficient competent evidence to support it, the judgment will be affirmed. *Dyer v. Ilg* 568

38. Divorce cases are tried de novo on appeal to the Supreme Court, subject to the rule that when credible evidence on material questions of fact is in irreconcilable conflict, the 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. *Killip v. Killip* 573

39. If the jury is correcly instructed generally as to law, error cannot be predicated upon an omission of the court to charge as to some particular phase of the case unless a proper instruction was requested by the party complaining of the omission. *Franz v. State* 587

40. An error in a criminal case to require a reversal of a conviction must be harmful to a substantial right of the defendant. *Franz v. State* 587

41. In deciding if there was error in a part of an instruction it will be considered with the whole instruction and any additional matter in the charge on the subject. *Franz v. State* 587

42. Actions in equity, on appeal to the Supreme Court, are triable de novo, subject to the rule with respect to the superior opportunity of the trial court to observe the witnesses. *Sofio v. Glissmann* 610
Paul v. McGahan 656
Barnes v. Morash 721
Budde v. Anderson 812

43. The Supreme Court cannot have jurisdiction of an appeal from the district court, unless a notice of appeal is filed in the office of the clerk of the district court and the docket fee is deposited with the clerk within 1 month after rendition of the judgment, or within 1 month from the overruling of a motion for a new trial timely filed in the cause. *Sloan v. Gibson* 625

44. It is not the province of the Supreme Court to resolve conflicts in the evidence in law actions, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Those matters are for the jury. *Vanderheiden v. State* 735

45. In a criminal case, the Supreme Court will not interfere with a verdict of guilty based upon the evidence, unless it is so lacking in probative force that it is insufficient to support a finding of guilt beyond a reasonable doubt. *Vanderheiden v. State* .. 735

46. Instructions are to be considered together, to the end that they may be properly understood, and, when so construed, if as a whole they fairly state the law applicable to the evidence, error cannot be predicated on the giving of the same. *Vanderheiden v. State* 735

47. Where the charge to the jury, considered as a whole, correctly states the law, the judgment will not be reversed merely because a single instruction, when considered separately, is incomplete. *Vanderheiden v. State* 735

48. The Supreme Court has authority to reduce a sentence imposed for the commission of a crime but it will not often do so if the crime involves violence and moral turpitude. *Parsons v. State* 847

49. An instruction which sets out a state of facts, and authorizes a verdict for one of the parties upon a finding of such facts, is erroneous, unless it includes every fact necessary to sustain a verdict in favor of such party, or unless the omitted facts are conclusively established. *Angstadt v. Coleman* 850

50. Where the instructions as a whole clearly present to the jury the issues of fact and the law applicable thereto, harmless error in instructions separately criticized on appeal does not require a reversal of the judgment on the verdict. *Angstadt v. Coleman* .. 850

Army and Navy.

1. The Soldiers' and Sailors' Civil Relief Act cannot be construed to require a continuance on a mere showing that the defendant was in the military service. *Sullivan v. Storz* 177

2. The Soldiers' and Sailors' Civil Relief Act leaves it to the discretion of the court as to what party must come forward with the facts needed to determine whether or not the ability of a party to present his cause is materially affected by reason of his military service. *Sullivan v. Storz* 177

3. The Soldiers' and Sailors' Civil Relief Act does not require a stay upon mere showing that at some future time the ability to prosecute or defend may be

materially affected by reason of military service. *Sullivan v. Storz* 177

4. The Soldiers' and Sailors' Civil Relief Act requires that there be a present and not a mere anticipatory danger of inability to prosecute or defend by reason of military service in order to grant a stay. *Sullivan v. Storz* 177

Attorney and Client.

1. An attorney is not barred from representing a subsequent client against a former client if his duties do not conflict with those involved in the first employment. *Adams v. Adams* 778
2. Only when provided for by statute can attorney fees be allowed and taxed as costs. *Strawn v. County of Sarpy* 797
3. When provided for by statute the attorney fee in tax foreclosure actions is payable to the party the statute designates. *Strawn v. County of Sarpy* 797
4. Where a statute provides in part that attorney fees equal to 10 percent of the amount found due in tax foreclosure actions shall be taxed as part of the costs, such fees may be awarded to a county as plaintiff upon failure of attorneys representing the county by contract in tax foreclosure proceedings to file their claim with the county. *Strawn v. County of Sarpy* 797
5. Where attorney fees have been awarded to a county in a tax foreclosure action and an attorney's claim thereto has been denied and his cause of action dismissed, parties cannot thereafter intervene and file motion to distribute such fees as tax revenue. *Strawn v. County of Sarpy* 797

Automobiles.

1. A certificate of title to a motor vehicle, issued pursuant to the Certificate of Title Act, provides the exclusive method of conveying title to a motor vehicle, but it is not conclusive of ownership. *Snyder v. Lincoln* 190
2. The duties and obligations which attend a motorist when he approaches a stop sign erected pursuant to city ordinance are the same as those which attend when he approaches one erected pursuant to statute. *Borcherding v. Eklund* 196
3. A driver of a vehicle about to enter a highway protected by stop signs must stop as directed, look in

both directions, and permit all vehicles to pass which are at such a distance and traveling at such a speed that it would be obviously dangerous for him to proceed across the intersection. *Borcherding v. Eklund* 196

4. Where the driver of a vehicle approaching a through street or highway stops, looks, and sees an approaching vehicle on the favored street or highway but erroneously judges its speed or distance, or for some other reason assumes he can proceed with safety and not have a collision, the question of contributory negligence is usually one for the jury. *Borcherding v. Eklund* 196

5. The purpose of the Motor Vehicle Safety Responsibility Act is to protect the public against the operation of motor vehicles by financially irresponsible persons and thus is referable to the police power of the state. In the interests of the public the state may make and enforce regulations reasonably calculated to promote care on the part of all who use its highways. *Hadden v. Aitken* 215

6. A license to operate an automobile is not property, but a mere privilege, the suspension of which does not deprive the licensee of his property without due process of law. *Hadden v. Aitken* 215

7. A license to operate an automobile upon the highways of the state is a privilege and not a property right. The power given the Department of Roads and Irrigation to suspend such operating privilege is an administrative and not a judicial function. *Hadden v. Aitken* 215

8. Where two or more parties are guilty of negligence in the operation of automobiles causing or proximately contributing to injury and damage to the plaintiff, one being the host of the plaintiff and being free from liability because of the guest statute and the other or others not, the one or ones not being host may be held liable for the entire damage. *Segebart v. Gregory* 261

9. It is gross negligence to leave an unlighted motor vehicle on a public highway on a dark night without warning to protect approaching travelers. *Segebart v. Gregory* 261

10. If the minds of reasonable men may reasonably differ on the question of whether or not an act producing a collision of automobiles was negligence a question is presented for determination by a jury. *Segebart v. Gregory* 261

11. Where reasonable minds may differ on the question of whether or not the operator of a motor vehicle exercises the care, caution, and prudence required of him under the circumstances of the particular situation, the issue of negligence on the part of the operator is one of fact to be determined by a jury. *Davis v. Spindler* 276
12. If the operator of a motor vehicle is familiar with a railroad crossing and the surrounding conditions, it is his duty in approaching it to look and listen at a time and place where looking and listening will be effective even though vision of the railroad track is restricted. *Kennedy v. Chicago, R. I. & P. R. R. Co.* 345
13. It is the duty of the driver of an automobile to have it under such control that when he arrives at a place while traveling toward a railroad crossing where it is possible to see and to hear an approaching train he can stop and avoid a collision with it. *Kennedy v. Chicago, R. I. & P. R. R. Co.* 345
14. The question of whether a person riding in a motor vehicle is or is not a guest depends for its determination upon the facts of each case. *Bishop v. Schofield* 830
15. The existence of a guest status must be ascertained from the facts establishing the identity of the persons advantaged by the carriage, the relationship between the parties, and the purposes to which the transportation is incident. To these facts are applied logical constructions of statutory words and phrases. *Bishop v. Schofield* 830
16. A person riding in a motor vehicle is a guest if his carriage confers only a benefit upon himself and no benefit upon the owner or operator except such as is incidental to hospitality, social relations, companionship, or the like, is a mere gratuity. *Bishop v. Schofield* 830
17. A person traveling a favored street protected by a traffic signal, of which he has knowledge, may properly assume that oncoming traffic will obey it. *Angstadt v. Coleman* 850
18. Until he has notice or knowledge to the contrary, a user of the highways may assume that other users of the highways will use them in a lawful manner, and he is entitled to govern his actions in accordance with such assumption. *Angstadt v. Coleman* 850
19. A violation of the statutes regulating the use and operation of motor vehicles upon the highways is not negligence per se, but is evidence of negligence

which may be taken into consideration with all the other facts and circumstances. *Angstadt v. Coleman* 850

Banks and Banking.

1. Corporate resolution authorizing designated officer to borrow money on behalf of corporation did not authorize bank to loan money on corporate note and deposit proceeds in personal account of officer. *Scottsbluff Nat. Bank v. Blue J Feeds, Inc.* 65
2. Where corporate officer attempts to have proceeds of corporate loan placed to his individual account, a bank has the duty to make inquiry and investigation to see that transaction is authorized. *Scottsbluff Nat. Bank v. Blue J Feeds, Inc.* 65
3. It is not controlling that a corporate officer might have avoided an illegal loan by carrying out the transaction in another manner. *Scottsbluff Nat. Bank v. Blue J Feeds, Inc.* 65
4. Where bank makes authorized loan on corporate note and deposits proceeds to personal credit of officer, true test of liability is aiding the misappropriation of corporate funds by failure to perform duty of inquiry and investigation. *Scottsbluff Nat. Bank v. Blue J Feeds, Inc.* 65
5. Resolution of board of directors of corporation, showing intention to authorize banks to honor corporate checks in which corporate officer had individual interest, was sufficient to absolve bank from liability. *Blue J Feeds, Inc. v. Scottsbluff Nat. Bank* 84

Bills and Notes.

1. As between the parties, a negotiable instrument requires a consideration. The absence of consideration is a defense to the original note and each successive renewal. *Scottsbluff Nat. Bank v. Blue J Feeds, Inc.* 65
2. A detriment to the promisee constitutes a valid consideration for a note or contract only where it is within the contemplation of the parties and is known and agreed to by them. *Scottsbluff Nat. Bank v. Blue J Feeds, Inc.* 65

Cancellation of Instruments.

1. In a petition to cancel a conveyance of real property alleged to have been obtained by fraud, an allegation that plaintiff in reliance upon fraudulent

representations parted with title to the land is a sufficient plea that he was damaged by the fraud. *Goger v. Voecks* 696

2. In an action to rescind a contract for fraud, a petition which sets out the facts from which a presumption of damage arises is sufficient to show injury to plaintiff by reason of the fraud. *Goger v. Voecks* 696

Commerce.

1. The denial to the states of the power to tax property actually moving in interstate commerce rests upon the supremacy of the federal power to regulate commerce, and its postulate is necessary freedom of commerce from the burden of local taxation. *State v. T. W. Jones Grain Co.* 822
2. Goods do not cease to be part of the general mass of property in the state, subject as such to taxation in the usual way, until they have been shipped or entered with a common carrier for transportation to another state or have started upon such transportation in a continuous route or journey. *State v. T. W. Jones Grain Co.* 822
3. Intention to remove from a state into another state does not impress it with the character of interstate commerce so as to render it immune from state taxation under the commerce clause of the federal Constitution. *State v. T. W. Jones Grain Co.* 822

Constitutional Law.

1. Under Wyoming statute, service of process on county attorney and guardian ad litem alone for nonresident insane defendant was not valid constructive or substituted service of summons and did not constitute due process of law. *Repp v. Repp* 45
2. The merits of the cause of action resulting in the judgment may not be reviewed by virtue of the full faith and credit clause of the Constitution of the United States. *Repp v. Repp* 45
3. When the record of the judgment of a sister state shows that service of process, either personal, constructive, or substituted, was not had, within the limitations imposed by the Fourteenth Amendment to the Constitution of the United States, the judgment rendered is not entitled to full faith and credit in this state. *Repp v. Repp* 45
4. A divorce decree of a sister state which was entered

without the notice required to meet the requirements of due process will be given no effect in this state. A divorce decree is, in this respect, subject to the same rules as to due process as a judgment in other forms of actions. *Repp v. Repp* 45

5. The constitutional provision that all courts shall be open and that justice shall be administered without delay is self-executing and controlling, paramount and mandatory upon all courts of this state. *Sullivan v. Storz* 177

6. The Constitution of Nebraska provides that no bill shall contain more than one subject, and the same shall be clearly expressed in the title. *Hadden v. Aitken* 215

7. The Constitution does not require that the title of a bill be a synopsis of the law. *Hadden v. Aitken*.... 215

8. A license to operate an automobile is not property, but a mere privilege, the suspension of which does not deprive the licensee of his property without due process of law. *Hadden v. Aitken* 215

9. The Fourteenth Amendment to the Constitution of the United States provides that no state shall make or enforce any law which shall "deny to any person within its jurisdiction the equal protection of the laws." *Hadden v. Aitken* 215

10. The equality required by the Fourteenth Amendment to the Constitution of the United States is equality of right and not of enjoyment. A law that confers equal rights on all citizens of the state, or subjects them to equal burdens, is an equal law. *Hadden v. Aitken* 215

11. The administrative action of the Board of Educational Lands and Funds in declaring renewal leases on state school lands to be void, and in offering such lands for releasing at public auction, did not constitute a violation of the due process requirement of the Constitution of the state. *Propst v. Board of Educational Lands and Funds* 226

12. An unconstitutional statute is a nullity, is void from its enactment, and is incapable of creating any rights or obligations. *Propst v. Board of Educational Lands and Funds* 226
State v. Cooley 330

13. It was the decision of the Supreme Court that gave renewal leases on school lands under the act of 1947 their status of legal nullity, and not the action of the Board of Educational Lands and Funds in

entering the fact upon its records by its declaration or by its vacation of the previous orders concerning the issuance thereof. *State v. Gardner* 326
State v. Cooley 330

14. The Constitution prohibits any game of chance no matter what is given for the play. *Baedaro v. Caldwell* 489

15. A five-ball pinball machine which gives a player an additional free game or games upon obtaining a high enough score is a game of chance played for money or property and is prohibited in this state. *Baedaro v. Caldwell* 489

16. To establish an unconstitutional discrimination, there must be more than a showing that an ordinance has not been enforced against others as it is sought to be enforced against the person claiming discrimination. The failure to consistently enforce an ordinance does not destroy it. Abuse in its enforcement does not affect its validity. *City of Omaha v. Lewis & Smith Drug Co., Inc.* 650

17. The Director of Insurance is an executive officer within the constitutional provision that such an officer shall receive such salary as may be provided by law, but that the salary of no officer shall be changed more than once in 8 years. *State ex rel. Laughlin v. Johnson* 671

18. The constitutional provision to the effect that the salary of no executive officer shall be changed more than once in 8 years is a prohibition against legislative action on the subject for the period stated. *State ex rel. Laughlin v. Johnson* 671

19. The salary of the Director of Insurance having been properly increased in 1941, the attempt of the Legislature to again increase it in 1945 was unconstitutional and void. *State ex rel. Laughlin v. Johnson* 671

20. The Director of Insurance is an executive officer having a fixed and definite term within the purview of the constitutional provision that the compensation of a public officer shall not be increased or diminished during his term of office. *State ex rel. Laughlin v. Johnson* 671

21. The term of an office is distinct from the tenure of an officer. The latter has no application to the question whether or not an office has a fixed and definite term. *State ex rel. Laughlin v. Johnson*.... 671

Continuances.

1. The Soldiers' and Sailors' Civil Relief Act cannot be construed to require a continuance on a mere showing that the defendant was in the military service. *Sullivan v. Storz* 177
2. The Soldiers' and Sailors' Civil Relief Act leaves it to the discretion of the court as to what party must come forward with the facts needed to determine whether or not the ability of a party to present his cause is materially affected by reason of his military service. *Sullivan v. Storz* 177
3. The Soldiers' and Sailors' Civil Relief Act does not require a stay upon mere showing that at some future time the ability to prosecute or defend may be materially affected by reason of military service. *Sullivan v. Storz* 177
4. The Soldiers' and Sailors' Civil Relief Act requires that there be a present and not a mere anticipatory danger of inabiliay to prosecute or defend by reason of military service in order to grant a stay. *Sullivan v. Storz* 177
5. Court's ruling on an application for a continuance will not be reversed in absence of showing of abuse of discretion. *Linder v. State* 504
6. Unless party suffers prejudice, refusal to grant continuance is not abuse of discretion. *Linder v. State* 504

Contracts.

1. In the absence of an otherwise binding agreement, there is no privity of contract between a subcontractor and the owner. *Gatchell v. Henderson* 1
2. Where a mechanic's lien is invalid and there is no privity of contract between a subcontractor and the owner, such owner has a right as against the contractor to offset damages for breach of contract against any sum of money in his hands due and owing on his building contract with the contractor. *Gatchell v. Henderson* 1
3. As between the parties, a negotiable instrument requires a consideration. The absence of consideration is a defense to the original note and each successive renewal. *Scottsbluff Nat. Bank v. Blue J Feeds, Inc.* 65
4. A detriment to the promisee constitutes a valid consideration for a note or contract only where it is within the contemplation of the parties and is

known and agreed to by them. *Scottsbluff Nat. Bank v. Blue J Feeds, Inc.* 65

5. When the provisions of a contract together with the facts and circumstances that aid in ascertaining the intent of the parties thereto are not in dispute, the proper construction of such contract is a question of law. *Mecham v. Colby* 386

6. A written contract which is couched in clear and unambiguous language is not subject to a construction other and different from that which flows from the language used. *Mason v. Mason* 478

7. A stipulated amount will usually be regarded as a provision for liquidated damages where the damages arising from a breach of contract are difficult to ascertain and where the amount is not disproportionate to the damages reasonably anticipated from the breach. *Sofio v. Glissmann* 610

8. As a general rule, the question of whether a sum mentioned in a contract is to be considered as liquidated damages or as a penalty is a question of law, dependent on the construction of the contract by the court. *Sofio v. Glissmann* 610

9. To support an oral promise to pay the debt of another, a consideration must operate to the advantage of the promisor, and place him under a pecuniary obligation to the promisee independent of the original debt. *King v. Schmall* 635

10. A contract restraining a person from establishing a business competitive with that of the other party to it is strictly construed and doubts are resolved against a latitudinarian construction thereof. *Adams v. Adams* 778

11. The party bound by a contract not to establish a business in competition with the other party to it is not precluded from loaning money to others though they may use it to engage in business in competition with the person for whose benefit the restriction was made. *Adams v. Adams* 778

12. The negative provision of a contract that a party thereto will not set up or establish a competitive business contemplates a business in which he has a proprietary interest, a right of control, or a right of management. *Adams v. Adams* 778

13. The words in a contract that a party will not set up or establish a business competitive with the other party thereto means that the covenantor will not create or bring into being and operate a new busi-

ness of the character of that operated by the person in whose favor the prohibition is made. The words set up and establish therein are intended to describe something not in existence. *Adams v. Adams* 778

Corporations.

1. Corporate resolution authorizing designated officer to borrow money on behalf of corporation did not authorize bank to loan money on corporate note and deposit proceeds in personal account of officer. *Scottsbluff Nat. Bank v. Blue J Feeds, Inc.* 65
2. Where corporate officer attempts to have proceeds of corporate loan placed to his individual account, a bank has the duty to make inquiry and investigation to see that transaction is authorized. *Scottsbluff Nat. Bank v. Blue J Feeds, Inc.* 65
3. It is not controlling that a corporate officer might have avoided an illegal loan by carrying out the transaction in another manner. *Scottsbluff Nat. Bank v. Blue J Feeds, Inc.* 65
4. Where bank makes authorized loan on corporate note and deposits proceeds to personal credit of officer, true test of liability is aiding the misappropriation of corporate funds by failure to perform duty of inquiry and investigation. *Scottsbluff Nat. Bank v. Blue J Feeds, Inc.* 65
5. Resolution of board of directors of corporation, showing intention to authorize banks to honor corporate checks in which corporate officer had individual interest, was sufficient to absolve bank from liability. *Blue J Feeds, Inc. v. Scottsbluff Nat. Bank* 84
6. In the absence of usurpation, fraud, gross negligence, or transgression of statutory limitations, courts of equity will not intervene at the suit of dissatisfied policyholders merely to overrule and control the discretion of directors on questions of corporate management, policy, or business. *Ledwith v. Bankers Life Ins. Co.* 107

Costs.

1. Only when provided for by statute can attorney fees be allowed and taxed as costs. *Strawn v. County of Sarpy* 797
2. When provided for by statute the attorney fee in tax foreclosure actions is payable to the party the statute designates. *Strawn v. County of Sarpy* 797

3. Where a statute provides in part that attorney fees equal to 10 percent of the amount found due in tax foreclosure actions shall be taxed as part of the costs, such fees may be awarded to a county as plaintiff upon failure of attorneys representing the county by contract in tax foreclosure proceedings to file their claim with the county. *Strawn v. County of Sarpy* 797

Counties.

1. What a private landowner may not do neither may a county nor other public authority do, except in the exercise of eminent domain. *Purdy v. County of Madison* 212
2. Where a county wrongfully diverts surface 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. *Purdy v. County of Madison* 212
3. Section 39-809, R. R. S. 1943, refers to damages resulting from the construction of bridges, culverts, or highways through the fault, neglect, or oversight of county officers, and has no relation to the unlawful diversion of surface waters flowing in a natural watercourse to the damage of adjoining landowners. *Purdy v. County of Madison* 212
4. Where a single proposition to issue bonds and levy a tax for the erection of a courthouse contemplated a tax levy in excess of constitutional debt limit, a favorable vote of two-thirds of electors voting on proposition was required. *State ex rel. Shelley v. Board of County Commissioners* 583

Courts.

1. A district court lacks original jurisdiction to hear and adjudicate a cause of action for money only claimed to have existed against a person at the time of his death. Original jurisdiction of such a claim is, by the Constitution, conferred upon the county court having jurisdiction of the estate of the deceased debtor. *Flessner v. Wenquist* 378
2. The county court is by Constitution and statutes given exclusive original jurisdiction of all matters relating to the settlement of estates of deceased persons. *Rohn v. Kelley* 463
3. County courts, in carrying out their exclusive orig-

inal jurisdiction in matters relating to the administration of the estates of deceased persons, have jurisdiction to determine title to personal property claimed by representatives of decedents' estates. *Rohn v. Kelley* 463

4. County courts are courts of record. *Rohn v. Kelley* 463
5. Under the Uniform Declaratory Judgments Act, courts of record, within their respective jurisdictions, are vested with power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. *Rohn v. Kelley* 463
6. County courts are without general equity jurisdiction but, in exercising exclusive original jurisdiction over estates, may apply equitable principles to matters within probate jurisdiction, and render to the parties interested in the assets of the estate such relief as their respective situations may justify. *Rohn v. Kelley* 463
7. Where exclusive jurisdiction of a subject matter is constitutionally conferred on county courts, and where relief sought in an action pertaining thereto but instituted in a district court is such that the county court, under powers so conferred, is authorized to grant it, the district court will be deemed to have no original jurisdiction in the premises. *Mueller v. Shacklett* 881

Criminal Law.

1. A motion for a change of venue in a criminal case is addressed to the sound discretion of the trial court, and its ruling thereon will not be disturbed unless an abuse of such discretion is disclosed. *Medley v. State* 25
2. The venue of an offense need not be established by direct testimony, nor in the words of the information. If from the facts in evidence the only rational conclusion which can be drawn is that the crime was committed in the county alleged, the proof is sufficient. *Medley v. State* 25
3. Where the punishment of an offense 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 in the absence of abuse of discretion. *Onstott v. State* 55
   Parsons v. State 847
4. The failure to give a preliminary examination to a person charged with a crime is not a jurisdictional

defect and is waived if complaint is not made before entry of a plea of not guilty in the district court. *Drewes v. State* 319

5. Impeaching evidence is that which is directed to the question of the credibility of the witness. *Drewes v. State* 319

6. In a criminal prosecution, any testimony, otherwise competent, which tends to dispute the testimony offered on behalf of the accused as to a material fact, is proper rebuttal testimony. *Drewes v. State* 319

7. It is within the discretion of the court to permit in rebuttal the introduction of evidence not strictly rebutting. *Drewes v. State* 319

8. Insanity of a person accused of a crime existing at the time of the commission of the offense may be shown in defense of the accused at the trial of the charge made against him. It is not available as a ground of habeas corpus after conviction, sentence, and commitment of the accused. *Sedlacek v. Hann* 340

9. Generally, insanity as a bar to the imposition of sentence is a factual issue for the determination of the court having jurisdiction of the offense. A judgment or sentence by a court of competent jurisdiction may not be collaterally attacked on that issue in a habeas corpus proceeding. *Sedlacek v. Hann*.... 340

10. In a criminal case the trial court is invested with a broad judicial discretion in allowing or denying an application to require the state to produce documentary evidence for the inspection of defendant's counsel before the trial. Error may be predicated only for an abuse of such discretion. *Linder v. State* 504

11. Insanity is not recognized as a defense to a criminal action, unless it affects the mind of the accused to such an extent that it renders him incapable of distinguishing between right and wrong with reference to the act committed. *Linder v. State* 504

12. Criminal trials should be conducted in such a manner that the accused may have a fair and impartial trial, uninfluenced by prejudice, passion, and public clamor. *Linder v. State* 504

13. Remarks made by the trial court are not ground for reversal where confined to orderly procedure, to the proper ascertainment of issuable facts, to the exclusion of inadmissible or unnecessary testimony,

and to the observance by counsel of recognized rules of evidence and procedure. *Linder v. State* 504

14. Based upon personal examination and the results thereof, a medical expert may give his opinion on the question of whether or not a defendant in a criminal action knew the difference between right and wrong with reference to the act committed. *Lyons v. State* 550

15. The credibility of witnesses and the weight of their testimony are for the jury to determine in a criminal case. The conclusion of the jury may not be disturbed unless it is clearly wrong. *Franz v. State* 587

16. Absence of any direct, incriminatory evidence is ordinarily made the test of the obligation of the trial court to instruct as to the probative value and manner of considering circumstantial evidence in a criminal case, and, if there is direct evidence of the principal facts essential to guilt, the failure to instruct in that respect is not error. *Franz v. State* 587

17. It is the duty of the court upon request of the accused to instruct the jury upon his theory of the case, if there is evidence to support it. *Franz v. State* 587

18. An error in a criminal case to require a reversal of a conviction must be harmful to a substantial right of the defendant. *Franz v. State* 587

19. In deciding if there was error in a part of an instruction it will be considered with the whole instruction and any additional matter in the charge on the subject. *Franz v. State* 587

20. One cannot be convicted of a felony upon his own voluntary, unsupported, extra-judicial admission or confession that a crime has been committed. *Vanderheiden v. State* 735

21. While a voluntary admission or confession tending to prove a crime is insufficient standing alone to prove the corpus delicti, it is competent evidence and may with slight corroborating circumstances be sufficient to warrant a conviction. *Vanderheiden v. State* 735

22. Circumstances capable of an innocent construction may be interpreted in the light of a defendant's admission or confession, and the fact under investigation be thus given a criminal aspect. *Vanderheiden v. State* 735

23. In a criminal case, the Supreme Court will not in-

terfere with a verdict of guilty based upon the evidence, unless it is so lacking in probative force that it is insufficient to support a finding of guilt beyond a reasonable doubt. *Vanderheiden v. State* 735

24. Failure to testify in his own behalf will not operate to defendant's disadvantage; but if he does testify, and fails to controvert in any way what has been said by witnesses against him, concerning a fact within his own personal knowledge, it will be taken as an admission that their testimony is true. *Vanderheiden v. State* 735

25. The Supreme Court has authority to reduce a sentence imposed for the commission of a crime but it will not often do so if the crime involves violence and moral turpitude. *Parsons v. State* 847

Damages.

1. In an action for personal injuries which are permanent and have impaired the earning capacity, damages for pecuniary loss by reason of decreased earning power are to be based on life expectancy immediately before the injury and for future mental and physical suffering on probable expectancy of life in plaintiff's injured condition. *Borcherding v. Eklund* 196

2. The only future pain and suffering which a jury is entitled to consider in the assessment of damages are such as the evidence shows with reasonable certainty will be experienced. *Borcherding v. Eklund* 196

3. Damages for permanent injuries cannot be based upon mere speculation, probability, or uncertainty, but must be based upon competent evidence that permanent damages, clearly shown, are reasonably certain as a proximate result of the injury. *Borcherding v. Eklund* 196

4. A jury should be fully and fairly informed as to the various items of damages which it should take into consideration in arriving at its verdict. In this respect it is the duty of the trial court to instruct as to the proper basis upon which damages are to be assessed for each such item. *Borcherding v. Eklund* 196

5. Plaintiff's recovery in a libel suit must be determined by the damages which proximately flow from the acts done by the defendant. *Rimmer v. Chadron Printing Co.* 533

6. A stipulated amount will usually be regarded as

a provision for liquidated damages where the damages arising from a breach of contract are difficult to ascertain and where the amount is not disproportionate to the damages reasonably anticipated from the breach. *Sofio v. Glissmann* 610

7. As a general rule, the question of whether a sum mentioned in a contract is to be considered as liquidated damages or as a penalty is a question of law, dependent on the construction of the contract by the court. *Sofio v. Glissmann* 610
8. Injunction is a proper remedy to prevent violation of a valid restrictive covenant not to establish a competitive business. A provision therein for liquidated damages does not make the remedy unavailable. *Adams v. Adams* 778
9. In an action to enjoin the violation of a restrictive covenant, the plaintiff may recover as an incident of it any damages to which he is legally entitled because of default in performance of the obligation of the covenant. *Adams v. Adams* 778

Deeds.

1. Failure to record a deed until after the grantor's death is not of itself sufficient to show nondelivery. *Cain v. Killian* 132
2. The possession of a deed by the grantee, in the absence of opposing circumstances, is prima facie evidence of delivery, and the burden of proof is on him who disputes this presumption. *Cain v. Killian* 132
3. While not conclusive, presumption of delivery arising from possession of deed controls until overcome by clear and satisfactory proof. *Cain v. Killian* 132
4. It is required by statute that consideration shall be set forth in a deed to real estate, but when title is attacked on the ground of want of consideration no burden devolves upon the grantee to assume the burden of proving consideration. *Pierce v. Fontenelle* 235
5. When an attack is made on a deed on the ground of lack of consideration, the general rule is that the statement of consideration is prima facie evidence which may be rebutted and that a delivered deed passes title even if there is no consideration. *Pierce v. Fontenelle* 235
6. Possession of a deed by a grantee raises a presumption that the instrument was properly deliv-

ered and the burden of proof is upon him who disputes it to overcome the presumption. *Pierce v. Fontenelle* 235

7. The presumption of delivery exists in favor of a grantee who is unable to explain how he came into possession of a deed because disqualified from testifying on account of the death of the grantor. *Pierce v. Fontenelle* 235

8. The fact that the grantee kept the deed without recording for a number of years, allowed the grantor to remain in possession, and made no claim to the property until after the grantor's death, does not necessarily overcome the presumption of delivery, when the deed, fully executed, is in his possession. *Pierce v. Fontenelle* 235

9. The statutory rule for interpreting a conveyance of real estate requires the court to give effect to the expressed intention of the parties as determined from the instrument as a whole if it is not inconsistent with law. *Elrod v. Heirs, Devisees, etc.* 269

10. Each word and provision of a conveyance of real estate must be given such significance as will make effective the intention of the parties. *Elrod v. Heirs, Devisees, etc.* 269

11. In ascertaining the intention expressed in an instrument conveying real estate, the court is not confined to a strict or literal interpretation of the language used if to do so would frustrate the intention of the parties thereto as gathered from the whole instrument. *Elrod v. Heirs, Devisees, etc.* 269

12. A reservation is always something taken back out of that which is demised, the creation by the grant of a new right in the grantor from the subject of the conveyance and something which did not exist as an independent right before the grant was made. *Elrod v. Heirs, Devisees, etc.* 269

13. An exception excludes from the operation of the conveyance the interest specified and it remains in the grantor unaffected by the conveyance. *Elrod v. Heirs, Devisees, etc.* 269

14. The legal terms exception and reservation are frequently used interchangeably and indiscriminately. The use of either term is not conclusive and many times is not even significant as to the intention of the parties. *Elrod v. Heirs, Devisees, etc.* 269

15. Parol evidence to set aside a deed, in order to be

sufficient to overcome the presumption arising from the express terms of the deed, must be clear, unequivocal, and convincing. *Paul v. McGahan* 656

Depositions.

An extrajudicial admission appearing in the deposition of a party taken before trial is not ordinarily final and conclusive upon him, but it may be competent and admissible as evidence in contradiction and impeachment of his present claim and his other evidence given at the trial, to be given such weight as the trier of fact deems it entitled. *Illian v. McManaman* 12
Cain v. Killian 132

Descent and Distribution.

1. The county court is by Constitution and statutes given exclusive original jurisdiction of all matters relating to the settlement of estates of deceased persons. *Rohn v. Kelley* 463
2. A proceeding in the probate court to settle the estate of a decedent is a proceeding in rem. Every one interested in such settlement is a party in the probate court whether he is named or not, and this is particularly true as to the distribution of an estate under a will. *Rohn v. Kelley* 463
3. County courts, in carrying out their exclusive original jurisdiction in matters relating to the administration of the estates of deceased persons, have jurisdiction to determine title to personal property claimed by representatives of decedents' estates. *Rohn v. Kelley* 463

Dismissal and Nonsuit.

The general rule is that a dismissal or nonsuit carries the parties and the entire cause of action out of court. All further proceedings in the action with certain exceptions are unauthorized until the judgment of dismissal or nonsuit is vacated and the cause reinstated. *Strawn v. County of Sarpy* 797

Divorce.

1. Under Wyoming statute, service of process on county attorney and guardian ad litem alone for nonresident insane defendant was not valid constructive or substituted service of summons and

did not constitute due process of law. *Repp v. Repp* 45

2. Under Wyoming statute providing for a divorce on the ground of insanity, the service of process therein provided must be construed and harmonized with other statutes and is in addtiion to general requirements for service of process contained in the latter sections. Jurisdiction over the person is not complete until service is had in accordance with such latter sections. *Repp v. Repp* 45
3. When the granting of divorce is made a judicial function, a hearing is implied at which the defendant is entitled to notice in a manner which is reasonably calculated to give the defendant actual notice of the proceeding and an opportunity to be heard. *Repp v. Repp* 45
4. A divorce decree of a sister state which was entered without the notice required to meet the requirements of due process will be given no effect in this state. A divorce decree is, in this respect, subject to the same rules as to due process as a judgment in other forms of actions. *Repp v. Repp* 45
5. In a divorce suit in which the custody of a minor child is involved, the custody of the child is to be determined by the best interests of the child, with due regard for the superior rights of fit, proper, and suitable parents. *Campbell v. Campbell* 155
   Killip v. Killip 573
6. The care, custody, and control of a child of tender years is usually awarded to the mother if she is a fit and suitable person. *Campbell v. Campbell* 155
7. In awarding the custody of minor children, the court looks to the best interests of such children, and those of tender age are usually awarded to the mother. Other considerations being equal, it is usual to award the custody of children to the innocent spouse. *Campbell v. Campbell* 155
8. Custody of minor children awarded to their mother in a divorce action will not be disturbed in a subsequent proceeding to modify the original decree, unless it is shown that she is an unfit person to have their custody, or that their best interests require such action. *Campbell v. Campbell* 155
9. In a divorce case it is generally the best policy to keep minor children within the jurisdiction of the court. However, the welfare of the child should receive the paramount consideration and this policy

should yield to the best interests of the child. *Campbell v. Campbell* 155

10. A parent who has been awarded the custody of a child may temporarily provide a suitable home for it in the home of its grandparents without losing the right to its custody. *Campbell v. Campbell* 155

11. Divorce cases are tried de novo on appeal to the Supreme Court, subject to the rule that when credible evidence on material questions of fact is in irreconcilable conflict, the 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. *Killip v. Killip* 573

12. The custody of young children should be committed to their parents rather than to strangers. The court may not deprive the parent of such custody unless it is shown that the parent is unfit to perform the duties imposed by the relation or has forfeited the right. *Killip v. Killip* 573

13. The right of a parent to the custody of a child is not lost beyond recall by an act of relinquishment performed under circumstances of temporary caprice or discouragement. *Killip v. Killip* 573

14. The right of a parent is not lightly to be set aside, and it should not be done unless unfitness is affirmatively shown or a forfeiture clearly established. *Killip v. Killip* 573

15. Custody of a child of tender years should be awarded the mother unless it is shown that she is unsuitable or unfit to have such custody or through some peculiar circumstances is unable to furnish a good home. *Killip v. Killip* 573

16. Extreme cruelty may consist of personal injury or physical violence, or it may be acts or omissions of such character as to destroy the peace of mind or impair the bodily or mental health of the one upon whom they are inflicted or toward whom they are directed, or be such as to destroy the objects of matrimony. *Killip v. Killip* 573

17. 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. *Killip v. Killip* 573

18. A decree of divorce may not be granted on the uncorroborated declarations, confessions, or admis-

sions of the parties to the case. *Killip v. Killip* 573
19. Rule for determining question of alimony stated. *Killip v. Killip* 573
20. The earnings of a husband and his ability to earn are proper elements to be taken into consideration in determining the amount of alimony to be awarded in a suit for divorce. *Prosser v. Prosser* 629
21. In the allowance of alimony, the earning capacity of the husband is an element to be considered and, in a proper case, the allowance of permanent alimony may exceed the value of the husband's estate at the time the marriage is dissolved. *Prosser v. Prosser* 629
22. The amount of alimony to be granted a wife is not to be determined alone from the property possessed by the husband. Many other factors enter into the determination such as the husband's age, health, earning capacity, future prospects, and social standing. *Prosser v. Prosser* 629
23. A divorce may not be decreed on the uncorroborated testimony of a party to the action. *Lees v. Lees*.... 664
24. A divorce decree is not conclusive in a subsequent habeas corpus proceeding where the parties to the two proceedings are not the same. *Barnes v. Morash* 721
25. The statutory rule requiring corroboration in divorce cases has application alike in default and contested cases. *Spray v. Spray* 774

Elections.

Where a single proposition to issue bonds and levy a tax for the erection of a courthouse contemplated a tax levy in excess of constitutional debt limit, a favorable vote of two-thirds of electors voting on proposition was required. *State ex rel. Shelley v. Board of County Commissioners* 583

Eminent Domain.

1. In a condemnation proceeding it is ordinarily a question of law whether or not the property involved constitutes one contiguous unit or tract. Where the facts create a doubt, depending on conflicting evidence or on different views of the evidence, the court should submit the question to the jury under proper instructions. *Rath v. Sanitary District No. One* 444
2. In estimating the damages occasioned by the appropriation of a part of one contiguous tract for

public use, the injury to the property remaining as well as the market value of the property actually taken should be considered although the petition filed by the condemnor for the appointment of appraisers only describes the property taken. *Rath v. Sanitary District No. One* 444

3. The measure of damages for land taken for public use is the fair and reasonable market value of the land actually appropriated and the difference in the fair and reasonable market value of the remainder of the land before and after the taking. *Rath v. Sanitary District No. One* 444

4. In fixing the damages sustained by a landowner in consequence of the taking or damaging of his property for a public use the jury may take into account every nonspeculative element of annoyance and disadvantage resulting from the improvement which would influence an intended purchaser's estimate of the market value of such property. *Rath v. Sanitary District No. One* 444

5. A landowner cannot ordinarily recover, on account of a lawful public improvement, damages that he suffers in common with the public generally, though his loss may be greater in degree, but this rule does not prevent the recovery of special damages. *Rath v. Sanitary District No. One* 444

Equity.

1. Equity will devise a remedy to meet emergencies, and will adjust the property and financial interests of litigants whenever it can do so without prejudice to the legal or equitable rights of any person. *Gatchell v. Henderson* 1

2. Where the court dealing in equity has money or property under its jurisdiction, it has the power to appropriately direct its application in order to carry out justice. *Gatchell v. Henderson* 1

3. In the absence of usurpation, fraud, gross negligence, or transgression of statutory limitations, courts of equity will not intervene at the suit of dissatisfied policyholders merely to overrule and control the discretion of directors on questions of corporate management, policy, or business. *Ledwith v. Bankers Life Ins. Co.* 107

4. Rule with respect to review by Supreme Court in equity cases is stated. *Cain v. Killian* 132

5. The relief granted in equity is generally what the

nature of the case, the facts, and the law require not at the beginning of the litigation but at the time the decree is rendered. *Propst v. Board of Educational Lands and Funds* 226

6. County courts are without general equity jurisdiction but, in exercising exclusive original jurisdiction over estates, may apply equitable principles to matters within probate jurisdiction, and render to the parties interested in the assets of the estate such relief as their respective situations may justify. *Rohn v. Kelley* 463

7. If a defendant in a suit in equity moves at the close of the evidence of the plaintiff for a dismissal of the suit for want of proof to support a judgment, he admits the truth of the evidence and any reasonable conclusions deducible from it. *Adams v. Adams* 778

8. The test of equity jurisdiction is generally the absence of an adequate remedy at law. *Adams v. Adams* 778

9. An adequate remedy at law is one that is as practicable and efficient to the ends of justice and its administration as the remedy in equity. *Adams v. Adams* 778

10. A remedy at law is not adequate if the situation requires relief preventing the repetition or continuance of wrongful acts. *Adams v. Adams* 778

11. Actions in equity, on appeal to the Supreme Court, are triable de novo subject to the rule with respect to the superior opportunity of the trial court to observe the witnesses. *Budde v. Anderson* 812

Estates.

1. Where an estate in fee simple is devised, an attempt by the testator to prevent alienation is ineffective and void for the reason that it is repugnant to the estate thus created. *Andrews v. Hall* 817

2. The rule permitting reasonable restrictions on alienation of an estate in fee simple, as announced in Peters v. Northwestern Mutual Life Ins. Co., 119 Neb. 161, 227 N. W. 917, 67 A. L. R. 1311, is disapproved and the case overruled. *Andrews v. Hall* 817

Estoppel.

1. Estoppel does not apply where all interested parties have equal knowledge of the facts, or where the

party claiming its benefit is chargeable with notice of the facts or is equally negligent or at fault. *Scottsbluff Nat. Bank v. Blue J Feeds, Inc.* 65

2. The rule that as between two innocent parties the loss should fall on him who made the loss possible protects only those who exercise ordinary care in performance of duty. *Scottsbluff Nat. Bank v. Blue J Feeds, Inc.* 65

Evidence.

1. An admission should possess the same degree of certainty as would be required in the evidence which it represents. Mere conjectures or suggestions as to what might have happened if certain circumstances had occurred are not competent. *Cain v. Killian* 132
2. An extrajudicial admission appearing in the deposition of a party is not ordinarily final and conclusive upon him, but it may be competent and admissible as evidence in contradiction and impeachment of his present claim and his other evidence given at the trial. *Cain v. Killian* 132
   Angstadt v. Coleman 850
3. When objection to the admission of evidence as to transactions or conversations with deceased has been properly made by the representative of a deceased person and erroneously overruled, the party making such objection does not waive his rights under the statute by cross-examining the witness on the same matters or offering direct evidence thereon to meet that erroneously admitted. *Pierce v. Fontenelle* 235
4. If either on cross-examination or by direct examination the representative of a deceased person goes beyond the scope of the inquiry to which his objection was properly made and as to which it should have been sustained, and introduces evidence of other matters in regard to the original transaction or conversation which is not admissible under the provisions of the statute, then the representative thereby waives the benefit of the statute and any related erroneous rulings of the court. *Pierce v. Fontenelle* 235
5. When the representative of a deceased person voluntarily opens the door for the purpose of obtaining what he affirmatively desires, he thereby waives the benefit of the statute and gives the interested

party the right to further testify in his own behalf and fully explain such transaction or conversation. *Pierce v. Fontenelle* 235

6. Communications by telephone are admissible in evidence where otherwise relevant, provided the identity of the person making the communication is satisfactorily established. However, where it appears the parties to a telephone conversation are not vested with authority to act, then such telephone conversation is inadmissible in evidence. *Linch v. Carlson* 308

7. Impeaching evidence is that which is directed to the question of the credibility of the witness. *Drewes v. State* 319

8. In a criminal prosecution, any testimony, otherwise competent, which tends to dispute the testimony offered on behalf of the accused as to a material fact, is proper rebuttal testimony. *Drewes v. State* 319

9. It is within the discretion of the court to permit in rebuttal the introduction of evidence not strictly rebutting. *Drewes v. State* 319

10. Questions propounded to a witness must not assume the existence of a fact not proven in the cause. *Rimmer v. Chadron Printing Co.* 533

11. A hypothetical question which consists of a recitation of facts containing nothing subject to an expert opinion is improper and should be excluded by the trial court. *Lyons v. State* 550

12. Parol evidence to set aside a deed, in order to be sufficient to overcome the presumption arising from the express terms of the deed, must be clear, unequivocal, and convincing. *Paul v. McGahan* 656

13. A death certificate as such may be admissible under appropriate circumstances for the purpose of impeachment, but it is not a public record and is incompetent when offered as proof of the cause of death in a controversy where the cause of death is a material issue. *Vanderheiden v. State* 735

14. A photograph proved to be a true representation of the person, place, or thing which it purports to represent, is competent evidence of anything of which it is competent and relevant for a witness to give a verbal description. *Vanderheiden v. State* 735

15. Where a photograph illustrates or makes clear some controverted issue in the case, a proper foundation having otherwise been laid for its reception in evidence, it may properly be received, even though it

may present a gruesome spectacle. *Vanderheiden v. State* 735

16. Photographs of the person or body of a deceased, proper foundation having been laid, may ordinarily be received in evidence for purpose of identification, to show the condition of the body, or to indicate the nature or extent of wounds or injuries thereon. *Vanderheiden v. State* 735

17. Rule for submission of hypothetical questions stated. *Vanderheiden v. State* 735

18. In propounding a hypothetical question, a party may assume the existence of facts in accordance with his theory, if there is evidence in the record to sustain it, notwithstanding there may be a conflict of evidence on the point raised. *Vanderheiden v. State* 735

19. Failure of defendant in a criminal case to testify in his own behalf will not operate to his disadvantage; but if he does testify, and fails to controvert in any way what has been said by witnesses against him, concerning a fact within his own personal knowledge, it will be taken as an admission that their testimony is true. *Vanderheiden v. State* 735

20. The provisions of the discovery statute are not merely directory, but substantial compliance therewith is required. However, they are not self-executing, and the party claiming admissions for failure to deny must prove service of a proper request in compliance therewith and failure to appropriately respond thereto. *Mueller v. Shacklett* 881

21. Where a party properly serves a request for admissions of relevant matters of fact or the genuineness of relevant documents, and all objections thereto are heard and appropriately denied by the court, and the other party has been ordered to respond thereto, the failure to do so within the time allotted constitutes an admission of the facts sought to be elicited. *Mueller v. Shacklett* 881

Executors and Administrators.

1. Under the Uniform Declaratory Judgments Act, an executor of the estate of a decedent may have a declaration of the rights or legal relation in respect thereto to determine any question arising in the administration of the estate, including questions of construction of wills and other writings. *Rohn v. Kelley* 463

2. A petition for a declaratory judgment may be filed in probate proceedings by an executor to have a declaratory judgment to determine whether proceeds of certain United States Savings Bonds should be declared to be assets of the estate. *Rohn v. Kelley* 463
3. The word "claim" includes every species of liability which an executor or an administrator of an estate can be called upon to pay, or provide for payment, out of the general fund of the estate. *Mueller v. Shacklett* 881
4. A contingent claim against an estate is one where the liability depends upon some future event or contingency which may or may not ever occur. Such contingency does not relate simply to the amount which may be recovered but to the uncertainty of whether or not the future event will ever occur to thereby effect a right of action or liability. *Mueller v. Shacklett* 881
5. Liability upon an unliquidated claim for damages arising out of a tort does not depend for its creation upon the occurrence of some uncertain event in the future, and is not a contingent claim. *Mueller v. Shacklett* 881
6. A cause of action for personal injuries alleged to have been proximately caused by negligence of a decedent during his lifetime survives. When no action is brought thereon during his lifetime, it must be prosecuted by a claim filed against the estate of decedent in the county court which has exclusive original jurisdiction thereof. *Mueller v. Shacklett* 881

Fraud.

1. To maintain an action for fraud it is necessary to establish the telling of the untruth, knowing it to be such, or that it was told without knowledge of the facts, and 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. *Linch v. Carlson* 308
2. Fraud must relate to a present or preexisting fact, and cannot ordinarily be predicated on unfulfilled promises or statements as to future events. *Linch v. Carlson* 308
3. One of the essential elements of fraud practiced by means of false representations is that the rep-

resentation must be concerning a matter material to the contract. *Linch v. Carlson* 308

4. A person is justified in relying upon a representation made to him in all cases where the representation is a positive statement of fact, and where an investigation would be required to discover the truth. *Linch v. Carlson* 308

5. Fraud may be predicated on false representations or concealments, although the truth could have been ascertained by an examination of public records. *Linch v. Carlson* 308

6. The purpose of the recording acts is to afford protection not to those who make fraudulent misrepresentations but to bona fide purchasers for value. The party to whom false representations are made is not held to constructive notice of a public record which would reveal the true facts. *Linch v. Carlson* 308

7. Statements of past or present rents, income, profits, patronage, sales, or earnings of a business are material, and when positively made are representations of fact upon which a charge of fraud may be predicated if the other essential elements of fraud are present. *Goger v. Voecks* 696

8. In a petition to cancel a conveyance of real property alleged to have been obtained by fraud, an allegation that plaintiff in reliance upon fraudulent representations parted with title to the land is a sufficient plea that he was damaged by the fraud. *Goger v. Voecks* 696

9. In an action to rescind a contract for fraud, a petition which sets out the facts from which a presumption of damage arises is sufficient to show injury to plaintiff by reason of the fraud. *Goger v. Voecks* 696

10. A purchaser of real or personal property is entitled to the benefit of his bargain. Where the vendor by fraud has conveyed to him or induced him to accept something not contemplated by his contract, the purchaser may rescind the sale and recover what he has paid without showing that he has sustained any pecuniary injury or damage thereby. *Goger v. Voecks* 696

Frauds, Statute of.

1. Where goods are furnished at the request of a promisor to a third party in reliance on his credit, and the transaction is such that the third party is liable

therefor to the promisee as an original undertaking on his part, the promisor's liability is collateral only as guarantor, and unless in writing is void under the statute of frauds. *King v. Schmall* 635

2. To support an oral promise to pay the debt of another, a consideration must operate to the advantage of the promisor, and place him under a pecuniary obligation to the promisee independent of the original debt. *King v. Schmall* 635

3. In an action to recover for services rendered to a third person the general rule is that, if the person for whose benefit the promise was made is himself liable, the promise of the defendant, although made before the services were rendered, is collateral and within the statute of frauds. *King v. Schmall* 635

Gaming.

1. The Constitution prohibits any game of chance no matter what is given for the play. *Baedaro v. Caldwell* 489

2. A five-ball pinball machine which gives a player an additional free game or games upon obtaining a high enough score is a game of chance played for money or property and is prohibited in this state. *Baedaro v. Caldwell* 489

Garnishment.

1. A judgment creditor's claim in garnishment rises no higher than that of his debtor. *Certain-teed Products Corp. v. Carlisle* 185

2. In a garnishment proceeding by a judgment creditor, an explanation by the garnishee of a credit appearing on its books in favor of the judgment debtor is a proper and appropriate part of the answer. *Certain-teed Products Corp. v. Carlisle* 185

3. Where liability of a garnishee to a judgment debtor is wholly dependent on the collection of money from a third person, it is contingent and not subject to levy of garnishment. *Certain-teed Products Corp. v. Carlisle* 185

Habeas Corpus.

1. The sufficiency of the statements in a petition for a writ of habeas corpus may be tested before making return thereto by a motion to quash the writ. *Sedlacek v. Hann* 340

2. A motion to quash admits ultimate facts well pleaded

in a petition for a writ of habeas corpus as distinguished from conclusions of law stated therein. When thus tested if it is ascertained that the petition is not sufficient to entitle relator to be discharged the motion should be granted and the writ vacated. *Sedlacek v. Hann* 340

3. The remedy of habeas corpus is not demandable of course, but legal cause must be shown to entitle a petitioner to the benefit of it. *Sedlacek v. Hann* .. 340

4. Habeas corpus is a collateral, not a direct proceeding, when regarded as a method of attack of a judgment imposing sentence for a crime, and facts, as distinguished from legal conclusions, are required to be alleged to negative the legal force and effect of the judicial record. *Sedlacek v. Hann* 340

5. Insanity of a person accused of a crime existing at the time of the commission of the offense may be shown in defense of the accused at the trial of the charge made against him. It is not available as a ground of habeas corpus after conviction, sentence, and commitment of the accused. *Sedlacek v. Hann* 340

6. Generally, insanity as a bar to the imposition of sentence is a factual issue for the determination of the court having jurisdiction of the offense. A judgment or sentence by a court of competent jurisdiction may not be collaterally attacked on that issue in a habeas corpus proceeding. *Sedlacek v. Hann* 340

7. Habeas corpus is not available to discharge a prisoner from a sentence of penal servitude if the court imposing it had jurisdiction of the offense and of the person charged with the crime, and the sentence was within the power of the court. *Sedlacek v. Hann* 340

8. The judgment of a court of record in a criminal case, when challenged by habeas corpus, is presumed to be regular and valid. *Sedlacek v. Hann* 340

9. The petition in a habeas corpus proceeding must state facts sufficient to show illegal detention of the relator. A statement therein of the reasons that the detention of relator is illegal in the form of conclusions is not sufficient to justify the allowance of a writ. *Sedlacek v. Hann* 340

10. The writ of habeas corpus may be used in controversies regarding the custody of infants. Such proceedings are governed by considerations of expediency and equity, and should not be bound by tech-

nical rules of practice. *Barnes v. Morash* 721

11. In a habeas corpus action for the custody of an infant of tender years, the court will consider the best interests of the child, and will make such order for its custody as will be for its welfare without reference to the wishes of the parties. *Barnes v. Morash* 721

Highways.

1. A driver of a vehicle about to enter a highway protected by stop signs must stop as directed, look in both directions, and permit all vehicles to pass which are at such a distance and traveling at such a speed that it would be obviously dangerous for him to proceed across the intersection. *Borcherding v. Eklund* 196
2. Where the driver of a vehicle approaching a through street or highway stops, looks, and sees an approaching vehicle on the favored street or highway but erroneously judges its speed or distance, or for some other reason assumes he can proceed with safety and not have a collision, the question of contributory negligence is usually one for the jury. *Borcherding v. Eklund* 196
3. The violation of a statute the design of which is to protect the safety of people in the use of public highways is evidence of negligence. *Segebart v. Gregory* 261
4. A person traveling a favored street protected by a traffic signal, of which he has knowledge, may properly assume that oncoming traffic will obey it. *Angstadt v. Coleman* 850
5. Unless he has notice or knowledge to the contrary, a user of the highways may assume that other users of the highways will use them in a lawful manner, and he is entitled to govern his actions in accordance with such assumption. *Angstadt v. Coleman* 850
6. A violation of the statutes regulating the use and operation of motor vehicles upon the highways is not negligence per se, but is evidence of negligence which may be taken into consideration with all the other facts and circumstances. *Angstadt v. Coleman* 850
7. The permissive use of a road, however long continued, cannot ripen into a prescriptive right. *Walsh v. Walsh* 867
8. A prescriptive right to property being used by

permission cannot arise until 10 years after it has been brought home to the owner in some plain and unequivocal manner that the person in possession is claiming adversely to him. *Walsh v. Walsh* 867

Homicide.

1. A purpose to kill and malice are material elements of murder in the second degree. Under a charge therefor both must be proved beyond a reasonable doubt. *Vanderheiden v. State* 735
2. In a prosecution for homicide, the unlawful killing constitutes the principal fact, but the condition of the mind or attendant circumstances determine the degree or grade of the offense. Where the evidence and circumstances of the killing are such that different inferences may properly be drawn therefrom as to the degrees, it becomes the duty of the court to submit the different degrees to the jury for them to draw the inferences. *Vanderheiden v. State* 735

Infants.

The writ of habeas corpus may be used in controversies regarding the custody of infants. Such proceedings are governed by considerations of expediency and equity, and should not be bound by technical rules of practice. *Barnes v. Morash* 721

Injunctions.

1. Where an attempted annexation of territory to a municipal corporation is illegal, injunction is a proper remedy, either to prevent consummation of the annexation or, if it has been completed, to have the proceedings declared null and void. *Wagner v. City of Omaha* 163
2. Equity will not usually issue an injunction after the act complained of has been committed and the injury has been done. *Propst v. Board of Educational Lands and Funds* 226
3. A litigant may not complain of the refusal of the court to enjoin acts of his adversary when the litigant has, with knowledge of the facts, participated and assisted in the performance of the acts and is the beneficiary of the result thereof. *Propst v. Board of Educational Lands and Funds* 226
4. Injunction is a proper remedy to prevent violation of a valid restrictive covenant not to establish a

competitive business. A provision therein for liquidated damages does not make the remedy unavailable. *Adams v. Adams* 778

5. In an action to enjoin the violation of a restrictive covenant, the plaintiff may recover as an incident of it any damages to which he is legally entitled because of default in performance of the obligation of the covenant. *Adams v. Adams* 778

6. For unlawful removal of impediment to flowage of waters, injunction is the proper remedy. Equity looks to the nature of the injury inflicted, together with the fact of its constant repetition, rather than to the magnitude of the damage inflicted, as the ground of affording relief. *Rudolf v. Atkinson* 804

Insane Persons.

Insanity is not recognized as a defense to a criminal action, unless it affects the mind of the accused to such an extent that it renders him incapable of distinguishing between right and wrong with reference to the act committed. *Linder v. State* 504

Insurance.

Officers of a domestic insurance company are not employees within the statute authorizing the company to establish and administer a retirement plan for the benefit of employees. *Ledwith v. Bankers Life Ins. Co.* 107

Intoxicating Liquors.

1. Intoxicating liquor is any liquor intended for use as a beverage, or capable of being so used, which contains alcohol to the extent that it will produce some degree of intoxication when consumed in a quantity that may practically be drunk. *Franz v. State* 587

2. The distinctive characteristic of all intoxicating liquors is that they contain alcohol; that they are capable of being consumed as a beverage; and that when so used, they will produce, to some degree, intoxication in the common acceptation of the term. *Franz v. State* 587

3. A complaint charging the offense of being under the influence of alcoholic liquor is not defective or insufficient because the words intoxicating liquor

are used therein instead of the words alcoholic liquor. *Franz v. State* 587
4. A witness may testify from observation made by him, after stating the facts upon which the conclusion is drawn, that a person was or was not under the influence of intoxicating liquor. *Franz v. State* 587
5. The condition of being under the influence of intoxicating liquor is a fact which a nonexpert may ascertain in the same manner in which he gains knowledge of other facts. *Franz v. State* 587

Judgments.
1. Summary judgment is authorized only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, and that no genuine issue remains for trial. The purpose of the statute is not to cut litigants off from their right of trial by jury if they really have issues to try. *Illian v. McManaman* 12
Mecham v. Colby 386
2. The issue to be tried on a motion for summary judgment is whether or not there is a genuine issue as to any material fact, and not how that issue should be determined. Rules applicable for consideration and determination of such motion are stated. *Illian v. McManaman* 12
3. In cases which turn on the credibility of witnesses the summary judgment act does not permit a trial by affidavits if either party objects. *Illian v. McManaman* 12
4. A motion for summary judgment is not a substitute for a motion for a directed verdict or for error proceedings taken after full trial. *Illian v. McManaman* 12
5. In considering a motion for summary judgment the court should view the evidence in the light most favorable to the party against whom it is directed. *Dennis v. Berens* 41
Mecham v. Colby 386
6. A summary judgment is authorized only when the moving party is entitled to a judgment as a matter of law. If there is a genuine issue of fact to be determined, a summary judgment may not be properly entered. *Dennis v. Berens* 41
City of Omaha v. Lewis & Smith Drug Co., Inc. 650
7. The court examines the evidence on motion for summary judgment, not to decide any issue of fact

presented, but to discover if any real issue of fact exists. *Dennis v. Berens* 41
Mecham v. Colby 386
City of Omaha v. Lewis & Smith Drug Co., Inc. 650

8. The burden is upon the party moving for summary judgment to show that no issue of fact exists, and unless he can conclusively do so the motion must be overruled. *Dennis v. Berens* 41
Mecham v. Colby 386

9. Where a defendant in a personal injury action moves for summary judgment, the evidence in support thereof must eliminate every basis of liability on the part of the defendant presented by the pleadings in order that it might be properly sustained. *Dennis v. Berens* 41

10. Where a judgment rendered in one state is challenged in another, a want of jurisdiction over either the person or the subject matter is open to inquiry. *Repp v. Repp* 45

11. One attacking the validity of a judgment has the burden of establishing its invalidity. *Repp v. Repp* 45

12. If a judgment appears on its face to have been entered by a court of general jurisdiction, jurisdiction over the subject matter and the parties will be presumed, unless disproved by extrinsic evidence or by the record itself. *Repp v. Repp* 45

13. The merits of the cause of action resulting in the judgment may not be reviewed by virtue of the full faith and credit clause of the Constitution of the United States. *Repp v. Repp* 45

14. When the record of the judgment of a sister state shows that service of process, either personal, constructive, or substituted, was not had, within the limitations imposed by the Fourteenth Amendment to the Constitution of the United States, the judgment rendered is not entitled to full faith and credit in this state. *Repp v. Repp* 45

15. A judgment of a sister state is without validity, even as a matter of comity, where service of process was not had. *Repp v. Repp* 45

16. Where there is a finding of fact in an action such finding is res judicata in any other action on the same issues of fact between the same parties or their privies whether the action be in equity or law. *City of Wayne v. Adams* 297

17. A party should not be vexed more than once for the same cause of action. The doctrine of res judicata

ordinarily includes not only the things which were determined in the former action but also any other matter properly involved which might have been raised and determined therein. *City of Wayne v. Adams* 297

18. The conclusiveness of a judicial determination is not affected by the kind of proceeding or form of action in which it was made or by a difference in form or object of the litigation in which the adjudication was made and that in which res judicata is pleaded. *City of Wayne v. Adams* 297

19. The private rights of parties which have been vested by the judgment of a court cannot be taken away by subsequent legislation but must be thereafter enforced by the court regardless of such legislation. *City of Wayne v. Adams* 297

20. Under the Uniform Declaratory Judgments Act, courts of record, within their respective jurisdictions, are vested with power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. *Rohn v. Kelley* 463

21. Under the Uniform Declaratory Judgments Act, an executor of the estate of a decedent may have a declaration of the rights or legal relation in respect thereto to determine any question arising in the administration of the estate, including questions of construction of wills and other writings. *Rohn v. Kelley* 463

22. A petition for a declaratory judgment may be filed in probate proceedings by an executor to have a declaratory judgment to determine whether proceeds of certain United States Savings Bonds should be declared to be assets of the estate. *Rohn v. Kelley* 463

23. If a defendant relies upon the rule of res judicata as a defense, the burden is upon him to bring such facts into the record as will affirmatively show that the plaintiff's relation to the former action was such as to make the judgment therein conclusive of the matter in controversy. *Schuster v. Douglas* 484

24. An interest in property involved in litigation, acquired after jurisdiction of the court in which the matter is pending has attached, is subject to any judgment rendered in the litigation. *Tesar v. Leu* 528

25. A judgment is rendered when the court announces its decision upon the law and the facts in contro-

versy as ascertained from the pleadings. *Sloan v. Gibson* 625

26. The entry of a judgment upon the records is not an integral part of the judicial act of rendering a judgment, although the entry thereof may be required before it can become available for certain purposes. *Sloan v. Gibson* 625

27. The issue to be tried on a motion for summary judgment is whether or not there is a genuine issue as to any material fact, and not how that issue should be determined. *City of Omaha v. Lewis & Smith Drug Co., Inc.* 650

28. After the final adjournment of the term of court at which a judgment has been rendered the district court has no authority or power to modify the judgment except for the reasons stated and within the time limited by statute providing for modification at subsequent term. *Meier v. Nelsen* 666

29. A divorce decree is not conclusive in a subsequent habeas corpus proceeding where the parties to the two proceedings are not the same. *Barnes v. Morash* 721

30. Where attorney fees have been awarded to a county in a tax foreclosure action and an attorney's claim thereto has been denied and his cause of action dismissed, parties cannot thereafter intervene and file motion to distribute such fees as tax revenue. *Strawn v. County of Sarpy* 797

31. A motion for summary judgment is appropriate and may be granted if admissions made or failure to deny, together with the pleadings, show that there is no genuine issue as to any material fact or that the court is without jurisdiction of the subject matter. *Mueller v. Shacklett* 881

Juries.

1. It is the duty of counsel in interrogating a juror to elicit such information as he desires before the juror is qualified. Failure to interrogate a juror may operate as waiver of disqualification. *Medley v. State* 25

2. Passion and prejudice must be affirmatively shown before a verdict will be disturbed on that ground. *Dyer v. Ilg* 568

Landlord and Tenant.

1. Ordinarily there is an implied covenant in a lease

that the premises shall be open to entry by the lessee at the time fixed in the lease as the beginning of the term. *Canaday v. Krueger* 287

2. Where the lessor has not fulfilled his obligation to have a building ready for occupancy by the date fixed by the lease for the commencement of the term, the lessee is not bound to enter on that date. *Canaday v. Krueger* 287

3. Sale of premises subject to a lease does not relieve the lessor from liability for damages for failure to deliver possession. *Canaday v. Krueger* 287

4. An entry for a particular purpose under an agreement, other than the lease, with the lessor does not amount to taking possession. *Canaday v. Krueger* 287

5. A tenant states a cause of action for damages for wrongful eviction by averment and proof of an unexpired contract of renting, occupancy of the premises by him, eviction or dispossession by the landlord, and damages attributable to the eviction. *Dinkel v. Hagedorn* 419

6. A tenant who, being lawfully in possession, is wrongfully evicted by his landlord before the expiration of his term may bring an action for the resulting damages. *Dinkel v. Hagedorn* 419

7. Actual eviction of a tenant by his landlord consists of removal or exclusion of the tenant from the premises, or a part thereof, by physical acts, or threats of violence equivalent to force. *Dinkel v. Hagedorn* 419

8. Even though the tenant has voluntarily left the premises, an entry by the landlord without his consent and not under any arrangement with him, followed by a continuous possession which is inconsistent with the possessory title assured to the tenant under the lease, amounts to an eviction. *Dinkel v. Hagedorn* 419

9. In determining whether there has been an actual expulsion of a tenant, with intent and effect of depriving him of the premises or some substantial part thereof, all the circumstances must be considered. *Dinkel v. Hagedorn* 419

10. Where prompt payment of rental due under a lease has been waived by the conduct of the parties, a demand for payment is a condition precedent to the forfeiture of the lease. *Goetz Brewing Co. v. Robinson Outdoor Advertising Co.* 604

11. The measure of damages for breach of a lessor's obligation to deliver possession of the leased prop-

erty is the difference between the rental value and the rent reserved. *Goetz Brewing Co. v. Robinson Outdoor Advertising Co.* 604

12. By rental value is meant, not the probable loss of profits that the lessee might suffer, but the reasonable value that the premises would rent for as ascertained by proof or by evidence of other facts from which the fair rental value may be determined. *Goetz Brewing Co. v. Robinson Outdoor Advertising Co.* 604

13. Where the proof shows that the fair and reasonable rental value of the property leased does not exceed the rent reserved, plaintiff can recover nothing more than nominal damages because of the failure of the lessor to deliver possession. *Goetz Brewing Co. v. Robinson Outdoor Advertising Co.* 604

14. A lessee may recover, in addition to the difference between the reasonable rental value and the rent reserved, such special damages as he pleads and proves to have necessarily resulted from the breach of the lease. *Goetz Brewing Co. v. Robinson Outdoor Advertising Co.* 604

Libel and Slander.

1. A publication is libelous per se if the nature and obvious meaning of the language is such as (1) to impute to a person the commission of a crime, or (2) to subject him to public ridicule, ignominy, or disgrace, or (3) to render him contemptible or ridiculous in public estimation, or (4) to expose him to public hatred or contempt, or (5) to hinder virtuous men from associating with him. *Rimmer v. Chadron Printing Co.* 533

2. One who is liable for a libel or for a slander actionable per se is liable for at least nominal damages. *Rimmer v. Chadron Printing Co.* 533

3. In an action for libel, it is immaterial that the imperfection of the description is caused by the careless or even non-negligent error of a clerk, workman, or printer for whose conduct the defamer is responsible as master or principal. *Rimmer v. Chadron Printing Co.* 533

4. A newspaper cannot avoid responsibility in a libel suit by proving that a reporter, by mistake, used the wrong person's name. *Rimmer v. Chadron Printing Co.* 533

5. Plaintiff's recovery in a libel suit must be deter-

mined by the damages which proximately flow from the acts done by the defendant. *Rimmer v. Chadron Printing Co.* 533

6. Malice will be presumed from the publication of an article libelous per se, and that presumption will become conclusive unless the truth of the libel is established. Such malice does not mean hatred or ill will, but the want of legal excuse for the publication. *Rimmer v. Chadron Printing Co.* 533

Lis Pendens.

An interest in property involved in litigation, acquired after jurisdiction of the court in which the matter is pending has attached, is subject to any judgment rendered in the litigation. *Tesar v. Leu* 528

Master and Servant.

1. It is the duty of each independent contractor to use ordinary and reasonable care not to cause injuries to the servants of another contractor, and an employee of one contractor may recover against another contractor for injuries caused by the negligence of the latter contractor, or of his employees acting within the scope of their employment, in the performance of a duty owed by such contractor to the injured employee. *Rumsey v. Schollman Bros. Co.* 251
2. The care necessary to avoid injury or harm must be commensurate with the danger of harm involved in the particular case. *Rumsey v. Schollman Bros. Co.* 251

Mechanics' Liens.

1. A subcontractor must file a sworn statement of the amount due him from the contractor within sixty days from the date of the last material furnished to or labor performed for the contractor in order to perfect a mechanic's lien. *Gatchell v. Henderson* 1
2. Where more than sixty days intervene between items of a lien account, there is a presumption that all items following the hiatus were furnished under a separate contract. The time for filing a mechanic's lien cannot be extended by tacking one contract to another. *Gatchell v. Henderson* 1
3. A subcontractor cannot extend the time for filing a mechanic's lien by substituting proper labor or

material for defective labor or material previously furnished and charged to the contractor. *Gatchell v. Henderson* 1

4. Where a mechanic's lien is invalid and there is no privity of contract between a subcontractor and the owner, such owner has a right as against the contractor to offset damages for breach of contract against any sum of money in his hands due and owing on his building contract with the contractor. *Gatchell v. Henderson* 1

Mortgages.

In an action to quiet title, the court may award the incidental relief of foreclosure of a deed as a mortgage, even though plaintiff alleges ownership in fee of the land. *Pierce v. Fontenelle* 235

Municipal Corporations.

1. A municipal corporation while acting by virtue of a grant of sovereign power is not liable, in the absence of a statute, for the negligent or wrongful acts of its officials, servants, or agents. *Greenwood v. City of Lincoln* 142
2. The right of a municipal corporation to require the destruction of weeds and worthless vegetation therein is a governmental function for the benefit, comfort, and protection of the health of the public. *Greenwood v. City of Lincoln* 142
3. A city is not liable for and cannot ratify acts done in the wrongful performance of purely governmental functions, however improperly the authority is exercised. *Greenwood v. City of Lincoln* 142
4. If lands within a municipality adjacent to the corporate limits thereof are so situated that they do not have substantial unity or community of interest with other portions of the corporate area in the maintenance of municipal government, justice and equity dictate that such lands should be severed from the municipality. *Jones v. City of Chadron* 150
5. The word adjacent means contiguous or coexistent with. *Jones v. City of Chadron* 150
6. In a proceeding to detach real estate from a municipality, the petition must contain a statement of fact showing that the territory sought to be detached is within the municipality and that a substantial part of the boundary thereof is adjacent

to a part of the boundary of the municipality. *Jones v. City of Chadron* 150

7. Justice and equity within the intention of detachment statute do not contemplate the severance of real estate from a municipality when to do so would result in an island of rural land surrounded by urban land. *Jones v. City of Chadron* 150

8. Detachment of land from a city may be denied where to detach would enhance the difficulties of city administration and would lessen the availability of contiguous areas for urban use. *Jones v. City of Chadron* 150

9. Annexation of territory by a metropolitan city is a legislative matter. However, courts have the power to inquire into and determine whether the conditions exist which authorize the annexation thereof. *Wagner v. City of Omaha* 163

10. It is not for the courts to determine what portions may be properly annexed to a municipal corporation, for the fixing of boundary lines is a legislative act. *Wagner v. City of Omaha* 163

11. Constitutional and statutory limitations on the nature and extent of the territory which may be annexed to a municipal corporation must be observed. *Wagner v. City of Omaha* 163

12. The power of municipal corporations to enact ordinances is to be construed strictly, and the exercise of the power must be confined within the general principles of the law applicable. *Wagner v. City of Omaha* 163

13. The power to extend the boundaries of a municipal corporation must be expressly granted by constitutional provision or legislative act, and must be exercised in strict accord with the grant of power. *Wagner v. City of Omaha* 163

14. The burden is on one who attacks an ordinance, valid on its face and enacted under lawful authority, to prove facts to establish its invalidity. *Wagner v. City of Omaha* 163

15. Where an attempted annexation of territory to a municipal corporation is illegal, injunction is a proper remedy, either to prevent consummation of the annexation or, if it has been completed, to have the proceedings declared null and void. *Wagner v. City of Omaha* 163

16. The duties and obligations which attend a motorist when he approaches a stop sign erected pur-

suant to city ordinance are the same as those which attend when he approaches one erected pursuant to statute. *Borcherding v. Eklund* 196

17. A contiguous tract or unit is that which belongs to the same proprietor as that taken, and is continuous with it and used together for a common purpose, whether or not the same is separated by platted or existing lines, lots, blocks, streets, alleys, or like divisions. *Rath v. Sanitary District No. One* 444

18. A petition for enlargement of a rural fire protection district requires the signatures only of the required number of qualified electors in the territory proposed to be annexed to an existing district. *Seward County Rural Fire Protection Dist. v. County of Seward* 516

19. Where the boundaries of an existing rural fire protection district comprise land all within one county and the boundaries of territory proposed to be annexed thereto comprise land all within an adjacent county, notice need be published only in a newspaper of general circulation in the county where the land proposed to be annexed is situated. *Seward County Rural Fire Protection Dist. v. County of Seward* 516

20. Where the boundaries of an existing rural fire protection district comprise land all within one county and the boundaries of territory proposed to be annexed thereto comprise land all within an adjacent county, the proper county board to hear and determine the questions presented by the petition for annexation is the county board of the county where the land proposed to be annexed is situated. *Seward County Rural Fire Protection Dist. v. County of Seward* 516

21. The formation of municipal corporations and the fixing of the boundaries thereof are legislative functions. *Seward County Rural Fire Protection Dist. v. County of Seward* 516

22. The Legislature may authorize the annexation to an existing rural fire protection district of territory adjacent thereto, upon the petition of 60 percent of the qualified electors of such adjacent territory, and by the consent of the board of directors of the existing district. *Seward County Rural Fire Protection Dist. v. County of Seward* 516

23. Municipal corporations are political subdivisions of the state. The powers conferred upon these corpora-

tions and the territory over which they shall be exercised rests in the absolute discretion of the state. *Seward County Rural Fire Protection Dist. v. County of Seward* 516

24. Under terms of ordinance, closing on Sunday was required and keeping open on that day was illegal even though certain merchandise was not sold therein on that day. *City of Omaha v. Lewis & Smith Drug Co., Inc.* 650

25. Ordinance involved contained no arbitrary discrimination between drug stores. *City of Omaha v. Lewis & Smith Drug Co., Inc.* 650

26. The power delegated to a city to construct local improvements and levy assessments for payment thereof is to be strictly construed. Every reasonable doubt as to the extent or limitation of such power and authority is resolved against the city and in favor of the taxpayer. *Chicago & N. W. Ry. Co. v. City of Omaha* 705

27. When a party attacks a paving assessment for the reason that it is illegal or for an unauthorized purpose, the burden is on him to prove the invalidity of the assessment or that it was for an unauthorized purpose. *Chicago & N. W. Ry. Co. v. City of Omaha* 705

28. Statute prescribing procedure for payment of taxes under protest applies to special assessments as well as to taxes levied for general purposes. *Chicago & N. W. Ry. Co. v. City of Omaha* 705

29. Where the physical facts are such that the property was not and could not have been specially benefited in any amount or to any extent approaching the assessment, the levy of assessment is then arbitrary, constructively fraudulent, and therefore void and subject to collateral attack. *Chicago & N. W. Ry. Co. v. City of Omaha* 705

Negligence.

1. The violation of a safety regulation established by statute or ordinance is not negligence as a matter of law, but may be considered in connection with all of the other evidence in the case in deciding the issue of negligence. *Borcherding v. Eklund* 196

2. It is the duty of each independent contractor to use ordinary and reasonable care not to cause injuries to the servants of another contractor. An employee of one contractor may recover against an-

other contractor for injuries caused by the negligence of the latter contractor, or of his employees acting within the scope of their employment, in the performance of a duty owed by such contractor to the injured employee. *Rumsey v. Schollman Bros. Co.* 251

3. The care necessary to avoid injury or harm must be commensurate with the danger of harm involved in the particular case. *Rumsey v. Schollman Bros. Co.* 251

4. Where two or more parties are guilty of negligence in the operation of automobiles causing or proximately contributing to injury and damage to the plaintiff, one being the host of the plaintiff and being free from liability because of the guest statute and the other or others not, the one or ones not being host may be held liable for the entire damage. *Segebart v. Gregory* 261

5. The violation of a statute the design of which is to protect the safety of people in the use of public highways is evidence of negligence. *Segebart v. Gregory* 261

6. It is gross negligence to leave an unlighted motor vehicle on a public highway on a dark night without warning to protect approaching travelers. *Segebart v. Gregory* 261

7. If the minds of reasonable men may reasonably differ on the question of whether or not an act producing a collision of automobiles was negligence a question is presented for determination by a jury. *Segebart v. Gregory* 261

8. The violation of a safety regulation that a locomotive engine shall ring a bell or sound a whistle is not negligence as a matter of law but must be considered with all the other evidence in the case in deciding the issue of negligence. *Kennedy v. Chicago, R. I. & P. R. R. Co.* 345

9. Beyond the limits of a municipality no rate of speed of a train is generally in itself unlawful or evidence of negligence. *Kennedy v. Chicago, R. I. & P. R. R. Co.* 345

10. If the operator of a motor vehicle is familiar with a railroad crossing and the surrounding conditions, it is his duty in approaching it to look and listen at a time and place where looking and listening will be effective even though vision of the railroad track

is restricted. *Kennedy v. Chicago, R. I. & P. R. R. Co.* 345

11. It is the duty of the driver of an automobile to have it under such control that when he arrives at a place while traveling toward a railroad crossing where it is possible to see and to hear an approaching train he can stop and avoid a collision with it. *Kennedy v. Chicago, R. I. & P. R. R. Co.* 345

12. Negligence which is the moving and effective cause of a happening is the proximate cause thereof. *Kennedy v. Chicago, R. I. & P. R. R. Co.* 345

13. Whenever an ordinarily prudent person could reasonably apprehend that, as the natural and probable consequences of his act, another person will be in danger of receiving an injury, a duty to exercise ordinary care to prevent such injury arises. If such care is not exercised and injury to another person results therefrom, liability on the part of the negligent party to the person injured will generally exist. *Hilzer v. Farmers Irrigation Dist.* 398

14. Negligence is a failure to do what reasonable and prudent persons would ordinarily have done under the circumstances and situation, or doing what reasonable and prudent persons under the existing circumstances would not have done. *Hilzer v. Farmers Irrigation Dist.* 398

15. Where one is confronted suddenly with an emergency he is not necessarily negligent if he pursues a course which mature reflection or deliberate judgment might prove to be wrong. All the law requires is that one conduct himself as an ordinary, careful, and prudent person would have done under similar circumstances. *Hilzer v. Farmers Irrigation Dist.* 398

16. In order to justify a resort to the defense of sudden emergency there must be an absence of opportunity for mature deliberation. *Hilzer v. Farmers Irrigation Dist.* 398

17. An act of God is such an unusual and extraordinary manifestation of the forces of nature that it could not under normal conditions have been reasonably anticipated or expected. *Hilzer v. Farmers Irrigation Dist.* 398

18. A person who enters a store for the purpose of making a purchase is an invitee. The owner of the store must use reasonable care to keep the premises reasonably safe for the use of the invitee, but is not

an insurer against accident. *Taylor v. J. M. McDonald Co.* 437

19. Where there is evidence that plaintiff discovered chewing gum on the heel of her shoe after slipping and falling, and that gum was found on the floor which had been scuffed over as if done by a person slipping upon it, the jury can properly infer that the gum deposit was the proximate cause of her fall. *Taylor v. J. M. McDonald Co.* 437

20. Evidence that plaintiff slipped on a wad of chewing gum on the floor, which had been there for two weeks or more, will sustain a finding that defendant in the exercise of reasonable care to keep the premises in safe condition for the use of customers should have found and removed it. *Taylor v. J. M. McDonald Co.* 437

21. Contributory negligence is such an act or omission on the part of a plaintiff, amounting to a want of ordinary care, as, concurring or cooperating with the negligence of the defendant, is a proximate cause or occasion of the injury complained of. *Bay v. Robertson* 498

22. Pleading contributory negligence as a defense does not justify submission of that issue to the jury where there is no evidence to support it. *Bay v. Robertson* 498

23. Ordinarily, contributory negligence is a question for the jury; but, where there is no basis in the evidence for a finding of contributory negligence, it is error to instruct on the subject. *Bay v. Robertson* 498

24. Thirty days notice in writing and institution of action within one year are required in order to hold an irrigation district liable for negligence in delivery of or failure to deliver water from its canals. *Cover v. Platte Valley Public Power & Irr. Dist.* 644

25. Gross negligence means great or excessive negligence; that is, negligence in a very high degree. It indicates the absence of even slight care in the performance of a duty. *Bishop v. Schofield* 830
Montgomery v. Ross 875

26. What amounts to gross negligence in any given case must depend upon the facts and circumstances of that case. *Bishop v. Schofield* 830
Montgomery v. Ross 875

27. In a guest case, a verdict should not be directed nor a cause of action dismissed unless a court can

definitely determine that the evidence of defendant's negligence, when taken as a whole, fails to reach that degree of negligence that is considered gross. *Montgomery v. Ross* 875

28. A series of acts of ordinary negligence may, under certain circumstances, operate to produce gross negligence but not necessarily so. *Montgomery v. Ross* 875

Officers.

1. The Director of Insurance is an executive officer within the constitutional provision that such an officer shall receive such salary as may be provided by law, but that the salary of no officer shall be changed more than once in 8 years. *State ex rel. Laughlin v. Johnson* 671
2. The constitutional provision to the effect that the salary of no executive officer shall be changed more than once in 8 years is a prohibition against legislative action on the subject for the period stated. *State ex rel. Laughlin v. Johnson* 671
3. The salary of the Director of Insurance having been properly increased in 1941, the attempt of the Legislature to again increase it in 1945 was unconstitutional and void. *State ex rel. Laughlin v. Johnson* 671
4. The Director of Insurance is an executive officer having a fixed and definite term within the purview of the constitutional provision that the compensation of a public officer shall not be increased or diminished during his term of office. *State ex rel. Laughlin v. Johnson* 671
5. The term of an office is distinct from the tenure of an officer. The latter has no application to the question whether or not an office has a fixed and definite term. *State ex rel. Laughlin v. Johnson* 671
6. A holding over is an encroachment upon the term of the successor. It does not change the length of the term, but merely shortens the tenure of the successor. *State ex rel. Laughlin v. Johnson* 671
7. Statutory provisions providing that the Director of Insurance may be removed from office by the Governor, that the office might be discontinued by the Governor, and that such Director shall serve until a fixed date and until his successor is appointed and qualified, do not make the office one without a fixed and definite term. Such provisions bear upon

the tenure of the officer rather than the term of the office. *State ex rel. Laughlin v. Johnson* 671

Parent and Child.

1. The care, custody, and control of a child of tender years is usually awarded to the mother if she is a fit and suitable person. *Campbell v. Campbell* 155
2. In awarding the custody of minor children, the court looks to the best interests of such children, and those of tender age are usually awarded to the mother. Other considerations being equal, it is usual to award the custody of children to the innocent spouse. *Campbell v. Campbell* 155
3. Custody of minor children awarded to their mother in a divorce action will not be disturbed in a subsequent proceeding to modify the original decree, unless it is shown that she is an unfit person to have their custody, or that their best interests require such action. *Campbell v. Campbell* 155
4. In a divorce case it is generally the best policy to keep minor children within the jurisdiction of the court. However, the welfare of the child should receive the paramount consideration and this policy should yield to the best interests of the child. *Campbell v. Campbell* 155
5. A parent who has been awarded the custody of a child may temporarily provide a suitable home for it in the home of its grandparents without losing the right to its custody. *Campbell v. Campbell* 155
6. In a divorce suit in which the custody of a minor child is involved, the custody of the child is to be determined by the best interests of the child, with due regard for the superior rights of fit, proper, and suitable parents. *Killip v. Killip* 573
7. The custody of young children should be committed to their parents rather than to strangers. The court may not deprive the parent of such custody unless it is shown that the parent is unfit to perform the duties imposed by the relation or has forfeited the right. *Killip v. Killip* 573
8. The right of a parent to the custody of a child is not lost beyound recall by an act of relinquishment performed under circumstances of temporary caprice or discouragement. *Killip v. Killip* 573
   Barnes v. Morash 721
9. The right of a parent is not lightly to be set aside,

and it should not be done unless unfitness is affirmatively shown or a forfeiture clearly established. *Killip v. Killip* 573

10. Custody of a child of tender years should be awarded the mother, unless it is shown that she is unsuitable or unfit to have such custody, or through some peculiar circumstance is unable to furnish a good home. *Killip v. Killip* 573
Barnes v. Morash 721

11. In a habeas corpus action for the custody of an infant of tender years, the court will consider the best interests of the child, and will make such order for its custody as will be for its welfare without reference to the wishes of the parties. *Barnes v. Morash* 721

12. The natural rights of the parents are of important consideration. In the absence of special circumstances, a child should be awarded to the parent as against more distant relatives or third persons. *Barnes v. Morash* 721

Parties.

In a declaratory judgment proceeding where the question is one of construction of an ordinance to determine whether or not an operator of a business is violating the ordinance, other business operators are not necessary parties to the action. *City of Omaha v. Lewis & Smith Drug Co., Inc.* 650

Partition.

A court of equity in partition proceedings may establish a lien on the interest of a cotenant for the amount found due to the other cotenant on an accounting had of the rental value of the common property. *Tesar v. Leu* 528

Pensions.

A pension, when a reward for service, requires that the service be rendered before the pension be granted, and the reward must be free from any character as the discharge of an existing legal or contractual liability. *Ledwith v. Bankers Life Ins. Co.* 107

Pleadings.

1. When a party affirmatively pleads a fact material

to an issue he thereby assumes the burden of proving such fact. *Sack v. Sack* 171

2. A variance between a pleading and the evidence adduced to sustain it is not deemed material unless it has misled the adverse party to his prejudice in maintaining his action or defense on the merits. *Segebart v. Gregory* 261

3. If the matter of variance has not in some appropriate manner been brought to the attention of the trial court, a court of review may decline to consider it. *Segebart v. Gregory* 261

4. Where defendant relies on the fact that any condition precedent has not been performed, he must set out specially the condition and the breach, thus confining the issue to be tried to such particular condition or conditions precedent as he may indicate as unperformed. *Dinkel v. Hagedorn* 419

5. Where a party answers after an adverse ruling on his motion or demurrer, and goes to trial on the merits of an issue he has elected to join, he waives error, if any, in such ruling. *Dinkel v. Hagedorn* 419

6. Where during the trial of a cause both parties treat an affirmative defense as denied, it will be so considered in the Supreme Court, although the plaintiff filed no reply. *Dinkel v. Hagedorn* 419

7. An order of the district court requiring a petition to be made more definite and certain will be sustained on appeal unless it clearly appears that the court abused its discretion to the prejudice of the plaintiff. *Schuster v. Douglas* 484

8. If a defendant relies upon the rule of res judicata as a defense, the burden is upon him to bring such facts into the record as will affirmatively show that the plaintiff's relation to the former action was such as to make the judgment therein conclusive of the matter in controversy. *Schuster v. Douglas* 484

9. Where an objection that a petition does not state a cause of action is interposed for the first time during the trial of a cause, the pleadings will be liberally construed in the light of the entire record and if possible sustained. *Goger v. Voecks* 696

10. Where objection is first interposed during the trial, if the general elements of plaintiff's case may be implied by reasonable intendment from the terms of the pleadings assailed, they will be regarded as sufficiently alleged. *Goger v. Voecks* 696

Principal and Agent.

1. A party alleging the existence of any agency relationship assumes the burden of proving the agent's authority and that the acts of the agent, for which liability against the principal is sought, were within the scope of that authority. *Sack v. Sack* 171
2. The question of agency is one of fact. There is no presumption of its existence. *Nebraska Tractor & Equipment Co. v. Great Lakes Pipe Line Co.* 366
3. A party alleging the existence of an agency relationship assumes the burden of proving the agent's authority and that the acts of the agent, for which liability against the principal is sought, were within the scope of that authority. *Nebraska Tractor & Equipment Co. v. Great Lakes Pipe Line Co.* 366
4. An apparent or ostensible agent is one whom the principal, either intentionally or by want of ordinary care, induces third persons to believe to be his agent, although he has not, either expressly or by implication, conferred authority upon him. *Nebraska Tractor & Equipment Co. v. Great Lakes Pipe Line Co.* 366
5. Where a principal has placed an agent in such a situation that a third person is justified in presuming that such agent has authority to perform a particular act, the principal is estopped as against such third person from denying the agent's authority. *Nebraska Tractor & Equipment Co. v. Great Lakes Pipe Line Co.* 366
6. A person dealing with a known agent is not authorized blindly to trust an agent's statements as to the extent of his powers. Such person must not act negligently, but must use reasonable diligence and prudence to ascertain whether the agent acts within the scope of his powers. *Nebraska Tractor & Equipment Co. v. Great Lakes Pipe Line Co.* 366
7. A person dealing with an agent assumes the risk of lack of authority in the agent. Such person cannot charge the principal by relying upon the agent's assumption of authority which proves to be unfounded. *Nebraska Tractor & Equipment Co. v. Great Lakes Pipe Line Co.* 366
8. A principal may act on the presumption that third persons dealing with his agent will not be negligent in failing ao ascertain the extent of the agent's authority and the existence of his agency. *Nebraska*

Tractor & Equipment Co. v. Great Lakes Pipe Line Co. 366

9. Where a person seeks to bind a principal by implied, apparent, or ostensible authority greater than the actual authority of an agent, such person has the burden of proof. *T. S. McShane Co. v. Great Lakes Pipe Line Co.* 766

10. Where a principal is justified in presuming that an agent had authority to perform a particular act, the principal is estopped, as against an innocent third person, from denying the authority of the agent to perform it. *T. S. McShane Co. v. Great Lakes Pipe Line Co.* 766

11. The performance of similar acts by an agent with the acquiescence of the principal is ordinarily sufficient to establish the apparent or ostensible authority of the agent in the absence of actual knowledge to the contrary on the part of the person seeking to hold the principal. *T. S. McShane Co. v. Great Lakes Pipe Line Co.* 766

12. Rule as to admissibility of evidence to prove the apparent or ostensible authority of an agent is stated. *T. S. McShane Co. v. Great Lakes Pipe Line Co.* 766

13. Where the evidence is insufficient on any ground to sustain a finding that an agent was clothed with actual, implied, apparent, or ostensible authority, a principal sought to be held for the act of the agent is entitled to a directed verdict when a timely motion is made. *T. S. McShane Co. v. Great Lakes Pipe Line Co.* 766

Process.

When the granting of divorces is made a judicial function, a hearing is implied at which the defendant is entitled to notice in a manner which is reasonably calculated to give the defendant actual notice of the proceeding and an opportunity to be heard. *Repp v. Repp* 45

Public Lands.

1. Prior to enactment of amending legislation in 1947, a lessee of state school land had a right upon the expiration of his contract to a renewal lease of the land provided no other person offered a higher bid and return to the state than the amount the lessee was willing to pay. *Propst v. Board of Educational*

Lands and Funds 226

2. The 1947 amendments to the School Lands Lease Act attempted to grant a lessee of state school land upon the expiration of his contract an automatic and absolute right to a new lease of the land for a 12-year term if he possessed the statutory qualifications, had performed the covenants of his lease, and was willing to comply with the requirements of law and the regulations of the Board of Educational Lands and Funds. *Propst v. Board of Educational Lands and Funds* 226

3. There was sufficient distinction between the situation of persons holding leases on state school lands by virtue of the statute in force prior to the act of 1947 and those who applied for and secured renewal leases under the act of 1947 to allow the state to treat them as different classes. *Propst v. Board of Educational Lands and Funds* 226

4. The administrative action of the Board of Educational Lands and Funds in declaring renewal leases on state school lands to be void, and in offering such lands for releasing at public auction, did not constitute a violation of the due process requirement of the Constitution of the state. *Propst v. Board of Educational Lands and Funds* 226

5. The title to the state school lands was vested in the state upon an express trust for the support of common schools without right or power of the state to use, dispose of, or alienate the lands or any part thereof except as allowed by the Enabling Act and the Constitution. *Propst v. Board of Educational Lands and Funds* 226

6. It was the decision of the Supreme Court that gave renewal leases on school lands under the act of 1947 their status of legal nullity, and not the action of the Board of Educational Lands and Funds in entering the fact upon its records by its declaration or by its vacation of the previous orders concerning the issuance thereof. *State v. Gardner* 326
State v. Cooley 330

7. The title of school lands is not vested in the state with all the ordinary incidents of other titles but the title thereto was granted to and vested in the state upon an express trust for the support of common schools with no right or power of the state to use, dispose of, or alienate the lands or any part

thereof, except as allowed by the Enabling Act and the Constitution. *State v. Cooley* 330

8. The school lands were received and are held in trust by the state for educational purposes. The state as trustee of the lands and of the income therefrom is required to administer the trust estate under the rules of law applicable to trustees acting in a fiduciary capacity. *State v. Cooley* 330

9. Anyone dealing with the school lands must do so with knowledge of and subject to the trust obligations of the state and the legislative grant of power to the Board of Educational Lands and Funds as to the terms and conditions of the lease. *State v. Cooley* 330

10. The Board of Commissioners of Educational Lands and Funds, under the direction of the Legislature, has the power to lease school lands. *State v. Cooley* 330

11. The action of the Board of Educational Lands and Funds in leasing the school lands is subject to and limited by the terms imposed by the Legislature. *State v. Cooley* 330

12. The Board of Educational Lands and Funds is vested with a discretionary power in approving or rejecting the highest bid received at a public auction of school land leases. Such discretionary power must be reasonably exercised and it is only when the action of the board is arbitrary or unreasonable that relief may be had in the courts. *State ex rel. Raitt v. Peterson* 678

13. It is the duty of the Board of Educational Lands and Funds, in its fiduciary capacity in handling school lands and funds committed to its care, to obtain a maximum return to the trust estate from trust properties under its control, subject to the taking of necessary precautions for the preservation of the trust estate. *State ex rel. Raitt v. Peterson* 678

14. Ordinarily if a public sale of a school land lease is fairly conducted and the property is sold for a fair and reasonable value under the circumstances, the Board of Educational Lands and Funds is required to approve the sale and make the lease. *State ex rel. Raitt v. Peterson* 678

15. A substantially increased bid for a school land lease sold at public auction, made before the approval of the sale to the highest bidder, is sufficient evidence to sustain the Board of Educational Lands and Funds in finding that the sale price was inade-

quate and that a resale is required. *State ex rel. Raitt v. Peterson* 678
16. An increased bid is relevant only to the extent that it bears upon the fairness of the sale and the adequacy of the high bid there obtained. *State ex rel. Raitt v. Peterson* 678

Quantum Meruit.
An action for specific performance of an alleged oral contract to devise real estate, and a cause of action on the basis of a quantum meruit for services rendered and for the value of improvements made to the real estate, the subject of the alleged contract, are inconsistent remedies. *Flessner v. Wenquist* .. 378

Quieting Title.
1. Questions of title may be fully litigated and determined in an action to quiet title. *Pierce v. Fontenelle* 235
2. In an action to quiet title, the court may award the incidental relief of foreclosure of a deed as a mortgage, even though plaintiff alleges ownership in fee of the land. *Pierce v. Fontenelle* 235

Railroads.
1. The violation of a safety regulation that a locomotive engine shall ring a bell or sound a whistle is not negligence as a matter of law but must be considered with all the other evidence in the case in deciding the issue of negligence. *Kennedy v. Chicago, R. I. & P. R. R. Co.* 345
2. Beyond the limits of a municipality no rate of speed of a train is generally in itself unlawful or evidence of negligence. *Kennedy v. Chicago, R. I. & P. R. R. Co.* 345

Rape.
1. Corroboration of prosecutrix as to the particular act constituting the offense is not required. Corroboration as to the material facts and circumstances supporting her testimony is sufficient.
Medley v. State 25
Onstott v. State 55
Linder v. State 504
2. Whether or not prosecutrix resisted advances of defendant to the extent of her ability is a question of fact. Where her testimony, if believed, would

indicate that she had so resisted, a verdict based on such testimony will not be set aside. *Medley v. State* 25

3. In statutory rape prosecution, evidence of similar criminal acts not remote in time is admissible to explain the act charged or to corroborate the prosecutrix. *Onstott v. State* 55

Reformation of Instruments.

1. In an action for reformation of a written instrument, the moving party must overcome the strong presumption arising from the terms of the written instrument. If there is a failure to overcome this presumption by testimony entirely plain and convincing, the writing will be held to express correctly the intention of the parties. *Du Teau Co. v. New Hampshire Fire Ins. Co.* 690
2. To justify reformation of a contract in writing on the ground of mutual mistake the proof must be clear, convincing, and satisfactory, and must establish that the mutual mistake involved is common to both parties, each laboring under the same misconception. *Du Teau Co. v. New Hampshire Fire Ins. Co.* 690
3. Where the evidence, in an action for reformation of a written instrument, is sharply and irreconcilably conflicting, it becomes necessary to apply the rule of equity that the evidence must be clear, convincing, and satisfactory, and, in consequence, deny reformation. *Du Teau Co. v. New Hampshire Fire Ins. Co.* 690

Retirement Benefits.

1. The benefits of a retirement plan are contingent deferred compensation, presently earned, but payable in the future to employees upon condition that they possess the qualifications required by the plan and that they comply with the conditions and regulations imposed. *Ledwith v. Bankers Life Ins. Co.* 107
2. Officers of a domestic insurance company are not employees within the statute authorizing the company to establish and administer a retirement plan for the benefit of employees. *Ledwith v. Bankers Life Ins. Co.* 107
3. Contributions by employees to the cost of a retirement plan of a domestic insurance company were

neither required nor prohibited by the Legislature. *Ledwith v. Bankers Life Ins. Co.* 107

4. With respect to retirement systems, credit for past services is only a standard or formula by which to measure the amount of benefits that satisfy the desired objective. *Ledwith v. Bankers Life Ins. Co.* 107

Sales.

A grain broker in Nebraska is anyone engaged in buying and selling grain for profit. *State v. T. W. Jones Grain Co.* 822

Schools and School Districts.

Any signer of a petition to create a new school district from other districts or to change the boundary of any district may withdraw his signature therefrom at any time before the county superintendent has affirmatively acted upon such petition by authoritatively declaring the district created or change made. *State ex rel. Glenn v. Bennett* 258

Set-off and Counterclaim.

1. Under the practice in this state, an action that includes a counterclaim is tried as an entirety. Separate suits are not required. *Harbert v. Mueller* 838
2. If for any reason the defendant does not desire to have his counterclaim disposed of in the action wherein it is pleaded, he should move to withdraw it before final submission of the case. *Harbert v. Mueller* 838
3. Defendant, by moving for a directed verdict upon plaintiff's cause of action and obtaining a favorable ruling thereon, waived a hearing on a pleaded counterclaim when the counterclaim was not withdrawn by him before final submission of the cause. *Harbert v. Mueller* 838

Signatures.

1. Ordinarily a signature authenticating an instrument in writing is placed at the end thereof, but in the absence of statutory direction it may be placed anywhere on the instrument. *Sofio v. Glissmann* 610
2. While a signature usually appears at the end of an instrument, it may appear elsewhere if so intended, which intention must ordinarily be manifested either by express reference or by internal evidence in the writings involved. *Sofio v. Glissmann* 610

Specific Performance.

1. Specific performance of an alleged oral contract to devise real estate owned by a deceased person at the time of his death will not be granted unless the contract and the terms thereof are established by clear, satisfactory, unequivocal, and convincing evidence. *Flessner v. Wenquist* 378
2. An action for specific performance of an alleged oral contract to devise real estate, and a cause of action on the basis of a quantum meruit for services rendered and for the value of improvements made to the real estate, the subject of the alleged contract, are inconsistent remedies. *Flessner v. Wenquist* 378
3. Specific performance is not generally demandable as a matter of absolute legal right, but is governed by the sound legal discretion of the court. It will not be granted where enforcement would be unjust and may be denied when the party seeking it has failed to perform. *Sofio v. Glissmann* 610
4. A party who seeks specific performance must show not only that he has a valid legally enforceable contract but also that he has substantially performed, or is ready, willing, and able to perform. *Sofio v. Glissmann* 610
5. Specific performance of a contract may be lost by failure of performance, by abandonment thereof, by 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. *Sofio v. Glissmann* 610
6. Where a plaintiff is ready, willing and able to perform and has repeatedly requested a defendant to perform a recorded contract for the purchase of real property and where defendant has failed to tender or pay the purchase price or otherwise perform according to the terms of his contract, defendant is not entitled to specific performance but plaintiff is entitled to have title quieted. *Sofio v. Glissmann* 610

Statutes.

1. In the absence of any indication of a contrary intention on the part of the Legislature, the construction given to a statute by the courts of another state from which it was adopted will be followed here. *Illian v. McManaman* 12

2. If a statute is unambiguous, courts will not by interpretation or construction give it a meaning not intended or expressed by the Legislature. *Ledwith v. Bankers Life Ins. Co.* 107
City of Wayne v. Adams 297
3. If a statute is unambiguous, there is no room for construction and courts may not search for its meaning beyond the statute itself. *Ledwith v. Bankers Life Ins. Co.* 107
4. In construing a statute effect should be given, if possible, to all its several parts and nothing should be avoided. The subject of the enactment and the language thereof in its plain, ordinary, and popular sense should be considered to determine the legislative will. *Ledwith v. Bankers Life Ins. Co.* 107
5. The court, so far as practicable, should give effect to the entire language of a statute and reconcile its different provisions so that they are consistent, harmonious, and sensible. *Ledwith v. Bankers Ins. Co.* 107
6. A particular intention expressed in an amendment of a statute, in conflict to some extent with a general intention, will be given effect only to the extent of the conflict, leaving the statute as it was before the amendment to operate outside the scope of the amendment. *Ledwith v. Bankers Life Ins. Co.* 107
7. The intention of the Legislature may be expressed by omission as well as by inclusion. *Ledwith v. Bankers Life Ins. Co.* 107
8. Expressio unius est exclusio alterius means that where a statute enumerates the things upon which it is to operate, or forbids certain things, all those not expressly mentioned are excluded, unless the Legislature has plainly indicated a contrary intent. *Ledwith v. Bankers Life Ins. Co.* 107
9. It is not the province of the court to read into a statute something omitted from it or to discover a meaning not warranted by the legislative language. *Ledwith v. Bankers Life Ins. Co.* 107
City of Wayne v. Adams 297
10. The omission of a word from an amendment of a statute must be assumed to have been intentional and for a purpose. Courts in giving effect to the amendment may not supply the omission. *Ledwith v. Bankers Life Ins. Co.* 107
11. In the construction of a statute or a part thereof, courts may consider the preexisting law and any

other act relating to the same subject or of a similar nature to the statute under consideration although not precisely in pari materia. *Ledwith v. Bankers Life Ins. Co.* 107

12. Courts will substitute the disjunctive "or" for the conjunctive "and" to effectuate the legislative intent. *Ledwith v. Bankers Life Ins. Co.* 107
13. The Constitution of Nebraska provides that no bill shall contain more than one subject, and the same shall be clearly expressed in the title. *Hadden v. Aitken* 215
14. The Constitution does not require that the title of a bill be a synopsis of the law. *Hadden v. Aitken* 215
15. In construing a statute, the legislative intention is to be determined from a general consideration of the whole act, and the intent as deduced from the whole will prevail over that of a particular part considered separately. *Seward County Rural Fire Protection Dist. v. County of Seward* 516
16. All parts of an act relating to the same subject should be considered together and not each by itself. *Seward County Rural Fire Protection Dist. v. County of Seward* 516
17. A word or phrase repeated in a statute will bear the same meaning throughout the statute, unless a different intention appears. *Seward County Rural Fire Protection Dist. v. County of Seward* 516
18. Where a statute is dealing with a procedure to be followed, it will ordinarily be construed as directory only where the matter to which it relates is a proper subject for the exercise of a reasonable discretion, notwithstanding the use of imperative terms. *State ex rel. Raitt v. Peterson* 678
19. The intent statute relates only to rules of construction and does not have the effect of enlarging, limiting, or modifying any rule of substantive law that existed at the time of its passage or that has thereafter been created. *Andrews v. Hall* 817

Taxation.

1. Statutory provisions for completing sale in defective tax foreclosure actions are only procedural in character and do not of themselves give or grant any rights. *City of Wayne v. Adams* 297
2. An appeal is authorized to the Supreme Court from any final decision of the State Board of Equalization and Assessment by a person affected thereby.

Where it is shown that a kind or class of property in a county was not valued in accordance with law or that it was not valued uniformly or proportionately among the various counties of the state, a taxpayer in such county is a person affected within the meaning of the statute. *Laflin v. State Board of Equalization and Assessment* 427

3. Notice to a county before valuations of property as returned by said county is a procedural step required of the the State Board of Equalization and Assessment that operates as a condition precedent to a valid order. The failure to give such notice, where the record requires that it be done to accomplish the primary purposes of the Board, does not excuse a failure to comply with the law with respect to the duty to value and equalize property for taxation purposes. *Laflin v. State Board of Equalization and Assessment* 427

4. All property in this state not expressly exempt is subject to taxation and is to be valued and assessed at its actual value. *Laflin v. State Board of Equalization and Assessment* 427

5. It is the function of the State Board of Equalization and Assessment to examine the assessment rolls of the various counties and, by the process of equalization, raise or lower the valuations therein contained to conform to the requirement that taxable property shall be assessed at its actual value. *Laflin v. State Board of Equalization and Assessment* 427

6. The objective in equalization of property is not only to assess taxable property at its actual value but also to secure a uniform and proportionate valuation for taxation purposes as required by the Constitution. *Laflin v. State Board of Equalization and Assessment* 427

7. A 20-year average of farm sales in a county is not competent evidence of the actual value of farm lands and improvements in such county. Such evidence is too remote. *Laflin v. State Board of Equalization and Assessment* 427

8. To authorize the imposition of an estate or succession tax the decedent must have, at the time of his death, an interest in the property the transfer of which can be taxed. *County of Holt v. Gallagher* 457

9. The power delegated to a city to construct local improvements and levy assessments for payment thereof is to be strictly construed. Every reason-

able doubt as to the extent or limitation of such power and authority is resolved against the city and in favor of the taxpayer. *Chicago & N. W. Ry. Co. v. City of Omaha* 705

10. When a party attacks a paving assessment for the reason that it is illegal or for an unauthorized purpose, the burden is on him to prove the invalidity of the assessment or that it was for an unauthorized purpose. *Chicago & N. W. Ry. Co. v. City of Omaha* 705

11. Statute prescribing procedure for payment of taxes under protest applies to special assessments as well as to taxes levied for general purposes. *Chicago & N. W. Ry. Co. v. City of Omaha* 705

12. Where the physical facts are such that the property was not and could not have been specially benefited in any amount or to any extent approaching the assessment, the levy of assessment is then arbitrary, constructively fraudulent, and therefore void and subject to collateral attack. *Chicago & N. W. Ry. Co. v. City of Omaha* 705

13. All property of every nature not expressly exempt must be valued for taxation and bear its share of the public burden. *State v. T. W. Jones Grain Co.* 822

14. Tangible property of a grain broker must be returned for taxation and be assessed and taxed in precisely the same manner as like property employed in other ways. *State v. T. W. Jones Grain Co.* 822

15. A grain broker is 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. *State v. T. W. Jones Grain Co.* 822

16. In the statute imposing a tax on grain brokers, the words real estate and other tangible property mean all tangible property including real estate used in the business of the grain broker. *State v. T. W. Jones Grain Co.* 822

17. A grain broker should return for taxation all property belonging to or used in the business including real estate and grain on hand. If the average capital invested in the business during the preceding year was greater than the value of the tangible property returned separately for taxation, he should add to his statement of property for taxation such excess of the average capital invested. *State v. T. W. Jones Grain Co.* 822

18. The denial to the states of the power to tax prop-

erty actually moving in interstate commerce rests upon the supremacy of the federal power to regulate commerce, and its postulate is necessary freedom of commerce from the burden of local taxation. *State v. T. W. Jones Grain Co.* 822

19. Goods do not cease to be part of the general mass of property in the state, subject as such to taxation in the usual way, until they have been shipped or entered with a common carrier for transportation to another state or have started upon such transportation in a continuous route or journey. *State v. T. W. Jones Grain Co.* 822

20. Intention to remove property from a state into another state does not impress it with the character of interstate commerce so as to render it immune from state taxation under the commerce clause of the federal Constitution. *State v. T. W. Jones Grain Co.* 822

Tenancy in Common.

1. If a tenant in common appropriates to himself the exclusive possession and use of the common property, he is generally liable to the cotenant for his proportionate share of the rental value of the common property. *Tesar v. Leu* 528

2. A cotenant charged with the rental value of the common property should be credited on an accounting with payments made by him which were required for the protection of the property. *Tesar v. Leu* 528

3. A court of equity in partition proceedings may establish a lien on the interest of a cotenant for the amount found due to the other cotenant on an accounting had of the rental value of the common property. *Tesar v. Leu* 528

Tender.

1. A formal tender is not necessary where a party has shown by act or word that it would not be accepted, if made, since the law does not require a useless formality. *Canaday v. Krueger* 287

2. An offer becomes a tender only if it is coupled with a present ability to act. *Adams v. Adams* 540

3. A formal tender is not waived by an indication of refusal in the absence of ability on the part of the party making the tender to perform at the time and make his tender good. *Adams v. Adams* 540

4. The rule that a formal tender is not required if it

appears that if made it would have been futile is not available to a party who is without present ability to make a tender good. *Adams v. Adams* 540

Torts.

1. A municipal corporation while acting by virtue of a grant of sovereign power is not liable, in the absence of a statute, for the negligent or wrongful acts of its officials, servants, or agents. *Greenwood v. City of Lincoln* 142
2. Liability upon an unliquidated claim for damages arising out of a tort does not depend for its creation upon the occurrence of some uncertain event in the future, and is not a contingent claim. *Mueller v. Shacklett* 881

Trial.

1. Summary judgment is authorized only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, and that no genuine issue remains for trial. The purpose of the statute is not to cut litigants off from their right of trial by jury if they really have issues to try. *Illian v. McManaman* 12
   Mecham v. Colby 386
2. The issue to be tried on a motion for summary judgment is whether or not there is a genuine issue as to any material fact, and not how that issue should be determined. Rules applicable for consideration and determination of such motion are stated. *Illian v. McManaman* 12
3. In cases which turn on the credibility of witnesses the summary judgment act does not permit a trial by affidavits if either party objects. *Illian v. McManaman* 12
4. A motion for summary judgment is not a substitute for a motion for a directed verdict or for error proceedings taken after full trial. *Illian v. McManaman* 12
5. In considering a motion for summary judgment the court should view the evidence in the light most favorable to the party against whom it is directed. *Dennis v. Berens* 41
   Mecham v. Colby 386
6. A summary judgment is authorized only when the moving party is entitled to a judgment as a matter of law. If there is a genuine issue of fact to be determined, a summary judgment may not be properly

entered. *Dennis v. Berens* 41
City of Omaha v. Lewis & Smith Drug Co., Inc. 650
7. The court examines the evidence on motion for summary judgment, not to decide any issue of fact presented, but to discover if any real issue of fact exists. *Dennis v. Berens* 41
Mecham v. Colby 386
City of Omaha v. Lewis & Smith Drug Co., Inc. 650
8. The burden is upon the party moving for summary judgment to show that no issue of fact exists, and unless he can conclusively do so the motion must be overruled. *Dennis v. Berens* 41
Mecham v. Colby 386
9. Where a defendant in a personal injury action moves for summary judgment, the evidence in support thereof must eliminate every basis of liability on the part of the defendant presented by the pleadings in order that it might be properly sustained. *Dennis v. Berens* 41
10. Where jury is waived, findings of court in a law action have the effect of verdict of a jury, and judgment entered thereon will not be disturbed unless clearly wrong. *Scottsbluff Nat. Bank v. Blue J Feeds, Inc.* 65
11. An order affecting a substantial right, when made in a special proceeding, is a final order and is appealable, even though it does not terminate the action, nor constitute a final disposition of the case. *Sullivan v. Storz* 177
12. The admission of incompetent evidence in a law case tried to the court without a jury is immaterial if the judgment is supported by sufficient competent evidence. *Snyder v. Lincoln* 190
13. If a motion for directed verdict made at the close of the evidence should have been sustained, it is the duty of the court, on motion for judgment notwithstanding the verdict timely made, to set aside the verdict and to render judgment pursuant to the motion for directed verdict. *Borcherding v. Eklund* 196
14. In determining the sufficiency of evidence to sustain a verdict the successful party is entitled to most favorable consideration of evidence, to have any controverted fact resolved in his favor, and to have the benefit of inferences reasonably deducible from the evidence. *Borcherding v. Eklund* 196
Dyer v. Ilg 568
King v. Schmall 635

15. It is the duty of the court to instruct the jury upon the issues presented by the pleadings and evidence whether requested to do so or not. *Borcherding v. Eklund* 196
16. A jury should be fully and fairly informed as to the various items of damages which it should take into consideration in arriving at its verdict. In this respect it is the duty of the trial court to instruct as to the proper basis upon which damages are to be assessed for each such item. *Borcherding v. Eklund* 196
17. Where a motion for a directed verdict is made the party against whom it is made is entitled to have his evidence accepted as true by the court and he is further entitled to have all favorable inferences reasonably to be drawn therefrom resolved in his favor. *Segebart v. Gregory* 261
18. By statute it is required that a motion for a directed verdict shall state the specific grounds of the motion. *Segebart v. Gregory* 261
19. It is error for a trial court to sustain a motion for a directed verdict unless the motion contains the specific grounds therefor. *Segebart v. Gregory* 261
20. It is prejudicial error for a trial court to sustain a motion for a directed verdict which fails to contain the specific grounds of the motion except where from an examination of the entire record it appears that a verdict would lack evidence to support it. *Segebart v. Gregory* 261
21. A motion for directed verdict must, for purpose of decision thereon, be treated as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence. *Davis v. Spindler* 276
Bishop v. Schofield 830
Angstadt v. Coleman 850
Montgomery v. Ross 875
22. Where reasonable minds may differ on the question of whether or not the operator of a motor vehicle exercised the care, caution, and prudence required of him under the circumstances of the particular situation, the issue of negligence on the part of the operator is one of fact to be determined by a jury. *Davis v. Spindler* 276
23. In an action where there is any evidence which will

support a finding for a party having the burden of proof, the trial court cannot disregard it and direct a verdict against him. *Davis v. Spindler* 276
Bishop v. Schofield 830

24. When a motion is made by a defendant at the close of plaintiff's evidence for a directed verdict or for dismissal for want of sufficient evidence to make a prima facie case, every fact alleged which the evidence tends to prove, for the purposes of the motion, will be considered as proved. *Canaday v. Krueger* 287
25. A litigant has a right to have his theory of a case presented to the jury by proper instruction only if it is pleaded and there is evidence to sustain it. *Kennedy v. Chicago, R. I. & P. R. R. Co.* 345
26. Rule for consideration and determination of motion for directed verdict or judgment notwithstanding the verdict stated. *Hilzer v. Farmers Irrigation Dist.* 398
27. The party upon whom rests the burden of the issues is entitled, on the trial of the cause, to open and close the evidence and arguments to the jury. *Rath v. Sanitary District No. One* 444
28. In a suit in equity the presumption obtains that the trial court, in arriving at decision, considered such evidence only as was competent and relevant. The Supreme Court will not reverse a case so tried because other evidence was admitted, if there is sufficient competent and relevant evidence in the record to sustain the judgment. *Rohn v. Kelley* 463
29. Pleading contributory negligence as a defense does not justify submission of that issue to the jury where there is no evidence to support it. *Bay v. Robertson* 498
30. Ordinarily, contributory negligence is a question for the jury; but, where there is no basis in the evidence for a finding of contributory negligence, it is error to instruct on the subject. *Bay v. Robertson* 498
31. Court's ruling on an application for a continuance will not be reversed in absence of showing of abuse of discretion. *Linder v. State* 504
32. Unless party suffers prejudice, refusal to grant continuance is not abuse of discretion. *Linder v. State* 504
33. The question of the competency of a child as a witness rests largely in the sound discretion of the

trial court, whose decision will not be disturbed in the absence of clear abuse. *Linder v. State* 504

34. Test for determination of competency of a child as a witness is whether the child is sufficiently mature to receive correct impressions by his senses, to recollect and narrate intelligently, and to appreciate the moral duty to tell the truth. *Linder v. State* 504

35. Questions propounded to a witness must not assume the existence of a fact not proven in the cause. *Rimmer v. Chadron Printing Co.* 533

36. The district court may set aside a verdict if it appears that the verdict is so exorbitant and excessive as to indicate that it was the result of passion, prejudice, mistake, or some means not apparent in the record, or if it is clear that the jury disregarded the evidence or rules of law. *Dunn v. Safeway Cabs, Inc.* 554

37. Passion and prejudice must be affirmatively shown before a verdict will be disturbed on that ground. *Dyer v. Ilg* 568

38. Absence of any direct, incriminatory evidence is ordinarily made the test of the obligation of the trial court to instruct as to the probative value and manner of considering circumstantial evidence in a criminal case, and, if there is direct evidence of the principal facts essential to guilt, the failure to instruct in that respect is not error. *Franz v. State* 587

39. It is the duty of the court upon request of the accused to instruct the jury upon his theory of the case, if there is evidence to support it. *Franz v. State* 587

40. If the jury is correctly instructed generally as to law, error cannot be predicated upon an omission of the court to charge as to some particular phase of the case unless a proper instruction was requested by the party complaining of the omission. *Franz v. State* 587

41. The issue to be tried on a motion for summary judgment is whether or not there is a genuine issue as to any material fact, and not how that issue should be determined. *City of Omaha v. Lewis & Smith Drug Co., Inc.* 650

42. In a declaratory judgment proceeding where the question is one of construction of an ordinance to determine whether or not an operator of a business is violating the ordinance, other business operators are not necessary parties to the action. *City of Omaha v. Lewis & Smith Drug Co., Inc.* 650

43. Actions in equity, on appeal to the Supreme Court, are triable de novo, subject to the rule with respect to the superior opportunity of the trial court to observe the witnesses. *Barnes v. Morash* 721

44. Instructions are to be considered together, to the end that they may be properly understood, and, when so construed, if as a whole they fairly state the law applicable to the evidence, error cannot be predicated on the giving of the same. *Vanderheiden v. State* 735

45. Where the charge to the jury, considered as a whole, correctly states the law, the judgment will not be reversed merely because a single instruction, when considered separately, is incomplete. *Vanderheiden v. State* 735

46. If a defendant in a suit in equity moves at the close of the evidence of the plaintiff for a dismissal of the suit for want of proof to support a judgment, he admits the truth of the evidence and any reasonable conclusions deducible from it. *Adams v. Adams* 778

47. If the evidence is undisputed, or such that minds of men could not reasonably arrive at any other conclusion, the question is one for decision by the court as a matter of law; otherwise, it is a question for the jury to decide as other issuable facts in the case. *Bishop v. Schofield* 830

48. A verdict should only be directed in a guest case where the court can clearly say that the proof fails to approach the level of negligence in a very high degree under the circumstances. *Bishop v. Schofield* 830

49. An instruction which sets out a state of facts, and authorizes a verdict for one of the parties upon a finding of such facts, is erroneous, unless it includes every fact necessary to sustain a verdict in favor of such party, or unless the omitted facts are conclusively established. *Angstadt v. Coleman* 850

50. Where the instructions as a whole clearly present to the jury the issues of fact and the law applicable thereto, harmless error in instructions separately criticized on appeal does not require a reversal of the judgment on the verdict. *Angstadt v. Coleman* 850

51. In a guest case, a verdict should not be directed nor a cause of action dismissed unless a court can definitely determine that the evidence of defendant's negligence, when taken as a whole, fails to reach

that degree of negligence that is considered gross. *Montgomery v. Ross* 875

52. The provisions of the discovery statute are not merely directory, but substantial compliance therewith is required. However, they are not self-executing, and the party claiming admissions for failure to deny must prove service of a proper request in compliance therewith and failure to appropriately respond thereto. *Mueller v. Shacklett* 881

53. Where a party properly serves a request for admissions of relevant matters of fact of the genuineness of relevant documents, and all objections thereto are heard and appropriately denied by the court, and the other party has been ordered to respond thereto, the failure to do so within the time allotted constitutes an admission of the facts sought to be elicited. *Mueller v. Shacklett* 881

54. A motion for summary judgment is appropriate and may be granted if admissions made or failure to deny, together with the pleadings, show that there is no genuine issue as to any material fact or that the court is without jurisdiction of the subject matter. *Mueller v. Shacklett* 881

Trusts.

1. In the matter of control of discretionary powers of a trustee, the real question is whether it appears that the trustee is acting in that state of mind in which it was contemplated by the settlor that he should act. *Reed v. Ringsby* 33

2. Where discretion is conferred upon the trustee with respect to the exercise of a power, its exercise is not subject to control by the court, except to prevent an abuse by the trustee of his discretion. *Reed v. Ringsby* 33

3. Conditions under which a court of equity can remove express trustee from his office are stated. *Reed v. Ringsby* 33

4. A court of equity has power to remove a trustee for hostility between himself and the beneficiaries, which, in combination with other circumstances, interferes with the proper administration of the trust. *Reed v. Ringsby* 33

5. The mere fact that the trustee named by the settlor is one of the beneficiaries of the trust is not a sufficient ground for his removal or for refusing to confirm his appointment even though a large degree of

discretion is conferred upon the trustee. *Reed v. Ringsby* 33

6. The title to the state school lands was vested in the state upon an express trust for the support of common schools without right or power of the state to use, dispose of, or alienate the lands or any part thereof except as allowed by the Enabling Act and the Constitution. *Propst v. Board of Educational Lands and Funds* 226

7. The title of school lands is not vested in the state with all the ordinary incidents of other titles but the title thereto was granted to and vested in the state upon an express trust for the support of common schools with no right or power of the state to use, dispose of, or alienate the lands or any part thereof, except as allowed by the Enabling Act and the Constitution. *State v. Cooley* 330

8. The school lands were received and are held in trust by the state for educational purposes. The state as trustee of the lands and of the income therefrom is required to administer the trust estate under the rules of law applicable to trustees acting in a fiduciary capacity. *State v. Cooley* 330

9. Anyone dealing with the school lands must do so with knowledge of and subject to the trust obligations of the state and the legislative grant of power to the Board of Educational Lands and Funds as to the terms and conditions of the lease. *State v. Cooley* 330

10. General rules of construction of written instruments apply to the construction of trust instruments, whether they are contracts, deeds, or wills. The cardinal rule of construction is to determine the intention of the settlor, where the creation of the trust is a unilateral matter, and give effect thereto if it is not in conflict with law. *County of Holt v. Gallagher* 457

11. It is the duty of the Board of Educational Lands and Funds, in its fiduciary capacity in handling school lands and funds committed to its care, to obtain a maximum return to the trust estate from trust properties under its control, subject to the taking of necessary precautions for the preservation of the trust estate. *State ex rel. Raitt v. Peterson* 678

Vendor and Purchaser.

1. The statutory rule for interpreting a conveyance of real estate requires the court to give effect to the expressed intention of the parties as determined from the instrument as a whole if it is not inconsistent with law. *Elrod v. Heirs, Devisees, etc.* 269
2. Each word and provision of a conveyance of real estate must be given such significance as will make effective the intention of the parties. *Elrod v. Heirs, Devisees, etc.* 269
3. In ascertaining the intention expressed in an instrument conveying real estate, the court is not confined to a strict or literal interpretation of the language used if to do so would frustrate the intention of the parties thereto as gathered from the whole instrument. *Elrod v. Heirs, Devisees, etc.* 269
4. A reservation is always something taken back out of that which is demised, the creation by the grant of a new right in the grantor from the subject of the conveyance and something which did not exist as an independent right before the grant was made. *Elrod v. Heirs, Devisees, etc.* 269
5. An exception excludes from the operation of the conveyance the interest specified and it remains in the grantor unaffected by the conveyance. *Elrod v. Heirs, Devisees, etc.* 269
6. The legal terms exception and reservation are frequently used interchangeably and indiscriminately. The use of either term is not conclusive and many times is not even significant as to the intention of the parties. *Elrod v. Heirs, Devisees, etc.* 269
7. The purpose of the recording acts is to afford protection not to those who make fraudulent misrepresentations but to bona fide purchasers for value. The party to whom false representations are made is not held to constructive notice of a public record which would reveal the true facts. *Linch v. Carlson* 308
8. A vendee cannot refuse performance upon the ground that title is encumbered by outstanding tenancies where he has knowledge of an outstanding leasehold or where the contract is made subject to rights of tenants in possession. *Sofio v. Glissmann* 610
9. Where a plaintiff is ready, willing, and able to perform and has repeatedly requested a defendant to perform a recorded contract for the purchase of real property and where defendant has failed to tender or pay the purchase price or otherwise

perform according to the terms of his contract, defendant is not entitled to specific performance but plaintiff is entitled to have title quieted. *Sofio v. Glissmann* 610

10. A purchaser of real or personal property is entitled to the benefit of his bargain. Where the vendor by fraud has conveyed to him or induced him to accept something not contemplated by his contract, the purchaser may rescind the sale and recover what he has paid without showing that he has sustained any pecuniary injury or damage thereby. *Goger v. Voecks* 696

Venue.

1. Ruling on motion for change of venue will not be reversed unless abuse of discretion is shown. *Medley v. State* 25
   Onstott v. State 55
2. The venue of an offense need not be established by direct testimony, nor in the words of the information. If from the facts in evidence the only rational conclusion which can be drawn is that the crime was committed in the county alleged, the proof is sufficient. *Medley v. State* 25

Waters.

1. Where surface water flows in a well-defined course in a ditch, swale, or draw, in its primitive condition, its flow cannot be lawfully arrested by a landowner to the injury of neighboring proprietors. *Purdy v. County of Madison* 212
2. What a private landowner may not do neither may a county nor other public authority do, except in the exercise of eminent domain. *Purdy v. County of Madison* 212
3. Where a county wrongfully diverts surface 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. *Purdy v. County of Madison* 212
4. Section 39-809, R. R. S. 1943, refers to damages resulting from the construction of bridges, culverts, or highways through the fault, neglect, or oversight of county officers, and has no relation to the unlawful diversion of surface waters flowing in a natural watercourse to the damage of adjoining

landowners. *Purdy v. County of Madison* 212

5. Thirty days notice in writing and institution of action within one year are required in order to hold an irrigation district liable for negligence in delivery of or failure to deliver water from its canals. *Cover v. Platte Valley Public Power & Irr. Dist.* 644

6. An owner of land has the right to drain ponds or basins thereon of a temporary character 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. *Rudolf v. Atkinson* 804

7. An owner of land may, without liability in damages, drain the same in the general course of natural drainage by constructing and maintaining in a reasonable and proper manner, and wholly on his own land, an open ditch or tile drain, discharging a reasonable quantity of water therefrom into a natural watercourse or a natural drainway. *Rudolf v. Atkinson* 804

8. Where water is impounded upon land by natural conditions whereby a pond is formed, the owner of such land has no lawful right to remove an impediment to its flowage and thereby cause such water to flow upon the land of another to his damage. *Rudolf v.. Atkinson* 804

9. For unlawful removal of impediment to flowage of waters, injunction is the proper remedy. Equity looks to the nature of the injury inflicted, together with the fact of its constant repetition, rather than to the magnitude of the damage inflicted, as the ground of affording relief. *Rudolf v. Atkinson* 804

Wills.

1. The evidence of all the attesting witnesses to a will who are available is indispensable to the proving of a will when such will is contested. *First Trust Co. v. Lanyon* 21

2. The fate of a will does not depend entirely upon the testimony of the attesting witnesses thereto. *First Trust Co. v. Lanyon* 21

3. In addition to all available attesting witnesses, the proponent in a will contest may properly call gen-

eral witnesses to prove the lawful execution of the will and the mental capacity of the testator to make the same. All the evidence thus adduced will be considered in determining the issues presented. *First Trust Co. v. Lanyon* 21

4. Unless estopped by conduct, a proponent should be permitted to withdraw from petition for probate of will in order to object to probate thereof. *Hill v. Humlicek* 61

5. General rules of construction of written instruments apply to the construction of trust instruments, whether they are contracts, deeds, or wills. The cardinal rule of construction is to determine the intention of the settlor, where the creation of the trust is a unilateral matter, and give effect thereto if it is not in conflict with law. *County of Holt v. Gallagher* 457

6. A proceeding in the probate court to settle the estate of a decedent is a proceeding in rem. Every one interested in such settlement is a party in the probate court whether he is named or not, and this is particularly true as to the distribution of an estate under a will. *Rohn v. Kelley* 463

Witnesses.

1. Jurors are the judges of credibility of witnesses. Their verdict will not be set aside unless clearly wrong. *Onstott v. State* 55
Franz v. State 587

2. When objection to the admission of evidence as to transactions or conversations with deceased has been properly made by the representative of a deceased person and erroneously overruled, the party making such objection does not waive his rights under the statute by cross-examining the witness on the same matters or offering direct evidence thereon to meet that erroneously admitted. *Pierce v. Fontenelle* 235

3. If either on cross-examination or by direct examination the representative of a deceased person goes beyond the scope of the inquiry to which his objection was properly made and as to which it should have been sustained, and introduces evidence of other matters in regard to the original transaction or conversation which is not admissible under the provisions of the statute, then the representative thereby waives the benefit of the statute and

any related erroneous rulings of the court. *Pierce v. Fontenelle* 235

4. When the representative of a deceased person voluntarily opens the door for the purpose of obtaining what he affirmatively desires, he thereby waives the benefit of the statute and gives the interested party the right to further testify in his own behalf and fully explain such transaction or conversation. *Pierce v. Fontenelle* 235
5. In the absence of a statute rendering children under a specified age incompetent, a witness is not disqualified because of his youth. *Linder v. State* 504
6. The question of the competency of a child as a witness rests largely in the sound discretion of the trial court, whose decision will not be disturbed in the absence of clear abuse. *Linder v. State* 504
7. Test for determination of competency of a child as a witness is whether the child is sufficiently mature to receive correct impressions by his senses, to recollect and narrate intelligently, and to appreciate the moral duty to tell the truth. *Linder v. State* 504
8. A hypothetical question which consists of a recitation of facts containing nothing subject to an expert opinion is improper and should be excluded by the trial court. *Lyons v. State* 550
9. Based upon personal examination and the results thereof, a medical expert may give his opinion on the question of whether or not a defendant in a criminal action knew the difference between right and wrong with reference to the act committed. *Lyons v. State* 550
10. A witness may testify from observation made by him, after stating the facts upon which the conclusion is drawn, that a person was or was not under the influence of intoxicating liquor. *Franz v. State* 587
11. The condition of being under the influence of intoxicating liquor is a fact which a nonexpert may ascertain in the same manner in which he gains knowledge of other facts. *Franz v. State* 587
12. The opinion of a medical expert may rest upon any one or more of three bases, namely (1) acquaintance with the party under investigation, (2) medical examination made by the expert, or (3) hypothetical case stated to the expert in court. *Vanderheiden v. State* 735

13. Rule for submission of hypothetical questions stated. *Vanderheiden v. State* 735
14. In propounding a hypothetical question, a party may assume the existence of facts in accordance with his theory, if there is evidence in the record to sustain it, notwithstanding there may be a conflict of evidence on the point raised. *Vanderheiden v. State* 735

Workmen's Compensation.
1. On any appeal to the Supreme Court in a workmen's compensation case, the cause will be considered de novo upon the record. *McCoy v. Gooch Milling & Elevator Co.* 95
Schneider v. Village of Shickley 683
Gilbert v. Metropolitan Utilities Dist. 750
2. In a workmen's compensation case, claimant has burden to establish by a preponderance of the evidence that personal injury was sustained by the employee by an accident arising out of and in the course of his employment. *McCoy v. Gooch Milling & Elevator Co.* 95
3. Where injury was latent, employee will not be denied compensation for failure to give notice and file claim within time prescribed by statute where notice is given and action commenced within the statutory period after the employee has knowledge that the accident has caused a compensable disability. *McCoy v. Gooch Milling & Elevator Co.* 95
4. The word "latent" means the time within which a disease is supposed to be in existence without manifesting itself, that is, during the time it lies dormant. *McCoy v. Gooch Milling & Elevator Co.* 95
5. Where a claim for compensation becomes barred during the lifetime of the injured employee, a claim by his dependents after his death is also barred. *McCoy v. Gooch Milling & Elevator Co.* 95
6. When an accident accelerates or aggravates an existing impairment to a state of disability, such disability not being the result of a natural progression of the impairment, there may be an award of compensation therefor. *McCoy v. Gooch Milling & Elevator Co.* 95
7. The burden of proof is upon the claimant to show that the disability for which compensation is sought resulted from an accident arising out of and in the course of his employment. *Hahl v. Heyne* 599

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8. An accident within the meaning of the Workmen's Compensation Act is defined as an unexpected or unforeseen event happening suddenly and violently with or without human fault and producing at the time objective symptoms of an injury. *Hahl v. Heyne* 599
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9. Awards for compensation benefits cannot be based upon possibilities or probabilities. They must be supported by evidence showing that claimant incurred disability from an accident arising out of and in the course of the employment. *Hahl v. Heyne* 599

10. The contract under which service is performed and the performance thereunder determine the relationship between the contracting parties. *Schneider v. Village of Shickley* 683

11. On the issue as to whether a workman is an employee as distinguished from independent contractor, his relation to his employer should be determined from all of the facts, rather than from any particular feature of the employment or service. *Schneider v. Village of Shickley* 683

12. For an injury resulting in temporary total loss and thereafter permanent partial loss of the use of both hands, an employee is entitled under the Workmen's Compensation Act to recover such proportion of the compensation allowed for total disability as the extent of his loss would bear to the total loss of such members. *Paulsen v. City of Lincoln* 702

13. Where employee gave notice of injury and requested medical services, which was followed by treatment by the employer's doctors, there was sufficient notice to the employer that the employee suffered an injury arising out of and in the course of his employment, and a demand for compensation under the Workmen's Compensation Act. *Gilbert v. Metropolitan Utilities Dist.* 750