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CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

SEPTEMBER TERM, 1953

STATE EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, v. H. J. PINKETT, RESPONDENT.
60 N. W. 2d 641

Filed October 23, 1953. No. 33135.

Disbarment: Attorney and Client. In a proceeding for the disbarment of an attorney at law the presumption of innocence applies, and the charge made against him must be established by a clear preponderance of the evidence.

Original action. *Judgment for respondent.*

Clarence S. Beck, Attorney General, and *Dean G. Kratz,* for relator.

H. J. Pinkett, pro se.

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

CARTER, J.

This is an original proceeding questioning the right of the respondent, H. J. Pinkett, to continue in the practice of law because of conduct alleged to be in violation of his duties and obligations as a practicing lawyer. After the filing of the complaint the matter was referred to Wilber S. Aten, referee, for hearing, report, and recommendation. A hearing was had and the report of the referee made, in which it was determined that the

charge was not sustained by sufficient evidence. The relator moved for a disciplinary order notwithstanding the decision of the referee. The respondent moved for judgment upon the report of the referee. These motions present the question to be here decided.

The evidence shows that one Richard Bryant was charged, prior to February 18, 1950, with first degree murder. On the last named date respondent was called to the home of W. B. Bryant, the attorney for Richard Bryant, and requested to aid in the trial of the case which was to commence on February 20, 1950. On February 19, 1950, he met Richard Bryant and agreed to help with his defense for a fee of $250, which offer was accepted. Richard Bryant thereupon paid him $10 and gave him a note for $240. During the trial, which commenced on February 20, 1950, Richard Bryant paid respondent $100 which was credited on the note. He thereafter made four payments of $5 each. The remaining $120 due on the note was never paid, so far as the record shows.

The jury found Richard Bryant guilty of murder in the second degree on or about February 23, 1950. Richard Bryant thereupon entered into a written contract with the respondent by which the latter agreed to perfect an "appeal" to the Supreme Court for a total consideration of $400. The contract states that $300 was to be paid on the signing of the agreement and $100 "within the time when the Bill of Exceptions is ready for approval and filing." Out of the total sum of $400, respondent was to pay for the bill of exceptions, the printing of the brief, and all costs in the district court and Supreme Court, except the cost of bonds. The $300 was paid in cash. The $100 remains unpaid. Richard Bryant disappeared while out on bond and is now a fugitive from justice.

The transcript was ordered and filed in the Supreme Court. A bill of exceptions was ordered. The time for preparing and serving the bill of exceptions was Sep-

tember 8, 1950. On the latter date the court reporter delivered the bill of exceptions to respondent who gave his check for $100 therefor. The court reporter discovered that the bank upon which the check was drawn would not honor it and demanded and received back the bill of exceptions. Respondent withdrew from the case at the instance of W. B. Bryant on October 10, 1950. Subsequent to this date he received and paid the court reporter for the bill of exceptions.

The record indicates that W. B. Bryant was hospitalized for a considerable period following the completion of the trial in the district court. This delayed a hearing on the motion for a new trial in the murder case. Respondent filed two affidavits with the clerk of the district court, which purported to establish misconduct on the part of the jury sufficient to vitiate the verdict. On the hearing on the motion for a new trial, both W. B. Bryant and the respondent neglected to offer such affidavits in evidence, a fact which was not discovered until later. Respondent contends that on August 28, 1950, he determined in view of this latter fact not to file the bill of exceptions in the Supreme Court and to rely solely upon the invalidity of the verdict as shown by the affidavits appearing in the transcript. He states that his decision was influenced largely by proof offered by the State that Richard Bryant had been convicted of felonies on four different occasions after Bryant testified that he had been convicted but once. Respondent states that he accepted and paid for the bill of exceptions after he was out of the case because he had ordered and agreed to pay the court reporter for it.

The relator infers throughout its case that the $100 paid to the respondent on February 20, 1950, was to be used to pay for the bill of exceptions. The evidence will not sustain such a finding. Respondent testifies that it was needed to carry on certain investigations during the course of the trial and that it was properly credited on the note given for repondent's services in the

district court. It could hardly have been given as payment for a bill of exceptions when the district court trial was not completed at the time the payment was made. The need for a bill of exceptions had not at that time arisen. For ought the parties knew, the verdict could have been such that no review would have been sought. We think the evidence as to this $100 payment falls far short of establishing that respondent commingled, with his own, money that was given to him for the purpose of paying for a bill of exceptions.

The relator then asserts that, according to the provisions of the written agreement, respondent was obligated to pay for the bill of exceptions. We point out that respondent was to receive $400 for his services out of which he was to pay for the bill of exceptions, the printing of the brief, and the costs of perfecting the appeal. The written agreement specifically provides that $300 was to be paid in cash and $100 "within the time when the Bill of Exceptions is ready for approval and filing." This leaves a clear inference that the $100 was intended to be used in payment of the cost of preparing and filing the bill of exceptions. This $100 was never paid. We cannot say, therefore, that respondent used funds as his own which were given to him for the specific purpose of paying for the bill of exceptions. There is conflicting evidence which indicates that respondent may have negligently failed to procure a bill of exceptions within the maximum time allowed. There is also evidence in the record that Richard Bryant was dealing directly with the court reporter. There is some undisputed evidence that the bill of exceptions was not fully prepared until November 1, 1950, or thereabouts. This, coupled with the plain terms of the contract of employment that the last $100 would be paid when the bill of exceptions was ready for approval and filing, dissipates any claim that the evidence is sufficient to sustain a finding that respondent violated his duty as a lawyer in this respect.

It is urged also that respondent failed in his duty as a lawyer and thereby subjected himself to discipline when he failed to offer the affidavits in evidence purporting to establish misconduct of the jury sufficient to vitiate the verdict. While this court has many times held that all evidence to be considered on a review of a case must be contained in a bill of exceptions, the failure to include affidavits, and other evidence as well, in the bill of exceptions is an error that is too frequently made. Bryant v. State, 153 Neb. 490, 45 N. W. 2d 169; Darlington v. State, 153 Neb. 274, 44 N. W. 2d 468. The number of decisions of this court on the subject affords sufficient proof of that fact. Honest mistake does not ordinarily afford a basis for disciplinary action. If it did, the practice of law would indeed be a hazardous profession.

We have stated many times that while a disciplinary proceeding is not criminal in its nature, the presumption of innocence applies and the culpability of the person charged must be established by a clear preponderance of the evidence. State ex rel. Nebraska State Bar Assn. v. Gudmundsen, 145 Neb. 324, 16 N. W. 2d 474. We hold that relator has failed to establish by the required weight of the evidence that respondent violated his duty as a lawyer with reference to Canons 5, 11, 29, or 32 of the Canons of Professional Ethics, as charged in the complaint.

We sustain the findings of the referee that the evidence produced at the hearing is not sufficient to sustain the necessary elements of the charge set forth in the complaint and that the respondent is not subject to disciplinary action. The complaint of the relator is therefore dismissed.

JUDGMENT FOR RESPONDENT.

JOHN B. PEACOCK, APPELLEE, V. J. L. BRANDEIS & SONS, A CORPORATION, APPELLANT.
60 N. W. 2d 643

Filed October 23, 1953. No. 33324.

1. **Trial.** It is not error to refuse a requested instruction if the substance of the requested instruction is covered by instructions given.
2. **Evidence: Master and Servant.** Statements of an employee, who in the course of his employment is involved in an accident, are admissible in evidence if they are spontaneous and so related to the accident as to be regarded as a part of it.
3. **Damages: Trial.** Where a verdict in a personal injury case is excessive and it appears to have been returned under the influence of passion and prejudice rather than upon the facts or that the jury misapplied the law, it is the duty of this court to set the verdict aside and grant a new trial.
4. ———: ———. Where it is clear that a verdict is excessive but there is no method by which the court can rationally ascertain the extent of the excess, a remittitur cannot be properly required since a remittitur would amount only to a substitution of the judgment of the court for that of the jury.
5. ———: ———. The question of the amount of damage is one solely for the jury and its action in this respect will not be disturbed on appeal if it is supported by evidence and bears a reasonable relationship to the elements of injury and damage proved.

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

Kennedy, Holland, DeLacy & Svoboda, for appellant.

Gross, Welch, Vinardi & Kauffman, for appellee.

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

YEAGER, J.

This is an action for damages by John B. Peacock, plaintiff and appellee, against J. L. Brandeis & Sons, a corporation, defendant and appellant. The action is predicated upon a charge of negligence of an employee of defendant but attributable to it.

The case was tried to a jury and a verdict was returned in favor of the plaintiff for $17,500. Judgment was entered on the verdict. A motion for new trial was filed and in due course overruled. From the judgment and the order overruling the motion for new trial the defendant has appealed.

The substantial facts upon which the action is based are that on December 9, 1949, the plaintiff who was and still is in charge of the interior decorating department of Orchard & Wilhelm Company, with another employee of that company, was proceeding in an automobile belonging to Orchard & Wilhelm Company eastward on Dodge Street on the right-hand side thereof in the city of Omaha, Nebraska. When he arrived at Forty-sixth Street the traffic control light was against him. He thereupon stopped the automobile which he was operating. While he was stopped, an automobile described as a pick-up truck belonging to the defendant and operated by one of its employees collided with the rear of the automobile operated by plaintiff.

As to the facts as thus stated there is no dispute. Also there is no contention that plaintiff was guilty of any act which would charge him with any negligent responsibility for the collision. Further it is conceded that the driver of the defendant's automobile was at the time engaged in the business of the defendant.

One of the defenses pleaded by the defendant is that the collision was an unavoidable accident and because thereof the defendant was not guilty of negligence.

In the brief of defendant there are in number seven assignments of error. In substance there are but three. The three are: (1) The court erred in refusing to properly submit the defense of unavoidable accident, (2) the court erred in the admission of testimony as to a statement purported to have been made by the driver of defendant's automobile immediately after the collision, and (3) that the verdict is excessive.

The substance of the claimed error as to the first of

these assignments is that the court refused to give instructions 17 and 18 tendered, as follows:

No. 17. "You are instructed that if you find that the accident in question was the result of an unavoidable accident, then your verdict should be for the defendant and by the term unavoidable accident is meant an accident which happens without fault on the part of the parties involved."

No. 18. "You are instructed that an accident which happens without fault of either party is what is known in law as unavoidable accident. Where injury resulting from such an accident, the law leaves the parties where they are, and allows neither to recover against the other."

It is observable that these two tendered instructions are abstract in that they make no reference to the factual situation under consideration. There is nothing clearly definitive except the following at the end of No. 17: "* * * an accident which happens without fault on the part of the parties involved."

The trial court with particular reference to the only facts which the defendant contends caused this collision to be an unavoidable accident, in two instructions, told the jury what it was required to find in order to absolve the defendant from liability on the ground that the collision was within the meaning of law an unavoidable accident. It is true that the instructions do not use or define the term, but they do, and correctly, describe for the purposes of this case unavoidable accident and the rights to which the defendant would have been entitled had the jury found under the facts that this was an unavoidable accident.

The pertinent statements contained in the two instructions are as follows:

No. 5. "* * * On the other hand, if you find that a person exercising ordinary care could not reasonably have anticipated from all the facts and circumstances the presence of ice and of a slippery condition at the place where defendant's driver attempted to stop, and

that defendant's driver was driving at such time at what would have been a reasonable speed if such slippery condition did not exist at the place of the accident, and you further find that defendant's driver could reasonably have stopped his car in time but for such slippery condition of the street at the place of the accident, then you cannot find defendant negligent in respect to his speed or in failure to have his car under proper control."

No. 7. "The fact that an accident occurred or the fact that the plaintiff may have sustained damages, if such fact you find, either or both, taken alone without other evidence, facts and circumstances, is no evidence of negligence. When accidents happen as incidents to reasonable use and reasonable care, the law affords no redress. If any injuries of the plaintiff were not caused by negligence of the defendant's driver, plaintiff would not be entitled to recover for such."

Clearly the instructions given by the court were not less complete and comprehensive on the subject of unavoidable accident than those tendered by the defendant.

It is a well-established rule that it is not error to refuse a requested instruction if the substance of the requested instruction is covered by instructions given. Johnson v. Union P. R. R. Co., 111 Neb. 196, 196 N. W. 140; Fonda v. Northwestern Public Service Co., 138 Neb. 262, 292 N. W. 712; Parks v. Metz, 140 Neb. 235, 299 N. W. 643; Spaulding v. Howard, 148 Neb. 496, 27 N. W. 2d 832; Johnson v. Griepenstroh, 150 Neb. 126, 33 N. W. 2d 549.

It must be said therefore that there was no error in the refusal of the trial court to give the two instructions requested by the defendant.

On the trial of the case the trial court permitted the plaintiff, over objections, to give testimony that the driver of defendant's automobile said to him: "I guess I was going too fast." The material part of the objection was that the statement was not a part of the res gestae and that it was, as to the defendant, hearsay.

This related to a time immediately following the collision. The collision caused the automobile operated by plaintiff to be moved forward a very short distance, a matter of, according to estimates, from 10 to 35 feet, where it was stopped. Plaintiff remained in the automobile momentarily to inquire into the condition of a lady riding with him, when he got out. Defendant's driver brought the other automobile to a stop immediately and got out. The two came together at once in the street and plaintiff testified it was at the time they came together that the statement was made.

Whether or not evidence of this statement was admissible depends upon whether or not it was a part of the res gestae or, in other words, spontaneous and so related to the accident as to be regarded as a part of it. Roh v. Opocensky, 125 Neb. 551, 251 N. W. 102; Roh v. Opocensky, 126 Neb. 518, 253 N. W. 680.

Whether or not a statement is in fact spontaneous and a part of an incident or occurrence is often if not usually a matter which is difficult to determine and is incapable of determination agreeable to any hard and fast rule, but must depend for the most part upon the peculiar facts of each instance. Ordinarily the determination must depend upon the application of reason to the facts and circumstances disclosed in the particular instance. However, some aid may come from parallel incidents which have been presented in earlier cases.

A very nearly parallel situation was presented to this court in the two cases of Roh v. Opocensky, *supra*. In the opinions in those cases this court said that the testimony was admissible.

The application of reason in this instance and the precedent cited leads to the conclusion that the court did not err in the admission of the testimony in question under this assignment.

The remaining question is that of whether or not the verdict is excessive or so excessive as to require a reversal and the granting of a new trial or a remittitur.

As indicated the defendant seeks a new trial on the ground that the verdict is so excessive as to indicate that it was rendered under the influence of passion and prejudice.

In the event however that it shall not be found that the verdict was rendered under the influence of passion and prejudice but that it is excessive the defendant seeks at the hands of this court a remittitur of the portion found to be excessive.

It is a well-established principle of law that where a verdict in a personal injury case is excessive and that it appears to have been returned under the influence of passion and prejudice rather than upon the facts or that the jury misapplied the law, it is the duty of this court to set the verdict aside and grant a new trial. Van Auker v. Steckley's Hybrid Seed Corn Co., 143 Neb. 24, 8 N. W. 2d 451; Horky v. Schroll, 148 Neb. 96, 26 N. W. 2d 396; Rueger v. Hawks, 150 Neb. 834, 36 N. W. 2d 236; Thoren v. Myers, 151 Neb. 453, 37 N. W. 2d 725; Erickson v. Morrison, 152 Neb. 133, 40 N. W. 2d 413; Remmenga v. Selk, 152 Neb. 625, 42 N. W. 2d 186; Johnson v. Schrepf, 154 Neb. 317, 47 N. W. 2d 853.

There is precedent in the decisions of this court which hold that in unliquidated damage cases where the amount of the recovery is incapable of ascertainment except by trial and where on appeal the recovery appears to be excessive this court may disturb the verdict of the jury and order a remittitur of the portion found to be excessive. One such precedent is Pearse v. Loup River Public Power Dist., 137 Neb. 611, 290 N. W. 474.

The holding of the majority in that case was challenged by a dissenting opinion. In the dissent the following appears: "It has long been the rule in this state that, where a verdict of a jury is clearly against the weight and reasonableness of the evidence, it will be set aside and a new trial granted. * * * I agree that, where the jury has made an error the extent of which the court can with some certainty ascertain, a remittitur is a proper

remedy. * * * But if there is no method by which the court can rationally ascertain the extent of the excess, a remittitur cannot be required. * * * Under such circumstances a remittitur is nothing more than a substitution of the judgment of the court for that of the jury."

The principle contained in this pronouncement has been adopted in later decisions of this court and has been followed consistently at least since 1943. Van Auker v. Steckley's Hybrid Seed Corn Co., *supra;* Horky v. Schroll, *supra;* Rueger v. Hawks, *supra;* Thoren v. Myers, *supra;* Erickson v. Morrison, *supra;* Remmenga v. Selk, *supra;* Johnson v. Schrepf, *supra.*

It is believed that the principles thus announced and followed are sound and that there should be no departure from them. It follows therefore that no further consideration will be given herein to the alternative request of the defendant for a remittitur. Attention will be given only to the contention that the verdict and judgment should be vacated on the ground that the verdict appears to be the result of passion and prejudice.

It must be concluded on the record that there was sufficient evidence from which the jury could find that plaintiff was injured as a result of this collision. On the trial of the case he testified as to how the collision occurred, as to the immediate consequences to him, and as to the later progress of these consequences.

An orthopedic surgeon called on his behalf testified that he received from plaintiff the history of the accident and its consequences, which reflected that to which plaintiff had testified in these respects, and made examinations of the plaintiff. He testified that in his opinion plaintiff was injured in the collision.

An orthopedic surgeon was also called on behalf of the defendant. He testified that he made an examination of plaintiff on behalf of defendant. He took a history from plaintiff, which he related, which history varied in no substantial particular from the history as testified to

by plaintiff and his witness. This witness gave it as his opinion, based upon the history, that plaintiff had been injured as a result of the collision.

The determination of whether or not it may be said that the verdict was the result of passion and prejudice must depend in this case upon whether or not it is so disproportionate to the injury and damage as disclosed by the evidence as to indicate that the jury disregarded the evidence and based its verdict on other considerations.

In order to arrive at a conclusion in this connection it becomes necessary to review the pertinent evidence relating to injury and damage.

The plaintiff gave testimony that he suffered pain in the region of the lower end of his spine immediately following the accident. The pain persisted until December 21, 1949, when he called upon a doctor. This doctor was not called to testify. The evidence discloses however that this doctor sent the plaintiff to the orthopedic surgeon who testified on behalf of the defendant, who took X-ray pictures of the area of injury. The pain persisted but plaintiff did nothing further about it until June 1950, when he called upon Dr. Herman Johnson who took a history and made an examination including the taking of X-ray pictures. Dr. Johnson advised the procurement of a brace to hold the area involved in rigidity and physio-therapy treatments. Over the period thereafter plaintiff received 91 treatments and procured a brace which he wore constantly thereafter in the daytime except on a few brief occasions and on occasion at night. He was advised to and did thereafter sleep on a hard bed. Plaintiff obtained relief from use of the brace but observed no improvement in his condition. The condition persisted and plaintiff saw Dr. Johnson next in April 1951, and also in March 1952. Throughout all of this time he experienced no improvement in his condition. He was an outdoor man and engaged in hunting, sports, and athletic activities. His occupation and his other activities entailed a large amount of travel. These

activities were not curtailed appreciably in quantity after the accident but his ability to perform attendant details of these activities was substantially reduced. His ability to bend his body from the upright position was progressively reduced. He lost no time from his occupation as a result of the injury but was unable to perform as diligently as before. He suffered no loss of income as a result of the injury.

Dr. Johnson gave testimony that he examined plaintiff on June 13, 1950, and received a history of the accident and a complaint of pain from that accident which had been aggravated on a recent fishing trip and from riding in a car; and that there was no pain radiating into the lower limbs. Inspection by palpation disclosed a straight spine with moderate fixation. On forward bending the finger tips could be carried to within 6 inches of the floor. Backward bending was three-fourths of normal. In these extreme positions there was pain in the lower part of the spine. Side bending was free and painless. The lower lumbar muscles were hard and tender.

After the taking of X-rays a low back brace and treatments in the form of heat and massage were recommended. It was thought at that time that to a certain extent this would bring about eventual recovery. The prescribed brace was fitted July 29, 1950.

The plaintiff was seen next on April 18, 1951, at which time there was a definite increase in stiffness in the back. In bending forward he was able to get his finger tips only to his knees. His side bending was estimated to be a third of normal. He at that time complained of pain.

The plaintiff was next seen February 15, 1952, at which time plaintiff was suffering low back pain and had developed some tingling and numbness over the left thigh. It was the doctor's opinion that this tingling and numbness was due to irritation of nerves as they came out of the spinal canal in the lower lumbar region. Plaintiff

returned for X-ray examination of his spine on March 11, 1952. At this time plaintiff's range of motion was one-fourth of normal. He could bring his finger tips to a point about three inches above the knees. Side motion was one-fourth of normal. The brace was removed during all examinations.

X-ray pictures were taken on the occasion of most of the examinations, all of which were exhibited to the jury and analyzed by the witness. Following the analysis and exhibition of the pictures the witness gave it as his opinion that there was a congenital abnormal shape of the joint between the fourth and fifth lumbar vertebrae. There was a narrowing of the disc between the fifth lumbar vertebra and the sacrum which continued to narrow further between the time the first pictures were taken and the last. The opinion given as to whether or not the condition of the back of plaintiff resulted from the accident and that injury was the following: "It is my opinion that a certain amount of it has, yes."

Reasonably explanatory of this answer, it is thought, is the following from the cross-examination: "Q- You thought it was a muscle strain at that time? A- Or ligamentous strain. Q- And increased because of this poor architecture of the spine to start with? A- That is right."

The two excerpts of testimony taken together appear to mean it was the opinion of the witness that the condition of plaintiff's back resulted from the accident and injury except to the extent that it was contributed to by the faulty congenital architecture between the fourth and fifth lumbar vertebrae.

The further testimony of this witness was that in the first instance it was thought that the brace would at least in part bring about a recovery. It did not do so. A major operation to bring rigidity between the fifth lumbar vertebra and the sacrum was considered and discussed. Usually such operations are satisfactory for the purpose but not certainly so. The operation would

entail ordinarily a surgeon's fee of $500, 2 weeks hospitalization, a period of 6 to 8 weeks convalescence at home, and the use of a protective brace or belt for a period of several months. No such surgery has been performed or attempted.

The plaintiff was 54 years old at the time of the accident with an expectancy of more than 18 years. His yearly average income from his occupation from 1948 forward was well above the amount of the verdict in this case.

As against this evidence of the plaintiff, Dr. James W. Martin gave testimony. This is the orthopedic surgeon hereinbefore referred to as having made an examination and who testified on behalf of the defendant. He was the only witness who gave any testimony on the subject of injury on behalf of the defendant. In his examination he took X-ray pictures of the plaintiff. These pictures and others hereinbefore referred to as having been taken by him were introduced in evidence. On the witness stand he examined all of these and also all of those placed in evidence by the plaintiff.

With the history which he received, the examination which he made, and his examination of all X-ray pictures as a basis, the witness testified that he found a congenital variation from normal structure; that he found no evidence of injury disclosed by X-rays; that plaintiff may have sustained a muscle and ligament strain of the low back region on December 9, 1949; that he found slight sensory changes in the lower left extremity suggestive of mild irritation involving the left fourth lumbar nerve root; that the clinical findings were far from conclusive as to the existence of disc prolapse or herniation; that the symptoms did not warrant radical treatment; that the plaintiff would do well to gradually discard the use of the brace; that he did not see any actual physical need for continuing to wear the support; that he saw no need for a fusion operation; and that discarding the brace

would cause the muscles to return to their normal work and get strong again.

The foregoing is a summary of the evidence pertinent to the matter under inquiry. No effort has been made to quote what was said, except in the instances so indicated. The effort has been to correctly reflect in summary the testimony of the witnesses. It is thought this result has been accomplished.

It becomes apparent that the verdict of the jury responded to the evidence of the plaintiff and to the inferences and conclusions to be drawn therefrom, rather than to those of the defendant. In doing this the jury was in the exercise of its proper function. It was the sole judge of the credibility of the witnesses as to the question of injury and damage as well as to every other question.

As is pointed out in the cases already cited herein the question of the amount of damage is one solely for the jury and its action in that respect may not be disturbed on appeal except for reasons which also appear in the cases already cited herein.

In arriving at the amount of plaintiff's damage the jury was required to take into consideration, as instructed, the character of the injury, pain, suffering, and loss already sustained, the reasonable value of medical care entailed or required up to the time of the trial, and also what in these respects would be entailed or required in the future as a consequence of the accident and injury.

Of course there is no monetary measure for pain and suffering but it is recognized that damages are allowable for them. No citation is necessary to support this assertion. If a jury has considered the duration and severity of pain and suffering and has manifested by verdict a reasonable attitude thereto in fixing damages the verdict will be upheld on appeal.

The jury had the right to find that the evidence of plaintiff in respect to pain and suffering was true. It also had the right to find that the same situation would

continue unless and until the back condition was corrected by a major operation, which operation if successful would correct the condition but would leave plaintiff with rigidity between the fifth lumbar vertebra and the sacrum. The possible or probable effect of such rigidity was not carefully described. Likewise the possible or probable effect of an unsuccessful operation was not described.

The medical and surgical expenses up to the time of trial appear to have been somewhere near $500.

The prospective operation would entail in probability surgery, $500; hospitalization, 2 weeks; recuperation or convalescent period at home, 6 to 8 weeks; and use of the brace for several months.

From this and what is disclosed in the record about plaintiff's compensation, if plaintiff was deprived of pay by his employer for the time lost, the total cost of surgery and hospitalization plus the deprivation of income would approximate one-third of the amount of the verdict. The verdict in its entirety was well below the annual earnings of the plaintiff.

These things appear in or are illustrations demonstrable from the evidence. They are based on facts as disclosed by the evidence subject to consideration by the jury in arriving at its verdict.

Taking into consideration all of the evidence and the inferences which a jury might reasonably draw from it, we are unable to say that the verdict is excessive.

The judgment of the district court is affirmed.

AFFIRMED.

JOHN ANDELT, JR., APPELLANT, V. COUNTY OF SEWARD, APPELLEE.

60 N. W. 2d 604

Filed October 23, 1953. No. 33354.

1. **Negligence.** Section 25-1151, R. R. S. 1943, by the use of the words "when the contributory negligence of the plaintiff was slight and the negligence of the defendant was gross in comparison" clearly intended the words "in comparison" as qualifying both of the clauses immediately preceding. The words "slight" and "gross" as used in the statute are comparative terms and the intent of the statute is that the negligence of the parties shall be compared one with the other in determining questions of slight and gross negligence.
2. **Negligence: Automobiles.** The general rule with exceptions, which provides that it is negligence as a matter of law for a motorist to drive an automobile so fast on a highway that he cannot stop or turn aside in time to avoid an obstruction discernible within the range of his vision ahead, should embrace in the exceptions all situations wherein reasonable minds may differ on the question of whether or not the operator of the automobile exercised the care and prudence required of a reasonably careful and prudent person under the circumstances of the particular situation.
3. ———: ———. Where a driver of an automobile is suddenly confronted with an emergency requiring instant decision, he is not necessarily guilty of negligence in pursuing a course which mature reflection or deliberate judgment might prove to be wrong.

APPEAL from the district court for Seward County: H. EMERSON KOKJER, JUDGE. *Reversed and remanded.*

McKillip, Barth & Blevens, for appellant.

Kirkpatrick & Dougherty and *Russell A. Souchek,* for appellee.

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

SIMMONS, C. J.

This is an action for damages to an automobile and for personal injuries resulting from an alleged negligently maintained public highway of defendant. At the

close of plaintiff's evidence the trial court sustained a motion for a directed verdict and dismissed plaintiff's petition. Plaintiff appeals. We reverse the judgment of the trial court and remand the cause for further proceedings.

The issues presented by the pleadings were those of negligence of the defendant and negligence of the plaintiff as the sole cause and as contributory negligence. Here the parties presuppose negligence of each and reduce the issue to the question as to whether or not the negligence of the plaintiff was sufficient under the contributory negligence rule as a matter of law to prevent submission of the cause to a jury. We determine that question.

We review the evidence in the light of that issue and the often-repeated established rule as to the consideration of the evidence on a motion for a directed verdict. See Cunning v. Knott, *ante* p. 170, 59 N. W. 2d 180.

There is a county highway in Seward County running north and south. It connects at the south end with an intersecting highway. About one-half mile north of that intersection is a bridge 24 feet long and 16 feet wide. The evidence as to this road is that the traveled portion of the road was 19 feet and 6 inches wide at the south end. Its width farther to the north is not shown, but the evidence indicates that it narrowed down in the traveled portion to a one-lane road toward the bridge. Its condition is described in the evidence from fairly smooth and level to narrow, poor, and more or less rutty.

There is evidence that sometime in June 1951, the dirt approach to the north side of the bridge washed out in part, leaving a dangerous condition, but remained passable, and was used thereafter by parties on the highway. That the defendant had notice of that condition the next day is not challenged here.

On the night of this washout in June a farmer living between the intersection and the bridge placed sawhorses with a board nailed across them 3 feet from the

ground and 9 feet long. This structure was placed within 48 to 60 feet from the intersection so as to extend across the right-hand lane of travel. It had no sign or other indication as to why it was placed there. It did not bar travel on the west side of the road, and traffic went in and out around it leaving traffic marks on the road surface. The bridge and defective approach were approximately one-half mile north of that barricade. No other warnings or barricades were posted. This structure remained in place until after the time of the accident involved here.

During the day of July 17, 1951, a road crew worked on the damaged approach. They excavated entirely across the highway, making a hole over 8 feet in width, 12 feet in depth, and with sides straight up and down. They left the excavation about 4 p. m. that afternoon. They did not place any warnings or barricades on the bridge or highway, leaving the only warning that above described one-half mile to the south. That this crew was working for the defendant is not challenged here.

About 5 p. m. on that afternoon the plaintiff entered the road from the south. The weather was clear, visibility good, and the road dry. Plaintiff saw the barricade and the tracks around it, and went north around the barricade at 35 miles an hour. Thereafter he increased his speed to 45 to 50 miles an hour as he drove north. He proceeded without incident onto the bridge, and when 15 or 20 feet from the hole, saw it, concluded he could not stop, and acting instantly, accelerated his speed, and his car jumped the excavation. In the landing the front running gear of his car and particularly the left front wheel were considerably damaged. Plaintiff suffered, what here appears to be, minor personal injuries.

There is evidence that the hole was first visible from 50 to 100 feet from the south as one approached on the highway.

The statute provides: "In all actions brought to re-

cover damages for injuries to a person or to his property caused by the negligence of another, the fact that the plaintiff may have been guilty of contributory negligence shall not bar a recovery when the contributory negligence of the plaintiff was slight and the negligence of the defendant was gross in comparison, but the contributory negligence of the plaintiff shall be considered by the jury in the mitigation of damages in proportion to the amount of contributory negligence attributable to the plaintiff; and all questions of negligence and contributory negligence shall be for the jury." § 25-1151, R. R. S. 1943.

"The statute by the use of the words 'when the contributory negligence of the plaintiff was slight and the negligence of the defendant was gross in comparison' clearly intended the words 'in comparison' as qualifying both of the clauses immediately preceding. The words 'slight' and 'gross' as used in the statute are comparative terms and the intent of the statute is that the negligence of the parties shall be compared one with the other in determining questions of slight and gross negligence." Roby v. Auker, 151 Neb. 421, 37 N. W. 2d 799.

We followed this holding in Krepcik v. Interstate Transit Lines, 153 Neb. 98, 43 N. W. 2d 609, and Murray v. Pearson Appliance Store, 155 Neb. 860, 54 N. W. 2d 250.

Under this rule the negligence of the plaintiff is to be compared with the negligence of the defendant. The negligence of the defendant consists in its failure for a period of over a month (as stated by one witness) to repair or erect any adequate warnings or barriers at or near the bridge of the dangerous condition of the highway following the June washout; and its failure to erect any adequate warnings at or near the bridge following the time on July 17, 1951, where by the excavation it rendered the highway impassable and created an obviously dangerous situation there.

Defendant urges that plaintiff was guilty of negli-

gence in that plaintiff drove past the barricade that only partially blocked the highway and which contained no indications of the reason for its being in the road. Passing such a barricade one-half mile away from an excavation across a road was not a sufficient act of negligence under the above rule as to bar recovery as a matter of law. But, thereafter plaintiff accelerated his speed to 45 to 50 miles an hour, and defendant argues that the two in combination constituted negligence.

The speed at which plaintiff traveled that one-half mile is not shown to have been in violation of the provisions of section 39-7,108, R. S. Supp., 1951, and as such is not in and of itself evidence of negligence under the rule as stated in Tempero v. Adams, 153 Neb. 331, 44 N. W. 2d 604. There is no evidence that the speed at which plaintiff drove that one-half mile had anything to do with causing this accident, save only that he came upon the bridge at 50 miles an hour, after having passed a point 50 to 100 feet from the excavation from which witnesses said the excavation could have been seen. There is no evidence that, at the speed at which he was traveling, he could have stopped his car before reaching the excavation, had he seen it.

Defendant also contends that plaintiff failed to see the excavation at a point where witnesses testified it could have been seen. It is contended that this is negligence which as a matter of law bars recovery. As to that we need only refer to the decision of this court in Hartford Fire Ins. Co. v. County of Red Willow, 149 Neb. 10, 30 N. W. 2d 51.

Defendant says that plaintiff was guilty of negligence as a matter of law barring recovery because his speed was such that he could not stop when he could have seen, but did not see, the excavation.

Defendant relies upon the rule as stated in Most v. Cedar County, 126 Neb. 54, 252 N. W. 465. Defendant overlooks the rule stated in Thurow v. Schaeffer, 151 Neb. 651, 38 N. W. 2d 732, as follows: "The general rule

with exceptions, which provides that it is negligence as a matter of law for a motorist to drive an automobile so fast on a highway that he cannot stop or turn aside in time to avoid an obstruction discernible within the range of his vision ahead, should embrace in the exceptions all situations wherein reasonable minds may differ on the question of whether or not the operator of the automobile exercised the care and prudence required of a reasonably careful and prudent person under the circumstances of the particular situation."

That rule presupposes "an obstruction discernible within the range" of the driver's "vision ahead." Here the obstruction is not in that classification. The obstruction here was a hidden one, discernible only when a driver was almost upon it.

If defendant's contention in this regard is correct, then any motorist driving Nebraska highways would be required to maintain a rate of speed that would at all times enable him to stop in 50 to 100 feet, lest he hit a hidden defect in a highway not discernible theretofore and be barred from recovery as a matter of law. Such is not the law.

Finally it is argued that plaintiff was guilty of negligence as a matter of law which bars recovery because when he discovered his peril he increased his speed instead of putting on the brakes. It seems to us that a jury could conclude reasonably that the use of brakes under the circumstances would have assured a serious accident. The rule is: "Where a driver of an automobile is suddenly confronted with an emergency requiring instant decision, he is not necessarily guilty of negligence in pursuing a course which mature reflection or deliberate judgment might prove to be wrong." Riekes v. Schantz, 144 Neb. 150, 12 N. W. 2d 766. We there applied the rule in a case where a plaintiff speeded up her car in an attempt to avoid a collision. It was contended that her act in that regard was negligent. We stated the above rule and further held: "All the law requires is that

one conduct himself as an ordinary, careful and prudent person would have done under similar circumstances, and if he does that he is not held to be negligent, even though he committed an error of judgment. Belik v. Warsocki, 126 Neb. 560, 253 N. W. 689. We cannot say therefore that the act of plaintiff in speeding up her car under the situation disclosed by her testimony constituted contributory negligence sufficient to bar recovery as a matter of law." Riekes v. Schantz, *supra*. The same holding applies here.

We conclude that under the comparative negligence statute the record here does not show contributory negligence which is sufficient as a matter of law to bar recovery. The trial court erred in so holding.

It becomes unnecessary to determine other questions presented by this appeal.

The judgment of the trial court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

STATE OF NEBRASKA, APPELLANT, V. COUNTY OF CHEYENNE, APPELLEE.
60 N. W. 2d 593

Filed October 23, 1953. No. 33372.

1. **Estates.** A possibility of reverter of real estate is not an estate or interest therein.
2. ———. A possibility of reverter has no value until the event upon which the determinable estate is limited has happened or until it can be determined that it will happen and when it will occur.
3. **Estates: Eminent Domain.** If the possibility of nonuser for the purposes for which the land is taken and a reverter to the state by virtue of the provisions of section 72-223, R. R. S. 1943, is so remote that it has no determinative value it should not be considered in deciding the reasonable market value of the land taken.
4. **Trial.** It is prejudicial error for a trial court to submit to the jury a question of fact material to the case if there is no evidence

from which a finding thereon can be made.

5. **Trial: Appeal and Error.** The proof in a trial of a jury case must be confined to legal evidence which tends to prove or disprove an issue in the case and the admission of improper evidence is prejudicial error if it may have influenced the verdict.

6. ———: ———. If it does not appear from the record that evidence wrongfully admitted in the trial of a jury case did not affect the result of the trial unfavorably to the party against whom it was received its reception must be considered prejudicial error.

7. **Eminent Domain.** All damages immediate and prospective which result from the taking of property by the exercise of the power of eminent domain must be compensated in the original condemnation proceeding.

8. ———. The jury in deciding the reasonable market value of land is privileged to consider the purpose for which it is used, any use to which the land is adapted or for which it is available, the condition, situation, and surroundings of the land, and every fact and circumstance shown in evidence bearing upon its value.

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

Clarence S. Beck, Attorney General, and *Robert A. Nelson,* for appellant.

Jack R. Knicely, for appellee.

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

BOSLAUGH, J.

These proceedings were instituted by the County of Cheyenne to acquire by condemnation through the power of eminent domain for county fair purposes about 40 acres of state school or educational land a short distance from, but not adjoining, the west boundary of the city of Sidney. The land is described in detail in the record but because of its length and absence of necessity for it the description is not repeated in this opinion.

The appraisers made an award of $2,500 to the State of Nebraska because of the appropriation of the land by

the county. An appeal was taken by the State to the district court. There were no pleadings filed in that court. The single inquiry there was the damages appellant had sustained by virtue of the county having taken the land. The trial in the district court resulted in a verdict of $5,959.16 for appellant. The motion of the State for a new trial was denied and judgment was rendered for it for the amount of the verdict with interest and costs. This appeal is from that judgment.

The appellee offered and there was received, over the objection of appellant, testimony that attendance of people at the Cheyenne County Fair increased in 1945, 1946, and 1947, and decreased each year thereafter including 1951; that there was very little interest in or activity at the county fair in 1952; that during the first 3 years referred to the "displays and exhibits" were more and better but that there has been a continual decrease since 1947; and that after 1947 special efforts made to encourage interest in the fair have not been successful. Appellee was also permitted to introduce evidence that because it could only use the land for fair purposes, and if it ceased to do so the land would revert to appellant, that the fair market value of the land was reduced as much as 75 percent.

The jury was instructed that the law provides that if the land taken by the county ceases to be used for the special purposes for which it was appropriated it shall revert to the State of Nebraska as educational land, and in determining the fair market value of the land taken if the jury found from a preponderance of the evidence that the reverter had a substantial determinate value then that value should be excluded. The state has authorized the taking of educational land by eminent domain for special purposes. § 72-213, R. R. S. 1943. Included in these is that a county may appropriate not to exceed 40 acres of such land located in the county for public purposes. § 72-219, R. R. S. 1943. This is subject to the condition that if the land ceases to be used for

the purpose for which acquired it shall revert to the state as educational land. § 72-223, R. R. S. 1943. Whether or not property acquired for county fair purposes is devoted to a public purpose is not made an issue herein. The significance in this case of the condition imposed by statute is that it creates only the possibility of a reverter. The estate acquired by the condemnation is to continue until the happening of a certain event and to then cease. That event, discontinuance of the land for fair purposes, may happen at any time or it may never occur. Until the determining event the proprietor of a determinable estate has all the rights and privileges of an absolute owner. The former owner retains at most a mere possibility of reverter should the event happen upon which the estate is limited. A possibility of reverter is not an estate or interest in land but is only the possibility of being an estate. It cannot have a value until it can be determined that the event upon which the estate is limited will happen and when it will occur. 19 Am. Jur., Estates, § 31, p. 491; 31 C. J. S., Estates, § 105, p. 125; Restatement, Property, § 53, p. 187; Connecticut Junior Republic Assn., Inc. v. Litchfield, 119 Conn. 106, 174 A. 304, 95 A. L. R. 56; Copenhaver v. Pendleton, 155 Va. 463, 155 S. E. 802, 77 A. L. R. 324; Magness v. Kerr, 121 Or. 373, 254 P. 1012, 51 A. L. R. 1466. In State v. Platte Valley Public Power & Irr. Dist., 147 Neb. 289, 23 N. W. 2d 300, 166 A. L. R. 1196, it is said: "Where the possibility of nonuser for the purposes for which the land is taken, and a reverter to the state under the provisions of section 72-223, R. S. 1943, is so remote that it has no substantial determinative value, it is not to be taken into consideration in determining the fair market value of the land taken."

The record does not show that any action was discussed, proposed, or taken to abandon or discontinue the county fair or to cease to use the land condemned as the place of its activities. It is not important what the county could or might have done in this regard. It is

important that it has a legal right to have and use the land in perpetuity for county fair purposes. Convincing evidence of its intention is the commencement of this case to condemn the land as a site for its fair as late as August 1952.

The court allowed appellee to offer proof that there was a gas well about 1½ miles and oil wells about 1 mile from the section of land of which the area condemned is a part; that the land involved in these proceedings "is strictly wildcat area"; and that the value of the minerals in the land was $25 to $30 an acre. The jury was charged that the county could not acquire by condemnation any mineral rights in the land and that in determining the fair market value of the land taken, if it found from a preponderance of the evidence that the mineral rights in the land had any value, that the value thereof should be excluded.

If there had been evidence that the land involved consisted in part of minerals and evidence of the probable extent thereof it would have been proper to have admitted evidence of the value of the mineral rights. In State v. Platte Valley Public Power & Irr. Dist., *supra,* it is said: "Under the provisions of section 72-223, R. S. 1943, a condemnor cannot acquire any mineral rights in the lands taken, and the value of the mineral rights, if any, is to be excluded in determining the fair market value of the land." The deficiency in this record in this regard is the absence of proof that there are any minerals in or under the land. Any evidence as to value of mineral rights in connection with this land was pure speculation. The inquiry of appellee to its witness assumed that there were "perpetual minerals under the tract of land." The charge of the court did not direct the jury to decide from the evidence whether or not there were minerals in or under the land, but it did admonish the jury to determine whether or not the "mineral rights in the lands taken" had any value and if they had the amount thereof should be by the jury deducted from the

market value of the land. It is prejudicial error for a trial court to submit to the jury a question of fact material to the case if there is no evidence from which a finding on the question can be made. Simcho v. Omaha & C. B. St. Ry. Co., 150 Neb. 634, 35 N. W. 2d 501.

Proof in the trial of a jury case should be confined to legal evidence which tends to prove or disprove an issue in the case. Evidence wrongfully received in such a case may not be considered without prejudice against whom it is admitted if it may have influenced the result as to him. If it does not appear from an examination of the record that the evidence wrongfully received did not affect the result of the trial its reception must be considered prejudicial error. In Thompson v. Wertz, 41 Neb. 31, 59 N. W. 518, it is said: "The proof must be confined to the issues as made by the pleadings, and the admission of irrelevant testimony in a case tried to a jury is prejudicial error where it may have influenced the verdict." See, also, Bee Publishing Co. v. World Publishing Co., 62 Neb. 732, 87 N. W. 945; Exchange Bank v. Gifford, 102 Neb. 324, 167 N. W. 69; Macke v. Wagener, 106 Neb. 282, 183 N. W. 360; In re Estate of Parvin, 131 Neb. 853, 270 N. W. 470. A consideration of the record prevents a conclusion that the jury was not influenced by the wrongfully admitted evidence on the subject of the effect of the statutory possibility of reverter of the land and the subject of mineral rights attached to the land. It cannot be said that the inadmissible evidence summarized above contributed less to the amount of the verdict than the other evidence. The evidence and the instructions on these subjects were improper and prejudicial.

Appellant in this case was not only entitled to receive but was obligated to make every reasonable effort to secure the fair market value of the land on August 15, 1952, without diminution on account of the possibility of reverter or the possible existence of minerals in or under the land. State ex rel. Johnson v. Central Ne-

braska Public Power & Irr. Dist., 143 Neb. 153, 8 N. W. 2d 841; State v. Platte Valley Public Power & Irr. Dist., *supra*. Appellant must obtain its damage in these proceedings for the property taken from it by the county and if it is denied full compensation now it will be hereafter without remedy. A landowner is assured by the Constitution of the state recovery in one action of the whole damage sustained by him because of the taking of his property by the power of eminent domain. All damages immediate and prospective which result from the taking of property by the exercise of the power of eminent domain must be compensated in the original condemnation proceeding. Churchill v. Beethe, 48 Neb. 87, 66 N. W. 992, 35 L. R. A. 442; Psota v. Sherman County, 124 Neb. 154, 245 N. W. 405; Snyder v. Platte Valley Public Power & Irr. Dist., 140 Neb. 897, 2 N. W. 2d 327; Burnett v. Central Nebraska Public Power & Irr. Dist., 147 Neb. 458, 23 N. W. 2d 661; Little v. Loup River Public Power Dist., 150 Neb. 864, 36 N. W. 2d 261, 7 A. L. R. 2d 355; Annotation, 133 A. L. R. 11.

The jury in deciding the fair and reasonable market value of the land was privileged to consider not only the use then actually made of it, but any and all uses to which the land was adapted and for which it was available, because market value includes the value of the property for any reasonable use to which it can and may be put. The condition, situation, and surroundings of the land and every fact and circumstance shown in evidence bearing upon its value and that would influence an intending good faith purchaser were proper for the consideration of the jury. If the land has a peculiar adaptation for a certain use this may be shown and considered and if it adds to the value of the land the owner is entitled to the benefit of it. Matters of this nature may properly be considered by the jury to assist it in reaching the final conclusion which is the reasonable market value of the property taken. Wahlgren v. Loup River Public Power Dist., 139 Neb. 489, 297 N.

W. 833; Langdon v. Loup River Public Power Dist., 144 Neb. 325, 13 N. W. 2d 168; Medelman v. Stanton-Pilger Drainage Dist., 155 Neb. 518, 52 N. W. 2d 328; Quest v. East Omaha Drainage Dist., 155 Neb. 538, 52 N. W. 2d 417.

The complaint of appellant that Exhibit 3 offered by it was improperly excluded is not well taken. The exhibit is not a complete or final drawing or plat. It bears evidence of this fact on its face in these words: "This study is simply a suggestion to assist the sponsor in meeting FHA planning objectives. The sponsors revised plan should be prepared by a competent technician and * * * should also be adapted to and indicate any existing conditions affecting the plan but not shown on this study." In any event the foundation was insufficient for introduction of the exhibit. It failed to show the correctness of the exhibit. The rule generally is that unofficial maps, plats, and the like are admissible in evidence when verified by testimony of witnesses having personal knowledge of their correctness.

The judgment should be and it is reversed and the cause is remanded to the district court for further proceedings.

REVERSED AND REMANDED.

NATIONAL FIRE INSURANCE COMPANY OF HARTFORD, APPELLEE, V. LYLE EVERTSON ET AL., APPELLANTS.
60 N. W. 2d 638

Filed October 23, 1953. No. 33376.

1. **Interest.** In order to recover interest there must be a fixed and determinate amount which could have been tendered and interest thereby stopped. The amount of the claim must be known, or readily determinable.
2. ———. Recovery of interest on an unliquidated claim, the subject of reasonable controversy, and incapable of being fixed by computation, may be had only from the date of the determination of the right of recovery and the ascertainment of the amount.

3. **Appeal and Error.** In the absence of a bill of exceptions, no question will be considered, a determination of which requires an examination of evidence produced at the trial.
4. ———. In the absence of a bill of exceptions, it is presumed that an issue of fact raised by the pleadings was sustained by the evidence, and that it was correctly determined.

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

Van Steenberg & Meyers, Davis, Healey, Davies & Wilson, and *Robert A. Barlow, Jr.,* for appellants.

Pilcher & Haney and *Torgeson, Halcomb & O'Brien,* for appellee.

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

BOSLAUGH, J.

An automobile owned by Frank Evertson and operated by his son, Lyle Evertson, traveling towards the west collided with a bus of the Burlington Transportation Company traveling eastward on U. S. Highway No. 30 near the town of Dix. The bus was diverted from its position in the right lane of travel into a ditch on the right or south of the highway. It overturned and was damaged. The cost of repairing the bus was $6,083.74. A policy of insurance of National Fire Insurance Company of Hartford obligated it to pay the transportation company for necessary expenditures in repairing the bus to the extent of $5,083.74. Appellee did this on October 22, 1947, and took an assignment from its assured of all its rights against appellants.

Appellee by this litigation sought to recover from appellants the amount it paid to the owner of the bus because, as alleged by it, the proximate cause of the collision and damage was negligence of the appellants. They denied any negligence by them and alleged that the collision and any injury or loss resulting therefrom was proximately caused by the negligence and careless operation of the bus by the driver of it. The claim of

appellants in this regard was traversed by appellee.

The court at the trial instructed the jury on the issue of negligence of appellants in the operation of the automobile, the issue of contributory negligence of the transportation company in the operation of the bus, and on the subject of comparative negligence. It defined by instruction to the jury negligence, ordinary care, contributory negligence, proximate cause, slight negligence, and gross negligence. The trial of the issues resulted in a verdict for appellee in the sum of $2,541.92. Judgment was entered for this amount with interest from the date of the verdict, December 18, 1952. The court on February 25, 1953, on motion of appellee, found that the amount awarded it by the verdict should bear interest from the date it paid its assured, October 22, 1947, the sum of $5,083.74; modified the judgment accordingly; and adjudged that appellee have judgment for $2,541.92 with interest from October 22, 1947.

The date when interest should commence is the only issue presented by this appeal.

In this case not only was the liability, if any, of appellants required to be established, but any amount owing by them to appellee was unliquidated. Neither of these could be known until a decision was had in the suit. The amount appellee paid its assured was known. It was stated in and claimed by the petition but whether or not appellants were legally liable for any or all of it was a subject of reasonable controversy and was not and could not be determined until a trial of the issues made by the claims of the parties. These included whether or not the damage to the bus resulted wholly from negligence of appellants; whether or not the collision and resulting injury and loss were proximately caused by negligence of the operator of the bus; or whether or not the accident and damage were caused by negligence of both the bus driver and appellants. Likewise if appellants and the transportation company

were negligent the degree and effect of the negligence of each had to be resolved before liability of appellants to appellee could be known. If a claim for damage is a matter of reasonable controversy, unliquidated, incapable of being fixed by computation, and may only be ascertained by agreement of the parties concerned or by legal action, recovery of interest may be had only from the date of the determination of the right of recovery and the ascertainment of the amount of the liability of the debtor. In McKain v. Platte Valley Public Power & Irr. Dist., 151 Neb. 497, 37 N. W. 2d 923, it is said: "Recovery of interest on an unliquidated claim, the subject of reasonable controversy, and incapable of being fixed by computation, may be had only from the date of the determination of the right of recovery and the ascertainment of the amount." See, also, Smith v. Platte Valley Public Power & Irr. Dist., 151 Neb. 49, 36 N. W. 2d 478. This court has recognized that in order to recover interest there must be a determinate amount which could have been tendered and interest thereby stopped; the amount of the claim must be known and determined, or readily determinable. Gee v. City of Sutton, 149 Neb. 603, 31 N. W. 2d 747. See, also, 47 C. J. S., Interest, § 19, p. 30.

Appellee contends that decisions of this court prior to those referred to above justify the conclusion of the district court in reference to the allowance of interest in this case. The doctrine of the cases referred to is: That interest is recoverable for damage occasioned by injury to or destruction of property if the damages are capable of being definitely ascertained or "where they (damages) are mathematically computed from data furnished by the evidence," as in that case "the difference between what it would have cost the plaintiff to procure and furnish the gravel according to contract and the contract price." Parkins v. Missouri P. Ry. Co., 76 Neb. 242, 107 N. W. 260. That "Interest on demands based on market values susceptible of easy proof is recover-

able in actions ex delicto." Missouri, Kansas & Texas Trust Co. v. Clark, 60 Neb. 406, 83 N. W. 202. It may also be observed that the opinion in that case states that Fremont, E. & M. V. R. R. Co. v. Marley, 25 Neb. 138, 40 N. W. 948, 13 Am. S. R. 482, confidently relied upon by appellee as controlling here, announced and was governed by the rule last quoted. These decisions are distinguishable but may not be considered inconsistent with the rule first above quoted.

The argument of appellee assumes "that the amount of the damage to the bus was fixed" and could not be disputed by the appellants; and that because there is no bill of exceptions no consideration can be given to the fact that there was an issue of negligence and contributory negligence, and that the doctrine of comparative negligence was applicable to the case. Appellee has misconceived the effect of the failure to furnish a bill of exceptions. It has frequently been decided that in the absence of a bill of exceptions, no question will be considered, a determination of which requires an examination of evidence produced at the trial, that it is presumed that an issue of fact raised by the pleadings was sustained by the evidence, and that it was correctly determined. Wabel v. Ross, 153 Neb. 236, 44 N. W. 2d 312; State ex rel. Wright v. Barney, 133 Neb. 676, 276 N. W. 676; Cozad v. McKeone, 149 Neb. 833, 32 N. W. 2d 760.

In this case the liability of appellants to appellee for any part of the claim involved had not been ascertained. The damages claimed were unliquidated and were incapable of determination with reference to the ordinary standards, such as calculation and market value. There was no data from which the liability could be fixed without judicial intervention. There was reasonable controversy affecting the subject of the litigation. There was no known or ascertainable amount before the verdict which appellants could have tendered or paid appellees. The judgment should have been for the amount

of the verdict with interest at 6 percent per annum from its date, December 18, 1952.

The part of the judgment allowing "interest from October 22, 1947 at the rate of 6 per cent per annum on the sum of $2541.92" should be and it is reversed and vacated, and it should be and is adjudged that the judgment for $2,541.92 in favor of appellee shall draw interest at 6 percent per annum from December 18, 1952. The judgment in all other respects should be and it is affirmed. The costs of this appeal should be and are taxed to appellee.

AFFIRMED AS MODIFIED.

RAYMOND RUSH ET AL., APPELLANTS, V. FRANK C. HEINISCH, SPECIAL ADMINISTRATOR OF THE ESTATE OF KRIST ANGELOFF, DECEASED, ET AL., APPELLEES.
60 N. W. 2d 608

Filed October 23, 1953. No. 33381.

1. **Specific Performance: Frauds, Statute of.** Where a party seeks specific performance of an oral contract for the conveyance of land of a deceased person, the burden is on such person to prove an oral contract, the terms of which are clear, satisfactory, and unequivocal and that the acts of part performance in relationship to the subject matter in and of themselves are such as are referable solely to the contract sought to be enforced and cannot be accounted for on any other reasonable hypothesis.
2. **Appeal and Error.** In an equity case appealed to this court, if it is desired to review alleged erroneous rulings of the trial court as to the reception of evidence, a motion for a new trial must be filed, assigning as error the admission or rejection of the evidence.

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

Kennedy, Holland, DeLacy & Svoboda, J. A. C. Kennedy, Jr., and *Beavers' Law Firm,* for appellants.

Clarence S. Beck, Attorney General, *Richard H. Williams,* and *George Evens,* for appellees.

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

SIMMONS, C. J.

This is an action for specific performance of an alleged oral contract to convey property made between the plaintiffs and Krist Angeloff, now deceased. The defendants, among others, are the administrators of the estate and the State of Nebraska, because of the laws as to escheated estates. The trial court denied performance and dismissed plaintiffs' petition with prejudice. Plaintiffs filed a motion for a new trial which was overruled. Plaintiffs appeal. We affirm the judgment of the trial court.

The plaintiffs are the sons of Ava Angeloff by a previous marriage. Plaintiffs' mother, hereinafter called Ava, married Krist Angeloff, hereinafter called Krist, in May 1937. Thereafter Ava lived with Krist in Omaha and the plaintiffs continued to reside with the grandmother in Iowa. There is evidence that Ava thereafter acquired an equitable interest in two vacant lots in South Omaha. This is challenged, but it is quite apparent that Krist thought she had such an interest. She died intestate on January 2, 1943. Her estate does not appear to have been probated.

Krist, prior to his marriage to Ava, owned a home adjoining the two lots above referred to. At the time of his death he possessed an estate in real and personal property appraised at above $23,000. He had not remarried. He at all times maintained friendly relations with plaintiffs, their families, and their grandmother. They visited in each others' homes. Krist on a number of occasions gave gifts to plaintiffs, their wives, and their children. No will of Krist has been found. His estate is being probated as an intestate one.

Plaintiffs alleged: "That subsequent to the death of the said Ava Angeloff, to wit: the 15th day of March, 1943, the plaintiffs and the said Krist Angeloff entered

into an agreement, the terms of which were as follows: that plaintiffs transfer to him, the said Krist Angeloff, all right, claims and title which they had in and to the said property descending to them through the said Ava Angeloff as aforesaid, and in consideration thereof the said Krist Angeloff promised and agreed that he would at his death vest plaintiffs with all his estate and would by his last will and testament make plaintiffs the sole beneficiaries therein.

"That plaintiffs performed fully that part of said agreement obligatory upon them to perform in this, to wit: that plaintiffs, pursuant to their said agreement with the said Krist Angeloff and in consideration of his promise to leave his entire estate to them alone when he died, did on the 15th day of March, 1943, execute and deliver deeds whereby plaintiffs conveyed and released to the said Krist Angeloff all their rights, title and interest in lands descending to them from the said Ava Angeloff and did orally release to the said Krist Angeloff all their rights, title and interest in and to the personal estate of Ava Angeloff.

"Plaintiffs further state that although plaintiffs fully performed the contract made with the said Krist Angeloff as aforesaid, yet the said Krist Angeloff completely failed to perform that part of said agreement obligatory upon him to perform; that the said Krist Angeloff failed to make and execute his last will devising his property both real and personal to plaintiffs as he had agreed; that the said Krist Angeloff did not leave to plaintiffs all his estate or any part thereof as he promised plaintiffs, in consideration for their conveyance and transfers aforesaid.

"WHEREFORE, PLAINTIFFS PRAY THE COURT that it specifically enforce the agreement between the plaintiffs and the said Krist Angeloff, deceased, and that the Court decree that plaintiffs have the property of which the said Krist Angeloff died seized, for the same purpose and with the same force and effect as if they had

been named sole beneficiaries in a last will and testament duly and properly executed by the said Krist Angeloff."

The state and the administrator joined issue on these allegations. The cause is here for trial de novo as to those issues.

The plaintiffs will be referred to by their first names of Raymond and Lewis.

We find no evidence that plaintiffs orally released their title to the personal property of Ava.

On March 15, 1943, Raymond and Lewis, by separate instruments, deeded to Krist their interest in the two lots, in which they claim their mother had an equitable interest. These deeds were delivered at that time. The recited considerations were "One Dollar and other valuable considerations." The grantors were minors at the time of the execution and delivery of the deeds.

The first question here is the sufficiency of the evidence to prove the alleged contract under the long-established rule that: "Where a party seeks specific performance of an oral contract for the conveyance of land of a deceased person, the burden is on such person to prove an oral contract, the terms of which are clear, satisfactory, and unequivocal and that the acts of part performance in relationship to the subject matter in and of themselves are such as are referable solely to the contract sought to be enforced and cannot be accounted for on any other reasonable hypothesis." Nelson v. Glidewell, 155 Neb. 372, 51 N. W. 2d 892.

The evidence is subject to the further rule that testimony as to the oral statements of deceased persons is regarded as the weakest kind of evidence and subject to the closest scrutiny. Cahill v. Mockett, 143 Neb. 730, 10 N. W. 2d 679.

It is undisputed that on the 14th day of March 1943, Krist appeared at the home in Iowa. He had the deeds to these two lots prepared at that time. The evidence of an uncle of plaintiffs is that Krist talked to him and

to Raymond, the younger of the plaintiffs, at that time. The uncle testified that Krist said he had some papers he wanted the boys to sign; that Raymond asked about the nature of the papers and was told that they were to some lots in Omaha; and that "He told Raymond why he wanted them signed. He said that they had an interest in their mother's property, if they turned that over to him, then, why, they would get it all eventually when Kris died." Lewis, the older of the two plaintiffs, lived at Eldora, Iowa. The uncle, the grandmother, Raymond, and Krist the next day drove to Mount Ayr and went to a lawyer's office where Raymond signed and acknowledged the deed. They then drove to Eldora where Lewis signed and acknowledged the deed. The uncle testified that on the way to Eldora, "He (Krist) talked about the boys signing over their interest in the property there, signed it over, that would not make no difference, they would get it back in the long run." The uncle also testified that Krist told Lewis: "He said that if they would sign the deed then they would get it all when he died * * *"; and that it was the same conversation about it. This is substantially the only evidence we find as to what Lewis was told.

Although the grandmother testified that she was with Krist and the boys all of this time at Mount Ayr, Eldora, and at home, she does not testify as to having heard any such conversations. It is also to be noted that in this testimony of the uncle the "get it all" and "it" obviously relate back to "their mother's property." We find no evidence that any other property of Krist had been mentioned at that time. It is then to be noted that this is a distinctly different subject matter than Krist's "entire estate" which they now claim it was agreed they were to receive.

The grandmother was with Krist and Raymond on the trip to Mount Ayr and Eldora. She was in the lawyer's office at Mount Ayr. She signed both deeds as a witness. We find no testimony from her as to what Krist

said until after these transactions were closed. She was asked what Krist said as to what "the boys had given him and what he was doing for them?" She answered, "He said the boys signed away their mother's rights, but he said the boys will get what I have got when I am through with it, when I am dead."

The lawyer who made the notarial acknowledgement on the deed from Raymond was called and testified as a witness for the plaintiffs. He knew all of the parties who came to his office. Krist told him he had a deed that Raymond was to sign and that he (Krist) wanted it acknowledged. The lawyer told Krist the deed would be of no validity because Raymond was a minor. Krist said he knew it, but that " 'It would make it easier for me to handle the property,' * * * 'It don't make any difference because the Boys are going to get my property any way when I am through.' " Raymond told the lawyer he understood what he was doing, and he signed the deed which the lawyer acknowledged. There is here an entire absence of any words indicating a promise or agreement. Assuming, but not deciding, that these two statements may be construed to include all of Krist's estate when he died, plaintiffs' position reduces itself to a contention that Krist made such a binding obligation in consideration for what he was told were invalid deeds to plaintiffs' undetermined interest in two vacant city residence lots.

There is evidence of plaintiffs as to other transactions that should be mentioned. Shortly after Ava's death Krist showed Ava's ring and watch to the grandmother and said, according to the grandmother, "the watch and ring were the boys. * * * the one that got married first was to have his choice, that was the way he had his mind made up at that time, * * *." She testified that after Lewis was married Krist had slips of paper prepared. Lewis drew the paper "with the ring on it, so he told me to get the ring and give it to Lewis, and I did." Lewis' wife testified that "it was his wish that we

should have it because it was our mother's." This was at Christmastime in 1946. Krist told Raymond that he was to have the watch when he married, that he "would not want to give it to him until he got married." Raymond was married October 7, 1947, and his mother's watch was given to "us" at the following Christmas, according to the testimony of Raymond's wife. We find no evidence in the record to indicate that plaintiffs felt they had a contract right to this property. It was treated as a gift of Krist's property to Raymond and Lewis and their wives.

There is also the testimony of Lewis' wife that in May 1947, in Krist's home, he showed her linens and fancy things that were Ava's and he said, "those things would be ours when he was gone." Raymond's wife testified also as to linens, silverware, and toilet articles which in May 1947, were shown to her by Krist and that "He mentioned how he kept everything that she had, and that when he got through with it that it was to become the boys and ours, * * * to take good care of it, and see that it was kept that way."

There is here no reference to any outstanding agreement or promise that this property was to be plaintiffs' when Krist died—it is rather negatived.

With the exception of these personal items of Ava's we find no mention of Krist's real estate or of his considerable personal property ever having been mentioned or discussed with plaintiffs or their people. He expressed to them his wish as to that which had been the property of plaintiffs' mother—nothing more.

There is evidence, offered by plaintiffs, as to what Krist said at different times to close friends in Omaha. In 1949 he told one friend he did not want to sell his property until he reached retirement age, that then he might sell it and go to live with the boys, and "the boys was going to get what he had when he was through with it." About 3 weeks before his death in February 1950, a friend talked to him about "what he should do with his property, and he says, 'I don't have anything to

do, that the boys will get it when I die.'" Another friend testified that about 2 weeks before Krist died he talked to Krist about a will and he said, "he would do it, when he passed away, why, his step boys could have the money and his property." The witness repeated the "could have" on two other occasions. Another neighbor and long-time friend, whose property adjoined Krist's, testified that 2 weeks before Krist died Krist told him he wanted to put in 3 years more on his pension; that then he would like to go and live in Iowa or get one of the boys to live with him in Omaha; and that he was going to turn his property "over to the one that was going to be with him." The witness repeated that statement, then said, "he was going to turn everything he got to the boys." This same witness said that 2 years before Krist died, Krist told him that he would like to have it fixed up so that "the boys have what I got." The witness finally returned to his original statement that Krist said, "the one that is going to take care of him, he says, is the one that get the property." He repeated it two additional times.

Such is the evidence upon which plaintiffs seek a decree. The things said and done and the circumstances surrounding the transactions when the deeds were delivered do not in anywise establish a contract under the rules above stated. The things said and done by the plaintiffs and Krist subsequently do not show that either plaintiffs or Krist considered that such an agreement existed. Such a conclusion is negatived by plaintiffs' testimony.

One thing further should be mentioned. Defendants offered the brother of Krist's first wife as a witness. He testified as to a long-standing friendship with Krist; that Krist had discussed Ava's possible interest in the lots with him; that Krist asked what to do about it; that he suggested the desirability of securing deeds from the plaintiffs; and that Krist later showed him the deeds. Over objection he testified that Krist told him he bought

the boys out and that he gave each of them $50 for the deeds. The trial court after receiving the evidence told plaintiffs that the evidence had been received subject to a motion to strike and that they could make such a motion. Plaintiffs did not. Rather, plaintiffs offered evidence undertaking to impeach the witness on collateral matters and offered evidence of the grandmother that no consideration was given so far as she knew.

Plaintiffs filed a motion for a new trial. They did not therein assign the admission of the above evidence as error. Here they assign error for the first time.

The established rules are:

"In an equity case appealed to this court, if it is desired to review alleged erroneous rulings of the trial court as to the reception of evidence, a motion for a new trial must be filed and overruled in the district court." Nemetz v. Nemetz, 147 Neb. 187, 22 N. W. 2d 619.

"The purpose of a motion for a new trial is to enable the court to correct errors that have occurred in the conduct of the trial." Krepcik v. Interstate Transit Lines, 151 Neb. 663, 38 N. W. 2d 533.

In Humpert v. McGavock, 59 Neb. 346, 80 N. W. 1038, we made specific application of these rules to a motion such as the one we have here. We there held: "* * * no complaint of the ruling or decision was made in the motion for a new trial. Such motion not only does not contain the usual assignments of 'errors of law occurring at the trial,' but in no way challenged the attention of the court below to its rulings upon the admission or rejection of testimony; hence such rulings are not reviewable."

The evidence is here for consideration along with other evidence in the case.

The judgment of the trial court is affirmed.

AFFIRMED.

CARTER, J., participating on briefs.

IN RE INQUIRY INTO THE CASE OF KAREN KAY AND RALPH THOMAS JENKINS. LAWRENCE C. KRELL, APPELLEE, V. GWEN JENKINS, NATURAL MOTHER OF KAREN KAY AND RALPH THOMAS JENKINS, APPELLANT, IMPLEADED WITH RALPH JENKINS ET AL., APPELLEES.

60 N. W. 2d 613

Filed October 30, 1953. No. 33369.

1. **Infants.** A condition of sufficiency of a complaint charging dependency of a minor is that it shall be filed by the county attorney or by a reputable person residing in the county with the consent of the county attorney.
2. ———. As applied to this case "dependent child" means a child under the age of 18 years who is destitute, homeless, or abandoned, or dependent upon the public for support, or has not proper parental care or guardianship.
3. ———. In a case where dependency is found to exist the juvenile court may (1) place a child in an institution, (2) place it in the care of a reputable citizen, (3) place it in the care of some association, (4) place it in the custody of the Board of Control, (5) place it in care of a probation officer and allow it to remain in its own home, or (6) place it in some other suitable home, subject to the supervision of the probation officer.
4. **Adoption: Infants.** When a dependent child has been disposed of by placement the person, association, institution, or probation officer with whom placed may with assent of the juvenile court consent to adoption in an adoption proceeding.
5. ———: ———. A decree of adoption of a child adjudged to be dependent by the juvenile court may be granted in an adoption proceeding in the county court on consent of a person, association, institution, or probation officer to whom or which the custody of the child has been committed, provided assent to such consent has been given by the juvenile court.
6. **Infants.** The juvenile court retains a continuing jurisdiction of a dependent child after an adjudication of dependency.
7. **Infants: Adoption.** The action of the juvenile court for the determination of whether or not a minor is a dependent is not an adoption proceeding.
8. ———: ———. One of the functions of the county court in an adoption proceeding is the determination of what is for the best interests of the child.

APPEAL from the district court for Douglas County: JAMES T. ENGLISH, JUDGE. *Affirmed.*

Warren C. Schrempp and *David S. Lathrop,* for appellant.

Eugene F. Fitzgerald and *Robert C. McGowan,* for appellee.

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

YEAGER, J.

This is an action commenced and tried in the juvenile court, a division of the district court for Douglas County, Nebraska, for the purpose of determining whether or not Ralph Thomas Jenkins and Karen Kay Jenkins, of the ages of three and four at the time of trial, were dependent children within the meaning of section 43-201, R. R. S. 1943, and if they were found to be dependent to have a suitable order entered concerning their custody and control.

The court found that they were dependent. The order and judgment contains the following provision in disposition of the subject: "IT IS, THEREFORE, ORDERED that Karen Kay Jenkins and Thomas Ralph Jenkins are dependent children and that Mina S. Brewster, assistant probation officer of the Juvenile Division of the District Court of Douglas County, Nebraska, be and is hereby appointed guardian of Karen Kay Jenkins and Ralph Thomas Jenkins for the purposes of placement and adoption."

Gwen Jenkins, the mother of the two children, filed a motion for new trial which was overruled. From the order and judgment and the order overruling the motion for new trial the mother has appealed.

The brief contains three assignments of error. No. 1 and No. 2 challenge the sufficiency of the evidence to support the finding of the court and will be considered as a single assignment.

The third charges that the petition on which the hearing was had was legally insufficient as a basis for the

proceeding. The attack is not directed to the substance of the petition. It is directed to a statutory condition precedent to the filing of such a petition.

Section 43-205, R. R. S. 1943, provides that either the county attorney or any reputable person residing in the county with the consent of the county attorney may file a complaint charging dependency. The complaint was not filed by the county attorney.

This assignment has apparently been abandoned since after the filing of appellant's brief a stipulation was entered into permitting an amendment of the transcript to show that authority to file was granted by a deputy of the county attorney.

In any event the defect, if any, was waived by a stipulation entered into on the day of trial, appearing in the bill of exceptions, which was dictated by one of the attorneys for appellant, agreeing and consenting to trial de novo of the case.

The following from section 43-201, R. R. S. 1943, for the purposes of this case, contains the statutory definition of a dependent child: "* * * For the purpose of this act the words 'dependent child' and 'neglected child' shall mean any child under the age of eighteen years, who for any reason is destitute, homeless or abandoned, or dependent upon the public for support, or has not proper parental care or guardianship, * * *."

On the question of whether or not the evidence was sufficient to sustain the finding that these children were dependent within the meaning of law certain facts are conclusively established.

The father of the children is serving a sentence in a federal prison. At the completion of his sentence he will be required to serve an additional term in the Nebraska State Penitentiary. In May 1951, the mother took the children to a probation officer of the juvenile court. This officer placed the children in a home for the care of children. The care from then on was at public expense. The parents of the mother, highly re-

spected and respectable people, have a home in Omaha, Nebraska. They are both gainfully employed. The mother of the children has since lived with her parents. After the children were placed in the home the mother saw the children frequently. They were taken to the home of their grandparents where they were kept for periods of from a couple of days to an occasion of 2 weeks or more until March 1952, as to Karen Kay and April 1952, as to Ralph Thomas. During this period no money was paid for the support and maintenance of the children. There is evidence that the mother offered to pay something in November 1951, and the grandmother made an offer in December 1951. No amount was mentioned in either instance. The offers were declined. The grandmother testified that she supplied some clothing. The mother, under the evidence, was receiving $10 a week and board for keeping house for her parents. She also did some housework for neighbors. She was never otherwise employed and sought regular employment only on one occasion. After placement of the children in the home the mother was convicted on the charge of petit larceny and also on the charge of vagrancy. The grandparents did not offer to allow the mother to bring the children into their home to live until after this action was instituted. The reason given was that their accommodations were not sufficient due to the fact that another daughter and her children were in the home. The mother testified that she was taking training to become a dental assistant. Where she was taking the training is not disclosed.

In addition to the foregoing, which stands without dispute in the record, there are some other matters which appear to be of significance. The mother did not take the stand in her own behalf in this action. She testified in the case only after being called by the appellee. Her evidence was not complimentary to her. It in nowise countered the contention that these children were dependent and neglected.

A matter of further significance, we think, is that the grandmother was called as a witness and testified to a willingness that the mother should bring the children into the home of the grandparents, but the grandfather, the head of the household, was not called although he was in the courtroom.

And again there was no offer at all that the grandparents would accept any responsibility for the children in their home except that financial assistance would be furnished until the mother finished her training.

It is not to be inferred from this last statement that this court is of the opinion that the grandparents were under any obligation to make any such offer.

Its significance is that in case of a finding of dependency it became the duty of the court, within statutory restrictions, to do that which was for the best interests of the children.

The court could (1) place the children in an institution, (2) place them in the care of a reputable citizen, (3) place them in the care of some association, (4) place them in the custody of the Board of Control, (5) place them in the care of a probation officer and allow them to remain in their own home, or (6) place them in some other suitable home, subject to the supervision of the probation officer. §§ 43-208 and 43-210, R. R. S. 1943.

The evidence clearly indicates that these children were dependent within the meaning of the statute as charged in the complaint. The evidence does not indicate that dependency would be removed by granting the wishes of the mother in the light of the record. The record does not furnish any clear indication that the best interests of the children would be served by placing them in the care of a probation officer and allowing them to return to their mother.

We think that the court did not improperly place the children in the care and custody of Mina S. Brewster as a reputable citizen of good moral character within the meaning of section 43-208, R. R. S. 1943, with assent to

her to place the children in a family home within the meaning of section 43-209, R. R. S. 1943, as apparently was done.

A possible and probable consequence of this order and judgment, but not a necessary one, is that Mina S. Brewster will consent to adoption of these children and that their parents will thereby lose all custody and control over them. It is possible because section 43-104, R. R. S. 1943, which is a part of the act relating to adoption of minor children, permits a decree of adoption in cases where parents are deprived of their custody by an order of a juvenile court of competent jurisdiction by reason of such children having been declared dependent and neglected, on consent being given thereto by the person to whom care and custody is given.

This is not a necessary consequence since the statute relating to juvenile courts reposes continuing jurisdiction in the juvenile court after a finding of dependency. § 43-210, R. R. S. 1943.

The appellant appears to be laboring under the impression that the order herein in and of itself deprives her permanently of the custody and control of these children. This is not correct. As pointed out they are now under the continuing jurisdiction of the juvenile court.

The forum for the determination of whether or not permanent custody and control shall be taken from appellant is the county court and the proceeding one for adoption. § 43-102, R. R. S. 1943.

In such a proceeding the pronouncements of this court with reference to taking children from natural parents and the natural rights of parents with regard to children have application. They have no application in a proceeding such as this.

It is the duty of the county court in an adoption proceeding to inquire into the question of the best interests of the child sought to be adopted and to grant a decree only if adoption will be for the best interests of the child. § 43-109, R. R. S. 1943.

It is the conclusion that the juvenile court did not err in its finding that the minor children involved herein were dependent children within the meaning of law.

AFFIRMED.

MARGARET H. SEGER, APPELLANT, V. KEATING IMPLEMENT COMPANY, APPELLEE.

60 N. W. 2d 598

Filed October 30, 1953. No. 33385.

1. **Workmen's Compensation.** A compensable injury within the provisions of the Workmen's Compensation Act is one caused by an accident arising out of and in the course of the employment.
2. ———. Whether an accident arises out of and in the course of the employment must be determined by the facts of each case. There is no fixed formula by which the question may be resolved.
3. ———. The fact that the employee was at the place of the injury because of his employment is not sufficient if the injury resulted from a cause having no relation to the employment.
4. ———. The rule of liberal construction of the Workmen's Compensation Act is related to determination of the scope of the act and does not apply to evidence produced to establish a claim for compensation.
5. ———. An award under the Workmen's Compensation Act may not be based upon possibilities, probabilities, or conjectural evidence.
6. ———. The term "arising out of the employment" in the Workmen's Compensation Act covers all risks of accident from causative acts done or occurring within the scope or sphere of the employment. All acts reasonably necessary or incident to the performance of the work, including such matters of personal convenience and comfort, not in conflict with specific instructions, as an employee may normally be expected to indulge in, under the conditions of his work, are regarded as being within the scope or sphere of the employment.
7. ———. In determining whether a risk arises out of the employment, the test to be applied to any act or conduct of an employee which does not constitute a direct performance of his work is whether it is reasonably incident thereto, or whether it is so substantial a deviation as to constitute a break in the employment and to create a formidable independent hazard.

APPEAL from the district court for Holt County: DAYTON R. MOUNTS, JUDGE. *Affirmed.*

Hugh Boyle and *Joseph H. McGroarty,* for appellant.

Julius D. Cronin and *Deutsch & Jewell,* for appellee.

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

BOSLAUGH, J.

This is an action against Keating Implement Company, appellee, by Margaret H. Seger, appellant, for death benefits provided by the Nebraska Workmen's Compensation Act because of the death of Edward F. Seger, an employee of appellee and the husband of appellant, resulting from an accident in the place of business of the employer.

The appellant claims that Edward F. Seger was employed as a mechanic by the appellee in its business for a wage of $48 a week; that on March 31, 1951, he was fatally injured in an accident which arose out of and occurred in the course of his employment; that as a result thereof on that date he died; and that appellant and the four minor children of the deceased are his dependents and entitled to the benefits provided by the Workmen's Compensation Act. Appellee admitted that the deceased was fatally injured and died on March 31, 1951; denied all the other claims of appellant; alleged that at the time of the accident, the injury to, and the death of Edward F. Seger he was not doing any work or perfoming any service of or for appellee but was engaged in his personal business working upon and repairing a motor vehicle owned by him for his use and purpose; that he was not then doing any act, work, or service for appellee, but was engaged in acts for his sole benefit; and that the accident, the injury to, and the death of the deceased arose out of his personal acts and affairs.

The district court found that the work the deceased was doing on his truck at the time of the accident was

not in the course of or connected with his employment but was for his exclusive benefit and advantage and did not concern or benefit his employer; and that the death of the deceased was not caused by an accident arising out of and in the course of his employment by appellee. A judgment of dismissal was rendered and the motion of appellant for new trial was denied.

The issues are whether the deceased was the victim of an accident arising out of and in the course of his employment or did it arise out of a personal transaction of the deceased while engaged in repairing his truck on his time not for the benefit of his employer or as an incident of the employment. The evidence contains no dispute as to any fact material to the issues.

Appellee was a partnership composed of Phillip Keating and his sons Robert Keating and John Keating. Its principal business was selling farm equipment, hardware, lumber, appliances, and "other supplies." It operated as a part of its business a shop for repair work. It employed two mechanics. Edward F. Seger was one of them. He worked for appellee at different times during a period of several years and continuously for about 2 years immediately prior to his death. The regular working hours for the mechanics were 8 a. m. to 6 p. m. excluding Sundays. Business places in Atkinson generally remained open on Tuesday and Saturday evenings of each week. Appellee kept its place of business, except the repair shop, open on these evenings. During the summer season the mechanics were usually at the place of business when it was open. They would frequently take care of any small repair work brought in by customers if there was reason to have it done immediately. Sometimes if they were not there they would be called to do urgently needed repair work. They did not regularly come to the place of business after regular hours during less busy periods. The mechanics were permitted on their own time to use the shop, tools, and appliances without charge to do repair work for them-

selves such as repairing any motor vehicles owned by them.

Mr. Seger was paid his wages for the week ending March 31, 1951, by check about 6 p. m. that day. He was not asked to return to the place of business that evening. There was no unfinished work in the shop when the mechanics left about 6 o'clock. When Mr. Seger reached his home "it was after 6 quite a little." Mr. Schneider brought a part of his washing machine to the home of Mr. Seger that evening and asked to have it repaired as soon as possible. He told Mr. Schneider that he could get it Monday, "If he didn't get it fixed that night he would get at it the first thing Monday morning." The only additional fact the record shows concerning the washing machine part is that it was repaired and Bill Dexter, a mechanic for appellee, delivered it to Mr. Schneider at the shop the next time he was in town which he estimated was "Just a couple of days." It is not shown when or by whom it was taken to the shop or by whom it was repaired. There is an entire absence of any evidence that Mr. Seger did any work on it.

After Mr. Seger had his supper that evening he told appellant that he was "* * * going to take the truck down to work on it between times." He left home about 8 p. m. and was next seen at the place of business of appellee. About 9 p. m. Willis Peterson went to the shop and Mr. Seger was there doing work on his Chevrolet dump truck. The repair work was on the hoist which was used to raise or elevate the body of the truck to dump the contents of it. The front end of the dump box on the truck was elevated and was supported by a 2 x 4 about 6 feet long which was intended to maintain the body of the truck in that position while repair work was being done. Mr. Peterson left the shop after talking to Mr. Seger and was gone an estimated period from 30 minutes to an hour. When he returned to the shop at probably about 10 p. m. Mr. Seger was continuing his work of repairing his truck. Mr. Peterson

left the shop a second time and when he returned about 11 p. m. the timber supporting the body of the truck was on the floor by its side, the truck body had fallen on the upper part of the body of Mr. Seger, and he was pinned between the bottom of the bed and the frame or chassis of the truck. He was dead and his death was caused by the accident.

The hoist on the truck was out of condition. Specifically the valve did not perform its function. The deceased was repairing this when the accident that caused his death happened. He had taken the hoist apart, remedied the defective condition, and had substantially reassembled the hoist before he was killed. There were tools appropriate to repair the truck beneath the hoist and where a mechanic working on it would have had tools. The repair work required that the oil in the cylinder be drained. There was a drain can near the truck after the accident. There was an open 1 gallon oil can about half filled with fresh unused oil near the truck where the work had been done, and the cylinder had been partly filled with fresh oil. The assembly of the hoist was completed after the death of the deceased and it then properly performed its function. It was definitely established that the hoist had been repaired the night of the accident. The truck owned by the deceased and involved in the accident was not in any way connected with or used in the business of appellee and it was of no interest or advantage to it. A truck previously owned by the deceased had been infrequently used on a very few occasions to remove snow and debris from the premises of the appellee.

Mr. Peterson at about 9 p. m. on the night of the accident entered the place of business of the appellee with the purpose of attempting to have a truck carburetor repaired. He saw Phillip Keating in the front part of the place of business. He directed Peterson to the deceased back in the shop and said something to the effect that maybe he could fix it. Peterson went to

the shop, found the deceased working on his dump or gravel truck, and showed him the carburetor. Deceased took a piece out of it, said it needed some screws, went to the front of the place of business, returned, and said they had no screws of the kind required to repair the carburetor. He took a little screw out of the carburetor, gave it to Peterson, and told him if he could get screws like that that he, the deceased, would put them in the carburetor for him. Peterson went to several places and finally got screws he believed would serve the purpose desired. He went back to the shop and gave them to the deceased, but he found upon trial that they could not be used. Peterson then went to another store in the hope of finding usable screws and when he came back to the shop about 11 p. m. he found that deceased had been the victim of the accident with the result above stated.

An important inquiry is whether the accident causing the death of the deceased arose out of his employment. An injury to be the basis of a cause of action within the provision of the Workmen's Compensation Act must be one caused by an accident arising out of and in the course of the employment. In many instances an injury which occurs in the course of the employment is also one which arises out of it. This is not always true. The compensation law does not make an employer an insurer against all injuries suffered by his employees in the course of their employment, but it does limit the recovery of disability benefits to injuries received both in the course of and out of the employment. The words "out of" refer to the origin of the cause of the accident, and the words "in the course of" relate to the time, place, and circumstances of the accident. The phrases "in the course of" and "arising out of" are not synonymous and when used conjunctively, as they are in the compensation law of this state, a double condition is imposed and both must exist to bring a claim within the act. The right of recovery is statutory and unless a case is brought within the conditions imposed by the

statute it must fail. There is no fixed formula by which the question whether or not an accident arises out of and in the course of employment may be resolved. This must be determined by the facts of each case. Simon v. Standard Oil Co., 150 Neb. 799, 36 N. W. 2d 102; Myszkowski v. Wilson and Co., Inc., 155 Neb. 714, 53 N. W. 2d 203.

It is when there has been some deviation from the usual experiences of employer and employee relationship that interpretation of the act is necessary. The burden is on the claimant to offer proof that preponderates in his favor of each indispensable element of his claim. Solheim v. Hastings Housing Co., 151 Neb. 264, 37 N. W. 2d 212; Rahfeldt v. Swanson, 155 Neb. 482, 52 N. W. 2d 261. An award of compensation may not be based upon possibilities or probabilities. Meester v. Schultz, 151 Neb. 614, 38 N. W. 2d 739; Rahfeldt v. Swanson, *supra*. Liberality of construction is related to determination of the scope of the act and not to the evidence produced to establish a claim for compensation. Peek v. Ayres Auto Supply, 153 Neb. 239, 44 N. W. 2d 321.

The dominant motive of the deceased in going to and being at the shop of appellee on the night of the accident was not an intention to further the work of his employer but to pursue and accomplish the repair of his own truck so that it would be available for suitable operation by the county, the lessee of it. This was his announced purpose in the statement to his wife as he was about to depart his home for the shop that night. He was engaged in the work necessary to repair the truck at the times he was seen during the evening. There is no denial that he did repair the truck commencing about 8 p. m. and continuing until he was injured about 11 p. m. that night. He had not at any time that evening abandoned his independent dominant purpose. He pursued it diligently and was interrupted only to examine a truck carburetor, remove a part of it, take out a screw from it, and advise the customer how it could

be repaired. The disclosed circumstances are convincing that the deceased was exclusively pursuing his personal objective at the moment of the accident. His employment by appellee, which was not the cause of his presence at the shop on that occasion, cannot be found to have been a significant factor in exposing him to the hazard and accident that caused his injury and death.

Appellant argues that deceased was principally concerned with performing services for his employer; that he received at his home from a customer a washing machine part for repair; that he transported it that night in his truck from his home to the shop and repaired or attempted to repair it that evening; that he acted in reference to the carburetor referred to above as there related; that the deceased also purchased from appellee one-half gallon of lubricating oil for his use in repairing his truck; and that the repair of the truck was only incidental and the performance of services for appellee was the major purpose of the deceased at the time of the accident. There is no direct evidence that the deceased did anything with the washing machine part after it was left at his home. If it is assumed, as appellant does, that he took it to the shop in his truck when he went there, there is still an entire absence of evidence that he did anything with or about it. It cannot be found that he was at the shop at that time to repair or that he did anything toward repairing it. This incident as it appears in the record is without significance. The indefinite and incomplete showing concerning and the minor character of the oil incident eliminates it from any important bearing on the disposition of this case.

The controlling facts are that the major mission of the deceased was to make a repair of his truck, an activity that was personal, foreign to his employment and the business of his employer, and of no concern, interest, or benefit to appellee; that he was injured while doing an act for his sole benefit; and that it is not shown that the activity in which the deceased was engaged at the

time of the accident had by the conduct of the parties become an incident of his employment.

It is going much too far to say, as appellant contends, that every act which benefits the employer, however slight, is in the course of employment. The Workmen's Compensation Act of this state declares that the clause personal injuries arising out of and in the course of employment shall not cover workmen who leave their line of duty for purposes of their own. § 48-151, R R. S. 1943. In Babcock v. School District, 123 Neb. 491, 243 N. W. 831, this appears: "Relatively a very small portion of the time spent by the plaintiff in Omaha on September 22, 1928, was devoted to the services of his school district. The evidence on this subject tends strongly to support the view that services performed on behalf of the school district were merely incidental to the plaintiff's personal transactions had by him on that day. The rule appears to be: 'But the mission (of the master) must be the major factor in the journey or movement, and not merely incidental thereto, that is to say, if incidental to the main purpose of going to or from the place of employment it would not bring such person under the protection of the act. * * *' London Guarantee & Accident Co. v. Industrial Accident Commission, 190 Cal. 587."

Hopper v. Koenigstein, 135 Neb. 837, 284 N. W. 346, concerned a claim for workmen's compensation because of an injury to and the death of Hopper, an employee of Koenigstein. The deceased at the time of the injury to him was at the place required by his employment—in a beer tavern. It was during his working hours. He was fixing the gauges and adjusting the valves of a refrigeration plant installed in the tavern by his employer. He drank beer and associated with customers, one of whom injured him in such a manner that it caused his death. In disallowing the claim of his widow for compensation the court said: "The term 'arising out of the employment' in the workmen's compensation

law covers all risks of accident from causative acts done or occurring within the scope or sphere of the employment. All acts reasonably necessary or incident to the performance of the work * * * are regarded as being within the scope or sphere of the employment. * * * But even if it were Hopper's privilege to sample beer in testing its temperature, or to take a drink as a reasonable incident of a leisure interval of his employment, that privilege could not be carried to the point of license, so that it, and not the employment, became the dominating factor in his conduct and relationship. The drinking by Hopper * * * of beer * * * the cultivation and continuance of a personal relationship with Denton * * * and the general sociabilities which were engaged in during the afternoon together created a hazard that went beyond the privileges or reasonable incidents of Hopper's employment. At the time of the assault, he stood at the tavern bar exposed to a formidable independent hazard which he, and not his employment, had created." The test to be applied in such a situation is there stated as follows: "In determining whether a risk arises out of the employment, the test to be applied to any act or conduct of an employee which does not constitute a direct performance of his work is whether it is reasonably incident thereto, or whether it is so substantial a deviation as to constitute a break in the employment and to create a formidable independent hazard." See, also, Bell v. Denton, 136 Neb. 23, 284 N. W. 751; Burlage v. Lefebure Corp., 137 Neb. 671, 291 N. W. 100; Weideman v. Milburn & Scott Co., 138 Neb. 205, 292 N. W. 594; Simon v. Standard Oil Co., *supra;* Solheim v. Hastings Housing Co., *supra;* Myszkowski v. Wilson and Co., Inc., *supra;* 58 Am. Jur., Workmen's Compensation, § 235, p. 740; 71 C. J., Workmen's Compensation, § 426, p. 678.

The injury inflicted upon the deceased and which caused his death did not arise out of and in the course

of his employment by appellee. The judgment of the district court should be and it is affirmed.

AFFIRMED.

MATILDA STRASSER ET AL., APPELLANTS, V. COMMERCIAL NATIONAL BANK, A CORPORATION, APPELLEE.

60 N. W. 2d 672

Filed October 30, 1953. No. 33386.

1. **Interpleader.** In order to interplead under the provisions of section 25-325, R. R. S. 1943, the following elements must exist: (1) The same thing, debt, or duty, must be claimed by both or all the parties against whom the relief is demanded. (2) All their adverse titles or claims must be dependent, or be derived from a common source. (3) The person seeking relief must not have nor claim any interest in the subject matter. (4) He must have incurred no independent liability to either of the claimants; he must stand perfectly indifferent and completely impartial between them, in the position of an innocent stakeholder.
2. ———. The rules applying to the common-law bill of interpleader as distinguished from a bill in the nature of an interpleader apply to section 25-325, R. R. S. 1943.
3. ———. A claimant to a fund held by a stakeholder is entitled to question the right of such stakeholder to interplead under section 25-325, R. R. S. 1943.
4. ———. A wrongdoer is not entitled to maintain an interpleader. One seeking such remedy has no right to it where his own act has caused the embarrassment of conflicting claims, the peril of double vexation, or precipitated the litigation from which he asks the court to extricate him.
5. ———. An order granting interpleader is interlocutory only as between the claimants, but as between the stakeholder and the claimants it is a final order in that it finally adjudicates the stakeholder's right to the remedy and, if allowed, discharges him from further liability.

APPEAL from the district court for Hall County: ERNEST G. KROGER, JUDGE. *Reversed and remanded.*

Harry Grimminger, for appellants.

Harold A. Prince, for appellee.

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

CARTER, J.

This suit was commenced by Matilda Strasser and Harold G. Strasser as administrators of the estate of William J. Wiese, deceased, against the Commercial National Bank for the recovery or cancellation of a deed to certain real estate in Hall County, Nebraska. The defendant bank filed an affidavit in interpleader in which it admitted that it had possession of the deed and a check for $6,000 drawn on the defendant bank by the grantees specified in the deed, which the bank has agreed to pay. The defendant bank asserts that it has no interest in the deed or check, or to the abstract of title to the land involved. It asserts that Alfred P. Wieck and Mildred A. Wieck, the named grantees in the deed, claim said deed and an abstract of title to the land described in the deed showing a marketable title in the grantors. The defendant bank thereupon prayed for an order of the court directing it to deposit the deed, abstract, and check into court; that Alfred P. Wieck and Mildred A. Wieck be served with process and required to set forth their claims to such property; and that the defendant bank be discharged from liability upon compliance with the order made. The plaintiffs filed an answer to the affidavit in interpleader, contending that the affidavit was made in collusion with Alfred P. Wieck and Mildred A. Wieck. The trial court summarily entered an order directing the defendant bank to deposit the deed, check, and abstract of title with the clerk of the district court; ordered Alfred P. Wieck and Mildred A. Wieck to be made parties to such action, and that summons be issued in the manner provided by law; and the defendant bank, having complied with the court's order, was discharged from liability except as to costs and attorney's fees, the right to recover costs and attorney's fees being held in abeyance until the final determination of

the suit. The plaintiffs appeal from this order.

The pleadings show that plaintiffs as administrators of the estate of William J. Wiese are charged with the duty of collecting certain sums due on a real estate contract. They had in their possession a warranty deed signed and executed by the heirs of William J. Wiese, which they intended to deliver when the balance of the contract price was paid by Alfred P. Wieck and Mildred A. Wieck, the purchasers of the land. The defendant bank asked to see the deed for the purpose of examination. The attorney for the plaintiffs complied with the request, and the defendant bank refused to return it, claiming that it was an informal escrow holder. The relations between the plaintiffs and the bank became very antagonistic at this point and the commencement of the suit followed.

It is the contention of plaintiffs that they are entitled to show that there was collusion between the defendant bank and the impleaded parties, Alfred P. Wieck and Mildred A. Wieck. The issue was pleaded by the plaintiffs substantially as follows: H. A. Prince, attorney and director of the bank, is the attorney for Alfred P. Wieck; that Wieck had employed other legal counsel until the deed was given to the defendant bank for inspection; that the officers of the bank conferred with Alfred P. Wieck and Mildred A. Wieck when the summons was served; and that the interpleader proceeding was collusively agreed to as an alleged protection to the Wiecks. Plaintiffs offered evidence to sustain these allegations. Objections were made and sustained thereto. This is asserted as error on the part of the trial court.

In Farming Corporation v. Bridgeport Bank, 113 Neb. 323, 202 N. W. 911, we set forth the four required elements of the right to interplead in the following language: "(1) The same thing, debt or duty, must be claimed by both or all of the parties against whom the relief is demanded. (2) All their adverse titles or claims must be dependent, or be derived from a common source.

(3) The person asking the relief—the plaintiff—must not have nor claim any interest in the subject-matter. (4) He must have incurred no independent liability to either of the claimants; that is, he must stand perfectly indifferent between them, in the position merely of a stakeholder." It will be noted, however, that no evidence was offered in the Bridgeport Bank case concerning that part of section 25-325, R. R. S. 1943, providing "that some third party, without collusion with him, has or makes a claim to the subject of the action."

The plaintiffs contend that they had the right to contest the assertions made by the defendant bank in its affidavit of interpleader, particularly those relating to the question of collusion. We think this is true. The authorities are not in harmony as to the precedure to be followed in a situation such as we have before us. We think, however, that the rules applying to the common-law bill of interpleader as distinguished from a bill in the nature of an interpleader apply. It is the essence of an interpleader under section 25-325, R. R S. 1943, as it was under the common-law bill of interpleader, that the party invoking the remedy shall be entirely indifferent to the conflicting claims, asserting no interest in himself in the subject matter of the dispute. An attitude of perfect disinterestedness, excluding even an indirect interest, is indispensable to the maintenance of the proceeding, and his position must be one of continuous impartiality except that the property in his possession shall be awarded to the person entitled to it. 30 Am. Jur., Interpleader, § 10, p. 220; 48 C. J. S., Interpleader, § 16, p. 55. "The position of a person seeking relief from conflicting claims, must be one of continuous impartiality. He must be, at the time he comes to the court, and must continue to be entirely indifferent between the conflicting claimants." Maclennan, Interpleader, p. 53.

The pleadings show that Alfred P. Wieck was negotiating with the defendant bank for funds with which to

complete the purchase of the lands in question. During the negotiations the defendant bank asked to see the deed by representing that it wanted to close the loan and that it desired to inspect the deed in the furtherance of that purpose. The bank thereafter retained the deed against the demands of the plaintiffs, the bank claiming that it obtained the deed for deposit until the loan was completed. This contention is specifically denied by the pleadings. The answer of the plaintiffs to the bank's affidavit of interpleader alleges that H. A. Prince is a director of the bank and its attorney as well, and that he had also represented Alfred P. Wieck in the case presently before the court. It is alleged further that Alfred P. Wieck had employed other counsel prior to the time the bank gained possession of the deed, but that he had been represented by H. A. Prince since that time. Plaintiffs' answer further alleges that the bank called Alfred P. Wieck to the bank, consulted with him and H. A. Prince, and that the bank through its officers assured Wieck and his wife that they "Needn't worry, this wasn't going to cost them anything."

The foregoing pleaded facts constitute collusion, sufficient to deny the right of interpleader under section 25-325, R. R. S. 1943. The plaintiffs had the right to offer evidence in support of the allegations and, if the allegations were established by sufficient proof, they were entitled to an order denying the right of the defendant bank to interplead. Unless such procedure be invoked at this stage of the proceedings it would amount to a recognition of the right of interpleader.

The defendant bank assumes the position that as it was a disinterested stakeholder it has no interest in the subject matter of the dispute, that it is entitled to interplead other claimants, deposit the deed with the court, and be discharged from further liability except that for costs and attorney's fees to be subsequently determined. While it is true that to interplead one must have no interest in the subject of the litigation other than to see

that it goes to the right claimant, the law imposes additional requirements upon the right to interplead other claimants and be released from further liability.

Interpleader, although authorized by statute, is an equitable remedy whereby a disinterested stakeholder in possession of property claimed by two or more persons may require them to litigate the claims of each without embroiling him in the controversy. Provident Savings & Loan Assn. v. Booth, 138 Neb. 424, 293 N. W. 293. The statute, section 25-325, R. R. S. 1943, protects a depository or escrow holder who interpleads in good faith from vexatious and expensive litigation. Farming Corporation v. Bridgeport Bank, *supra*. It is, in fact, a substitute for the common-law remedy by bill of interpleader. Hartford Life & Annuity Ins. Co. v. Cummings, 50 Neb. 236, 69 N. W. 782. It is a remedy for an innocent stakeholder who has no liability to any claimant of the property who is and has been perfectly indifferent and completely impartial between them.

The pleadings in the present case show that the defendant bank received the deed for inspection as an accommodation to it. Without any justifiable reason, so far as this record shows, it arbitrarily retained possession against the demands of these plaintiffs. By its own alleged wrongful conduct the defendant bank precipitated the litigation against itself. One who causes a dispute by his own wrongful act cannot claim the right to implead other defendants, deposit the property with the court, and be discharged. A wrongdoer may not cause litigation against himself by his own wrongful act and then seek refuge under the interpleader statute. If the allegations of the plaintiffs are true, the bank was protecting the Wiecks from any expense that might grow out of the litigation. This is not the position of an impartial and disinterested stakeholder.

"A wrongdoer is not entitled to maintain a bill for interpleader, since one seeking the advantages of a bill

of interpleader must show not only that he stands indifferent between the claimants and that he is without interest in the controversy to be waged between them, but that he is in the position of a mere innocent stakeholder or depository, and that no act on his part has caused the embarrassment of conflicting claims and the peril of double vexation." 30 Am. Jur., Interpleader, § 13, p. 223. See, also, 48 C. J. S., Interpleader, § 16, p. 57; Amos v. Angotti, 78 W. Va. 448, 88 S. E. 1094; Gulf Pipe Line Co. v. Warren (Tex. Civ. App.), 45 S. W. 2d 719; State ex rel. St. Louis Cooperage Co. v. Green (Mo. App.), 92 S. W. 2d 930.

In the early English case of Belcher v. Smith, 9 Bing. 495 (1832), the court on this subject said: "The act of parliament is not compulsory, but authorizes the interposition of the Court at its discretion upon proper occasions; and our duty is, to see that the party applying for the exercise of our discretion, has not voluntarily put himself into the situation from which he calls on the Court to extricate him. * * * Without applying the word *collude* in an offensive sense, we cannot avoid seeing that the defendant has placed himself in the situation in which he now stands, at the request, and with a view to the interest, of his nephew. The rule, therefore, must be Discharged."

We are of the opinion therefore that plaintiffs could properly test the right of the defendant bank to an order of interpleader by evidence; that the allegations of plaintiffs' answer, if established, were sufficient to establish collusion within the meaning of section 25-325, R. R. S. 1943; and that the court was in error in denying the right of plaintiffs to offer evidence in support of the allegations of their answer.

The question whether the order entered is a final order or merely interlocutory becomes important as to the disposition to be made of the case. We think that any contesting claimant to the property or funds in the hands of the stakeholder is entitled to question the right

to the interpleader. It is altogether possible that the answers of the respective impleaded defendants may assert allegations, if established, that destroy the right to interplead. In the present case, for instance, the impleaded defendants, the Wiecks, do not claim the deed involved in the suit of the plaintiffs against the defendant bank. They assert that they entered into a lease and option agreement with William J. Wiese in 1946. They allege that they have exercised the option and paid $3,000 thereon and that they are willing and able to pay the balance due. They allege, further, that the lease and option agreement misdescribe the premises and they pray that the lease and option agreement be reformed to show the real contract. The deed involved is not mentioned or claimed by their answer. If it be found that the same thing, debt, or duty is not claimed by the parties against whom the relief of interpleader is demanded, a question which we do not here decide, the court certainly has the authority, if the question be properly raised at that time, to set aside the order of interpleader. In other words, such order is interlocutory and subject to review on appeal when a final order is entered which is prejudicial to the claimed rights of one or more of the parties. The authorities on this subject are not numerous and are far from uniform in result. We think, however, that the following cases set out the correct rule.

In Miller v. Massachusetts Mut. Life Ins. Co., 183 Md. 19, 36 A. 2d 517, the controlling rules are stated to be: "Where the right to interplead is denied the plaintiff upon demurrer to the bill, there can be no question of the right of the plaintiff to appeal. Supra. And where the right to interplead has been denied and the bill for interpleader dismissed, after testimony, this court has entertained an appeal on the part of the plaintiff. Phillips v. Taylor, 148 Md. 157, 129 A. 18. We can, therefore, see no valid reason for denying the right of appeal to a defendant who has contested the right of the plaintiff to require the defendants to interplead by offering evidence

in support of the contention and has been unsuccessful, particularly in view of the fact that if the question is raised by demurrer to the bill the appeal will be entertained." The case of National Bank of New Jersey v. White, 93 N. J. Eq. 109, 115 A. 533, is authority for the following statement of the law: The usual so-called interlocutory decree is interlocutory only as between the claimants, but as between the stakeholder and the claimants it is a final decree in that it adjudicates the stakeholder's right to the remedy. In such a case the court, by the entry of the decree granting the relief to the stakeholder, has determined that the stakeholder is entitled to maintain interpleader. This is a final adjudication on the particular matter in controversy and consequently a final decree within the purview of section 25-1902, R. R. S. 1943.

In LaFayette-South Side Bank & Trust Co. v. Siefert, 223 Mo. App. 431, 18 S. W. 2d 572, the Missouri court stated the rule as follows: "The judgment appealed from in this case is a final judgment as between the plaintiff and all of the defendants concerning its right to require the defendants to contest between themselves their respective rights to the fund authorized to be deposited under the order of the court. It finally discharges the plaintiff from all further liability in the case and the plaintiff has absolutely no interest in the contest to be thereafter waged between the parties to the suit. After the entry of that order all further considerations relate wholly to the claims which the defendants may assert to the fund in question in which the plaintiff has no interest whatever. For the reasons thus assigned, we conclude that the judgment appealed from is such a final judgment as that this appeal may be maintained."

For the reasons herein stated the decree of the district court is reversed and the cause remanded for further proceedings in accordance with this opinion.

REVERSED AND REMANDED.

IN RE CONTEMPT OF ROY RICE. ROY RICE, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.

60 N. W. 2d 668

Filed October 30, 1953. No. 33400.

1. **Depositions.** In the absence of waiver or agreement in the taking of depositions the notice required by section 25-1267.20, R. S. Supp., 1951, is an essential prerequisite to the vesting of authority in a notary public to issue subpoenas, take the testimony, enforce the attendance of witnesses, or perform any function in connection with the taking of depositions.
2. **Contempt: Depositions.** A refusal to answer such improper questions as would constitute abuse of process is not a contempt and may not be punished, and a witness is entitled to his privileges and immunities as well when a deposition is taken as when examined in open court.

ERROR to the district court for Douglas County: CARROLL O. STAUFFER, JUDGE. *Reversed and remanded with directions.*

Fred N. Hellner and *Moran & James,* for plaintiff in error.

Pilcher & Haney, for defendant in error.

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

SIMMONS, C. J.

The plaintiff in error Roy Rice, a witness, was found guilty of contempt of court for refusal to answer certain questions and refusal to produce documents in response to a subpoena duces tecum in a proceeding whereby his deposition was being taken. He was fined $1 and costs. His application to set aside the judgment and quash the proceeding being overruled, he brings the matter here by petition in error.

It is patent that the parties to the litigation are undertaking, by this means, to secure a construction of the scope of the provisions of section 25-1267.02, R. S. Supp., 1951. Their briefs are directed toward that matter.

However, at the beginning of this case we are presented with a plain error that requires notice, a reversal of the judgment, and a dismissal of the proceeding.

The transcript here consists of the findings and judgment of the district court, and proceedings subsequent thereto.

The findings and judgment show that it relates to proceedings in a deposition being taken in Douglas County "in a case pending in the District Court of Otoe County, Nebraska" entitled McKeone et al., v. Almond et al.

The bill of exceptions shows the proceedings before a notary public and subsequently those before the District Court of Douglas County. The proceedings before the notary were offered in evidence by the defendants who sought to take the deposition.

The first thing in the bill is a copy of a "Notice to Take Depositions." It is captioned "In the District Court of the Fourth Judicial District of Nebraska, in and for Douglas County." This is followed by the usual bracket setting out the names of four plaintiffs "etc." and two defendants "et al." The notice runs to the "above named" plaintiffs and a defendant, whose name does not otherwise appear, that the two-named defendants and one not named "will take the depositions of ROY RICE to be used as evidence on the trial of the above entitled cause." This is followed by a statement of time and place. It was served upon counsel for plaintiffs and the one defendant. There follows a copy of the notary's subpoena duces tecum directed to plaintiff in error, commanding him to appear at the time and place stated in the notice "to give evidence in behalf of defendants in an action pending in the District Court for Douglas County" wherein one-named party "etc." were plaintiffs and two-named parties "etc." were defendants. It further commanded him to bring with him records, documents, insurance policies, memoranda, etc., not necessary to be detailed here.

The "Deposition in behalf of Defendants Almond" is captioned "In the District Court for Otoe County." That is followed by a recital that it is the deposition of Roy Rice taken "to be read in evidence in behalf of Defendants, Almond, in an action pending in the District Court for Otoe County, Nebraska, as entitled above." The witness Rice was sworn and asked his name. The plaintiffs objected to the taking of the deposition because, for one reason, it "is not in accordance with the Statutes of the State of Nebraska."

After plaintiff in error (Rice) refused to produce "records as ordered by the subpoena duces tecum" defendant moved that the matter be certified to the district court and that the witness be charged with contempt and punished for contempt of a lawful process of the court. The plaintiff objected on the ground, among others, that the "notice to take depositions does not come within any of the statutory provisions" therefor and that the proceedings were "irregular and unenforceable." The matter was taken before a judge of the Fourth Judicial District where the plaintiff again objected that the judge did "not have jurisdiction to hear this matter." There was argument to the court, which is not shown. Briefs were requested and the cause continued.

Over 6 months later the matter again came on before the judge, wherein the case is referred to as "pending in the District Court for Otoe County." Objection was made, among others, that the "court can not require him to produce" the documents and that there was "no adequate or legal reason given, justifying the production of the original records and statements, whether it be a subpoena or court order."

Reference was again made to a case "pending in the District Court for Otoe County." The names of the parties were all read into the record and it was stipulated that it was a "true and correct" statement of the title of the case.

The examination of the witness then proceeded before the district judge. Over objection that the court did "not have sufficient legal authority to require" the production and delivery of an insurance policy, the witness was ordered to do it and refused. The court then sustained a motion that the witness be held in contempt. The witness then refused to produce papers requested in the subpoena duces tecum and was again over similar objection adjudged guilty of contempt. This procedure was followed as to several documents and then a general motion was made to find the witness guilty of contempt and punished. The objection, among others, was that "this entire proceeding is contrary to law." The motion was sustained and the witness adjudged guilty of contempt and fined. In the witness' application to set aside the order and quash the proceedings the legality of the proceedings was again raised and overruled.

In his petition in error here and in his assignments of error he presents the correctness of the court's rulings above stated.

It does not appear that the specific matter in this proceeding which we raise was called to the attention of the trial court. It does not appear that it was not so called to the court's attention in the off-the-record argument and briefs, nor does it appear that counsel was at any time asked to amplify his objections.

The fact is that the plaintiff in error, a witness, was found guilty of contempt for refusal to produce documents in a deposition being taken for use in an action in Otoe County, when the notice and the subpoena duces tecum called for his testimony and the production of instruments in an action pending in the district court of Douglas County.

Section 25-1267.01, R. S. Supp., 1951, provides that: "Depositions shall be taken only in accordance with * * * (the sections there set out)."

Section 25-1267.20, R. S. Supp., 1951, provides: "Prior

to the taking of any deposition, * * * a written notice specifying * * * the name of the court or tribunal in which it is to be used, * * * shall be served upon the adverse party, * * *."

Section 25-1267.20, R. S. Supp., 1951, further provides that: "The notice shall also specify the names of the witnesses to be examined." This is in substance a reenactment of an earlier provision of our code. In Miller v. Frey, 49 Neb. 472, 68 N. W. 630, we had a case where the notice did not specify the name of the witness whose deposition was taken. We held that the deposition should have been quashed, obviously because of failure to comply with the statutory requirement.

In Tiede v. Fuhr, 264 Mo. 622, 175 S. W. 910, there was a defect in the notice as to the time of taking the deposition. The court held that in the absence of waiver and agreement, the statutory notice to take depositions is an essential prerequisite to the vesting of authority to take depositions at all.

Construing the Tiede opinion in State ex rel. Utz v. Daues (Mo.), 287 S. W. 606, the court said: "The justice of the peace had no jurisdiction to take the deposition of plaintiff, because no valid notice to take depositions had been given and hence said justice had no power to issue the subpoena, for disobedience of which plaintiff was attached" and "the notice to take depositions * * * was ineffectual to confer jurisdiction * * *."

In Union Pacific R. R. Co. v. Thompson, 75 Neb. 464, 106 N. W. 598, notice was given to take depositions in a case pending in the district court of Custer County. The action was pending in the county court of that county. On motion to suppress, it was held that the error had been corrected by an agreement of the parties. We find nothing indicating an agreement or waiver in this case.

In Bowyer v. Knapp & Martin, 15 W. Va. 277, notice to take depositions was served upon a defendant in a suit pending in "Fayette County." The action was pending

in "Greenbrier County." The defendant knew that he had a suit pending against him in Greenbrier County. His attorney advised him to ignore the notice. The trial court on motion suppressed the deposition. On appeal the court affirmed. It held that: "Notice to take depositions should indicate to the adverse party, with reasonable certainty, when, where, and in what cause the depositions are to be taken." The similarity between that holding and the requirement of section 25-1267.20, R. S. Supp., 1951, is apparent. The court held that the notice was "fatally defective."

Burnett v. Prince, 272 Mo. 68, 197 S. W. 241, was an action for damages for false imprisonment. There notice was served on a defendant that depositions would be taken in a cause pending in the circuit court of Jackson County at Kansas City, whereas the action was pending in the circuit court of Jackson County at Independence. Our statute, section 25-1267.14, R. S. Supp., 1951, names the persons before whom a deposition may be taken in this state. Missouri's statute, section 6387, R. S. 1909, is referred to in the opinion in Burnett v. Prince, *supra*. The Missouri court there held: "* * * the notice is necessary before any of the officers named in section 6387 can take the testimony or enforce the attendance of witnesses, or perform any function in connection with the taking of depositions, such as issuing subpoenas. A notary or justice of the peace has no power in the premises until the statute is complied with. It is the proper service of a proper notice of the time and place which vests the officer with authority to take testimony and to compel the attendance of witnesses by issuing subpoenas." The court further held that: "Notices of the pendency of a suit in one of those places would not be notice of the pendency of a suit in the other place." Citing Bowyer v. Knapp & Miller, *supra*. The notice required by section 6392, R. S. 1909, (Mo.), cited in the opinion, is not as inclusive as our section 25-1267.20, R. S. Supp., 1951. The Missouri act provided that the

party taking the deposition "shall cause notice in writing of the time and place of taking them to be served on the adverse party * * *."

Our statute provides that the "attendance of witnesses may be compelled by the use of subpoena * * *." § 25-1267.01, R. S. Supp., 1951. The Missouri act, section 6404, R. S. 1909, cited in the opinion, provides that the officer "shall have power to issue subpoenas for witnesses to appear and testify, and to compel their attendance * * *." It further provides for commitment for refusal to testify. § 6404, R. S. 1909. See our section 25-1267.44, R. S. Supp., 1951, for a provision of like import.

The Missouri court in Burnett v. Prince, *supra,* held that "The service of the notice is the summary method of vesting authority" in the officers named in the statute. The court then held: "The notice, naming Kansas City instead of Independence as the place where the suit was pending, * * * did not authorize the notary to enforce the attendance of witnesses." Obviously it would not authorize the notary, or the court, acting subsequently, to enforce the giving of testimony.

We have here then a proceeding before a notary and before the court that has neither notice nor subpoena to support it and is without statutory authority.

"A refusal to answer such improper questions as would constitute abuse of process is not a contempt and may not be punished, and a witness is entitled to his privileges and immunities as well when a deposition is taken as when examined in open court." In re Hammond, 83 Neb. 636, 120 N. W. 203, 23 L. R. A. N. S. 1173.

As we said in the above case, so we hold here: A finding and punishment of a witness for contempt for properly protecting himself from an illegal inquisition will not be upheld.

The judgment of the district court is reversed and the cause remanded with directions to dismiss.

REVERSED AND REMANDED WITH DIRECTIONS.

CARTER, J., participating on briefs.

RICHARD KRAJESKI, APPELLEE, V. ROY BEEM, DOING BUSINESS AS BEEM TRANSPORT COMPANY OF CHADRON, NEBRASKA, ET AL., APPELLANTS.

60 N. W. 2d 651

Filed October 30, 1953. No. 33428.

1. **Workmen's Compensation.** The limitation prescribed for the filing of a petition by an employee under section 48-137, R. R. S. 1943, is tolled as long as such employee is under legal disability and, as to a minor employee, it does not begin to run until he becomes of age.
2. ———. Section 48-132, R. R. S. 1943, is a permissive statute and failure of either a guardian or next friend to bring an action thereunder in behalf of a minor employee does not preclude such employee from asserting his rights under section 48-137, R. R. S. 1943, within 1 year after becoming of age.
3. ———. An employer who attempts to avoid liability on the ground that employee was willfully negligent must prove a deliberate act knowingly done, or at least such conduct as evidences a reckless indifference to his safety.
4. ———. "Reckless indifference to safety," as used in the workmen's compensation law, subdivision (7) of section 48-151, R. R. S. 1943, means more than want of ordinary care. It implies a rash and careless spirit, not necessarily amounting to wantonness, but approximating it in degree, a willingness to take a chance.

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

George N. Mecham and *Charles A. Fisher*, for appellants.

William B. Quigley and *Davis, Healey, Davies & Wilson*, for appellee.

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

WENKE, J.

This is a workmen's compensation claim instituted in the Nebraska Workmen's Compensation Court by appellee Richard Krajeski against appellants Roy Beem, doing business as Beem Transport Company of Chad-

ron, Nebraska, and St. Paul Mercury Indemnity Company. From a finding for claimant by that court on rehearing, and an allowance of compensation in accordance therewith, appeal was taken to the district court for Lancaster County pursuant to the provisions of section 48-186, R. R. S. 1943, the accident out of which the injuries arose having occurred in South Dakota. The district court affirmed the award of the compensation court. This appeal was taken therefrom after a motion for new trial had been filed and overruled. The appeal will be considered here de novo on the record. See, Rahfeldt v. Swanson, 155 Neb. 482, 52 N. W. 2d 261.

Appellee, whom we shall herein refer to as claimant, started working for appellant Roy Beem, whom we shall herein refer to as Beem, on June 1, 1949, as an oil transport driver. He was then 19 years of age, having been born on March 3, 1930. The accident, out of which the injuries arose for which compensation has been allowed, happened on September 26, 1949. It occurred on State Highway No. 87 at a point about 8 miles south and east of Edgemont, South Dakota. At the time of the accident claimant was driving east. He was driving a WB-28 White semi-trailer transport loaded with 5,600 gallons of crude oil. This oil was being hauled from Newcastle, Wyoming, to Chadron, Nebraska, via Edgemont, South Dakota.

Appellants contend the court erred in holding that claimant, a minor, was legally permitted to work under the laws of Nebraska so as to bring him under the provisions of the Workmen's Compensation Act. Subdivision (2) of section 48-115, R. R. S. 1943, of the act provides, in this respect, as follows: "Every person in the service of an employer who is engaged in any trade, occupation, business, or profession as described in section 48-106, under any contract of hire, expressed or implied, oral or written, * * * including minors who are legally permitted to work under the laws of the state, who for the purpose of making election of remedies under this

act shall have the same power of contracting and electing as adult employees."

This contention is based on the following language of section 66-522, R. R. S. 1943: "No vehicle, for which a permit has been issued under the provisions of sections 66-516 to 66-518, shall be operated on the highways of this state unless it be manned by a driver * * * more than twenty-one years of age and less than sixty years of age, authorized and qualified to operate motor vehicles under the laws of this state as now or hereafter enacted."

We have carefully examined the provisions of the statutes to which this statute refers and have come to the conclusion that it has no application to the hauling of crude oil. It should be understood that we are not herein in any manner passing on the question of a minor's rights under the Workmen's Compensation Act if and when a claim is made based on employment that is expressly prohibited by any law of this state because of the claimant's age.

It is contended that the petition was not filed within time. The accident happened on September 26, 1949. Claimant became 21 years of age on March 3, 1951. He filed his petition in the Workmen's Compensation Court on May 14, 1951. Section 48-133, R. R. S. 1943, provides, insofar as here material, as follows: "No proceedings 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, or in case of death of the employee, or in event of his physical or mental incapacity, within six months after death or the removal of such physical or mental incapacity * * * Want of such written notice shall not be a bar to proceedings under this act, if it be shown that the employer had notice or knowledge of the injury."

Beem knew of the accident on the day it happened and on the following day brought claimant to Chadron from the hospital at Edgemont, South Dakota, where he had stayed over night under a doctor's care. There is evidence that sometime about the middle of October, following the accident, claimant came to Chadron to see Beem for the purpose of making a claim for compensation because of the injuries he had suffered in the accident but, because of certain statements made by Beem, did not do so in written form. We think the factual situation as to notice brings this case within a situation to which the last sentence of the quoted statute has application.

With reference to the time for filing a petition in the Workmen's Compensation Court in case of a dispute, which section 48-173, R. R. S. 1943, provides may be done by either party, 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, one of the parties shall have filed a petition as provided in section 48-173. * * * In the event of legal disability of an injured employee such limitation shall not take effect until the expiration of one year from the time of removal of such legal disability."

The legal disability of a minor would, of course, continue until he reached maturity. Claimant became of age on March 3, 1951. Section 48-132, R. R. S. 1943, provides: "If an injured employee is mentally incompetent or is a minor at the time when any right or privilege accrues to him under this act, his guardian or next friend may, in his behalf, claim and exercise such right or privilege."

This is a permissive statute and failure of either a guardian or next friend to bring an action thereunder in behalf of a minor employee would not preclude such employee from asserting his rights under section 48-137, R. R. S. 1943, within 1 year after becoming of age.

We hold the limitation prescribed for the filing of a petition by an employee under section 48-137, R. R. S.

1943, is tolled as long as such employee is under legal disability and, as to a minor employee, it does not begin to run until he becomes of age even though section 48-132, R. R. S. 1943, provides such a suit may be brought by his guardian or next friend while he is under such disability.

Section 48-109, R. R. S. 1943, provides: "If both employer and employee become subject to sections 48-109 to 48-147, both shall be bound by the schedule of compensation provided in section 48-121, which compensation shall be paid in every case of injury or death caused by accident or occupational disease arising out of and in the course of employment, except accidents caused by, or resulting in any degree from the employee's willful negligence as defined in section 48-151."

In such case, section 48-127, R. R. S. 1943, provides: "If the employee is injured by reason of his intentional willful negligence, * * * neither he nor his beneficiaries shall receive any compensation under the provisions of this act."

It is appellants' contention that claimant was guilty of such willful negligence in causing the accident that under the provision of the foregoing statutes it bars his right to recover.

Subdivision (7) of section 48-151, R. R. S. 1943, provides, in this respect, as follows: "* * * willful negligence shall consist of (a) deliberate act, (b) such conduct as evidences reckless indifference to safety, * * *."

We said of this provision in Richards v. Abts, 136 Neb. 741, 287 N. W. 199: "'An employer who attempts to avoid liability on the ground that employee was willfully negligent must prove a deliberate act knowingly done, or at least such conduct as evidences a reckless indifference to his safety.' Hoff v. Edgar, 133 Neb. 403, 275 N. W. 602."

And we went on to hold: "Mere negligence is not sufficient, but such conduct must be shown on the part of the workman as manifests a reckless disregard of con-

sequences coupled with a consciousness that injury will naturally or probably result."

And in Richards v. Abts, 135 Neb. 347, 281 N. W. 611, we said: " 'Reckless indifference to safety,' as used in the workmen's compensation law, section 48-152, Comp. St. 1929, means more than want of ordinary care. It implies a rash and careless spirit, not necessarily amounting to wantonness, but approximating it in degree, a willingness to take a chance." See, also, Farmers Grain & Supply Co. v. Blanchard, 104 Neb. 637, 178 N. W. 257; Moise v. Fruit Dispatch Co., 135 Neb. 684, 283 N. W. 495.

It could reasonably be said that claimant was guilty of conduct constituting ordinary negligence but certainly there is nothing in the record indicating deliberate conduct on his part evidencing reckless indifference to safety.

Appellants contend that claimant made such a deviation from the route he was authorized and directed to take in hauling crude oil from Newcastle, Wyoming, to Chadron, Nebraska, that he thereby deprived himself of all benefits of the Workmen's Compensation Act. This contention is based on the claim that Beem specifically directed claimant, in hauling from Newcastle, Wyoming, to Chadron, Nebraska, to travel only on the hard surfaced oiled highway via Hot Springs, South Dakota, and paid him accordingly on a mileage basis. Admittedly on September 26, 1949, when claimant was returning from Newcastle to Chadron with a load of crude oil, he left this route near Edgemont, South Dakota, and took a short cut on State Highway No. 87 which rejoins the other route near Oelrich, South Dakota. It was while traveling on this road, which was a graveled highway and at the time under construction, that this accident happened.

This contention presents two issues: First, was the authority of claimant, as to the route he could travel, specifically limited by Beem as a matter of fact; and second, if so, would the deviation he made defeat any

rights he might have under the provisions of the act?

Claimant testified he was paid on a mileage basis for the route through Hot Springs; that Beem could have told him not to take the short cut because that road was under construction and hard on equipment; denies Beem ever gave him specific orders not to take it; and that he did not know he was not supposed to take it. In fact, there is evidence in the record that he had previously taken this shorter route on some eight other trips; that at the time he was following an older and more experienced employee; and that this older and more experienced employee was also in the habit of taking the short cut.

Beem testified he positively instructed claimant to stay off of this short cut in hauling from Newcastle to Chadron and to travel only via Hot Springs on the hard surfaced oiled highway. His testimony in this regard is very unsatisfactory and somewhat contradictory as to when and where he did so. He also denies any knowledge of the fact that his drivers were in the habit of using this short cut.

We said in Sporcic v. Swift & Co., 149 Neb. 246, 30 N. W. 2d 891: "It is obvious that the evidence in the instant case is irreconcilable and in direct conflict. This being true, this court will consider the trial court's observation of the witnesses and their manner of testifying, and also that the trial court must have accepted one version rather than the opposite." See, also, Sbarra v. Middle States Creameries, Inc., 140 Neb. 813, 2 N. W. 2d 26; Bolen v. Buller, 143 Neb. 237, 9 N. W. 2d 204. This applies to the compensation court where the matter was tried on rehearing and from which appeal was taken to the district court.

Applying this principle to the factual situation presented by the record we do not think claimant was ever specifically ordered not to take this short cut in traveling between Chadron and Newcastle. But, for the purpose of discussion only, we shall assume that such in-

structions were given. Would that fact defeat recovery here?

This is not a case where the employee has gone off on an errand of his own, such as was involved in McNaught v. Standard Oil Co., 128 Neb. 517, 259 N. W. 517, and Luke v. St. Paul Mercury Indemnity Co., 140 Neb. 557, 300 N. W. 577, cited by appellants, but rather one involving the question of whether or not the claimant violated any instructions as to the manner of performing the work sufficient to defeat his recovery.

"Whether a departure from instructions defeats compensation depends largely upon the facts and circumstances of each particular case." Volcheck v. Western Union Telegraph Co., 128 Neb. 502, 259 N. W. 371.

Restatment, Agency, § 234, p. 524, states: "Conduct is within the scope of employment only in a locality not unreasonably distant from the authorized area." In comment (a) thereunder the following example is given: "One may be a servant, although a bad servant, in performing his master's business at a forbidden place if the place is within the general territory in which the servant is employed. One engaged to drive an automobile in New York City would not be in the service while driving in Albany; but a servant directed to drive from New York to Albany on the west side of the Hudson would not cease to be acting within the scope of the employment while driving on the east side. In all cases, it is a question of degree whether or not the difference in place is so great as to make the act done substantially different from the act authorized." See, also, Volcheck v. Western Union Telegraph Co., *supra.*

Having come to the conclusion that claimant is entitled to compensation under the act, we affirm the allowance made by the Workmen's Compensation Court as affirmed by the district court, since the amount allowed is not questioned.

Application is made by appellee for an allowance of attorney fees for services in this court in case of affirm-

ance. The application is made under the provisions of section 48-125, R. R. S. 1943. The situation here comes within those to which the statute has application. See Werner v. Nebraska Power Co., 149 Neb. 408, 31 N. W. 2d 315. We allow such a fee in the sum of $250, same to be taxed as costs. All costs are taxed to appellants.

AFFIRMED.

CARTER, J., participating on briefs.

IN RE APPLICATION NO. 19060, CHICAGO AND NORTH WESTERN RAILWAY COMPANY FOR AUTHORITY FROM THE NEBRASKA STATE RAILWAY COMMISSION TO DISCONTINUE TRAINS 21 AND 22 BETWEEN OMAHA AND NORFOLK, NEBRASKA.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, APPELLEE, V. CITY OF NORFOLK, NEBRASKA, ET AL., APPELLANTS, CITY OF OMAHA, NEBRASKA, APPELLEE.

60 N. W. 2d 662

Filed November 6, 1953. No. 33360.

1. **Railroads: Public Service Commissions.** It is the duty of a carrier to seek, and of regulatory agencies to permit, the elimination of those services and facilities that are no longer needed or used by the public to any substantial extent.
2. ———: ———. In the final analysis, when an application is made for additional service or to discontinue an existing service, the question to be determined is the public need or lack of need therefor.
3. ———: ———. A final order of the Nebraska State Railway Commission granting a railroad company authority to discontinue specified passenger trains, operated within the state at a loss and for the operation of which no public need exists, is within the scope of its authority and not arbitrary and unreasonable.
4. **Appeal and Error: Public Service Commissions.** On appeal to the Supreme Court from an order of the Nebraska State Railway Commission, while acting within its jurisdiction, the question for determination is the sufficiency of the evidence to prove that the order is not unreasonable or arbitrary.

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

Richards, Yost & Schafersman, for appellants.

Neely, Otis & Cockle, and *Herbert M. Fitle,* for appellees.

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

WENKE, J.

The Chicago and North Western Railway Company, a common carrier, pursuant to the Nebraska State Railway Commission's general order No. 11, filed an application with the commission seeking authority to discontinue the operation of its trains Nos. 21 and 22 providing local passenger service between Omaha and Norfolk, Nebraska, via Fremont. A hearing was had on this application and, based on the evidence adduced thereat, the commission granted carrier the authority it sought. Motion asking for a new trial and rehearing was filed and, upon being denied, appeal was taken to this court.

Section 75-109, R. R. S. 1943, provides: "The State Railway Commission shall have the power to adopt rules and regulations to govern its proceedings, the mode and manner of conducting investigations and hearings of railroad companies, common carriers, and other persons before it, with reference to the fixing of any rate or rates, classifications and charges for the transportation of freight and cars, the making of any orders provided for herein, or under the laws of this state relating to the control and regulation of railway companies and common carriers, and other acts required of it by the laws of this state; * * *."

Rule 3.11 of the commission's General Rules of Practice and Procedure provides: "A protest against the granting of any application shall set forth specifically the grounds upon which it is made and contain a con-

cise statement of the interest of protestant in the proceedings. A protest must be filed with the Commission five days prior to the date of the hearing and such protest must show service of a copy thereof on the applicant or his attorney."

All of the towns and cities along the route of trains Nos. 21 and 22, including Omaha, Fremont, and Norfolk, were represented by counsel at the hearing held on appellee's application, were considered and treated as protestants thereto, and, without objection, presented evidence in opposition to the application although they had not filed a written protest thereto with the commission as Rule 3.11 provides should be done at least 5 days before the hearing. All of these towns and cities, except Omaha, have perfected this appeal. It is apparently appellee's thought that since none of appellants filed such written protest they are not parties to the proceeding and therefore without right to appeal from the commission's order. As no objection of any kind was made by appellee to the participation of appellants in the hearing and since the commission did not require appellants to file such written protest, we find the commission waived the requirement and appellee likewise waived the service thereof upon it or its attorney.

Appellants contend there was error in the commission's receiving in evidence, over their objection, certain evidence relating to items of costs of operation as it affects these trains. Appellee, on the other hand, denies the commission erred in this regard but contends that even if it did it would not be material here since no one contends that public convenience and necessity requires the continuation of the passenger service afforded by trains Nos. 21 and 22. This latter contention is grounded on the principle that public convenience and necessity are the criteria against which any discontinuance must be measured. In this regard carrier is correct.

"It is the duty of a carrier to seek, and of regulatory

agencies to permit, the elimination of those services and facilities that are no longer needed or used by the public to any substantial extent." In re Application of Chicago, B. & Q. R. R. Co., 152 Neb. 352, 41 N. W. 2d 157.

We said in In re Application of Chicago, B. & Q. R. R. Co., 152 Neb. 367, 41 N. W. 2d 165: "While the railroad company is relieved of the necessity of meeting unnecessary and wasteful competition, it is required to meet all the needs of the territory it serves. It may not at will abandon lines or trains, or even particular types of service that railroads customarily perform. It is, therefore, a question of public need that is to be determined when application is made for additional service or to discontinue an existing service."

And in Chicago, B. & Q. R. R. Co. v. Order of Railroad Telegraphers, 155 Neb. 387, 52 N. W. 2d 238, we said: "In the final analysis, when an application is made for additional service or to discontinue an existing service, the question to be determined is the public need or lack of need therefor."

See, also, Chicago & N. W. Ry. Co. v. Public Service Comm., 329 Mich. 432, 45 N. W. 2d 520; Ann Arbor R. R. Co. v. Michigan Public Service Comm., 91 F. Supp. 668; Pennsylvania-Reading Seashore Lines v. Board of Public Utility Commissioners, 5 N. J. 114, 74 A. 2d 265.

In Chicago, B. & Q. R. R. Co. v. Order of Railroad Telegraphers, *supra,* we said: "In the case at bar, a large part of the record, briefs of counsel, and arguments as well have been devoted to the question of whether or not the carrier's theory of allocation of revenue and cost of operation at the station involved was correct. We do not consider that question of prime importance except insofar as sums involved may measure the public need by indicating the extent of use or lack of use of the services there made available by the carrier. In other words, the carrier is not required to maintain standby station agency service not comprehensively used

by the public, or to be used only when other established carriers fail to meet the need."

However, in In re Application of Chicago, B. & Q. R. R. Co., 152 Neb. 367, 41 N. W. 2d 165, we said: "In determining such questions the cost of providing the service is an important element, although not a controlling one." And in Chicago, B. & Q. R. R. Co. v. Order of Railroad Telegraphers, *supra:* "In deciding such question the cost of providing the service and revenue derived therefrom are important elements although not controlling."

"A final order of the Nebraska State Railway Commission granting a railroad company authority to discontinue specified passenger trains, operated within the state at a loss and for the operation of which no public need exists, is within the scope of its authority and not arbitrary and unreasonable." In re Application of Chicago, B. & Q. R. R. Co., 154 Neb. 281, 47 N. W. 2d 577.

"On appeal to the Supreme Court from an order of the Nebraska State Railway Commission, while acting within its jurisdiction, the question for determination is the sufficiency of the evidence to prove that the order is not unreasonable or arbitrary." In re Application of Chicago, B. & Q. R. R. Co., 152 Neb. 352, 41 N. W. 2d 157.

The record shows that the need for the service provided by these trains has been absorbed by other adequate methods of transportation. The little use of the passenger service offered by trains Nos. 21 and 22, as shown by the record, affords most convincing proof of that fact.

The record does show the discontinuance of these two trains will cause some inconvenience to a few persons and businesses. We said, in In re Application of Chicago, B. & Q. R. R. Co., 152 Neb. 367, 41 N. W. 2d 165: "The record shows as we have herein cited that the public makes little use of the passenger service afforded. The discontinuance of the two trains in question will cause inconvenience to a few persons and businesses.

This is not a criterion to be considered, however, when other forms of transportation are available and preferred." And in In re Application of Chicago, B. & Q. R. R. Co., 152 Neb. 352, 41 N. W. 2d 157: "Where some inconvenience would result to a small number of the public by discontinuance of the service of branch line of a railroad, but other services existent and prospective could handle all the business handled by the railroad with comparatively little extra trouble and additional expense to the public, and the evidence shows that loss in revenue by continuance of the service of passenger trains on a branch line overbalanced inconvenience to public from discontinuance thereof, it is unreasonable and arbitrary for the Nebraska State Railway Commission to deny application for the railroad to discontinue such branch line service."

The record before us conclusively shows that need does not exist for the continued operation of these two trains for the reason that the public prefers and has adopted other methods of transportation and has abandoned the use thereof.

Rule 5.1 of the commission's General Rules of Practice and Procedure provides, in part, as follows: "Any evidence which would be admissible in civil actions under the laws of the State of Nebraska shall be admissible in hearings before the Commission. While the Commission is not bound to follow strictly all technical common law rules of evidence, the Commission will require the record in each case to be supported by competent evidence in order to afford parties a full and fair hearing. The rules of evidence shall be applied in any proceeding to the end that needful and proper evidence shall be produced conveniently and speedily, while preserving the substantial rights of the parties."

As to the Interstate Commerce Commission, 49 U. S. C. A., § 20, p. 102, provides that: "The Commission may, in its discretion, for the purpose of enabling it the better to carry out the purposes of this chapter, prescribe a uni-

form system of accounts applicable to any class of carriers subject thereto, and a period of time within which such a class shall have such uniform system of accounts, and the manner in which such accounts shall be kept."

Charles H. O'Hearn, carrier's auditor of capital expenditures, testified that under its system of accounting, as provided by the Interstate Commerce Commission, all costs entering into the production of transportation service are assembled in the accounting department at Chicago in their final form and from such records he had compiled exhibits Nos. 18, 19, and 20 dealing with the revenues and expenses of trains Nos. 21 and 22 during the period from October 1, 1951, to May 9, 1952, and then projected the results thus obtained to an annual estimate. These exhibits show these trains were operated at an annual loss of $36,892. Included in "Out-of-pocket above the rail direct movement expenses" of these trains are certain items of expense computed on an average cost per mile to carrier of equipment of the class used in these trains. This average cost per mile is based on the total actual cost of labor and material necessary for maintaining in serviceable condition all equipment of the carrier of the type used in these trains. The computation is based on a 5-year average, that is, the 5 most recent years for which complete records are available.

The reason given by carrier for using system cost averages is because of its interchange in the use of equipment which, if direct expenses were used, might result in an entirely improper allocation of costs if, for instance, equipment while being used on a particular run should break down and need heavy repairs.

Appellants objected to these exhibits on the ground that they were not the best evidence as carrier's witness acknowledged that generally speaking the records could be made available showing the actual expenses incurred on the equipment used in this service. Appellants also requested the commission to require carrier to produce,

insofar as motor, locomotive, and passenger car repairs were concerned, the original records of its actual expenses for repairs to the particular equipment used in this service during the period which the exhibits cover.

The commission stated this question as follows: "Objections were raised to the receipt in evidence of Exhibits 18, 19 and 20 and ruling thereon was deferred and taken under advisement along with the deferred ruling of protestants' motion requesting a break-down of Exhibit 19 to reflect the expense for motor car, locomotive and passenger car repairs resulting from actual operations within Nebraska rather than on a system-wide basis." It overruled the objections and received the exhibits in evidence.

We said in Bee Publishing Co. v. World Publishing Co., 59 Neb. 713, 82 N. W. 28: "It is elementary * * * that in all judicial proceedings disputed questions of fact must be established by the best means attainable, and that evidence can not be received which indicates on its face that it is secondary and that the original source of information is in existence and accessible."

As stated in 32 C. J. S., Evidence, § 776, p. 701: " 'Best evidence' or 'primary evidence' is that which is the most natural and satisfactory proof of the fact under investigation. All other evidence which in its nature suggests the presence of better evidence is called 'secondary evidence.' "

While the commission has been invested with broad powers within the sphere of duty assigned to it and, in carrying out these duties, is not bound to strictly follow all common law rules of evidence, it should, however, in every instance, require its action to be supported by competent and relevant evidence in order to afford the parties a full and fair hearing.

The following quote from Interstate Commerce Comm. v. Baird, 194 U. S. 25, 24 S. Ct. 563, 48 L. Ed. 860, is here applicable: "The inquiry of a board of the character of the Interstate Commerce Commission should not be

too narrowly constrained by technical rules as to the admissibility of proof. Its function is largely one of investigation and it should not be hampered in making inquiry pertaining to interstate commerce by those narrow rules which prevail in trials at common law where a strict correspondence is required between allegation and proof."

And in Interstate Commerce Comm. v. Louisville & Nashville R. R. Co., 227 U. S. 88, 33 S. Ct. 185, 57 L. Ed. 431, it was stated: "The Commission is an administrative body and, even where it acts in a quasi-judicial capacity, is not limited by the strict rules, as to the admissibility of evidence, which prevail in suits between private parties."

As stated in New York v. United States, 331 U. S. 284, 67 S. Ct. 1207, 91 L. Ed. 1492: "The appraisal of cost figures is itself a task for experts, since these costs involve many estimates and assumptions * * *."

We think the formula followed by the carrier of apportioning motor, locomotive, and passenger car repairs to that class of equipment on a system-wide basis in order to get the average cost per mile for the use thereof is a fairer and more nearly accurate method of allocating such costs to individual operations than to charge to such operations the cost arising directly in connection with its use thereon. The commission here approved that method by overruling appellants' objections to exhibits Nos. 18, 19, and 20 and we can find nothing wrong in the commission's doing so.

Mention is made by appellants of sections 25-12,115 and 25-12,117, R. S. Supp., 1951. We do not think these statutes have application here but, assuming that they do, we think, under the circumstances here shown, that appellee complied therewith by attaching exhibit A to it application.

AFFIRMED.

R. T. CALDWELL, APPELLANT, V. WALTER SAVAGE ET AL., APPELLEES.

60 N. W. 2d 657

Filed November 6, 1953. No. 33383.

1. **Appeal and Error.** In the absence of a bill of exceptions on appeal to the Supreme Court it will be presumed that the determination on the issues of fact presented by the pleadings was established by evidence and that such issues were correctly decided.
2. ———. In order that a stipulation of facts may be considered on appeal such stipulation must be identified and introduced in evidence on the trial of the case and preserved in a bill of exceptions.

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

Leslie D. Carter, for appellant.

James A. Hart, for appellees.

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

YEAGER, J.

This is an action, on its face, by R. T. Caldwell, plaintiff and appellant, against Walter Savage, Ernest J. Hug, and Evelyn T. Hug, defendants. Walter Savage, insofar as the case is concerned is but a nominal defendant. Ernest J. Hug and Evelyn T. Hug are the appellees herein. They will be referred to hereinafter as defendants. The action is for the recovery of $500 claimed to be owing by defendants to the plaintiff.

A trial was had to the court and judgment was rendered in favor of the defendants. From the judgment and an order overruling a motion for new trial the plaintiff has appealed.

For his cause of action the plaintiff pleaded that on August 24, 1948, a certain agreement was entered into between plaintiff and defendants whereby the defendants agreed to sell certain real estate to plaintiff which agree-

ment was void and unenforceable because it was the homestead of the defendants and not acknowledged as required by statute; that the plaintiff paid $500 on the purchase price to Walter Savage, agent of the defendants; and that the defendants refused to perform the contract and have refused to return the $500. The prayer is for a judgment for this $500 with interest.

The defendants by answer admitted the execution of the void contract.

By general denial they denied that Walter Savage as their agent received from plaintiff $500.

The sole issue presented by the pleadings was that of whether or not Walter Savage as agent of the defendants received $500 from the plaintiff which defendants refused to repay to plaintiff.

The court accepted the contention contained in the answer and rendered judgment accordingly. The judgment therefore is supported by the pleadings. It is not contended otherwise in the briefs.

This case comes here without a bill of exceptions. It therefore follows that the judgment, being supported by the pleadings, must be affirmed.

The controlling rule in a situation such as this is the following: "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." Goger v. Voecks, 156 Neb. 696, 57 N. W. 2d 621. See, also, Jones v. City of Chadron, 156 Neb. 150, 55 N. W. 2d 495; Wabel v. Ross, 153 Neb. 236, 44 N. W. 2d 312.

This court is asked to consider a stipulation of facts which was filed in the district court before trial. The stipulation appears in the clerk's transcript and it may be presumed that it was considered by the trial court in arriving at its decision. That stipulation however may

not be considered here. It is not a part of the record which has come here for review.

The procedure for presenting a stipulation of facts for review on appeal is identification, introduction in evidence, and preservation in a bill of exceptions. Unless this procedure is followed the stipulation may not be noticed. State Ins. Co. v. Buckstaff Bros. Mfg. Co., 47 Neb. 1, 66 N. W. 27; Younie v. Specht, 99 Neb. 621, 157 N. W. 336; Prokop v. Mlady, 136 Neb. 644, 287 N. W. 55; Todd v. Board of Educational Lands and Funds, 154 Neb. 606, 48 N. W. 2d 706.

In the light of the conclusions arrived at, specific reference to the assignments of error contained in the appellant's brief is rendered unnecessary.

The judgment of the district court is affirmed.

AFFIRMED.

FANNIE RUDERMAN, APPELLEE, V. FORMAN BROS. ET AL., APPELLANTS.

60 N. W. 2d 658

Filed November 6, 1953. No. 33394.

1. **Workmen's Compensation.** An accident within the meaning of the workmen's compensation law shall be construed to mean an unexpected or unforeseen event happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury.
2. ———. In a workmen's compensation case the burden is on the plaintiff to prove by a preponderance of the evidence that an accident occurred.
3. ———. A compensation award cannot be based on possibilities or probabilities, but must be based on sufficient evidence that the injured person incurred disability or death as the result of an accident arising out of and in the course of his employment.
4. ———. If an inference favorable to the claimant in an action for recovery under the workmen's compensation law may be reached only by speculation or conjecture an award may not be allowed.

APPEAL from the district court for Douglas County: JAMES M. PATTON, JUDGE. *Reversed and dismissed.*

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

Monsky, Grodinsky, Good & Cohen, for appellee.

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

YEAGER, J.

This is an action by Fannie Ruderman, plaintiff and appellee, for the recovery of death benefits under the workmen's compensation law against the defendants and appellants, Forman Bros. and Ocean Accident and Guarantee Corporation.

Plaintiff is the widow of Harry Ruderman who died on January 7, 1952. He died suddenly while in the employ of the defendant Forman Bros. The defendant Ocean Accident and Guarantee Corporation was the workmen's compensation insurance carrier for Forman Bros.

The full workmen's compensation court allowed a recovery. From the award of that court an appeal was taken to the district court where again a recovery was allowed and judgment was rendered in favor of plaintiff. From the judgment of the district court the defendants have appealed.

The only question presented by the appeal is that of whether or not the evidence is sufficient to sustain a finding that Harry Ruderman came to his death as the result of an accident within the meaning of the workmen's compensation law. It is undisputed that he died while in the employ of Forman Bros. and while engaged in the performance of his assigned duties. He and another employee were engaged in plastering a house and while so engaged he fell from the position occupied by him and died within a matter of very few minutes.

The only evidence pertaining to the fall was furnished

by Harry Trinan, a fellow employee. This witness testified that he and the deceased were plastering a stair well; that in the well was a temporary stairway without risers; that the witness was working under the stairway and deceased was plastering above it; that deceased was working on about the fourth step from the top; that deceased finished plastering one wall and started to turn to the other side wall; that deceased had a straightedge made of aluminum about 5½ feet in length which was used to straighten or even plastering; that the instrument was about 5 inches wide and 1½ inches thick tapering to an edge of about ¼ of an inch; that through the stairway treads the witness saw the straightedge tangled up between the legs of deceased and deceased said "uh" and fell right down; that the straightedge just slipped between his legs; and that he could not tell what happened only that the deceased was turning and the straightedge was between his legs.

In order to get to the deceased the witness said first that he had to go around three rooms and then that he had to go around a room. He estimated that death ensued in 2, 3, or 4 minutes.

An autopsy was conducted by Dr. Harlan L. Papenfuss, acting coroner's physician, but the report is not in evidence. The physician who conducted the autopsy testified as a witness. This witness gave it as his opinion that Ruderman died from an episode of acute coronary insufficiency, in other words, lack of nutrition to the heart on a heart which had been severely and previously damaged, a coronary heart disease.

The autopsy disclosed a heart which had become badly damaged over an indefinite period before the death. We do not deem it necessary to describe the damage here, but only to say that it was of such a quality that there was a preexistent and constant imminence of fatal consequences.

Dr. Abraham S. Rubnitz, a specialist in the field of pathology, attended the autopsy and as a witness was

found to be in substantial agreement with Dr. Papenfuss as to the immediate cause of death and as to the preexisting condition of Ruderman.

This witness took into consideration the preexisting condition of Ruderman, the autopsy findings, and the history of the fall as it appears in the testimony of the witness Trinan, and with these elements as a basis, testified: "In my opinion at that time, we thought Mr. Ruderman had changes there, heart changes about the coronary vessels that would put him as a substandard —I should say in a substandard condition, and the fall which under ordinary conditions, that is in a younger individual with a sound heart, perhaps would result in an acceleration of the rate of the heart, and perhaps would not result in any disastrous termination, in the condition like his where he had a substandard condition of the heart, it most likely precipitated a ventricular fibrillation. I feel that the fall served as a trigger mechanism, in other words the same as Dr. Papenfuss expressed himself in his protocol, to produce the series of events which led to death."

A ventricular fibrillation is a flutter of the muscle in the wall of the ventricle.

The witness testified that ventricular fibrillation could not be demonstrated by any organic change. It therefore could not be demonstrated in this case. It could only be inferred. The witness based his conclusion on inferences and not on anything which could be demonstrated.

On the trial of this action before a single judge of the workmen's compensation court, the following appears as a part of the examination of this witness:

"Question: Well now, let me be sure that I have got this straight in my own mind. At the autopsy we don't have any way of establishing that there was a ventricular fibrillation, do we? Answer: No; nobody established that. Question: All we know is that we have here a heart with extensive coronary disease changes? Answer:

That is right. Question: In a sixty-two-year-old man these changes are such as we commonly see in a coronary death? Answer: Yes. Question: And we do know that those individuals collapse sometimes just while sitting at the table eating a meal, or even lying on the couch in the living room, and sitting in a chair reading the paper, it frequently happens? Answer: Yes. Question: Now then, if this man was standing on a stairway and his heart failed, of course he would fall, would he not? Answer: I presume so. Question: And it is true that we have to conjecture as to which occurred first, the fall or the cardiac failure? Answer: Yes."

This testimony does not in substance depart from the testimony given before the full workmen's compensation court which was the testimony presented to the district court.

The other evidence adduced will not be reviewed herein since such a review would furnish no aid in the determination of the matters involved.

In order that there may be a recovery in an action under the workmen's compensation law it must be proved that an accident occurred arising out of and in the course of employment producing injury and disability or death. As to this proposition there is no controversy in this action.

An accident within the meaning of the statute shall be construed to mean an unexpected or unforeseen event happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury. § 48-151, R. R. S. 1943; Shamp v. Landy Clark Co., 134 Neb. 73, 277 N. W. 802; Schwabauer v. State, 147 Neb. 620, 24 N. W. 2d 431.

The burden is on the plaintiff in a workmen's compensation case to prove by a preponderance of the evidence that an accident occurred. Tucker v. Paxton & Gallagher Co., 153 Neb. 1, 43 N. W. 2d 522.

"A compensation award cannot be based on possibilities or probabilities, but must be based on sufficient

evidence that the claimant incurred a disability arising out of and in the course of his employment." Beam v. Goodyear Tire & Rubber Co., 152 Neb. 663, 42 N. W. 2d 293. See, also, Hassmann v. City of Bloomfield, 146 Neb. 608, 20 N. W. 2d 592.

"* * * if an inference favorable to the applicant can only be reached by speculation or conjecture, then the applicant cannot recover." De Bruler v. City of Bayard, 124 Neb. 566, 247 N. W. 347. See, also, Beam v. Goodyear Tire & Rubber Co., *supra*.

Of course these rules apply in case the claim is made by the widow or other representative of a deceased person.

Under the evidence as summarized herein and these rules of law this appeal must be determined.

Ruderman fell, and he died as the result of the failure of his heart to continue to function. The question for determination is narrowed to this: Did the heart fail to function because of the fall, or was the fall a result of the failure of the heart?

The evidence on which plaintiff relies leaves any answer to this question in the realm of uncertainty. The answer given by the plaintiff is based in its terms and essence on probability, possibility, speculation, and conjecture, and nothing more.

This being true the plaintiff has failed to sustain the burden of proving that Harry Ruderman came to his death as the result of an accident within the meaning of the workmen's compensation law.

Accordingly the judgment of the district court should be and it is reversed and the case dismissed.

REVERSED AND DISMISSED.

HELEN WAKEFIELD, APPELLEE, V. RALPH W. WAKEFIELD, APPELLANT.

61 N. W. 2d 208

Filed November 20, 1953. No. 33364.

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.** 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.
3. ———. A decree of divorce may not be granted on the uncorroborated declarations, confessions, or admissions of the parties to the case.
4. ———. It is impossible to lay down any general rule as to the degree of corroboration required in a divorce action, as each case must be decided on its own facts and circumstances.
5. ———. Condonation is forgiveness for the past upon condition that the wrongs shall not be repeated. It is dependent upon future good conduct, and the repetition of the offense revives the wrong condoned.
6. ———. Conduct of a husband towards his wife which would not alone support a decree of divorce on the ground of extreme cruelty may, nevertheless, be sufficient to avoid a condonation extended to the husband by the wife for such cruelty.
7. ———. One party to the marriage may condone the cruelty of the other, but one claiming condonation must establish it by clear and satisfactory proof.
8. **Divorce: Parent and Child.** In awarding the custody of minor children, as between parents, 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.
9. ———: ———. Custody of minor children awarded their mother in a divorce action will not be disturbed unless it is shown that the mother is an unfit person to have their custody, or that their best interests require such action.

10. **Divorce.** 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 Douglas County: JAMES T. ENGLISH, JUDGE. *Affirmed.*

George Evens, for appellant.

William N. Jamieson, for appellee.

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

CHAPPELL, J.

Helen Wakefield filed her petition seeking a decree of separate maintenance from defendant Ralph W. Wakefield, alleging extreme cruelty and nonsupport as grounds therefor. Without objection plaintiff was subsequently permitted to amend her petition to pray for an absolute divorce. Contrary to defendant's contention, her petition did not rely upon desertion as a ground for relief. In response to defendant's motion to make plaintiff's original petition more definite and certain, she did set forth at length in her amended petition two occasions when defendant left her and the children several months without any means of support, simply as part of a chain of circumstances to sustain her claim of continuous extreme cruelty and nonsupport. Defendant filed an answer and cross-petition, denying generally, and specifically alleging condonation, and seeking an absolute divorce upon the grounds of extreme cruelty by plaintiff.

Five children were born during the marriage, to wit: One boy of age, self-supporting, and not here involved; one girl 18 years old; one girl 17 years old; one boy 15 years old; and one boy 10 years old. Plaintiff sought

custody of the minor children together with a proper allowance for the support of herself and the children. On the other hand, defendant sought custody of the two younger boys and an alleged equitable division of their home, which always stood in the name of plaintiff.

After hearing upon the merits, a decree was rendered finding generally against defendant and in favor of plaintiff, granting her an absolute divorce and custody of the minor children, with right of visitation by defendant, together with an allowance of $20 per week for their support until further order of the court. In that connection, at time of trial defendant concededly had failed for about 6 weeks to pay anything upon a temporary allowance of $20 per week for support of the children and he had not paid anything upon a temporary allowance of $75 attorney's fee. The decree also awarded plaintiff the home, more particularly described in the decree, which was located at 6047 South 40th Street in Omaha, and quieted the absolute title thereto in plaintiff, together with all the household goods, furniture, and personal property therein, worth approximately $500. All costs, including an additional sum of $175 as attorney's fee, were taxed to defendant. His motion for new trial was overruled, and he appealed, assigning substantially that the trial court erred: (1) In awarding plaintiff a decree of divorce and custody of the children instead of awarding a decree to defendant with custody of the two younger boys; and (2) in awarding plaintiff absolute title to the real estate together with $20 per week as child support instead of making an equitable distribution of the real estate between the parties. We conclude that the assignments have no merit.

It is generally the rule 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." Killip v. Killip, 156 Neb. 573, 57 N. W. 2d 147. Such case also held: "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.

"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.

"A decree of divorce may not be granted on the uncorroborated declarations, confessions, or admissions of the parties to the case.

"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."

The court, in Hodges v. Hodges, 154 Neb. 178, 47 N. W. 2d 361, has also held that: "It is impossible to lay down any general rule as to the degree of corroboration required in a divorce action, as each case must be decided on its own facts and circumstances.

"Condonation is forgiveness for the past upon condition that the wrongs shall not be repeated. It is dependent upon future good conduct, and the repetition of the offense revives the wrong condoned.

"Conduct of a husband toward his wife which would not alone support a decree of divorce on the ground of extreme cruelty may, nevertheless, be sufficient to avoid a condonation extended to the husband by the wife for such cruelty.

"One party to the marriage may condone the cruelty of the other but one claiming condonation must establish it by clear and satisfactory proof.

"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.

"Custody of minor children awarded their mother in a divorce action will not be disturbed unless it is shown that the mother is an unfit person to have their custody, or that their best interests require such action."

In the light of such rules we have examined the record. In that connection, we find no satisfactory evidence corroborating defendant's testimony with relation to the facts alleged in his cross-petition, as required by section 42-335, R. R. S. 1943. Upon such basis we conclude that defendant was properly denied a decree of divorce, and also in the light of the foregoing rules, we conclude that defendant was properly denied the custody of the two younger boys. The custody of the two girls is not questioned, and there is no contention that the mother was not a fit and proper person to have custody of the children. As a matter of course, it is elementary that defendant had a legal obligation and the ability as well to support his minor children, and an allowance to plaintiff of $20 a week therefor was certainly not unreasonable.

We are confronted then with the question of whether or not plaintiff was entitled to a divorce, and whether or not the real estate was properly awarded to her. At the outset it will be noted defendant's position at the trial, as reflected in his testimony, was that there was no chance of reconciliation.

The record discloses that the parties were married June 30, 1930, at Dunlap, Iowa. At that time plaintiff was employed by the State Highway Commission at Shenandoah, Iowa, earning $150 a month. They lived there for awhile, and plaintiff furnished their home.

They have resided in Omaha for the last 7 years, but they previously lived in numerous places, as far away as Portland, Oregon, where defendant repeatedly changed his employment. At time of trial, plaintiff was 49 years old and had been continuously employed since October 1948, as a cashier for Brandeis, earning $30 a week. Such employment became necessary in order to properly care for herself and the children. At time of trial defendant, a mechanic, 55 years old, was employed as such at the Mead Ordnance Plant, concededly earning $49 a week take-home pay. Their marital difficulties with regard to nonsupport and extreme cruelty began in June 1932, when defendant disappeared for several months, concealed his whereabouts, and left plaintiff with a 10-month old child and no means of support except her own labor and the assistance of relatives. Ultimately the parties were reunited, and again in 1937 defendant disappeared for several months, concealing his whereabouts from and leaving plaintiff in poor health, with four small children, and no means of support except her own labor and the assistance of relatives. They were again subsequently reunited, but over the years defendant has repeatedly, as alleged by plaintiff, used indecent and abusive language toward plaintiff and the children in the presence of the children, and has physically abused some of them, striking them with whatever instrument, including his foot, as was available at the moment. He struck the oldest boy on the right side of the head with such force as to injure him in such manner that the army would not retain him for service. In the words of such boy, who testified as a witness for plaintiff, the father "didn't treat any of us as human beings" and the general atmosphere of the home was "a hell on earth." The oldest daughter, testifying for plaintiff, also corroborated some of such evidence.

In September 1945, the parties moved into a home at 6047 South 40th Street in Omaha, paying rent therefor. However, in February 1946, plaintiff purchased the prop-

erty for $5,900, taking the title in her own name, where it has since remained. Her father loaned her $1,500 with which to make the down payment. As evidencing such loan, she executed a promissory note for $1,500 at 3 per cent, payable to her father on March 1, 1956, secured by second mortgage. Defendant signed the note following plaintiff's signature, and the mortgage was executed first by plaintiff and then by defendant as "her husband." It does not appear that the mortgage was ever filed of record, and no part of the principal was ever paid. On the back of the note appear the endorsement of two payments of interest, $45 each, for 1947 and 1948 respectively. The fact is, plaintiff's father subsequently waived any further payments, and returned the note and mortgage to plaintiff, making her a present of the amount represented therein. Plaintiff produced both the note and mortgage in open court, and they were received in evidence. There is approximately more than $3,900 still owing upon the first mortgage, payable in amounts of $38 to $42 a month, depending upon the amount of taxes assessed against the property. There is no competent evidence showing the value of the property at the time of trial. Over a period of more than 6 years, only about $500 has been paid on the principal. If defendant had paid it all, which apparently is not the fact, his interest in the property would be little enough to award in lieu of alimony for plaintiff. She purchased most of the furniture or it was given to her by relatives. During the marriage, plaintiff received a $300 inheritance from her mother's estate, and $1,500 from an aunt's estate, all of which she used to pay back borrowed money, family bills, and keep up the home.

There is competent evidence that since June 1952, defendant has purchased no groceries or food for the family, who ate their meals out of the home. He would buy enough to feed himself and prepared his own meals in the home. He produced, identified, and explained several checks written by him to grocers for sums of

$5.00 to $7.50 during July, August, and September, before plaintiff's divorce action was filed, in order to evidence that he did buy groceries for the family after June 1952. However, on cross-examination, defendant admitted that during such period his wife and children ate elsewhere, and he alone ate the groceries allegedly purchased by such checks.

In evidence adduced by defendant, he specifically or generally denied the charges made by plaintiff against him or undertook to favorably explain his conduct with respect thereto, the material part of which the trial court evidently concluded was not true. We sustain that conclusion.

For reasons heretofore stated, the judgment of the trial court should be and hereby is affirmed. All costs are taxed to defendant, including $150 allowed plaintiff for services of her attorney in this court.

AFFIRMED.

CARTER, J., participating on briefs.

THURE E. PETERSON, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.

61 N. W. 2d 263

Filed November 20, 1953. No. 33377.

1. **Criminal Law: Juries.** Unless otherwise provided by statute, one charged with a statutory misdemeanor has the right to demand a trial by jury in the county where the offense is alleged to have been committed but may waive his right thereto.
2. **Appeal and Error.** The mode of trial in the lower court may affect the scope of the review both by reason of statutory provisions and because consent to a particular mode of trial may operate as a waiver of the right to have certain questions reviewed.
3. ———. In an action, either civil or criminal, tried to the court without a jury, the erroneous admission of evidence is immaterial on appeal where the judgment below is sustained by sufficient competent evidence.

ERROR to the district court for Lancaster County: JOHN L. POLK, JUDGE. *Affirmed.*

Richard O. Johnson, for plaintiff in error.

Clarence S. Beck, Attorney General, and *Ralph D. Nelson,* for defendant in error.

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

WENKE, J.

Plaintiff in error Thure E. Peterson was found guilty by the district court for Lancaster County of operating a motor vehicle upon the highways of said county while under the influence of alcoholic liquor. He was sentenced accordingly.

In this respect section 39-727, R. R. S. 1943, provides, as far as here material, as follows: "It shall be unlawful for any person to operate or be in the actual physical control of any motor vehicle while under the influence of alcoholic liquor or of any drug. Any person who shall operate or be in actual physical control of any motor vehicle while under the influence of alcoholic liquor or of any drug shall be deemed guilty of a crime and, upon conviction thereof, shall be punished as follows: (1) If such conviction is for a first offense, such person shall be imprisoned in the county jail for not more than thirty days, or shall be fined not less than fifty dollars nor more than one hundred dollars, or both, and shall be ordered by the court, as part of the judgment of conviction, not to drive any motor vehicle for any purpose for a period of not to exceed one year from the date of his final discharge from the county jail, or the date of payment or satisfaction of such fine, whichever is the later; * * *."

Plaintiff in error complains primarily of the admission in evidence of the results obtained from an analysis of his urine as to alcoholic content. The sample used for this purpose was given to the arresting officer shortly after

plaintiff in error was taken into custody. The analysis thereof was made later the same day by a chemist in the employ of the State Department of Health, who made a report thereof. Objections were made to the admission thereof. Plaintiff in error's brief is primarily devoted to discussing reasons why such objections should have been sustained and why the report, or the results shown thereby, should not have been received in evidence. In view of what is hereinafter said, the question of whether or not these objections should or should not have been sustained and the report, or the results shown thereby, should or should not have been received in evidence becomes immaterial.

Trial by jury was waived. This plaintiff in error had a right to do. As stated in Miller v. State, 116 Neb. 702, 218 N. W. 743: "While one charged with a statutory misdemeanor has a right to demand a trial by a jury of the county where the offense is alleged to have been committed, yet the great weight of authority, and the better view, is that the defendant in such a case may waive his right to a jury trial. 35 C. J. 199, sec. 106, and cases there cited."

This is further evidenced by the holding in Bell v. State, 104 Neb. 203, 176 N. W. 544, where it was held: "It is within the power of the legislature to enact a law declaring possession and transportation of intoxicating liquors to be misdemeanors, and providing that violators of the law may be tried before magistrates and police courts without a jury, where the penalty does not exceed a fine of $100 or imprisonment for three months."

It should be remembered this has no application in cases where a party is charged with a felony for as stated in Michaelson v. Beemer, 72 Neb. 761, 101 N. W. 1007: "The judge of a district court has no jurisdiction to try and determine the guilt or innocence of a defendant charged with a felony who pleads not guilty, without a trial to a jury, and such jurisdiction cannot be conferred by consent of the accused."

As stated in 3 Am. Jur., Appeal and Error, § 816, p. 357: "The mode of trial in the lower court may affect the scope of the review both by reason of statutory provisions and because consent to a particular mode of trial may operate as a waiver of the right to have certain questions reviewed."

Beginning as early as Richardson v. Doty, 25 Neb. 420, 41 N. W. 282, and as recently as Snyder v. Lincoln, 156 Neb. 190, 55 N. W. 2d 614, this court has consistently held: "In an action at law, tried to the court without a jury, the erroneous admission of evidence is immaterial on appeal where the judgment below is sustained by sufficient competent evidence. In re Estate of Black, 125 Neb. 75, 249 N. W. 84; Elmcreek Ditch Co. v. St. John, 127 Neb. 253, 255 N. W. 16; Thomas v. Sheldon Co., 137 Neb. 181, 288 N. W. 546."

For a list of cases so holding see Nebraska Digest, Appeal and Error, Key No. 1054 (1).

The reason for this rule is well stated in 3 Am. Jur., Appeal and Error, § 940, p. 504, as follows:

"When, in a case tried before a jury, error in the admission of evidence is disclosed, or improper or incompetent evidence is introduced by reason of an erroneous ruling, the error will generally be presumed to be prejudicial, at least in cases where the evidence improperly admitted was of an influential character, and unless that presumption is rebutted, or it legally appears that the objecting party was not prejudiced thereby, the judgment will be reversed. In trials before a jury, the presumption is that the jury considered whatever evidence was laid before it.

"In equity cases and in an action tried before the court without a jury, the judgment will not be reversed on appeal because of the admission of incompetent evidence on the trial, unless the record shows affirmatively that the action of the trial court was influenced by such evidence. The presumption, in such a case, is that the incompetent evidence was finally disregarded by the court,

and that the trial judge considered only the competent evidence adduced, in the absence of anything in the record that shows affirmatively that the action of the trial court was influenced by the incompetent evidence. This presumption, however, loses its force when it reasonably appears from an inspection of the record that the incompetent testimony did influence in some degree the action of the trial court in rendering the particular judgment."

As stated in 3 Am. Jur., Appeal and Error, § 1040, p. 595: "A conviction in a case tried without a jury will not be reversed on appeal for admission of improper evidence unless the court can see that the accused was prejudiced by the error."

The rule is the same in criminal cases, where a jury can be waived, as evidenced by the following from Birmingham v. State, 228 Wis. 448, 279 N. W. 15, 116 A. L. R. 554: "The rule which this court applies in reviewing a finding of a trial court, in either a civil or a criminal case, tried to the court, is that it is presumed that improper evidence taken under objection was given no weight in reaching the final conclusion unless the contrary appears." See, also, Ward v. State, 26 Ga. App. 61, 105 S. E. 373; People v. Jorczak, 366 Ill. 507, 9 N. E. 2d 227; State v. Mason, 85 Ohio App. 186, 83 N. E. 2d 807.

The finding of guilt by the trial court is sustained by sufficient competent evidence in the testimony of patrolmen James J. Kontos, Donald E. Mayhew, and Winston L. Flower of the Nebraska Safety Patrol. See, Haffke v. State, 149 Neb. 83, 30 N. W. 2d 462; Schmidt v. State, 155 Neb. 369, 51 N. W. 2d 759; Poppe v. State, 155 Neb. 527, 52 N. W. 2d 422; Danielson v. State, 155 Neb. 890, 54 N. W. 2d 56.

AFFIRMED.

CARTER, J., participating on briefs.

DALE SHERRICK, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.

61 N. W. 2d 358

Filed November 20, 1953. No. 33398.

1. **Juries: Trial.** The exercise of peremptory challenges may not be required until at least 12 jurors are in the jury box and passed for cause.
2. ———: ———. Otherwise, the course of procedure with regard to peremptory challenges is left to the sound discretion of the trial court, and its decision will not be disturbed unless it clearly appears that there has been an abuse of discretion prejudicial to defendant.
3. **Evidence: Officers.** When a statute requires or authorizes a public official to make a certificate or written statement as to some matter or fact pertaining to and part of his official duty and file or keep the same as a record belonging to his public office, such certificate or writing is ordinarily competent evidence of the matters or facts recited therein.
4. **Rape.** In a prosecution for rape, the prosecutrix may testify in chief, if within a reasonable time under all the circumstances after the act was committed she made complaint to another, to the fact and nature of the complaint, but not as to its details; and that other may likewise testify in chief to such fact and nature of the complaint but not as to its details.
5. ———. In that connection, such complaint must be voluntary and made as soon as practicable without any inconsistent delay, and if the complaint is involuntary or delayed without sufficient reason therefor being shown, such as intimidation or threats, or lack of opportunity, the complaint has no force either as corroboration of prosecutrix or to support her credibility, and is inadmissible for any purpose.
6. **Trial.** Cross-examination is a leading and searching inquiry of the witness for further disclosure touching the particular matters detailed by him in his direct examination, and questions calling for evidence tending to show the improbability of or to throw doubt upon statements made in the examination in chief are proper.
7. **Rape.** When a sex crime is charged to have been committed and prosecutrix testifies thereto, which is denied by accused, great latitude should be allowed in cross-examination of prosecutrix, but in cases wherein defendant is charged with rape or assault with intent to rape a female child under 15 years of age, whose consent is immaterial, prosecutrix cannot ordinarily be cross-examined with regard to previous unchaste acts with others

for the purpose of testing her credibility.

8. **Criminal Law: Evidence.** Great latitude should be allowed in cross-examination of an accomplice who testifies for the State on a trial of his associates. He may be required to disclose all that he and his associates may have said or done in relation to the offense, and disclose whether he has in any manner been promised leniency or immunity for testifying.
9. **Criminal Law: Trial.** When the district court has by its instructions fully and correctly stated the law as it should be applied to the facts disclosed by the evidence in a criminal prosecution, it is not required to give further or additional instructions requested by defendant.
10. ———: ———. Any attempt by the trial court to collaterally encourage, invite, or induce a verdict of guilty in a criminal case, is prejudicial error requiring reversal.
11. **Rape.** Under the laws of this state, an accused charged with rape cannot be convicted solely on the uncorroborated testimony of prosecutrix, but if she is corroborated as to material facts and circumstances which tend to support her testimony and from which, together with her testimony as to the particular act an inference of guilt may be drawn, the corroboration is sufficient.
12. **Criminal Law: Trial.** It is only where there is a total failure of competent proof in a criminal case to support a material allegation in the information, or where the testimony adduced is of so weak or doubtful a character that a conviction based thereon could not be sustained, that the trial court will be justified in directing a verdict of not guilty.

ERROR to the district court for Deuel County: ISAAC J. NISLEY, JUDGE. *Reversed and remanded.*

L. M. Clinton, for plaintiff in error.

Clarence S. Beck, Attorney General, and *Homer L. Kyle,* for defendant in error.

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

CHAPPELL, J.

An information filed by the State charged plaintiff in error, hereinafter called defendant, with statutory rape upon a young lady 14 years of age. The crime was allegedly committed by him on October 8, 1952, when he was aged 18 years and upwards. Defendant pleaded not

guilty, but after trial to a jury he was found guilty with a recommendation for leniency. His motion for new trial was overruled, and he was sentenced to serve 4 years in the penitentiary. He thereafter prosecuted error to this court, assigning in substance that the trial court erred: (1) In denying his challenge of a named juror for cause and in requiring him to exercise 3 of his peremptory challenges before a panel of 24 jurors had been passed for cause; (2) in permitting his age to be proved by school census records and a duplicate driver's license; (3) in admitting over his objections complaints made by prosecutrix to her mother; (4) in unduly restricting cross-examination of prosecutrix and an alleged accomplice; (5) in giving and refusing certain instructions; (6) in ruling that the evidence adduced by the State was sufficient to sustain a verdict of guilty; and (7) in that the court made remarks during the trial in disparagement of defendant's counsel and his evidence. We conclude that some of such assignments have merit, requiring reversal.

During voir dire examination of a named juror, the trial court overruled defendant's challenge for cause, and he assigns such action as error. An examination of the record discloses that the assignment has no merit. In that regard, the situation is comparable with and controlled by related rules stated in Kitts v. State, 153 Neb. 784, 46 N. W. 2d 158.

After voir dire had been completed, and 18 jurors were in the box and passed for cause, the trial court said: "The State has 6 preemptory (sic) challenges; the Defendant has 6. Proceed with 3 challenges each." Thereupon counsel for defendant said: "At this time, we would elect to use our entire 6 preemptory (sic) challenges after all 24 jurors have been passed for cause." In reply the court said: "Overruled; you may proceed to exercise your challenges." Such challenges were then made "under protest by the Defense." In that connection, each side then exercised three peremptory challenges, and

after six additional jurors had been passed for cause, each side exercised its remaining three peremptory challenges, and a jury was thus chosen, which tried the case without further objection or showing by defendant that he had been prejudiced in any manner by the court's requirement. Defendant's assignment with regard thereto is: "The court erred in requiring the defendant to exercise three of his peremptory challenges before a panel of twenty-four jurors had been passed for cause."

At the outset, it will be observed that section 29-2005, R. R. S. 1943, provides in part: "Every person arraigned * * * for any offence that may be punishable by imprisonment for a term exceeding eighteen months and less than life, shall be admitted to a peremptory challenge of six jurors; * * *." Such section also provides that in such cases: "The attorney prosecuting on behalf of the state shall be admitted to a peremptory challenge of * * * six jurors * * *." In that connection, however, no statute provides any procedural time, order, method, or manner by which such peremptory challenges shall be exercised. Nevertheless, this court has placed limitations upon the time, method, and manner of procedure with reference thereto in order to preserve for an accused his constitutional right to a fair trial before an impartial jury. In Rutherford v. State, 32 Neb. 714, 49 N. W. 701, "while the jury was being impaneled" the trial court ordered " 'defendant to exercise his first three peremptory challenges *before the panel is filled.*' " (Italics supplied.) Objections were taken to such order, and this court reversed, holding: "Peremptory challenges to jurors are not to be exercised until the jurors have been passed for cause and twelve men are in the box." In the opinion it is said: "From the earliest history of this state the course pursued has been to call twelve men into the box as jurors, and after administering to them an oath to answer questions as to their competency, the prosecuting officer, and then the attorney for the accused, would interrogate the persons

so called as to their qualifications and ability to sit in that case, and objections to the competency of any of them, if sustained, were immediately followed by calling another into the box in his stead, so that at all times there were twelve men ready to be sworn as jurors should the parties signify their acceptance of them. * * * When the challenges for cause are exhausted and a full jury obtained, then the statute provides for the exercise of peremptory challenges."

In Mathes v. State, 107 Neb. 212, 185 N. W. 425, after 12 jurors had been passed for cause, defendant exercised his first peremptory challenge, leaving but 11 such jurors in the box. Thereupon, he moved that another juror be called to be examined for cause before the exercise of another peremptory challenge. Such motion was overruled, the trial court ordering that the parties should exhaust their respective peremptory challenges " 'against those jurors who are now in the box, whereupon the box will be filled with talesmen or other jurors.' " This court reversed, and, adhering to Rutherford v. State, *supra,* held: "The rule is that peremptory challenges are not to be exercised until the jurors have been passed for cause and twelve persons are in the jury-box having the qualifications of jurors." See, also, Fetty v. State, 119 Neb. 619, 230 N. W. 440.

In Gravely v. State, 45 Neb. 878, 64 N. W. 452, this court said: "While the statute prescribes the number of challenges, it contains no provision as to the order in which the right shall be exercised by the state or by the prisoner. This being true, it is clear that the course of proceeding in regard to peremptory challenges is left to the sound discretion of the trial court, and its decision in that regard is no cause for disturbing the verdict, unless it is clearly made to appear that there has been an abuse of discretion." See, also, Johnson v. State, 88 Neb. 565, 130 N. W. 282.

It will be noted in the case at bar that the court at all times rightly permitted peremptory challenges of any

juror remaining in the box at any and all times involved, so that twice defendant had an opportunity to exercise peremptory challenges and select a jury from any of 18 jurors in the box who had been theretofore passed for cause. In other words, when peremptory challenges were required, 18 jurors, already passed for cause, were twice in the box available for service. After each party had exercised three peremptory challenges therefrom, six in all, there were still 12 jurors in the box, all of whom had been passed for cause and available for service. Six more jurors were then called and passed for cause, leaving 18 again in the box available for service. Then each party exercised three peremptory challenges therefrom, six in all, which left 12 qualified jurors whose impartiality is not questioned, to whom the cause was tried without objection. While the procedure followed by the trial court was unusual and in some respects not that commended since Rutherford v. State, *supra,* we fail to see how it could in any manner have been prejudicial to defendant. We find no authority and none has been cited by defendant commanding the trial court to have 24 jurors in the box passed for cause before the exercise of peremptory challenges may be required.

As stated in Bufford v. State, 148 Neb. 38, 26 N. W. 2d 383: "The true object of challenges, either peremptory or for cause, is to enable the parties to avoid disqualified persons and secure an impartial jury. When that end is accomplished there can be no just ground for complaint against the rulings of the court as to the competency of the jurors." We conclude that the assignment should not be sustained.

Defendant assigned that the trial court erred in permitting his age to be proved by school census records and a duplicate of his driver's license. In that connection, the trial court permitted the county superintendent of schools and the deputy county treasurer to testify, over objection, regarding such official records executed and

in their custody and control, as required by law, which respectively disclosed defendant's age to be over 18 years. Photostatic copies thereof were received in evidence after appropriate foundation had been laid therefor. The authorities relied upon by defendant are clearly distinguishable upon the facts and do not sustain his contention. In that regard, section 25-1279, R. R. S. 1943, specifically provides: "Duly certified copies of all records and entries or papers belonging to any public office, or by authority of law filed to be kept therein, shall be evidence in all cases of equal credibility with the original records or papers so filed."

In 32 C. J. S., Evidence, § 626, p. 477, citing authorities, it is said: "As a general rule, where some enactment or rule of law requires or authorizes a public official to make a certificate or written statement as to some matter or fact pertaining to and as a part of his official duty, such writing is competent evidence of the matter or fact therein recited." See, also, 32 C. J. S., Evidence, § 637, p. 489, § 638, p. 491, § 644, p. 509. Also, as stated in 32 C. J. S., Evidence, § 645, p. 509, under certain circumstances as here: "A public record or document offered in evidence may be explained by its custodian." See, also, 20 Am. Jur., Evidence, § 1023, p. 861, § 1026, p. 865. We conclude that the assignment has no merit.

Evidence adduced by the State discloses that prosecutrix said nothing to her mother about the incident until the next day after school was out, although she had not been intimidated by threats or otherwise, and had ample prior opportunity to have done so. On the other hand, prosecutrix did not testify that she ever complained to or said anything to her mother about the incident. She did testify, without objection, that she told her best friend and another about it at school the next noon, and such friend was permitted without objection to testify that at that time prosecutrix told her, "the boys had raped her." The record discloses that

after school the next day prosecutrix and her mother had a conversation about it in which the mother questioned her. When counsel for the State asked the mother what the conversation was, she was permitted over objection to testify that prosecutrix told her, "she had been raped" by defendant and Maurice Callies, using their nicknames in describing them. In that respect, defendant had timely and appropriately objected to such conversation substantially for want of sufficient foundation, that it was hearsay, involuntary, and unreasonably delayed, which made it inadmissible and of no force for any purpose. The objection was overruled and the admission of such evidence is assigned as error. We sustain the assignment.

It is not necessary, under the circumstances presented, to consider its admissibility on any theory of res gestae, which no one contends is involved here. In Jump v. State, 146 Neb. 501, 20 N. W. 2d 375, after quoting from Krug v. State, 116 Neb. 185, 216 N. W. 664, this court held: "In a prosecution for rape, the prosecutrix may testify in chief, if within a reasonable time under all the circumstances after the act was committed she made complaint to another, to the fact and nature of the complaint, but not as to its details; and that other may likewise testify in chief to such fact and nature of the complaint, but not as to its details."

The above case is cited as authority in 75 C. J. S., Rape, § 53, p. 523, where it is said: "The state may introduce evidence that the prosecutrix made a complaint after the commission of the alleged offense and may show where and to whom it was made, provided the complaint was voluntary and was made within a reasonable time after the act complained of."

In other words, the complaint must be voluntary and made as soon as practicable without any inconsistent delay, and if the complaint is involuntary or delayed without sufficient reason therefor being shown, such as intimidation or threats, or lack of opportunity, the com-

plaint has no force either as corroboration of prosecutrix or to support her credibility, and is inadmissible for any purpose. See, 75 C. J. S., Rape, § 53, p. 525; 52 C. J., Rape, § 90, p. 1063; People v. Rock, 283 Mich. 171, 277 N. W. 873.

Under the circumstances appearing in this record, we conclude that the conversation aforesaid allegedly had with the mother by prosecutrix was involuntary, inexcusably delayed, and inadmissible.

Defendant assigned that the trial court erred in unduly restricting cross-examination of prosecutrix in numerous respects set forth in the brief. They are too voluminous to recite here at length. It is sufficient for us to say that except for one unrelated exception, all of the questions asked by defendant on cross-examination of prosecutrix to which objections were sustained, were within the scope of the direct examination of prosecutrix, and the objections were erroneously sustained.

As stated in 58 Am. Jur., Witnesses, § 632, p. 352: "Generally speaking, however, when the direct examination opens a general subject, the cross-examination may go into any phase, and may not be restricted to mere parts which constitute a unity, or to the specific facts developed by the direct examination. Cross-examination should always be allowed relative to the details of an event or transaction a portion only of which has been testified to on direct examination. As has been stated, cross-examination is not confined to the identical details testified to in chief, but extends to its entire subject matter, and to all matters that may modify, supplement, contradict, rebut, or make clearer the facts testified to in chief by the witness on cross-examination."

As held in Seiner v. State, 138 Neb. 130, 292 N. W. 112: "Cross-examination is a leading and searching inquiry of the witness for further disclosure touching the particular matters detailed by him in his direct examination.

"Questions calling for evidence tending to show the

improbability of or to throw doubt upon statements made in the examination in chief are proper."

We particularly held in Redmon v. State, 150 Neb. 62, 33 N. W. 2d 349: "When a sex crime is charged to have been committed and the prosecuting witness testifies thereto, which is denied by the accused, great latitude should be allowed in the cross-examination of the prosecuting witness." In that case prosecutrix was a woman over 18 years of age, and we reversed, primarily upon the ground that the trial court erroneously excluded direct evidence and also unduly restricted cross-examination of her with relation to her habits and past immoral conduct and unchaste acts with other men, not too remote in time, for the purpose of affecting her credibility as a witness.

In Frank v. State, 150 Neb. 745, 35 N. W. 2d 816, defendant was charged with assault with intent to rape a young woman who had reached the age of consent. We reversed his conviction and, citing Redmon v. State, *supra,* said: "* * * not only that cross-examination of the prosecutrix should be as unrestrained and searching as is consistent with rules of law, but that it was also prejudicial error to exclude any direct competent evidence not too remote in time, showing specific immoral or unchaste acts and conduct by her with others, not only for the purpose of being considered by the jury in deciding the weight and credibility of her testimony generally, but for the purpose of inferring the probability of consent and discrediting her testimony relating to force or violence used by defendant in accomplishing his purpose and her claimed resistance thereto. See, also, State v. Wood, 59 Ariz. 48, 122 P. 2d 416, 140 A. L. R. 361, and annotations p. 364; 3 Wigmore on Evidence (3d ed.), § 924a, p. 459, § 979, p. 537. Concededly, there is authority to the contrary, but the foregoing is the modern realist rule, and we deem it the better one." It will be noted, however, that we confined our aforesaid conclusions in that opinion to cases wherein prosecutrix had reached the age of

consent, or consent was properly an issue.

We conclude that the general rule, insofar as applicable here, is that when a sex crime is charged to have been committed, and the prosecutrix testifies thereto, which is denied by accused, great latitude should be allowed in cross-examination of prosecutrix, but in cases wherein defendant is charged with rape or assault with intent to commit rape of a female child under 15 years of age whose consent is immaterial, prosecutrix cannot ordinarily be cross-examined with regard to previous unchaste acts with others for the purpose of testing her credibility. This is true because under section 28-408, R. R. S. 1943, "any female child under the age of eighteen years" cannot give her consent to carnal knowledge unless she is "over fifteen years of age and previously unchaste, * * *." In other words, when a female child under 15 years is prosecutrix, her previous chastity is immaterial for any purpose.

In Schlegel v. State, 143 Neb. 497, 10 N. W. 2d 264, this court held: "In a prosecution for statutory rape, the question of the previous chastity of the female child under 15 years of age at the time of commission of the act is immaterial, and the trial court should sustain appropriate objections to proffered evidence thereon."

In such a case, the law presumes that the prosecutrix could not give consent regardless of previous chastity or lack of chastity. As stated in People v. Abbott, 97 Mich. 484, 56 N. W. 862, 37 Am. S. R. 360: "But here the law conclusively presumes that the girl could not give her consent, and every act of intercourse with her would be a crime committed against her, and such acts could not, therefore, affect her credibility. Her reputation for truth and veracity could be inquired into, the same as of an adult, but she could not be impeached by her acts of intercourse." To hold otherwise would be to conclude that the same criminal act with which a defendant is charged and to which prosecutrix could not consent, had not only deprived an innocent female child of her

chastity, but had also deprived her of veracity, and in effect made her impossibility of consent a shield of defense for accused. Wesner v. People (Colo.), 250 P. 2d 124; State v. Smith, 90 Utah 482, 62 P. 2d 1110; Self v. State, 62 Okl. Cr. 208, 70 P. 2d 1083; Walker v. State, 8 Okl. Cr. 125, 126 P. 829; Annotation, 140 A. L. R. 365. Some of such authorities discuss two purported exceptions, permitting extension of the rule, but they have no application under the circumstances presented in this record.

Defendant was therefore not entitled to cross-examine prosecutrix with regard to previous unchaste acts with others except Maurice Callies, with whom she testified on direct examination that she had intercourse as part of the incident here involved, with regard to which great latitude should have been allowed. In other respects, also, cross-examination of prosecutrix was unduly restricted and prejudicially erroneous.

Concededly, "Great latitude should be allowed in the cross-examination of an accomplice who testifies for the people on a trial of his associates. He must disclose all that he and his associates may have said or done in relation to the offense, and may be required to disclose whether he had been promised leniency or immunity for testifying." 58 Am. Jur., Witnesses, § 655, p. 362.

Defendant argued that the trial court unduly restricted in certain respects the cross-examination of David Carleton, an alleged accomplice. To discuss such claim at length would serve no purpose. In that regard, it is sufficient to say that in the light of such rule, the trial court unduly restricted the cross-examination of such witness, although we do not conclude that such restriction was prejudicially erroneous.

Defendant argued that the court erred in refusing to give his requested instructions Nos. 2 and 4. To set them forth at length would serve no purpose. In the light of the foregoing rules, we conclude that they were properly refused. It is not error for the trial court to

refuse to give an instruction requested by defendant which does not contain a full and correct statement of the law applicable to the facts of the case as shown by the evidence. Clements v. State, 80 Neb. 313, 114 N. W. 271. This court considers all of the evidence and all of the instructions given to the jury in determining whether the giving or refusal of a particular instruction is prejudicially erroneous. Schlegel v. State, *supra*. It is not error to refuse to give requested instructions when the material substance thereof is included in other instructions given to the jury. May v. State, 155 Neb. 786, 54 N. W. 2d 62. Danielson v. State, 155 Neb. 890, 54 N. W. 2d 56, held that: "A trial court may properly refuse tendered instructions which are covered by instructions given on its own motion."

In Graham v. State, 90 Neb. 658, 134 N. W. 249, this court held: "Where the district court has by his instructions fully and correctly stated the law as it should be applied to the facts disclosed by the evidence in a criminal prosecution, he is not required to give further or additional instructions requested by the defendant."

As held in Jurgensen v. State, 135 Neb. 537, 283 N. W. 228: "Where the trial court has instructed generally on, and stated fully, all the issues in a criminal prosecution, error cannot be predicated on failure to give an instruction on a particular phase of the case unless a proper instruction thereon was requested."

Defendant assigned that the giving of instruction No. 14 by the trial court was prejudicially erroneous. We sustain that assignment. In that regard, a jury at a former trial of defendant had disagreed, and after the jury at the trial here involved had deliberated for some time on February 20, 1953, it inquired of the court in writing, signed by the foreman, whether it would "be permissable (sic) to add the following statement to the 'Guilty' verdict providing it is agreeable with all the jurors. We the jury recommend leniency."

Thereafter the court gave written instruction No. 13

which read: "Gentlemen of the Jury: In answer to your question, you may add the proposed recommendation to your verdict, if you so desire." No complaint is made of that instruction. However, after the jury had further deliberated, on February 21, 1953, it inquired in writing, signed by the foreman: "The jury has reached a verdict, providing His Honor severely reprimands the parents of the defendant the plaintiff and her parents in open court in the presence of the jury as being parties contributing to this crime and to the delinquency of the plaintiff." Clearly the force and effect of such offer or proposal was that the jury would return a verdict of guilty if the court would accept the offer and comply with its proposal. Otherwise, it inferred that the jury would not return a verdict. In reply, the trial court gave instruction No. 14 in writing, which read: "GENTLEMEN OF THE JURY, I shall comply with your request as far as I can but the parents of the defendant are not in this County and I have no way of getting them here. If they are in the county and I can get them I shall comply with your request. The complaining witness parents are in the county and I can get them." The force and effect of such instruction was to accept the jury's offer and consent in part to compliance with its proposal. As such it was an unauthorized, collateral inducement, encouragement, or invitation by the court to return a verdict of guilty based upon extraneous matters having nothing to do with the law, issues, or evidence. The jury thereafter returned a verdict of guilty, recommending leniency.

No authority has been cited exactly in point and we have found none. However, in Commonwealth v. Trunk, 311 Pa. 555, 167 A. 333, a district attorney and others were charged with aggravated assault and battery and false imprisonment. The trial court's instructions told the jury substantially in part, insofar as important here, that he would take into account the good faith of defendants in their use of a letter written by the district at-

torney, and other mitigating circumstances when he came to sentence them, if the jury found the defendants guilty. Their conviction was reversed. In speaking of the instructions and rights of defendants, the opinion said: "This reflected upon the good faith of the defendants in their use of the letter. It was proper for the jury to take their good faith into account. It was highly prejudicial to them for the court to say in effect that he would take it into account when he came to sentence them, if they found the defendants guilty. This was an invitation to the jury to so find them."

In Potard v. State, 140 Neb. 116, 299 N. W. 362, citing among other authorities Sharp v. State, 115 Neb. 737, 214 N. W. 643, this court used apt language when it said: "The prestige of a trial court with the ordinary jury is well known. Any attempt by the court to encourage a verdict will be seized upon by the majority as a coercive argument against the minority, especially if the minority be small. Such a situation does not meet the constitutional requirements of a speedy, public trial by an impartial jury."

We turn then to defendant's assignment that the evidence was insufficient to sustain a verdict of guilty. We conclude that it was sufficient. In that regard, both at conclusion of the State's evidence and after both sides had rested, defendants moved to dismiss for insufficiency of the evidence. Both motions were overruled.

In Stapleman v. State, 150 Neb. 460, 34 N. W. 2d 907, wherein defendant was charged with statutory rape upon a girl under 15 years of age, this court held: "Under the law of this state an accused charged with rape cannot be convicted solely on the uncorroborated testimony of the prosecutrix.

"If the prosecutrix is corroborated as to material facts and circumstances which tend to support her testimony and from which, together with her testimony as to the particular act, the inference of guilt may be drawn, the

corroboration is sufficient." See, also, Schlegel v. State, *supra;* Krug v. State, *supra.*

Herein the testimony of prosecutrix is positive with regard to the main facts constituting the offense, which defendant explicitly denied. However, other facts and circumstances appearing in the evidence adduced by the State sufficiently corroborated the testimony of prosecutrix. In fact, the record here discloses that prosecutrix was corroborated by an alleged eye witness. As recently as Onstott v. State, 156 Neb. 55, 54 N. W. 2d 380, which involved a charge of assault with intent to commit rape upon a girl between 10 and 11 years of age, this court said: " 'The jury are the judges of the credibility of the witnesses who testify before them and of the weight of their testimony, when properly admitted, and, unless the decision of the jury thereon is clearly wrong, their verdict will not be molested.' Morrow v. State, 146 Neb. 601, 20 N. W. 2d 602.

" ' "This court, in a criminal action, will not interfere with a verdict of guilty, based upon conflicting evidence, unless it is so lacking in probative force that we can say, as a matter of law, that it is insufficient to support a finding of guilt beyond a reasonable doubt." Williams v. State, 115 Neb. 277, 212 N. W. 606.' Haines v. State, 135 Neb. 433, 281 N. W. 860.

" 'It is only when there is a total failure of proof in a criminal case to support a material allegation in the information, or where the testimony adduced is of so weak or doubtful a character that a conviction based thereon could not be sustained, that the trial court will be justified in directing a verdict of not guilty.' Wanzer v. State, 41 Neb. 238, 59 N. W. 909."

In the light of the foregoing rules, this court has examined the record and concludes that the trial court did not err in refusing to sustain defendant's motion to dismiss. To recite the salacious details appearing in the evidence would serve no useful purpose.

Defendant also argued that remarks made by the trial

court, during voir dire and in ruling upon objections during cross-examination of the State's witnesses, disparaged defendant's counsel and the evidence sought to be adduced by him.

In Hansen v. State, 141 Neb. 278, 3 N. W. 2d 441, this court held: "It is the duty of the trial judge to abstain carefully from any expression of opinion or comment on the facts or evidence, not only in his charge to the jury, but also on the examination of witnesses or otherwise during the course of the trial.

"Such partial remarks must be avoided by the trial judge, for it is a well-known fact that jurors are usually alert to discover the attitude of the court respecting the merits of the case, and particularly in criminal cases.

"Positive declarations made by the trial court in an emphatic, argumentative, or sarcastic manner cannot be dislodged from the minds of the jury by later reading a formal instruction that the jury are the sole judges of all questions of fact.

"Comments, if any, which a trial judge may add to his rulings upon objections to the introduction of evidence must always be fair to the accused, judicial, and dispassionate, and not present the picture of the case out of focus." Such conclusions were reaffirmed in Moore v. State, 147 Neb. 390, 23 N. W. 2d 552. See, also, Carrico v. State, 109 Neb. 177, 190 N. W. 576.

In the light of the foregoing rules, we have examined the remarks made by the trial court about which defendant complains, and conclude that the propriety of some of them was properly challenged, but in view of the fact that reversal is required upon other grounds, we do not deem it necessary to determine whether or not such remarks were prejudicially erroneous.

For like reasons, we are not required to discuss or determine whether or not the sentence imposed upon defendant was excessive.

For reasons heretofore stated, the judgment of the

trial court should be and hereby is reversed, and the cause is remanded for new trial.

REVERSED AND REMANDED.

MAURICE CALLIES, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.
61 N. W. 2d 370

Filed November 20, 1953. No. 33399.

1. **Criminal Law: Trial.** It is only when there is a total failure of proof in a criminal case to support a material allegation in the information, or where the testimony adduced is of so weak or doubtful a character that a conviction based thereon could not be sustained, that the trial court will be justified in directing a verdict of not guilty.
2. **Criminal Law.** Whoever aids, abets, or procures another to commit any offense may be prosecuted and punished as if he were the principal offender.
3. ———. A common purpose among two or more persons to commit a crime need not be shown by positive evidence but may be inferred from the circumstances surrounding the act and from the defendant's conduct subsequent thereto.
4. ———. Knowledge or intent is seldom capable of direct proof. It is usually inferred from the proven surrounding circumstances. Participation in criminal intent may be inferred from presence, companionship, and conduct before and after the offense is committed.
5. ———. A district court, within its district, is authorized to exercise the powers of examining magistrates generally, with respect to preliminary hearings of persons accused of the commission of a felony.
6. **Criminal Law: Juries.** The rule is that peremptory challenges are not to be exercised until the jurors have been passed for cause and 12 persons are in the jury box having the qualifications of jurors.
7. ———: ———. Otherwise the course of procedure with regard to peremptory challenges is left to the sound discretion of the trial court, and its decision will not be disturbed unless it clearly appears that there has been an abuse of discretion prejudicial to the defendant.
8. **Evidence.** Certified copies of public records belonging to any public office are evidence of those matters which are properly

shown therein and may be explained by the custodian of the records when a proper foundation is laid for the admission of such testimony.

9. **Criminal Law: Evidence.** When a witness has been previously examined in open court with the opportunity for cross-examination which has been availed of, and the witness cannot be produced at the trial, the evidence so given at the preliminary hearing for the same offense may be used at the trial, providing there is evidence of diligent search and inquiry as to the whereabouts of the witness and his unavailability to testify, which is required as a foundation for the admission of such testimony.

10. ———: ———. Great latitude should be allowed in the cross-examination of an accomplice who testifies for the State on a trial of his associates. He must disclose all that he and his associates have said or done in relation to the offense, and may be required to disclose whether he had been promised leniency or immunity for testifying.

11. **Rape.** In the prosecution for a crime such as aiding and abetting statutory rape, great latitude should be allowed in cross-examination of the prosecuting witness. Such witness may be cross-examined with reference to matters pertinent to the issues in the case concerning which she has testified to or referred to in her direct examination, and as to matters bearing upon her credibility and the weight to be given her testimony.

12. ———. In a prosecution for aiding and abetting the crime of statutory rape, a female child under 15 years of age cannot ordinarily be cross-examined with reference to her consent, it being immaterial, or with regard to previous unchaste acts with others for the purpose of testing her credibility.

13. **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.

ERROR to the district court for Deuel County: ISAAC J. NISLEY, JUDGE. *Reversed and remanded.*

L. M. Clinton, for plaintiff in error.

Clarence S. Beck, Attorney General, and *Homer L. Kyle,* for defendant in error.

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

MESSMORE, J.

Maurice Callies was charged in the district court for Deuel County with aiding and abetting Dale Sherrick to commit statutory rape on one Janice Irene Sneith. The jury returned a verdict finding defendant guilty as charged, and recommended leniency. The defendant filed a motion for new trial which was overruled. The trial court committed him to the State Institution for Boys at Kearney, Nebraska, until he reaches the age of 21 years or is discharged by the institution. He brings this error proceeding to this court to review his conviction and sentence.

The plaintiff in error will hereafter be referred to as the defendant.

At the conclusion of the State's evidence and at the conclusion of all of the evidence the defendant moved for a directed verdict, which was overruled. This ruling is assigned as error. The contention of the defendant is that the evidence is wholly insufficient to convict the defendant of the crime charged, beyond a reasonable doubt, and that there was a lack of competent evidence as to the age of the principal, Dale Sherrick.

To determine the above assignment of error we set forth a résumé of the evidence adduced at the trial.

The prosecutrix, Janice Irene Sneith, testified that she was born September 26, 1938, and that she attended Chappell high school. On October 8, 1952, when walking home from school with Irene Nelson, she saw the defendant, accompanied by Dave Carleton and Dale Sherrick, in an automobile driven by Dave Carleton. At several crossings she was asked by the defendant if she wanted to take a ride. She replied "no," and later said that she had to go home and take care of her little brother. The car stopped at a point and in such a manner as to block her path. The defendant got out of the car, grabbed her, put her arms behind her back, and forced her over to the car. He picked her up and put her in the car, and she "hollered" for Irene. At the direction of

the defendant the car was driven north of Chappell to the golf course. At the golf course the defendant and Dale Sherrick had intercourse with her. In both instances the act was complete. The defendant held her so she could not move while Dale Sherrick had intercourse with her. After about 30 or 40 minutes she requested Dave Carleton to drive her home. She was let out of the car at an alley within half a block of her home. When she arrived home her mother was not there. She informed her mother the next evening of what had occurred. The next day she told her sister Carol about the affair while Carol, Irene Nelson, and the prosecutrix were walking home from school.

In her cross-examination, she testified that she had met the defendant about a year previous, on Christmas Eve, that she had known Dale Sherrick about the same length of time, and Dave Carleton for about a year. She told about her position while the acts of intercourse were being carried on, the position of the boys in the back and front seats of the car during the time, the length of time they were there, and what occurred.

She was corroborated by Irene Nelson's testimony as to the manner in which she was picked up and the conversation had with her sister Carol in Irene's presence. Irene told her brother of the happening and had him go and tell Janice's mother.

The mother of the prosecutrix testified that she had been informed the evening of October 8, 1952, that Janice had been picked up by some boys. She was not at home at the time Janice arrived there, but noticed when she arrived that Janice looked pale and did not seem to be her usual self. She was unable to talk to Janice about the affair that evening due to the presence of her small son. The next day she inspected Janice's garments; they were soiled and the straps of her slip were broken. She notified the city police, and on October 31st, took Janice to a doctor for the purpose of ascertaining whether or not she was pregnant.

Dave Carleton's testimony corroborated that of the prosecutrix in almost all details. The variance in the testimony of the prosecutrix and this witness is of minor importance and need not be set out.

The defendant testified that he was born on August 25, 1936, and resided with his mother at Lodgepole, Nebraska. He further testified that he went to Chappell in Dave Carleton's car with Dale Sherrick. Dave was doing the driving. While in Chappell they saw Janice and Irene Nelson. Dave asked the defendant if he wanted to see if they could pick them up. The defendant said he did not care. Dale Sherrick said it did not make any difference to him. The defendant testified that he then asked Janice if she wanted to take a ride and she said "no." He described the course they took in following Janice. When the car stopped he stepped out of it, walked up to Janice, put his arms around her, and asked her if she wanted to go for a ride. She said she would for a little while, but she had to be back at 5 p. m. Then he told of the position of the different parties in the car as they rode to the golf course. He denied that he lifted her up and put her in the car, and that he told Dave where to drive. When the car stopped at the golf course, he testified, he started necking Janice, teasing her, and playing with her slip strap or brassiere strap; that they kissed each other, and she put her arms around him and kissed him; and that this continued for 5 or 10 minutes. He asked her if he could have intercourse with her and she said "no." Then he described the position that she placed herself in. He again asked her the same question. He testified to partially undressing Janice, at her request, and other matters incident to the act, the position that Janice was lying in at the time, the conversation had with Dale Sherrick with reference to having intercourse with Janice and with reference to a request by Janice to be driven home, the position of the parties in the car on leaving the

golf course, and letting Janice out at the place she requested.

There are many other facts which we deem it unnecessary to set forth.

Section 28-201, R. R. S. 1943, provides: "Whoever aids, abets or procures another to commit any offense may be prosecuted and punished as if he were the principal offender."

With reference to the offense as charged, as stated in State v. Kneedy, 232 Iowa 21, 3 N. W. 2d 611, knowledge or consent is seldom capable of direct proof. It is usually inferred from the proven surrounding circumstances. Participation in criminal intent may be inferred from presence, companionship, and conduct before and after the offense is committed. A common purpose among two or more persons to commit a crime need not be shown by positive evidence but may be inferred from the circumstances surrounding the act and from defendant's conduct subsequent thereto. See, also, 22 C. J. S., Criminal Law, § 87, p. 155; People v. Mummert, 57 Cal. App. 2d 849, 135 P. 2d 665; Brownrigg v. State, 136 Neb. 729, 287 N. W. 193; Fields v. State, 107 Neb. 91, 185 N. W. 400; Balis v. State, 137 Neb. 835, 291 N. W. 477; Smith v. State, 111 Neb. 432, 196 N. W. 633; Puckett v. State, 144 Neb. 876, 15 N. W. 2d 63.

The rule is well established that it is only where there is a total failure of proof to establish a material allegation of the information, or the testimony is of so weak or doubtful a character that a conviction based thereon cannot be sustained, that the trial court is justified in directing a verdict for the defendant. See, Onstott v. State, 156 Neb. 55, 54 N. W. 2d 380; Wanzer v. State, 41 Neb. 238, 59 N. W. 909. This assignment of error is without merit.

The defendant predicates error, contending that the trial court erred in overruling the defendant's motion to quash the amended information.

It appears that the defendant was first charged with

statutory rape under section 28-408, R. R. S. 1943, which provides that in the event any male person of the age of 18 years or upwards shall carnally know or abuse any female child under the age of 18 years, with her consent, unless such female child so known and abused is over 15 years of age and previously unchaste, shall be guilty of rape. The defendant was 16 years of age at the time of the alleged offense, and the prosecutrix less than 15 years of age. The defendant was accorded a preliminary hearing and bound over to the district court where an information was filed charging him with statutory rape. Later a request of the county attorney to file an amended information was granted, charging the defendant with aiding and abetting Dale Sherrick to commit rape upon the prosecutrix. A motion to quash the amended information was filed by the defendant on the ground that the information charged a new crime, different in identity from that charged in the original information; that no complaint was ever filed against the defendant alleging the commission of an offense as shown in the amended information; and that the defendant had not had a preliminary hearing and had not waived his right to a preliminary hearing. The motion to quash the information was overruled. Thereafter, the defendant was accorded a preliminary hearing in the district court. He waived the reading of the information and entered his plea of not guilty. Evidence was adduced by the State, but none by the defendant.

In this connection, section 29-203, R. R. S. 1943, provides in part: "Judges of the district courts shall have the same powers * * * for crimes and offenses committed in their respective districts as any of the magistrates aforesaid have in their respective counties."

A district court, within its district, is authorized to exercise the powers of examining magistrates generally, with respect to preliminary hearings of persons accused of the commission of a felony. See Van Buren v. State, 65 Neb. 223, 91 N. W. 201.

"It is discretionary with the district court whether it will sit as an examining magistrate, and its ruling in that regard will not be disturbed where no abuse is shown." State v. Dennison, 60 Neb. 192, 82 N. W. 628.

It is immaterial whether the information filed in the district court charging the defendant under the provisions of section 28-201, R. R. S. 1943, is called an amended information or just an information. It is apparent from the record that every constitutional and statutory right which protected the substantial rights of the defendant was carried out. This assignment of error is without merit.

The defendant contends the trial court erred in refusing to call 24 jurors into the box before permitting the State and the defendant to exercise their six peremptory challenges each.

There were 18 jurors called into the box, all of whom were passed for cause. The court required the defendant to exercise three of his peremptory challenges at that time, and also the State was required to do so. Additional jurors were interrogated by each side and passed for cause, then the balance of the peremptory challenges, that is three for each side, were exercised.

We find no legal requirement that 24 prospective jurors must be passed for cause before the parties are required to exercise their peremptory challenges. Section 29-2005, R. R. S. 1943, makes no such provision. While the usual course of procedure may not have been followed, as indicated in Mathes v. State, 107 Neb. 212, 185 N. W. 425, we find no prejudicial error, especially so when none is shown by the defendant, nor in what manner he was prejudiced by the court's action. The assignment of error cannot be sustained.

The defendant assigns as error that public records, such as school census records and duplicate driver's licenses testified to by the parties having custody and charge of such records, were not competent to show the age of the principal, Dale Sherrick.

Section 25-1279, R. R. S. 1943, provides for the admission in evidence of certified copies of all records belonging to any public office.

A public record is evidence of those matters which are properly shown therein. The custodian of a public record may explain it. This is a well-established rule. See, 32 C. J. S., Evidence, § 644, p. 509, § 645, p. 509. This assignment of error is without merit.

The defendant assigns as error the action of the trial court in permitting a transcript of the testimony of Dr. Rundquist, taken at the preliminary hearing of the defendant, to be read into the record.

The State offered this evidence on the ground that a subpoena had been issued and returned, that the witness could not be located, and was not available to testify. Objection was made to its admission on the grounds of hearsay and no proper foundation laid for its admission in evidence. This objection was overruled; it should have been sustained.

In Koenigstein v. State, 103 Neb. 580, 173 N. W. 603, we said that when a witness, now living, has been previously examined in open court with the opportunity for cross-examination, which has been fully availed of, and the witness cannot be produced for examination at the second trial, the evidence so given upon a former trial for the same offense may be used at the subsequent trial. See, also, Meyers v. State, 112 Neb. 149, 198 N. W. 871; Trobough v. State, 122 Neb. 7, 238 N. W. 771; Jackson v. State, 133 Neb. 786, 277 N. W. 92; Dolen v. State, 151 Neb. 76, 36 N. W. 2d 566. It is immaterial whether such testimony was adduced at a preliminary hearing or in a former trial for the same offense. See Jackson v. State, *supra*.

Neither the subpoena nor the return thereon is in evidence. There is no testimony by the officer in whose hands it was placed that he made a diligent search and inquiry as to the whereabouts of this witness, whether or not the witness could be found, or any other evidence

to the same effect. There is just the statement of the county attorney that a subpoena had been issued and returned. There must be evidence of diligence on the part of the prosecution to locate the witness, and evidence of the unavailability of the witness to testify. See, Koenigstein v. State, *supra;* Meyers v. State, *supra;* Jackson v. State, *supra;* Spaulding v. Chicago, St. P. & K. C. Ry. Co., 98 Iowa 205, 67 N. W. 227.

It is apparent that no sufficient foundation was laid for the admission of this testimony, and there was no sufficient showing that the witness was not available to testify or that he could not be in attendance at the trial. We sustain the assignment of error.

The defendant contends that the trial court erred in unduly restricting cross-examination of Dave Carleton, an accomplice called for the State as a witness.

Great latitude should be allowed in the cross-examination of an accomplice who testifies for the State on a trial of his associates. He must disclose all that he and his associates may have said or done in relation to the offense, and may be required to disclose whether he had been promised leniency or immunity for testifying. See 58 Am. Jur., Witnesses, § 655, p. 362.

In the instant case, from an examination of the cross-examination of the accomplice, it is apparent that this cross-examination was unduly restricted. The defendant had a right to test the credibility of this witness's testimony by eliciting from him questions on cross-examination in keeping with the rule as above stated.

The testimony of an accomplice, testifying on behalf of the State in a criminal prosecution, is not regarded with favor and should be closely scrutinized and received with caution. See, Henderson v. State, 135 Fla. 548, 185 So. 625, 120 A. L. R. 742; Gibbs v. State, 37 Ariz. 273, 293 P. 976, 74 A. L. R. 1105; 58 Am. Jur., Witnesses, § 868, p. 497; People v. Koukol, 262 Mich. 529, 247 N. W. 738, 87 A. L. R. 878.

We find that the trial court committed prejudicial error

as contended for by the defendant.

The defendant assigns as error that the trial court erred in unduly restricting the cross-examination of the prosecutrix. We deem it unnecessary to set out the specific questions and answers on cross-examination which demonstrate whereby defendant was deprived and restricted in the cross-examination of the prosecutrix. Suffice it is to say that the defendant was not permitted to elicit testimony as to whether or not the prosecutrix had met and been out with the defendant on previous occasions, or had been out with Dale Sherrick or Dave Carleton; what occurred between the defendant and the prosecutrix immediately before she testified she had intercourse with him; the position of the car with reference to whether it could be seen by other cars that might be in the immediate vicinity; whether or not the doors of the car were open at the time she testified she had intercourse with the defendant and Dale Sherrick; whether or not they met any other cars on the way to the golf course; and other matters connected with the surrounding circumstances when the alleged crime was committed.

Questions calling for evidence tending to show the improbability of, or to throw doubt upon, statements made in the examination in chief are proper upon cross-examination. See, Schrandt v. Young, 62 Neb. 254, 86 N. W. 1085; Lillie v. Modern Woodmen of America, 89 Neb. 1, 130 N. W. 1004; Fitch v. Martin, 84 Neb. 745, 122 N. W. 50.

The time and place of, and the circumstances surrounding or connected with, a transaction or occurrence testified to on direct examination are proper subjects of inquiry on cross-examination. 70 C. J., Witnesses, § 804, p. 636.

In the prosecution for such a crime as here being considered, great latitude should be allowed in cross-examination of the prosecuting witness. Such a witness may be cross-examined with reference to matters pertinent

to the issues in the case concerning which she has testified to or referred to in her direct examination, and as to matters bearing upon her credibility and the weight to be given her testimony. See 70 C. J., Witnesses, § 833, p. 680.

We are cognizant of the fact that the prosecutrix was incapable, legally, of giving her consent, and evidence to such effect must be and was properly rejected. We are also cognizant that any previous act of immorality, if any, on the part of the prosecutrix could not be inquired into in a case of statutory rape. See, Liebscher v. State, 69 Neb. 395, 95 N. W. 870; Bailey v. State, 57 Neb. 706, 78 N. W. 284, 73 Am. S. R. 540; Frank v. State, 150 Neb. 745, 35 N. W. 2d 816; Stapleman v. State, 150 Neb. 460, 34 N. W. 2d 907; Schlegel v. State, 143 Neb. 497, 10 N. W. 2d 264; 44 Am. Jur., Rape, § 91, p. 959; Annotation, 65 A. L. R. 425. See, also, Sherrick v. State, *ante* p. 623. We conclude, from an examination of the record, that the trial court unduly restricted the cross-examination of the prosecutrix, and by so doing committed prejudicial error.

The defendant predicates error on the refusal of the trial court to give several requested instructions, all of which have been examined and found either not to be pertinent to the crime charged, or mere abstract propositions of law which were given in substance by the trial court in its instructions to the jury.

"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, 156 Neb. 735, 57 N. W. 2d 761. See, also, Pauli v. State, 151 Neb. 385, 37 N. W. 2d 717; Kirkendall v. State, 152 Neb. 691, 42 N. W. 2d 374; Luster v. State, 148 Neb. 743, 29 N. W. 2d 364.

Other assignments of error need not be discussed.

For the reasons given in this opinion, the judgment of the trial court should be, and is hereby, reversed, and the cause remanded for a new trial.

REVERSED AND REMANDED.

IN RE APPLICATION OF LOUP RIVER PUBLIC POWER DISTRICT. JESSE B. HIGGINS, APPELLANT, V. LOUP RIVER PUBLIC POWER DISTRICT, A PUBLIC CORPORATION, APPELLEE.

61 N. W. 2d 213

Filed November 27, 1953. No. 33353.

1. **Eminent Domain.** The right to exercise the power of eminent domain must be conferred by statute, either in express words or by necessary implication. Such power being in derogation of common right, the acts conferring it are to be strictly construed in favor of the landowner.
2. ———. Where a statute requires that an attempt to agree with the owner shall first be made before the institution of condemnation proceedings to take private lands for public use, such provision is mandatory, and condemnation proceedings instituted without first making a bona fide attempt to agree with the owner are subject to direct attack.
3. ———. The attempt and failure to agree must be alleged and proved, and this must appear on the face of the record.
4. ———. An allegation of failure or inability to agree with the owner as to the purchase of the property, the value thereof, or the amount of damages, must be proved where such failure or inability is made a condition precedent by statute.
5. ———. Condemnation proceedings commenced in a county court contemplate an informal hearing by the appraisers, a view of the lands, no record of testimony, and a report of damages assessed to be filed subject only to the right of appeal.
6. **Eminent Domain: Appeal and Error.** The provisions of section 74-308, R. R. S. 1943, are regarded as mandatory and jurisdictional, and where objection is made that before the institution of condemnation proceedings in the county court to take private lands for public use no attempt was made by the condemner to agree with the condemnee as to the amount of damages for the taking of said land for a right-of-way, such objection may be raised on appeal to the district court.

APPEAL from the district court for Gage County: CLOYDE B. ELLIS, JUDGE. *Affirmed in part, and in part reversed and remanded with directions.*

Carstens & Pickett and *Perry & Perry*, for appellant.

Walter, Albert & Leininger and *Leslie H. Noble*, for appellee.

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

MESSMORE, J.

This is an action in eminent domain brought by the Loup River Public Power District, a Nebraska public power corporation, appellee, the purpose of which is to acquire a right-of-way for the construction and maintenance of an electric transmission line in Gage County across the lands of Jesse B. Higgins, appellant, and referred to as appellant herein.

The farm in question consists of 232 and a fraction acres. It is composed of three adjoining 80-acre tracts each extending one-half mile in length east and west, and is operated as a unit. The fraction acres is rectangular in shape, consisting of 7.28 acres taken out of the middle 80 acres. The appellant's residence and farm buildings are on the south 80 acres. The farm is located at the west end of Court Street, the main street running east and west in Beatrice. The city limits are at the east edge of the farm. The buildings are located south of the west end of Court Street, are three city blocks north of the south line of the farm, and occupy from 7 to 8 acres. The main channel of a creek runs through the three 80 acre tracts from northeast to southwest. There is one bridge across this creek.

The appellee actually entered upon the premises August 2, 1951, to construct the line. It is described as a two-pole, three-conductor, 115,000 volt line. This transmission line enters the appellant's land from the northeast, crossing the center of the public road east of the

farm at a point about 250 feet south of the southeast corner of his north 80 acres, continues in a southwesterly direction, and leaves his land about 150 feet east of the southwest corner thereof. There is a three-wire transmission line all the way across this described land. There are a total of 13 poles, all of which appear to be in the south two 80-acre tracts. The first structure from the northeast is a three-pole structure. The line continues southwest to the next structure consisting of two poles a distance of 711 feet, just north of the fraction acres mentioned. The next structure to the southwest consists of two poles at a distance of 550 feet from the second structure. Other structures continuing along the line as heretofore designated are described. The poles in each structure are set about 14 feet 6 inches apart, center to center, and are about 55 feet high. A cross arm carries three strings of bell insulators, each string containing seven bells, from which strings the conductors are suspended. The minimum height of the conductors at the point of suspension is 38 feet, and at the center of the span 25 feet at 120 degrees Fahrenheit. The total distance of the transmission line is 3,995 feet, with a right-of-way 100 feet in width. Where the transmission line enters the farm it immediately crosses an alfalfa field, and continues through the alfalfa field to a brome field. For 100 feet along the transmission line the appellee has cleared off the trees. This transmission line comes within 35 rods of the appellant's home and his farm buildings.

The above is substantially the description of the farm and the transmission line.

The action was instituted in the county court of Gage County, Nebraska, in which court an award for damages was made by appraisers, from which award an appeal was taken to the district court by the appellant herein. In the district court trial was had to a jury, resulting in a verdict and judgment in favor of the appellant for $5,000. The appellee filed a motion for new trial which was sustained. From the sustaining of this motion for

new trial, the appellant has appealed to this court.

While there are several assignments of error advanced by the appellant, the principal assignment of error and the one which determines this appeal is the contention of the appellant that the statutory prerequisite to condemnation proceeding has not been complied with by the appellee, and upon failure of the appellee to so comply, the condemnation proceeding must be dismissed.

There appears in the application of the appellee filed in the county court of Gage County, in paragraph 4, the following: "Your applicant has heretofore attempted to agree with the owners of said lands and the parties hereto as to the amount due them for acquiring an easement for said transmission line over and across said lands, but has been unable to reach an agreement." No other pleadings were filed in the county court.

On appeal to the district court the appellant alleged in paragraph 3 of his petition that the appellee failed to follow the lawful procedure of eminent domain in that appellee specifically failed to attempt to agree with the appellant as to the amount due for acquiring an easement for such transmission line as provided for by law before instituting this condemnation proceeding.

In the amended petition the appellant stated in paragraph 2 that the appellee began the condemnation proceeding by filing its application in the county court of Gage County without first contacting Jesse B. Higgins, appellant, and attempting to negotiate with him as to the purchase price for its right-of-way; that the appellee was required by law to contact and attempt to negotiate with the appellant before filing a condemnation action against him; and that the statutes of this state require, as a condition precedent to any condemnation action, that the condemner must first contact the owner of the property and attempt to arrive at an agreement as to the damages condemnee would suffer by the taking of a right-of-way across his land.

In the second amended petition, the appellant alleged

that he had been ordered by the district court of Gage County, Nebraska, not to again set up the claimed defense set forth in paragraphs 2 and 3 of his amended petition theretofore filed; and that except for the ruling of the district court of Gage County, Nebraska, directing him not to again set forth this claimed allegation, appellant would again allege the same subject matter as set forth in paragraphs 2 and 3 of his amended petition theretofore filed.

The transcript discloses an affidavit made by an employee of the appellee in charge of the procurement of right-of-way. This affidavit is to the effect that he visited appellant's premises for the purpose of negotiating with him as the owner of the lands over which the right-of-way was to be obtained, to ascertain the damages that would be suffered by him. He was unable to contact appellant, but did contact his wife who informed affiant that the appellant was working and it would avail affiant nothing to contact him. There was also reference to other matter collateral to the purpose of the visit made by this affiant. The affiant stated that it was apparent to him that further contact with the appellant or his wife would only cause unpleasantness and animosity toward the affiant and the appellee.

The record made at the trial on this point is in substance as follows: By stipulation of the parties in the absence of the jury and before opening statements were made to the jury it was agreed that in the event appellant was on the witness stand and the questions necessarily involved in presenting the subject matter of the offer to prove had been propounded the same would have full force and effect. The offer to prove was that no offer was made to the appellant for the rights which appellee was attempting to acquire at any time prior to the filing of the appellee's proceeding in the county court of Gage County to condemn the lands of the appellant. The appellee objected to the offer as being incompetent, irrelevant, and immaterial and not tending to prove or

disprove any of the issues in the case; further, that the orders of the trial court entered therein pertaining to the pleadings on file and on the basis of which the trial was to be conducted had eliminated such issue from the case; further, that the attempt to inject such issue in the case was contrary to the record; and that the appellant was represented by counsel and appeared at the original condemnation proceeding held in the county court from which he appealed directly, and was estopped from raising the issue. This objection was sustained.

The condemnation proceeding was commenced in the county court of Gage County on February 27, 1951. The report of the appraisers was filed March 20, 1951. The damages awarded the plaintiff in the amount of $515 was paid into the county court March 22, 1951.

The procedure in the county court contemplates an informal hearing by the appraisers, a view of the lands, no record of the testimony, and a report of damages assessed to be filed subject only to the right of appeal, not to confirmation by the appointing court. It is obvious that the appellant could only raise the proposition here being discussed for the first time in his petition on appeal to the district court.

The appellant sets forth sections 76-704 and 76-702, R. S. Supp., 1951. Section 76-704, R. S. Supp., 1951, reads as follows: "If any condemnee shall fail to agree with the condemner with respect to the acquisition of property sought by the condemner, a petition to condemn the property may be filed by the condemner in the county court of the county where the property or some part thereof is situated."

Section 76-702, R. S. Supp., 1951, reads as follows: "After negotiations have failed, any condemner, or his representative, upon proper identification and after informing the condemnee of the contemplated action is authorized to enter upon any land for the purpose of examining and surveying same in contemplation of bring-

ing or during the pendency of condemnation proceedings under sections 76-701 to 76-724; * * *."

The appellee states it started the condemnation proceeding under section 74-308, R. R. S. 1943, which provides as follows: "Any railroad corporation may purchase and use real estate for a price to be agreed upon with the owners thereof. The damages to be paid by such corporation for any real estate taken as aforesaid, *when not agreed upon,* shall be ascertained and determined by commissioners to be appointed by the county judge of the county wherein such real estate is situated, in conformity with the provisions of section 74-309." (Emphasis supplied.)

It appears by chapter 101, Laws of Nebraska, 1951, relating to eminent domain that section 74-308, R. R. S. 1943, was amended as shown by section 113 on page 501, as follows: "Any railroad corporation may purchase and use real estate for a price to be agreed upon with the owners thereof, and may acquire same through the exercise of the power of eminent domain. The procedure to condemn property shall be exercised in the manner set forth in sections 4 to 24 of this act." Section 4 of the act is now section 76-704, R. S. Supp., 1951, heretofore set out.

Sections 76-702 and 76-704, R. S. Supp., 1951, became effective May 21, 1951, and were not in existence at the time the condemnation proceeding was instituted in the county court of Gage County. This being true, these sections of the statute are not for consideration here. However, the new law which included these sections of the statute did not change the requirement that an attempt to contact the owner of the lands over which the condemner desires to acquire the easement with reference to the subject of damages for so doing be made before condemner proceeds to condemn the lands.

In reviewing section 74-308, R. R. S. 1943, as it appeared before it was amended, the language used therein "when not agreed upon" would indicate that there must

be an attempt on the part of the condemner to contact the condemnee with reference to damages to be paid by it for the right-of-way across the condemnee's lands.

The affidavit heretofore mentioned was not offered in evidence and did not become a part of the record for review in this court. This court has many times held that evidence to be considered on a review of a case must be contained in the bill of exceptions. See, Bryant v. State, 153 Neb. 490, 45 N. W. 2d 169; Darlington v. State, 153 Neb. 274, 44 N. W. 2d 468. There are many other cases to the same effect. We need not discuss the question of the admissibility of this affidavit in evidence.

"The right to exercise the power of eminent domain must be conferred by statute, either in express words or by necessary implication. Such power being in derogation of common right, the acts conferring it are to be strictly construed in favor of the landowner; * * *." 29 C. J. S., Eminent Domain, § 22, p. 806.

The case of Shirley v. Harlan County, 117 Neb. 846, 223 N. W. 284, involves a different statute than section 74-308, R. R. S. 1943. However, language does appear in this opinion which applies to a statute such as 74-308, R. R. S. 1943, which is applicable and is as follows: "Where a statute requires that before the institution of condemnation proceedings to take private lands for public use, an attempt to agree with the owner shall first be made, such provision is mandatory, and the condemnation proceedings are void in case no attempt is made, before beginning them, to come to an agreement with the owner." 20 C. J., Eminent Domain, § 317, p. 892, is cited. 20 C. J., Eminent Domain, § 318, p. 895, is also cited as follows: "In order to satisfy statutory requirement, there must be a bona fide attempt to agree. There must be an offer made honestly and in good faith, and a reasonable effort to induce the owner to accept it."

In the case of Rogers v. Cosgrave, 98 Neb. 608, 153 N. W. 569, the Chicago, Burlington & Quincy Railroad Company made application to the county court of Lancaster

County to condemn certain lands owned by George H. Rogers, Isabella Rogers, and Anna Rogers. The statute involved was section 5945, Rev. St. 1913, which provided in part that the damages to be paid by such corporations *"when not agreed upon"* should be ascertained by condemnation. It will be noted that the language "when not agreed upon" also appears in section 74-308, R. R. S. 1943. In the cited case negotiations were attempted but failed. It appears that there must be an attempt to contact and negotiate with a condemnee with reference to the damages that would be suffered by obtaining right-of-way over lands. It might be mentioned that section 74-308, R. R. S. 1943, is substantially the same as section 5945, Rev. St. 1913.

The attempt and failure to agree must be alleged and proved, and this must appear on the face of the record. See 29 C. J. S., Eminent Domain, § 224, p. 1166. See, also, 29 C. J. S., Eminent Domain, § 258, p. 1227.

Statutory provisions of the type here considered are usually regarded as mandatory and jurisdictional, and it has been stated broadly that objection based on the failure of the record to show that the parties cannot agree may be raised at any time by direct attack. See 29 C. J. S., Eminent Domain, § 224, p. 1172.

In the case of In re Petition of Rogers, 243 Mich. 517, 220 N. W. 808, while the action was not the same as in the instant case nor the statute the same as that involved herein, it appears that the statute made a requirement that the owners of the land over which the highway was to go should be contacted with reference to the damages. An offer was made for settlement which could under no circumstances be acceptable as a bona fide offer. The principal part of the opinion as it applies to the instant case is as follows: "The statute of eminent domain is to be strictly construed, and its jurisdictional conditions must be established in fact and may not rest upon technical waiver or estoppel." The court said that the allegation of the petition with reference to purchase

was sufficient, prima facie, to authorize appointment of court commissioners and open issues of fact, inclusive of jurisdictional prerequisites, but did not prove any alleged fact, call for traverse, dispense with evidence, or bring waiver by failure to move to dismiss before appointment of commissioners. The statute must be strictly construed when the exercise of eminent domain is sought.

"An allegation of failure or inability to agree with the owner as to the purchase of the property, the value thereof, or the amount of damages must be proved where such failure or inability is made a condition precedent by statute, * * *." 29 C. J. S., Eminent Domain, § 266, p. 1238. To like effect see, State ex rel. Bremerton Bridge Co. v. Superior Court, 194 Wash. 7, 76 P. 2d 990; 2 Lewis, Eminent Domain (3d ed.), § 497, p. 893; City of Portland v. Kamm, 132 Or. 317, 285 P. 236; Glass v. Basin Mining & Concentrating Co., 22 Mont. 151, 55 P. 1047; 2 Nichols, Eminent Domain (2d ed.), § 377, p. 1026; City of St. Louis v. Glasgow, 254 Mo. 262, 162 S. W. 596; City of Winston-Salem v. Ashby, 194 N. C. 388, 139 S. E. 764; City of Milwaukee v. Diller, 194 Wis. 376, 216 N. W. 837; Lake Shore & M. S. Ry. Co. v. Cincinnati, W. & M. Ry. Co., 116 Ind. 578, 19 N. E. 440.

On appeal to the district court from the appraisement of damages, if other issues than the question of damages are involved, they must be presented by proper pleadings. See Burnett v. Central Nebraska Public Power & Irr. Dist., 147 Neb. 458, 23 N. W. 2d 661.

The trial court in granting a new trial did not do so on the assignment of error determined in this appeal. However, it is obvious that a new trial must be had, and the judgment of the trial court in granting a new trial is hereby affirmed.

The trial court erred, as pointed out in the opinion, and its judgment in this respect is reversed and the cause remanded with directions to permit the appellant to raise the issue as contended for in his second amended

petition and as set forth in this opinion, the appellee to pay all costs.

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

DOROTHY CRONIN, APPELLANT, V. DALE SWETT, APPELLEE.
61 N. W. 2d 219

Filed November 27, 1953. No. 33378.

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.** 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.
3. **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.
4. **Automobiles.** Generally guests who enter an automobile of another must take such vehicle as they find it and as it pleases the owner, in the exercise of his right of dominion over his property, to maintain it.
5. **Automobiles: Negligence.** However, the owner of an automobile may be subject to liability for bodily harm proximately caused to guests by a defective or dangerous condition therein not known to them when, but only when, the owner knew of the defective or dangerous condition and realized, or should have realized, that it involved an unreasonable risk to them and had reason to believe that they would not discover it or realize the unreasonable risk created thereby and invited, or permitted them to enter or remain therein, without exercising reasonable care to warn them thereof and the risk involved.

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

Fitzgerald, Hamer, Brown & Leahy, for appellant.

Wear & Boland, for appellee.

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

WENKE, J.

Dorothy Cronin brought this action in the district court for Douglas County against Dale Swett. It is a tort action based on alleged negligent conduct of defendant in driving his car while plaintiff was riding therein as a guest. This conduct, it is alleged, caused the car to leave the paved surface of the highway and crash into a ditch, resulting in plaintiff being seriously injured. It also included a cause of action for damages which her husband, Murt F. Cronin, sustained as a result thereof for medical, hospital, and surgical expenses necessarily incurred for the care of his wife because of the injuries she suffered and for loss of her services, which causes of action he had assigned to her. After both parties had introduced their evidence and rested the trial court sustained defendant's motion for a directed verdict. This motion was based on several grounds, including the contention that the evidence failed to establish gross negligence on the part of the defendant which was the proximate cause of the accident. The trial court thereupon dismissed the action. Plaintiff filed a motion for a new trial and, from the overruling thereof, perfected this appeal.

The accident herein involved happened sometime between 10 and 11 p. m. on Saturday, January 13, 1951. It occurred on the north curve of a Y on Federal Highway No. 275 about 2 miles south of Waterloo, Nebraska. This Y is located about 18 miles west of Omaha where Federal Highway No. 275, coming from Fremont, Nebraska, joins with Federal Highway No. 30 Alternate,

coming from Wahoo, Nebraska, to become what we will herein refer to as the Dodge Street road. The Dodge Street road is a four-lane highway with a 42-foot paved surface as it approaches this Y. Appellee's car, which he was driving from Omaha to Fremont, ran off the west edge of the paved surface of Federal Highway No. 275 just after it had left the Dodge Street road. Upon leaving the paved surface it traveled across the shoulder of the road and down a 3-foot bank, turned over, and stopped upside down. When it stopped it was about 100 feet from where it left the paved surface of the highway and about 50 feet west thereof. In the car at the time were appellee and his wife, Margaret, and appellant and her husband, Murt. The latter couple was riding in the back seat. Appellant, as a result of what happened, was thrown out of the car and seriously injured.

Appellant, as a basis for her right to recover, alleged: "That at the time of and immediately prior to said accident, the defendant was guilty of the following grossly negligent acts and omissions and each of them: 1 - For a period of more than five days prior to said accident, defendant knew that the steering mechanism of said automobile was defective, inadequate, inefficient and was not operating properly, but he failed and neglected to have same corrected or repaired. 2 - That although the defendant knew prior to said accident that said steering mechanism was defective, inadequate and inefficient and was not operating properly, he wholly failed to warn the plaintiff of that fact and invited the plaintiff to ride in said automobile. 3 - That although the defendant knew prior to said accident that the said steering mechanism was defective and was not operating properly, he drove said automobile around the said curve at a speed of 45 to 50 miles per hour."

As stated in Paxton v. Nichols, *ante* p. 152, 59 N. W. 2d 184: "Since plaintiff was riding as a guest, she could not recover unless the evidence adduced by her was sufficient to establish by a preponderance of the evi-

dence that her driver was grossly negligent in some manner as alleged and that such negligence proximately caused the accident and her injuries."

Since appellant was riding as a guest the first question raised by this appeal is, is the evidence adduced in support of these allegations sufficient to support a finding that appellee was guilty of gross negligence? In determining whether or not appellant made a prima facie case in this regard 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." Montgomery v. Ross, 156 Neb. 875, 58 N. W. 2d 340. See, also, Bishop v. Schofield, 156 Neb. 830, 58 N. W. 2d 207.

"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, *supra.*

"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, *supra.* See, also, Paxton v. Nichols, *supra.*

"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." Montgomery v. Ross, *supra.* See, also, Bishop v. Schofield, *supra;* Cunning v. Knott, *ante* p. 170, 59 N. W. 2d 180; Paxton v. Nichols, *supra.*

In regard to defective conditions of automobiles being

grounds for recovering in guest cases, we said in Paxton v. Nichols, *supra*: "An automobile host may be liable for injuries to a guest proximately caused by a defective condition of his automobile, if he knew of such defect and realized or should have realized that it involved an unreasonable risk to his guest; if the defect was so concealed or hidden as not to be reasonably obvious or patent to his guest; if the defect and the risk involved were in fact unknown to the guest; and if the host failed to warn the guest as to the defective condition and the risk involved therein."

This court, in Paxton v. Nichols, *supra,* In re Estate of O'Byrne, 133 Neb. 750, 277 N. W. 74, and Heesacker v. Bosted, 131 Neb. 42, 267 N. W. 177, has held that:

Generally guests who enter an automobile of another must take such vehicle as they find it and as it pleases the owner, in the exercise of his right of dominion over his property, to maintain it.

However, the owner of an automobile may be subject to liability for bodily harm proximately caused to guests by a defective or dangerous condition therein not known to them when, but only when, the owner knew of the defective or dangerous condition and realized, or should have realized, that it involved an unreasonable risk to them and had reason to believe that they would not discover it or realize the unreasonable risk created thereby and invited, or permitted them to enter or remain therein, without exercising reasonable care to warn them thereof and the risk involved.

"What amounts to gross negligence in any given case must depend upon the facts and circumstances of each case." Montgomery v. Ross, *supra*. See, also, Bishop v. Schofield, *supra*.

Appellee, who was 30 years of age at the time of trial, is a farmer. He has always lived with his parents on their farm in Greeley County, Nebraska, located about 6 miles southwest of Spalding. This is about 160 to 170 miles from Omaha. In August of 1950 he purchased a

new four-door Dodge sedan. The car was used in connection with his farming operations and, at the time of the accident, had been driven about 5,000 miles.

Appellee had known Margaret Cronin, now his wife, and Murt F. Cronin, appellant's husband and Margaret's brother, for many years as they formerly lived in the vicinity of Spalding. Appellee and Margaret became engaged and planned to be married in Omaha at 11 a. m. on January 13, 1951. Murt F. Cronin was at that time engaged to appellant. Plans were made to have a double wedding ceremony.

Appellee testified that about 2 or 3 weeks before the accident there was something about his car that attracted his attention; that he noticed it did not drive good; that it acted as if the wheels were out of line, or something like that; that it pulled to one side of the road more or less; that it pulled back and forth; that it pulled to one side and the other; that he was not able to steer it in a straight course; that this first happened while he was traveling on a dirt road; that it was more pronounced on dirt and gravel roads than on pavement; that the speed at which it was driven did not seem to make any difference; that the trouble continued whenever he drove it; and that he continued to drive the car without doing anything about it.

He further testified that on Monday, January 8, 1951, he drove to Grand Island, a distance of about 58 miles, to buy a suit for the wedding; that while there he took the car to the Chevrolet garage to have it washed; that he told them at the garage to wash the car and to check the steering business or line up the wheels, whatever it was, as the car was not driving right; that the garage did not say whether they would be able to do it; that he left it there 2 or 3 hours; that when he got back they had washed the car but told him they had not had time to fix it; that he then drove the car home; that he continued to have the same trouble; and that he continued to use the car.

On Wednesday, January 10, 1951, appellee drove the car to Omaha. There it was used from Wednesday to Saturday, inclusive, in connection with preparations for the wedding. It is significant that during this time all those who testified they had ridden in the car during this period of time, which included appellant, her husband, his sister Betty Cronin, and appellee's wife, testified they noticed nothing wrong with the operation of the car, and those who drove it, which included appellant's husband and his sister Betty, testified they noticed nothing wrong with the steering apparatus or mechanism while doing so.

The parties were married at 11 a. m. on January 13, 1951. That evening, between 9:30 and 10 p. m., they left Omaha for what appellee planned as a trip to Fremont for the purpose of staying overnight. They proceeded west on the Dodge Street road to the Y. Appellee drove his car onto the north curve of the Y, or toward Fremont. After his car had entered the curve, the paved portion of which is about 20 feet wide, he testified he got about half way around the Y when his car shot off the road toward the northwest; and that it left the paved portion of the highway, going over a 3-foot grade, and then overturned, coming to rest on its top. The record shows appellee was, at the time, driving not over 50 miles an hour; that the paved surface was clear and dry, although there was some ice and snow on the shoulder; that the weather was clear although the night was dark; and that the curve, which was long and easy, was on the level.

After the accident appellee called the Nebraska Safety Patrol and he and Sergeant Vernon W. Byler of the patrol, now a Lieutenant, investigated the accident. Byler testified appellee told him that he had been having a little trouble with his car; that he had taken it to a garage in Grand Island for them to check; and that they thought it needed repair but that they could not do it that particular day. Appellee admits he told Byler he

had taken the car to Grand Island to be fixed and that they had not had time to do it. There is no evidence in the record that anyone at the garage in Grand Island told appellee that they thought his car needed repairs.

Murt F. Cronin, appellant's husband, testified that about 8 a. m. on the Sunday following the accident appellee told him he was sorry that the steering arm on the car broke and that he wished he had stayed in Grand Island and had it fixed. Appellee admits he told him he was sorry and wished he had taken the car and had it fixed. There is no evidence in the record showing the steering arm of the car broke.

Appellant testified that the day she came home from the hospital that appellee talked to her in her apartment; that he told her his car had been acting up; that he had taken it to Grand Island to get it fixed; but that he just did not have time to wait for it to be done. Appellant admits he had the conversation and that he told her about the car and that he was sorry the accident happened.

There is no evidence of the exact nature of the alleged defect or that the car was not in a reasonably safe condition or that the driver realized or should have realized that the driving of it, as he did, involved any unreasonable risk to his guests. His lack of such realization is fully evidenced by the fact that he not only entrusted his own safety but also that of his bride, his brother-in-law, and sister-in-law therein. We do not think, under the circumstances here shown by the record, that appellee was negligent in driving his car.

While not material, in view of what we have already said, there is another serious deficiency in appellant's proof. The record does not show what caused the car to leave the highway. That appellant must do so is elementary for a guest must not only prove that a dangerous defect existed but that such defect caused the accident for if it did not cause the accident there can be no liability. See, In re Estate of O'Byrne, *supra;* Paxton v.

Nichols, *supra*. Appellee testified the car did not skid but just shot out of the road toward the northwest and that he was not able to control the steering thereof. Byler testified he could not determine what had caused the car to leave the highway but that appellee told him he lost control of the car, that he was unable to turn it right, and that it just kept on going straight ahead. All of the witnesses who were riding in the car at the time testified there was nothing about appellee's manner of driving, up to the time the car left the highway, or the operation thereof that caused them any concern. However, appellee further testified he did not know if he could have turned it to the right for although he supposed he made an effort to do so he could not say that he did. There is no evidence that a check was made of the steering mechanism after the accident. Under this factual situation to say a previously defective steering mechanism caused the accident would be, at best, only a conjecture, surmise, or possibility. A verdict based on such evidence could not be sustained.

We find the decision of the trial court sustaining appellee's motion for a directed verdict to have been proper. Consequently its order dismissing the action was correct. Its decision is therefore affirmed.

AFFIRMED.

CARTER, J., participating on briefs.

GEORGE E. GALLAGHER ET AL., APPELLEES, V. EVERETT L. VOGEL, APPELLANT, IMPLEADED WITH RUBY G. VOGEL, APPELLEE.

61 N. W. 2d 245

Filed November 27, 1953. No. 33380.

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 evi-

dence, 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. **Contracts.** Contracts must receive a reasonable construction, so as to give effect to the intention of the parties thereto and carry out, rather than defeat, the purpose for which they were executed.

3. ———. Language used in a contract prepared by one of the parties thereto, which is susceptible to more than one construction, should receive such a construction as the party preparing the same at the time supposed the other party would give to it, or such a construction as the other party would be fairly justified in giving to it.

4. ———. The intention of the parties governs the meaning of words employed. A prospective rather than a retrospective meaning is favored, and the context determines whether a word is used in its broad or restricted sense.

5. **Property.** "Junk" is defined as articles that have outlived their usefulness in their original form, and are commonly gathered up and sold to be converted into another product, either of the same or a different kind.

6. **Damages.** While the measure of damages in an action for the breach of an agreement by the seller not to re-enter business in competition with the buyer is usually difficult of exact computation, he who is damaged will not be precluded from recovering because of that fact.

7. ———. In such an action, the plaintiff will be called upon, in order to recover substantial damages, to furnish such data to enable the court, with a reasonable degree of certainty and exactness, to estimate the actual damages, and if he fails to do this he can recover only a nominal sum.

8. ———. The general rule is that the party injured by a breach of contract is entitled to recover all of his damages, including gains prevented, as well as losses sustained, provided they are certain and such as might naturally be expected to follow the breach.

9. **Monopolies: Contracts.** Partial restraints in the exercise of any business are not unreasonable when they are ancillary to a valid contract affecting the business of the party in whose favor they are imposed, if made in good faith and are apparently necessary to afford reasonable protection to such party.

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

John A. Wagoner, for appellant.

Higgins & Higgins, for appellees.

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

MESSMORE, J.

The plaintiffs, George E. Gallagher and Dorothy M. Gallagher, brought this action in equity in the district court for Hall County against Everett L. Vogel and Ruby G. Vogel, defendants, the purpose of the action being to recover damages in the amount of $7,800 for a breach of a written contract entered into by and between the plaintiff George E. Gallagher and the defendant Everett L. Vogel, and to enjoin Everett L. Vogel from engaging in the junk business in violation of the agreement. The case proceeded to trial as between George E. Gallagher and Everett L. Vogel as being the proper parties in interest. The trial court rendered judgment against the defendant in the amount of $2,160, and enjoined the defendant from selling or otherwise disposing of usable parts from dissembled cars, and from owning and operating a junk business in violation of the agreement. The defendant filed a motion for new trial. Thereafter, the trial court modified the judgment by reducing the amount and granting the plaintiff a recovery of $1,350 instead of $2,160, and overruled the defendant's motion for new trial. From this order the defendant appeals to this court.

For convenience we will refer to the parties George E. Gallagher as plaintiff and Everett L. Vogel as defendant.

The record discloses that the plaintiff had engaged in farming, and had some experience in the junk business. On or about November 1, 1949, he became interested in purchasing the defendant's business. The defendant had been engaged in the junk business since 1933, and carried on his business at the west edge of Wood River. He had been, and was, engaged in the used-car business at the time that the plaintiff entered into a written

contract with the defendant on November 25, 1949. The terms of the agreement were to the effect that the plaintiff purchased from the defendant and his wife Ruby G. Vogel, 6½ lots in Wood River, Nebraska, and in addition, the building on said lots, tools, equipment, and stock of merchandise, junk and things pertaining to the junk business. The consideration was $6,000, $2,000 of which was paid in cash and the balance of $4,000 was due and payable when the abstract of title was delivered with the deed, clear of encumbrance. The agreement further provided: "Its (sic) further agreed by and between above named parties, that party of the first part (the defendant) will not start, own or operate a junk yard within 15 miles of Wood River, Nebraska."

The plaintiff took possession of the business on November 25, 1949. The deed was dated December 22, 1949, and was recorded February 20, 1950. The deed was placed in escrow until the purchase price was paid and eventually delivered to the plaintiff in April or May 1951.

The plaintiff testified that the reason the covenant was put in the contract to purchase was to eliminate competition from this type of business and to enable him to make a living in conducting the business.

About 3 weeks after the time the plaintiff took possession of the business, the defendant resumed the junk business on the east edge of Wood River in the Kinneman building. There was no sign over the building to show the business in which the defendant was engaged. About 4 weeks after the date of taking possession of the business, the plaintiff contacted the defendant and asked him what he was going to do about the contract. The defendant informed him that he was going to find another location in a different town. At that time the plaintiff inspected the defendant's yard and noticed several used cars in the back thereof which were partially torn down, and a truck on the inside of the building which was

also partially torn down. These cars had no license plates on them. The defendant also had on hand a stock of starters, generators, tires, and batteries, and was transacting the same kind of business as the plaintiff. About 4 months later, the plaintiff again went to the defendant's place of business. The defendant was still wrecking cars, and had four or five on hand. The defendant was conducting the same type of business in which the plaintiff was engaged. The defendant again told the plaintiff that he was looking for a location in another town to start a business. On May 24, 1951, the defendant purchased a building in Wood River, moved into it, and conducted the same type of business as he had formerly conducted. The plaintiff visited the defendant's place of business and noticed the defendant was still wrecking cars and had a number of wrecked cars on hand, and a display of merchandise for sale of the same kind as the plaintiff sold. Again on February 1, 1952, the plaintiff looked over the defendant's place of business and saw a number of cars in the yard. Another person who accompanied the plaintiff took pictures of these cars. These pictures are in evidence for the purpose of showing that some of the cars had been torn down, were being dissembled, and parts taken therefrom. These cars were for the most part just junk. After this action was started, the plaintiff visited the defendant's place of business and noted that all of the cars which were shown in the pictures were gone, and the defendant had cleaned up his yard. The plaintiff went over to the defendant's place of business after it had been cleaned up, and at that time he saw displayed the front and rear ends and wheels of cars, and some used iron.

The plaintiff's books were received in evidence, showing his sales and purchases during the period of time the defendant is alleged to have engaged in the same type of business as the plaintiff in violation of the agreement, and until the defendant had ceased to carry on

such business, which constituted a period of 27 or 28 months. The plaintiff testified that his margin of profit was 50 percent. He estimated his loss during this period to be $200 a month. He was assisted in determining this figure by his counsel, and in making his computation he used the months the defendant was in competition with him and also the months he was not in competition with him. He made a comparison of the business accordingly.

The assessment records of the defendant for the years of 1950 and 1951, disclose certain cars, some of which were of the value of $30 and less, and some $40, one at $100, one at $590, and one at $240. This was for the purpose of showing that cars that were taken in by the defendant were in fact cars ready to be junked. Also, the purchases and expenditures of the defendant for the same period of time were shown in evidence.

On cross-examination the plaintiff testified that at the time he purchased the business, there was no inventory taken; that the value of the iron and old cars which were referred to as "clunkers" or "junkers" was $2,000; that he also purchased used cars and sold them; that he kept a stock of merchandise on hand for the purpose of repairing cars, as well as for sales; that he understood the used-car business went along with the junk yard when he bought the business; and that when the plaintiff purchased the business nothing was said about the used-car dealer's license. The plaintiff obtained a used-car dealer's license in 1950. The plaintiff further testified that he does not junk all of the cars he purchases, and the certificates of title on the cars he does junk are sent to the Department of Motor Vehicles in Lincoln for cancellation. He further testified that the procedure in junking a car is to tear the body and the wheels off, cut up the frame, use the parts that are good for resale, and throw the rest into an iron pile.

The defendant testified that when he sold the business to the plaintiff, he was the owner of a used-car dealer's

license which was known to the plaintiff, and it was understood that the used-car dealer's license would not be transferred. After selling the business, the defendant purchased used cars at various places and repaired them. He kept a stock of parts on hand for such purpose, and to sell. He transferred the certificate of title to the purchaser, and did not send it in to the proper authorities for cancellation. He further testified that he did not junk a car after November 24, 1949; that he did take parts off of used cars, such as tires, generators, and batteries, and resold the usable parts; that he was also engaged in the selling of second-hand furniture; and that all of the merchandise that he purchases is of a usable nature, some of which requires repairs, and this he does. He further testified that 60 percent of his business consists of sales of used cars, 11 percent sales of tires and tubes, 18 percent sales of used furniture, and 6 percent sales of truck and automobile accessories, new and used. He buys and keeps in stock accessories such as bearings, coils, and headlight bulbs. He is not a junk collector, and does not deal in junk. His version of the junk business is, as testified to by him: "I would take and buy cars and tear them down and throw some iron in this pile and sold (sic) it out and sell a few parts; buy radiators, batteries, old tires, magnetoes and anything that says (sic) junk. Junk means stuff of that sort." He bought all kinds of machinery, farm machinery and tractors, assembled them, saved some parts, and when he accumulated a carload, he would ship it.

With reference to the cars in the pictures in evidence, the defendant testified that he sold 15 of such cars to a Mr. Perkins. Six or seven of this number would run. The defendant had taken a few parts off of some of the cars to be used on other cars. He delivered the title to these cars to Perkins, and permitted Perkins to tear up the cars on defendant's premises, which took about a month or so.

Perkins testified that he was in the junk business;

that he purchased 12 or 14 cars and a truck from the defendant in January 1952, and was permitted to cut the cars up on the defendant's premises; and that the titles of these cars were transferred to him by the defendant. Some parts of the cars were missing. He took the cars away in February 1952. He was unable to do so prior to that time on account of weather conditions.

A witness engaged in the used car business testified as to the nature of such a business as follows: A used-car dealer has a repair shop where he repairs used cars for resale. Some of the parts used in repairing cars are new, and some are old. The used parts come from a salvage yard and are taken off of used cars. The used-car dealer keeps a stock of parts on hand, which are very rarely sold to customers, but on occasions a sale is made. A used-car dealer usually takes a trade-in of an older car. When he gets possession of a car which cannot be sold as a running vehicle, the car is sold to a junk yard. The owner of the junk yard requires the title, and gets the title.

In determining this appeal, the following rule is applicable: An equitable action is tried de novo in this court. § 25-1925, R. R. S. 1943. Therein we will reach an independent conclusion without referring to the findings of the district court. However, when the evidence therein 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. See, Byram v. Thompson, 154 Neb. 756, 49 N. W. 2d 628. See, also, Hall v. Modern Woodmen of America, 153 Neb. 600, 45 N. W. 2d 630; Wiskocil v. Kliment, 155 Neb. 103, 50 N. W. 2d 786.

With reference to the manner in which a written contract should be interpreted, the following is applicable:

Contracts must receive a reasonable construction, so as to give effect to the intention of the parties thereto

and carry out, rather than defeat, the purpose for which they were executed. See Morse v. General American Life Ins. Co., 130 Neb. 37, 263 N. W. 676.

"Language used in a contract prepared by one of the parties thereto, which is susceptible to more than one construction, should receive such a construction as the party preparing the same at the time supposed the other party would give to it, or such a construction as the other party would be fairly justified in giving to it." Flory v. Supreme Tribe of Ben Hur, 98 Neb. 160, 152 N. W. 295. See, also, Lyman-Richey Sand & Gravel Co. v. State, 123 Neb. 674, 243 N. W. 891, 83 A. L. R. 1301.

The intention of the parties governs the meaning of the words employed. A prospective rather than a retrospective meaning is favored, and the context determines whether a word is used in its broad or restricted sense. See, 17 C. J. S., Contracts, § 300, p. 717, § 295, p. 689; Clough v. Standard Oil Co., 130 Neb. 136, 264 N. W. 170.

In consideration of the foregoing authorities, it is the duty of this court to review the evidence to determine the nature of the business carried on by the defendant at the time the contract was entered into, how the parties regarded the business, and the intention of the parties with respect to the business when the contract was entered into.

Much discussion appears in the brief of the defendant to the effect that there is a distinction between the business of a used-car dealer and that of a junk dealer; that it was never the intention of the defendant to dispense with his used-car business; and that the decision in the instant case depends upon the definition of the term "junk."

"Junk" has been defined in various ways. The common and usual definition of the word "junk" is as follows: "Worn out and discarded material in general that may be turned to some use; especially old rope, chain, iron, copper, parts of machinery and bottles gathered or bought up by tradesmen called junk dealers; * * *." Black's Law

Dictionary (4th ed.), p. 988. See, also, 23 Words and Phrases (Perm. ed.), pp. 349, 350, 351; Melnick v. City of Atlanta, 147 Ga. 525, 94 S. E. 1015; City of Chicago v. Iroquois Steel & Iron Co., 284 Ill. App. 561, 1 N. E. 2d 241.

"Junk" has been defined as articles that have outlived their usefulness in their original form, and are commonly gathered up and sold, to be converted into another product, either of the same or a different kind. See, City of Watseka v. Blatt, 320 Ill. App. 191, 50 N. E. 2d 589.

A junk shop is a place or shop where odds and ends are purchased and sold. See, City Council of Charleston v. Goldsmith (S. C.), 12 Rich. Law 470; Grace Iron & Steel Corp. v. Ackerman, 123 N. J. L. 54, 7 A. 2d 820.

We conclude that at the time the contract was entered into between the parties, the intention of the parties was to consider the business as it was at that time conducted and recognized as a junk business by the defendant and the plaintiff.

In cases such as the instant case, damages are rarely susceptible of accurate proof; but the measure of damages, expressed generally, is the value of the business lost to the plaintiff--not the gain of defendant, which may be more or less than plaintiff's loss; though such gain may be considered in evidence, it should be shown to correspond in whole or in part with the loss of plaintiff. See, Gregory v. Spieker, 110 Cal. 150, 42 P. 576, 52 Am. S. R. 70.

While the measure of damages in an action for the breach of an agreement by the seller not to re-enter business in competition with the buyer is usually difficult of exact computation, he who is damaged will not be precluded from recovering because of that fact. But the plaintiff will be called upon, in order to recover substantial damages, to furnish sufficient data to enable the court, with a reasonable degree of certainty and exactness, to estimate the actual damages, and if he fails to do this he can recover only a nominal sum. See,

Scotton v. Wright, 32 Del. 192, 121 A. 180; Salinger v. Salinger, 69 N. H. 589, 45 A. 558.

The most that can be done is to adduce the pertinent facts and submit them to the trial court to estimate and determine the sum which will afford the injured party reasonable compensation. See Galucha v. Naso, 147 Iowa 309, 126 N. W. 146.

Speaking broadly, the amount recoverable for breach of an agreement by the seller of a business not to engage in competition with the buyer is the loss which the latter has sustained, naturally resulting from the breach.

The general rule is that the party injured by a breach of contract is entitled to recover all of his damages, including gains prevented, as well as losses sustained, provided they are certain and such as might naturally be expected to follow the breach. See Western Union Tel. Co. v. Wilhelm, 48 Neb. 910, 67 N. W. 870.

The measure of damages in the case of a breach of contract is the amount which will compensate the injured party for the loss which a fulfillment of the contract would have prevented or the breach of it has entailed. See, Elvidge v. Brant, 131 Neb. 1, 267 N. W. 169; Western Union Tel. Co. v. Wilhelm, *supra;* Diels v. Kennedy, 88 Neb. 777, 130 N. W. 740; Schrandt v. Young, 2 Neb. Unof. 546, 89 N. W. 607; Merager v. Turnbull, 2 Wash. 2d 711, 99 P. 2d 434, 127 A. L. R. 1142; Annotation, 127 A. L. R. 1156.

This court has said that partial restraints upon the exercise of any business are not unreasonable when they are ancillary to a valid contract affecting the business of the party in whose favor they are imposed, if made in good faith and are apparently necessary to afford reasonable protection to such party. See, 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; Wittenberg v. Mollyneaux, 60 Neb. 583, 83 N. W. 842.

From an examination of the record and the authorities

heretofore set out, we conclude the judgment of the trial court should be, and is hereby, affirmed.

AFFIRMED.

CARTER, J., participating on briefs.

INA LAURINAT, APPELLEE, V. KATHRYN GIERY, APPELLANT.
61 N. W. 2d 251

Filed November 27, 1953. No. 33382.

1. **Automobiles: Negligence.** A motor vehicle having started to cross an intersecting street in accordance with the signal light is ordinarily entitled to complete the crossing notwithstanding a change in lights.
2. ———: ———. A person entering a street intersection with a traffic light in his favor is under an obligation to use due care and to yield the right-of-way to vehicles already in the intersection. His right-of-way is subject to the rights of those already in the intersection.
3. ———: ———. A motorist is not obligated to stop his motor vehicle or turn aside because a person gets so close to it that it is possible for a person to walk into it.
4. **Negligence.** In an action in tort for damages for personal injuries negligence is never presumed and cannot be inferred from the mere fact that an accident happened.

APPEAL from the district court for Hall County: WILLIAM F. SPIKES, JUDGE. *Reversed and remanded with directions.*

Gross, Welch, Vinardi & Kauffman and *Louis A. Holmes,* for appellant.

John A. Wagoner, for appellee.

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

SIMMONS, C. J.

This is an action for damages brought by plaintiff, a pedestrian, against defendant the driver of an automobile. It is an intersection case.

Plaintiff plead six specifications of negligence. Defendant denied generally, and plead negligence and contributory negligence. At the close of plaintiff's case and again at the close of all the evidence defendant moved for an instructed verdict. These motions were overruled. The trial court submitted the matter to the jury on three specifications of negligence and on contributory negligence. The jury found for the plaintiff and awarded substantial damages. The defendant moved for judgment notwithstanding the verdict. The motion was overruled. Defendant appeals, assigning error as to the rulings on the motion and in other particulars. We reverse the judgment of the trial court and remand the cause with directions to enter judgment for the defendant.

Plaintiff's evidence is summarized first here. Third Street and Walnut Street in Grand Island intersect in a business area. Third Street runs east and west. Walnut Street runs north and south. The streets are paved and level at the area here involved. The width of the streets is not shown, except from the evidence it appears that they are wide enough to permit traffic to move simultaneously in both directions. By calculation the width of Walnut Street may be about 45 feet. Traffic at the intersection is controlled by automatic signals which change from green to red and red to green. The accident happened on the crosswalk leading from the south side of Third Street across Walnut Street.

There are three automobiles whose movements are described in the evidence. The automobile of the defendant is first shown to be crossing the crosswalk at the south side of the intersection, headed south in a straight line and somewhat toward the east side of the west half of Walnut Street. Defendant's car stopped within 20 to 30 feet after the accident. The second automobile is first shown to be in a standing position at the west side of the intersection and headed east. From there it moved east across the intersection and out of the events that followed.

The third automobile is that of the witness Winfrey. It came from the west and slowed down behind the second car, coming within 6 or 8 feet of it, and then as the second car went east, turned to the right and came to a stop on the crosswalk at approximately the same point that had just been passed by defendant's car. There was no car between this witness' car and the car ahead. There is no evidence that defendant's car went between the east-bound car and the Winfrey car. This evidence would point to the fact that defendant's car cleared the west-to-east lane of traffic ahead of the east-bound car.

The accident happened about 11 a. m. on a May morning. The weather was clear, and visibility was good.

Plaintiff was walking east on the south side of Third Street when, entering or about to enter the intersection, she saw the traffic light was green. She does not know whether she stopped or not. She proceeded east. She looked to her right and saw cars stopped in the lane of traffic headed north. She looked to the left and saw a car moving east. She says she was then 3 or 4 feet out in Walnut Street. She did not again look north. There is no testimony that she looked ahead at any time after seeing that the light was green in her favor. About 15 feet out in the street, as she was walking east at a "normal rate" of speed, she made contact with defendant's car. She had not seen it prior to that time. Shortly after the accident she said that the point of contact was with the right-rear fender of defendant's car. On the witness stand she testified that it was the right-front fender, explaining the change of testimony by saying that she was under the impression at first that defendant's car had struck her in making a right turn, but when it was explained to her that defendant was moving from north to south, she knew differently. At no place, however, does she put herself in front of defendant's car or testify that she was struck by the front of

defendant's car. She puts the point of contact as on the right side of defendant's car.

The witness, Winfrey, testified that he was 16 to 20 feet away from the west side of Walnut Street when he observed the traffic signal change. He proceeded east in second gear behind the east-bound car and saw plaintiff hit when he started to make the right-hand turn. Shortly after the accident Winfrey gave a signed statement in which he said "the impact was the right rear fender." On the witness stand he said that all he knew was that the defendant's car hit the plaintiff.

Plaintiff testified that the defendant's car hit her on the left side, and that she suffered serious injuries to her left leg. The plaintiff spun around and came to rest in a sitting position, according to her testimony and that of Winfrey and one other witness Haessler, about 3 or 4 feet west of the point of impact and in the crosswalk, although plaintiff, in a deposition taken 5 days before the trial, marked her sitting position as in the street north and west of the point of impact.

The witness Haessler was walking east behind plaintiff. He did not see defendant's car hit the plaintiff. He saw plaintiff, he thought, "in the air." Although he was within 20 feet or so of her at the time, he heard no impact. By calculation, Haessler's testimony would put the point of impact about 10 to 12 feet east of the curb line.

The evidence offered by defendant is that she was proceeding south at 15 miles per hour or "very slow"; that the light was green in her lane of travel when she entered the intersection; that as she entered and progressed through the intersection she saw a woman, who was rubbing her eyes, standing on the southwest corner just off the sidewalk and in the crosswalk; that defendant moved on through the intersection; that the woman, later identified as plaintiff, was never in her line of vision as she looked ahead; that defendant's mother was with her on the right-front seat; that just as she

was leaving the crosswalk the mother looked back and saw the plaintiff on the paving; that there was no noise to attract her attention; and that no part of the car in front or in the line of vision struck the plaintiff. Defendant testified that she stopped in 15 feet.

Defendant further offered evidence that there were no marks of any kind on the car following the accident. Defendant also offered evidence of a witness who was on the northeast corner of the intersection that he saw a lady walk into the right-rear fender of defendant's car, whirl around, and fall down.

We take up first the assigned error as to the court's refusal to direct a verdict and in denying the motion for judgment notwithstanding the verdict.

The first question presented here is that of whether or not plaintiff proved negligence of the defendant. As against a motion for a directed verdict plaintiff is entitled to have every controverted fact resolved in her favor and to have the benefit of every inference that can reasonably be deduced from the evidence. Scarborough v. Aeroservice, Inc., 155 Neb. 749, 53 N. W. 2d 902.

Plaintiff alleged that she proceeded into the intersection protected by a green light in her favor. The evidence sustains that allegation. She proved also that by an ordinance of the city of Grand Island she was "entitled to the right of way." She alleged that the defendant drove through the intersection against the flow of traffic and that the signal was red for traffic on Walnut Street. The general denial of defendant put in issue that allegation, as well as other allegations of negligence. The trial court submitted to the jury the issue as to whether or not defendant drove 'into and through" the intersection against a red signal. Plaintiff so construes the issue here.

This accident happened at the far side of the intersection so far as defendant's movement is concerned.

There is no direct evidence that defendant entered the intersection against the mandate of a red light.

Every deduction that may be drawn from the evidence points to the contrary conclusion that defendant's car was in the intersection when the lights changed. The evidence of plaintiff's witness Winfrey is that the lights changed from red to green in her favor just as she was entering, or about to enter, the intersection. The evidence is that at that time they changed from green to red against the defendant. Between the time of the change and the impact plaintiff walked east a distance of 15 feet. The evidence of Winfrey is that his car moved from 16 to 20 feet during that time. Obviously the defendant's car moved across the east-bound cars' lane of traffic ahead of the east-bound car. There is no evidence of any delayed movement of the east-bound car. There is no evidence of speed on the part of defendant. The fact that defendant's car was stopped within 30 feet of the impact negatives any such conclusion.

We have then a situation where the defendant was moving through an intersection when the lights changed and plaintiff entered the intersection.

The applicable rules are: A motor vehicle having started to cross an intersecting street in accordance with the signal light is ordinarily entitled to complete the crossing notwithstanding a change in lights.

A person entering a street intersection with a traffic light in his favor is under an obligation to use due care and to yield the right-of-way to vehicles already in the intersection. His right-of-way is subject to the rights of those already in the intersection. Sklar v. Southcomb, 194 Md. 626, 72 A. 2d 11; United States Fidelity & Guaranty Co. v. Continental Baking Co., 172 Md. 24, 190 A. 768; Galliano v East Penn. Electric Co., 303 Pa. 498, 154 A. 805; Valench v. Belle Isle Cab Co., 196 Md. 118, 75 A. 2d 97; Caryl v. Baltimore Transit Co., 190 Md. 162, 58 A. 2d 239; Schindler v. Gage (La.), 59 So. 2d 215; Beard v. Ball, 96 Ind. App. 156, 182 N. E. 102; Radobersky v. Imperial Volunteer Fire Dept., 368 Pa. 235, 81 A. 2d 865; Byrne v. Schultz, 306 Pa. 427, 160 A. 125; Spence v.

Waters, 9 Harr. 582, 4 A. 2d 142; 60 C. J. S., Motor Vehicles, § 360, p. 854; 5 Am. Jur., Automobiles, § 309, p. 671.

Under these circumstances the fact that defendant completed her movement through the intersection, going against a red light in so doing, was not in and of itself a negligent act, and plaintiff was not entitled to recover on that ground.

The second ground of negligence which the court submitted to the jury was that the defendant failed to yield the right-of-way to the plaintiff. The third ground of negligence which the court submitted to the jury was that the defendant failed to turn her automobile so as to avoid striking plaintiff.

The difficulty with these contentions is that plaintiff does not put herself in a position of danger when defendant's car entered the crosswalk. She puts herself in the position of walking into that place of danger, and into the side of a car that, according to her own evidence, was moving straight ahead.

A motorist is not obligated to stop his motor vehicle every time a person gets so close to it that it is possible for a person to walk into it. Schroeder v. Pittsburgh Rys. Co., 311 Pa. 398, 165 A. 733. The same rule would apply to a requirement to turn aside.

Plaintiff and her witness, shortly after the accident, put the point of impact on the side at the right-rear fender. Plaintiff at the time of trial insisted that it was on the right-front fender, but at no time does she put the impact on the front of the car. Obviously if the point of impact was at the front side of the car, there was no turning aside or stopping that would have prevented plaintiff's walking into the side of the car.

We conclude that plaintiff did not prove negligence of the defendant. She proved only that an accident occurred.

"In an action in tort for damages for personal injuries negligence is never presumed and cannot be inferred

from the mere fact that an accident happened." In re Estate of Bingaman, 155 Neb. 24, 50 N. W. 2d 523.

The trial court erred in overruling defendant's motion for an instructed verdict at the close of plaintiff's case and in denying a judgment notwithstanding the verdict. Pursuant to section 25-1315.03, R. R. S. 1943, the judgment of the district court is reversed and the cause remanded with directions to enter judgment for the defendant. Yanney v. Nemer, 154 Neb. 188, 47 N. W. 2d 368.

REVERSED AND REMANDED WITH DIRECTIONS.

ROBERT SALL, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.

61 N. W. 2d 256

Filed December 4, 1953. No. 33347.

1. **Criminal Law: Witnesses.** The credibility of witnesses and the weight of the evidence are for the jury to determine in a criminal case and the conclusion of the jury may not be disturbed by this court unless it is clearly wrong.
2. **Criminal Law: Evidence.** Direct evidence of intent to commit a crime is not required. It may be established by circumstances.
3. **Criminal Law.** In criminal law, "malice" may denote that condition of the mind which is manifested by the intentional doing of a wrongful act without just cause or excuse.
4. **Criminal Law: Trial.** An instruction in a criminal case is not required to contain the exact language of the statute, if words equivalent in meaning are used in defining the offense or the elements of the case that the State must establish to justify conviction of the accused.
5. **Criminal Law: Evidence.** It is a general rule that, on the trial of one accused of crime, proof of a distinct and independent offense, of similar nature, is inadmissible. To this rule there are exceptions, but in order for evidence of an independent offense to be admissible it must appear that it is within one of the recognized exceptions.
6. ———: ———. Evidence of another crime, similar to that charged, is relevant and admissible if it tends to prove a par-

ticular criminal intent which is necessary to constitute the crime charged.

7. ———: ———. Whether the previous offense is too remote or whether it is sufficiently similar to the charge on trial is committed to the discretion of the trial court.

8. **Appeal and Error: Criminal Law.** The Supreme Court has authority to reduce a sentence imposed by the district court for the commission of a crime but it will not often do so if the crime involves violence and moral turpitude.

9. ———: ———. If the punishment of an offense is left to the discretion of the trial court to be exercised within prescribed limits, a sentence within those limits will not be disturbed in the absence of an abuse of such discretion.

ERROR to the district court for Dawson County: ISAAC J. NISLEY, JUDGE. *Affirmed.*

Keith Windrum and *W. A. Stewart,* for plaintiff in error.

Clarence S. Beck, Attorney General, and *Richard H. Williams,* for defendant in error.

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

BOSLAUGH, J.

The plaintiff in error was charged with, tried for, and convicted of the crime of mayhem. His motion for new trial was denied and he was adjudged to be confined in the State Penitentiary. He has brought the record of the case here for review.

The sufficiency of the evidence to sustain the verdict of guilt is challenged by the plaintiff in error, hereinafter identified as defendant. The occurrence resulting in this prosecution took place in Gothenburg between the hours of 5 and 6:30 p. m. on September 25, 1952. It was a day of celebration and the last day of the fall festival in that city. A rodeo was the afternoon attraction. When it was finished many of the persons attending the festival visited the saloons or beer taverns of the city, one of which was "Bert and Earls." The length

of the pause at the bar by many of the customers was brief, a matter of minutes, but for some it was much longer and lasted hours. The tavern, frequently referred to in the record as Bert and Earl's, had its front on the north side of U. S. Highway No. 30, a bar on the west side, and customers' booths on the east side. There was a door on the front or south and a door on the north or rear. The room was about 60 feet in length. There was a space between the north end of the building and the alley used for loading, unloading, and other purposes in the conduct of the business. This place of business, hereinafter designated as the tavern, and the space to the rear of it was the location of the unfortunate acts resulting in this litigation.

Arthur S. Houchin, prosecuting witness and victim of the injury complained of, entered the tavern with his father, James Houchin, between 5 and 6 p. m. and occupied the rear booth with Henry Derra and three or four other persons. The defendant, his wife, and other persons were in a booth towards the front. About 6 p. m. the defendant accompanied his wife to the rear of the tavern where she visited the ladies' rest room. The defendant stopped at the rear booth and talked with Henry Derra. He permitted the lighted cigarette he had in his hand to come in contact with and to burn James Houchin on the right wrist twice. The second time Houchin said to the defendant " 'watch your cigarette,' " and the defendant said " 'do you want to make something out of it,' " grabbed Houchin by his clothing near his throat, and hauled him out of the booth. They wrestled but no blows were struck. There were vulgar name-calling and profane epithets voiced. Arthur Houchin interfered with the defendant and his shirt was considerably torn. The intercession of persons, including a bartender prevented further combat at that time. The parties returned to and again occupied their respective booths and resumed beer drinking.

The elder Mr. Houchin and a Mr. Chapin, who had

just then entered the tavern, went out the front door. Mr. Houchin noticed that his son had not followed or joined them. He started back to get his son and met the defendant near the doorway. He cursed and attempted to attack Mr. Houchin but was prevented by the bartender and Mr. Chapin. Mr. Chapin and Mr. Houchin returned to and remained in the rear booth they had occupied. Arthur Houchin and Mr. Derra had remained there.

The defendant, his wife, and two rodeo performers went to the home of defendant and he there discarded his torn shirt and put on another. They returned to the tavern. The defendant entered alone by the rear door, went to the booth where Arthur Houchin, sometimes called Dude, was and said that he wanted "Dude to come out and settle it." He told defendant he had nothing to settle and did not want any trouble. A bartender escorted defendant from the booth. The defendant was asked at the trial the meaning of his request that Arthur Houchin "come out and settle it" and his answer was "There's my exhibit (indicating his torn shirt); you don't allow people to tear your shirt off and walk away from it."

The elder Mr. Houchin had been told by someone that there was going to be trouble before he and his son could get away. He bought two bottles of beer, put one in his pocket, gave one to his son, and made the statement that there might be some trouble there that evening. About 30 minutes after the defendant had challenged Arthur Houchin to "come out and settle it" Chapin and the Houchins left the tavern by the rear door. Gail McKim was in a booth towards the front with the defendant, his wife, Aaron Lee Olson, and two cowboys. McKim testified that he "understood there was to be a fight," and that the wife of the defendant got up and said " 'there they go.' " The defendant and Aaron Lee Olson left the booth and in a "good, fast walk" went to the rear of the tavern and out behind.

About the time Chapin and the Houchins were going through the back door the defendant called out " 'here I am.' " Mr. Chapin looked around and saw the defendant and Olson coming "plenty fast." The defendant proceeded toward Arthur Houchin and Olson grabbed James Houchin. He hit Olson on the head with a bottle of beer and Olson knocked him down. They had a bloody fight. Mr. Chapin grabbed the defendant and called to the Houchins to hurry away from there. The defendant was trying to contact Arthur Houchin. Mr. Chapin held defendant about 30 seconds until someone hit Chapin across the back of the head, knocked him down, and rendered him unconscious for a time. The defendant then attacked Arthur Houchin and they fought for a brief time. They were on the ground. Defendant was on top. Arthur Houchin felt defendant injure his left ear, and at about the same time he got the bottle of beer out of his hip pocket and struck the defendant across the back and somewhat to the side of his head. Arthur Houchin called for someone to take defendant off of him and that was done. When Arthur Houchin got to his feet he cried out that the defendant " '* * * tore my ear off.' " When the defendant approached Arthur Houchin he was not in usual fighting form but had his arms apart as if to take him in his arms. That is what he did and they went to the ground. After the fight defendant had blood upon his face and lips and was seen to spit when he got off of his victim. The left ear of Arthur Houchin was bit and torn off and he bled profusely. The defendant claimed he was rendered unconscious by the blow on his head and that he had not bit Arthur Houchin before he had passed out. After the fight, but before the defendant left the place of the encounter, his wife said to him " 'that Kid's lost an ear,' " and the defendant exclaimed " 'Oh, my God.' " He was asked at the trial if he bit off the left ear of Arthur Houchin and he gave this equivocal answer, "Not that I know of * * * not that I can remember." His wife

also said that when Arthur Houchin asked someone to get the defendant off of him that "Bob came right off," and that the fight lasted just a few seconds.

Police officers of the city went to the place pointed out to them as the location where the fight took place within about an hour of the time of the fight and found a human ear that had been recently removed from some person. It had marks on it that could have been made by the teeth of a human being.

The defendant and Lloyd Peterson had a fight on November 14, 1946. Defendant made no effort to hit Peterson but went down under his arms, grabbed him around the waist, and bit him on one of his ribs. Peterson put his arm around the neck of defendant. He bit the arm about four times and the marks he made on it were visible for about two months. Defendant and Gail McKim had a fight during the year 1947. McKim was grabbed by defendant and taken into his arms. They went to the ground, rolled, and wrestled, and when it was over McKim had been injured on the chest and one eye by the teeth of defendant. Defendant and Arthur Houchin had a fight in 1949 at the Oasis Cafe in Gothenburg. The defendant bit him on his chest and made a mark that was there for three or four months after the fight.

The defendant was accused by the State of willfully, unlawfully, and purposely biting and chewing off the left ear of Arthur Houchin with the intent to maim and disfigure him. There was evidence from which the jury could find that each part of the charge made by the State was true. There is conflict in the evidence but it was the province of the jury to determine the part it would accept and believe, and what part thereof it would reject. The credibility of witnesses and the weight of the evidence are for the jury to determine in a criminal case and its conclusion may not be disturbed by this court unless it is clearly wrong. Griffith v. State, *ante*

p. 448, 59 N. W. 2d 701. The evidence supports the verdict. It is not clearly wrong.

Defendant protests strenuously that proof of guilt is lacking because he claims there is no direct evidence that he intended to maim or disfigure Arthur Houchin. It is not required that there should be. Criminal intent may be shown by circumstances. Baskins v. State, 138 Neb. 334, 293 N. W. 270. The court advised the jury in substance, as the defendant desired, that the intent with which an act is done is not usually susceptible of proof by direct evidence but may be inferred from the words and acts of the party concerned and the facts and circumstances attendant upon the act charged to have been committed. The unjustified, quarrelsome, and belligerent attitude and conduct of the defendant before the fight in which the complaining witness lost his ear, his insistence that Arthur Houchin join him in a fight to settle some imagined wrong, his determination to avenge his honor because his shirt was torn publicly, the absence of any reason for the assault he made when the ear was bitten and torn off, the fact that the defendant had put his teeth in service as a weapon of offense in prior fights in which he had participated, and the many other incidences in the evidence were circumstances from which the jury might well have concluded that the defendant intended to severely chastise and humiliate Arthur Houchin in a severe manner with permanent results. The record justifies the conclusion of the jury that the defendant intended to maim and disfigure his adversary.

The defendant contends that he was prejudiced by the refusal of the court to include in his charge to the jury, as he requested, that malice was an element of the crime for which he was on trial; that malice is that condition of the mind which is shown by intentionally doing a wrongful act without just cause or excuse; and that it means any willful or corrupt intention of the mind. The part of the statute important to this case is: "Whoever shall willfully, unlawfully, and purposely * * * bite the

* * * ear * * * or disable any * * * member of any person, with intent to * * * maim, or disfigure such person, shall be imprisoned in the penitentiary * * *." § 28-406, R. R. S. 1943. The court in the instructions given to the jury quoted the statute except the penalty clause, informed it that the substance of the information accused the defendant of willfully, unlawfully, purposely, and feloniously biting and chewing off the ear of Arthur Houchin with intent to maim and disfigure him, and that to convict the defendant the State was required to establish by the evidence beyond a reasonable doubt that he purposely, feloniously, and unlawfully bit and chewed off the ear of his victim with the intent to maim and disfigure him.

Malice in a legal sense denotes that condition of mind which is manifested by the intentional doing of a wrongful act without just cause or excuse. It is sometimes defined as any willful or corrupt intention of the mind. It is said in Alt v. State, 88 Neb. 259, 129 N. W. 432, 35 L. R. A. N. S. 1212: "In criminal law, 'malice' may denote that condition of the mind which is manifested by the intentional doing of a wrongful act without just cause or excuse." See, also, Cate v. State, 80 Neb. 611, 114 N. W. 942; McVey v. State, 57 Neb. 471, 77 N. W. 1111; Housh v. State, 43 Neb. 163, 61 N. W. 571; Annotation, 38 L. R. A. N. S. 1100.

The instructions in this case, considered as a whole, in defining the crime charged against the defendant and the nature and quality of the evidence required of the State to convict him of the offense charged, used the words unlawfully, willfully, purposely, and feloniously. These included the full signification of the terms malice or maliciously. In Whitman v. State, 17 Neb. 224, 22 N. W. 459, this court said: "In an indictment under section 16 of the code for shooting with intent to kill the word 'maliciously' was omitted, but it was alleged that the act was 'unlawfully, willfully, purposely, and feloniously' done. Held, That these words included the

full signification of the word 'maliciously' * * *." An instruction is not required to contain the exact language of the statute, if words equivalent in meaning are used in defining the offense or the elements of the case that the State must establish to justify conviction of the accused. See, Cooper v. State, 123 Neb. 605, 243 N. W. 837; MacDonald v. State, 124 Neb. 332, 246 N. W. 716; Hans v. State, 147 Neb. 67, 22 N. W. 2d 385; Spreitzer v. State, 155 Neb. 70, 50 N. W. 2d 516. The words employed in the charge to the jury were the equivalent in meaning of the words of the statute defining the offense involved herein and comprehended the full legal meaning of the word malice. The instruction defining malice tendered by the defendant would not have added anything to the instructions given but would have been only a repetition in different words of a part of them. Smith v. State, 153 Neb. 308, 44 N. W. 2d 497.

The word willfully or purposely means intentionally and not accidentally or involuntarily, and the word feloniously means proceeding from an evil purpose or done with deliberate intention of committing a crime. Felonious describes a willful act and feloniously in a legal sense refers to an act done with intention to commit a crime. Wood v. Commonwealth, 246 Ky. 829, 56 S. W. 2d 556; Gatewood v. Commonwealth, 215 Ky. 360, 285 S. W. 193; State v. Dickerson, 139 La. 147, 71 So. 347; 36 C. J. S., Felonious, Feloniously, p. 633; Black's Law Dictionary (3d ed.), p. 763. This assignment of error cannot be sustained.

The defendant contests the correctness of the action of the trial court in permitting the State to present the evidence detailed above concerning three previous fights in which defendant participated and in each of which his teeth were used to inflict injury upon the person with whom he was contesting. This testimony was admitted for whatever bearing it had upon the intent of the defendant in inflicting the injury upon Arthur Houchin. The trial court carefully advised the jury to

this effect. The basis of the objection of defendant is that the prior offenses were each too remote and that the evidence of any of them had no probative value as tending to prove the fact in issue, the intent of the defendant at the time of the offense charged against him in this case. In Stagemeyer v. State, 133 Neb. 9, 273 N. W. 824, the court said: " 'It is a general rule that, on the trial of one accused of crime, proof of distinct and independent offenses, even of a similar nature, is inadmissible. To this rule there are exceptions; but, in order to make evidence of other independent offenses admissible, it must appear that the evidence offered falls within one of the recognized exceptions.' " Evidence of a separate and distinct crime committed by the accused is admissible in a prosecution of a crime that has an element of motive, criminal intent, or guilty knowledge. Henry v. State, 136 Neb. 454, 286 N. W. 338; Turpit v. State, 154 Neb. 385, 48 N. W. 2d 83. An exception to the general rule important in considering the objection made in this case is stated in Foreman v. State, 126 Neb. 619, 253 N. W. 898: "Evidence of other crimes, similar to that charged, is relevant and admissible when it tends to prove a particular criminal intent which is necessary to constitute the crime charged. Whether such other alleged crimes are too remote rests largely in the discretion of the trial court." See, also, Turpit v. State, *supra.* Defendant has referred to many Nebraska decisions on this subject but an examination of them has failed to disclose that a reversal in any one of them was had because of the remoteness of the prior similar offenses. Independent research has not led to a case in this jurisdiction where a reversal was made on the ground of remoteness. The extent to which the discretion of the trial court will be allowed to be exercised in this regard has not been fixed by any decision of this court. Probably it cannot be but depends upon the facts in each case. Courts of other jurisdictions have spoken on the subject. In State v. Siddoway, 61

Utah 189, 211 P. 968, it was held: "No exact limitation of time can be fixed as to when another offense tending to prove the intent of the act charged is remote. The decision of that question must depend upon the circumstances of the particular case, and whether evidence is too remote or not is a question whose decision is largely in the sound discretion of the trial court." See, also, Exchange Bank v. Moss, 149 F. 340; State v. France, 146 Kan. 651, 72 P. 2d 1001; State v. Konzen, 186 Iowa 1057, 171 N. W. 137. The doctrine generally accepted is that remoteness in point of time may weaken the evidential value of the evidence but does not justify its exclusion. State v. France, *supra;* State v. Ridgway, 108 Kan. 734, 197 P. 199.

Likewise it is a matter left to the discretion of the trial court as to whether the prior offenses are sufficiently similar to the one charged in the case on trial so that evidence thereof has probative value. In Exchange Bank v. Moss, *supra,* the court said: "It is sometimes said that the collateral instances, evidence of which is admissible, are those that occurred at or about the time of the one in question, yet in practice the proximity in point of time is largely left to the discretion of the trial court. The same is true of the degree of similarity." The evidence to which this assignment is directed was properly admitted.

The argument of defendant that the trial court should have instructed the jury on the defense of insanity is without merit. The claim of defendant is that he was unconscious from the time he was struck on the head with a beer bottle until after the fight was ended. If he was it is necessarily true that the injury to Arthur Houchin was inflicted before the blow was struck because the cause of his claimed temporary insanity was the blow on his head. The evidence is that the time he was struck on the head with the bottle of beer and the time of the injury to the ear were substantially contemporaneous. It may also be said that the intention of the

defendant was arrived at and was being pursued before he was hit on the head with the bottle. The court would not have been justified in submitting to the jury for its consideration the defense of the insanity of the defendant.

The sentence is said by the defendant to be excessive. The punishment for the offense charged is imprisonment in the State Penitentiary for not less than 1 year or more than 20 years. § 28-406, R. R. S. 1943. The record does not show that the discretion vested in the district court was abused by imposing upon the defendant a sentence of 3 years. This court has authority to reduce a sentence imposed for the commission of a crime but it will not often do so if it is one of violence and involves moral turpitude. Sundahl v. State, 154 Neb. 550, 48 N. W. 2d 689. If the punishment of an offense is left to the discretion of the trial court to be exercised within prescribed limits, a sentence imposed will not be disturbed unless there is an abuse of such discretion. Carr v. State, 152 Neb. 248, 40 N. W. 2d 677.

The sentence and judgment of the district court should be and they are affirmed.

AFFIRMED.

MICHAEL HARSCHE, APPELLEE, V. ANNA CZYZ, ALSO KNOWN AS ANNA CZYZ MISHAK, APPELLANT, IMPLEADED WITH STANLEY MISHAK, APPELLEE.

61 N. W. 2d 265

Filed December 4, 1953. No. 33368.

1. **New Trial.** An application for a new trial must be made within ten days, either within or without the term, after the verdict, report, or decision was rendered.
2. ———. In computing the time for the filing of a motion for a new trial or an amended motion for a new trial, the day the verdict, report, or decision in a cause was rendered shall be excluded, and the last day included; if the last day be Sunday, it shall be excluded. When the record discloses compliance with

the above rule, an amended motion for a new trial is filed in time.

3. **Trial: Appeal and Error.** It is the duty of the trial court, without request, to instruct the jury on each issue presented by the pleadings and supported by evidence. A litigant is entitled to have the jury instructed as to his theory of the case as shown by pleadings and evidence, and a failure to do so is prejudicial.
4. **New Trial.** It is sufficient, in assigning the grounds for a motion for a new trial or in an amended motion for a new trial, to assign the same in the language of the statute and without further or other particularity.
5. **Trial: Appeal and Error.** An instruction which conflicts with the propositions of law properly and correctly stated in another instruction in the same charge on a vital issue of fact and tends to mislead or confuse the jury in deliberating on conflicting evidence is erroneous and prejudicial.
6. **Fraud.** The general rule applicable to the measure of damages for fraud is that such an amount should be awarded to plaintiff as will compensate him for the loss occasioned by the fraud.
7. **Damages: Trial.** The trial court should instruct the jury on the proper measure of damages, and failure to do so is error.

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

Theodore L. Kowalski and *Norman Denenberg,* for appellant.

Eugene D. O'Sullivan, Sr., Arthur J. Whalen, Jno. A. McKenzie, and *Eugene D. O'Sullivan, Jr.,* for appellee.

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

MESSMORE, J.

The plaintiff, Michael Harsche, brought this action at law against Anna Czyz Mishak, defendant, in the district court for Douglas County, charging the defendant with perpetrating a fraud upon him by promising to marry him when in fact she had no intention of doing so, and that the plaintiff, believing the defendant's promises to be true and not false, relied on them to be true and entrusted to the defendant certain money for safekeeping, and in addition spent money on her for wearing apparel

and entertainment. He seeks to recover damages. The case was tried to a jury resulting in a verdict for the plaintiff in the amount of $7,500. The defendant filed a motion for a new trial and an amended motion for a new trial which were overruled. From this order, the defendant appeals to this court.

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

The plaintiff was born in Poland, and came to the United States when he was a little over 17 years of age. At the time of trial he was 57 years of age, and engaged in the occupation of a blacksmith, employed by the Union Pacific Railroad Company in Omaha, which employment he obtained after arriving from Jamaica, New York, after Labor Day in 1946. He was married to his first wife in New York, on June 30, 1918. She died on March 22, 1941. His family consists of three sons and a daughter. In 1937, he was employed in a ship yard in Jersey City, as a blacksmith. This employment continued until he quit and came to Nebraska.

The defendant was from the same town in Poland as the plaintiff's first wife. She met the plaintiff and his wife in New York in 1919, and visited them on occasions. Shortly after the death of the plaintiff's wife in 1941, while visiting with his cousin in Jamaica, New York, the plaintiff again met the defendant. He and his cousin called at her home. During this visit the defendant told the plaintiff that she was sorry for him, that he had a good wife, and for him not to cry, he was still young and could find another woman to marry him as he had a good trade with good wages. She also told the plaintiff that there was a play at the Polish Home that evening, and induced him to meet her there. At this function there was music and dancing. He took no part in the festivities. She asked him to take her home, which he did not do. Thereafter, either on April or May 27, 1941, he received a letter from the defendant, apparently in response to one he had written, to the effect that she

would meet him under the clock at the railroad station in order to save him a trip. He did meet her as suggested in the letter. There were several letters written by the defendant in evidence that pertain to the parties meeting each other, and disclosing some affection and endearing terms.

The plaintiff further testified that the defendant had asked him to marry her, and later in 1941, he asked her to marry him. Each thought it would be best to wait for a year after the death of the plaintiff's wife. On several occasions when the question arose, the defendant requested the plaintiff to wait until such time as their children required no further parental care. The plaintiff had two sons in military service and the defendant had one son in the service in the Second World War. During this period of time the defendant requested the plaintiff to leave with her certain sums of money for safekeeping, for the purpose of procuring a home after the marriage, and to live in some degree of comfort. The plaintiff kept an account of this money. It appears from his testimony that in 1941, he gave the defendant $1,800, in 1942, $650, and in 1943, a total of $500. In addition thereto, he expended on the defendant for entertainment, clothes, and other items approximately $1,320 over a period of 5½ years.

Plaintiff further testified that the defendant promised to marry him in 1945 and in 1946. Before she married him, she desired to dispose of her home and a grocery business which she had operated from the time of her husband's death. He advised her it would be all right to negotiate the sale.

The defendant made a trip to Omaha to visit her uncle, and at that time wrote a postal card to the plaintiff. Thereafter she informed the plaintiff that they would be married in Omaha, and have a small wedding. The plaintiff had the defendant's address in Omaha. He quit his employment and went to Omaha where the defendant was to meet him at the railroad station. She failed to

do so. He took a taxicab to the address that had been given him. When he arrived there, a Mr. Mishak came to the door. The plaintiff inquired if the defendant lived there, and Mr. Mishak told him that he did not know any such person. The defendant then came out on the porch. Mr. Mishak went back into the house, and defendant closed the door. She told the plaintiff that she was married, and asked him not to destroy her happiness. She told him that she would pay him $3,500. He told her that he had spent three times that amount, and if she would pay that, he would walk out. He testified that was the last conversation he had with the defendant.

With reference to the letters in evidence, written by the defendant to the plaintiff, it is apparent that all of these letters were written in 1941 and 1942, prior to the time the plaintiff moved to Jamaica, New York. The plaintiff testified that the defendant wanted him to live closer to her. The plaintiff asked her on many occasions to marry him. She always wanted to wait. He believed and relied upon her promises to marry him, which she failed and refused to perform.

The defendant testified that she was 55 years of age; that her family consisted of three sons and a daughter; that she first met the plaintiff in Elizabeth, New Jersey, on the street with his wife; that she moved to Jamaica, New York, where she and her husband engaged in the grocery business for 19 years; and that after the death of her husband in 1937, she operated the store, with the help of her children, for 6 years. When the plaintiff called at her house in 1941, he displayed an interest in her. At that time she thought nothing of it, and finally decided to go out with him to ascertain whether or not it would be to her best interest to marry him. She concluded that it would not be to her best interest to marry him. She did go with him for approximately 2 years and 2 months. She sold her business and home in 1943. She told him she was not ready to marry, that she was not

going to marry him or anyone else, and wished that he would go and get himself someone else. That was before she sold the store. She told him the same thing afterward, and did not encourage him to marry her, but told him to leave her alone, to forget about her. Subsequent to selling her store, she did housework for wages. On many occasions the plaintiff came to her home and ate Sunday dinner with her. She denied that plaintiff ever gave her any money to keep for him, that she owed him anything, that he bought her anything such as clothes or shoes, and that she ever promised to repay him $3,500 or any other amount. She also denied his testimony that she returned $120 to him when his daughter was ill, but stated that on occasions she had loaned him money which he paid back. She further testified that she was self-supporting, and that she did not marry Stanley Mishak until September 26, 1946.

Robert Czyz testified that he was the son of the defendant, lived with her in Omaha, and that he was engaged as a florist at Brandeis store. He testified that he had known the plaintiff and saw him around the store in Jamaica, New York, and that the plaintiff came to his mother's house a great many times, even after they had moved from the grocery store. He would come to dinner on Sunday. The plaintiff would happen to drop in, and when the mother of this witness came from church, they would eat dinner. He further testified that nobody would talk to the plaintiff, and many times when he came they would not answer the door, and endeavored to have nothing to do with him nor to answer his telephone calls. On occasions they would muffle the doorbell so that it would not be heard. His mother would ask the plaintiff to leave, and if the plaintiff asked her to marry him she would say that she would not, and would request him to go home.

The defendant, at the time of the trial, had lived in Omaha for about 6 years. Her husband was dismissed as a defendant in this cause.

The defendant filed a motion for a new trial on June 7, 1952, which was within 10 days after the judgment was entered as provided for in section 25-1143, R. R. S. 1943. On June 9, 1952, an amended motion for a new trial was filed. It is the contention of the plaintiff that the new matter set forth in the amended motion for a new trial cannot be considered in this appeal for the reason that it was filed out of time and not within the time specified in the above-cited statute, and is therefore a nullity and of no force or effect. See Frenchman-Cambridge Irr. Dist. v. Ferguson, 154 Neb. 20, 46 N. W. 2d 692.

Section 25-2221, R. R. S. 1943, provides: "The time within which an act is to be done as herein provided, shall be computed by excluding the first day and including the last; if the last day be Sunday, it shall be excluded." The judgment was rendered May 29, 1952, which fell on Thursday. Under the statute above cited, this day would be excluded. June 8, 1952, fell on Sunday, which likewise would be excluded under the above-cited statute. Therefore, the amended motion for a new trial complied with section 25-1143, R. R. S. 1943, and was filed in time. We so hold.

The defendant contends that the trial court erred in failing to instruct the jury on the issue of the statute of limitations pleaded in the defendant's answer. The defendant's answer pleaded the statute of limitations as a defense. The plaintiff contends that the defendant failed to make objection and assign as error in her motion for a new trial that the trial court should have instructed the jury on the statute of limitations. The motion for new trial and the amended motion for new trial were in compliance with section 25-1144, R. R. S. 1943, which provides in part: "It shall be sufficient, however, in assigning the grounds of the motion to assign the same in the language of the statute and without further or other particularity." See, also, McCullough v. Omaha Coliseum Corp., 144 Neb. 92, 12 N. W. 2d 639.

Both the motion for new trial and the amended motion for new trial set forth that the verdict and decision were not sustained by sufficient evidence and were contrary to law, and, in addition thereto, that errors of law occurred at the trial. We conclude that the motion for new trial and the amended motion for new trial were sufficient to raise the issue contended for by the defendant.

In support of her contention, the defendant cites section 25-207, R. R. S. 1943, which provides in part: "The following actions can only be brought within four years: * * * and (4) an action for relief on the ground of fraud, but the cause of action in such case shall not be deemed to have accrued until the discovery of the fraud * * *."

In this connection, the defendant asserts that the plaintiff's petition is predicated upon fraud perpetrated by the defendant upon the plaintiff by procuring from him certain sums of money for safekeeping and for other purposes, by stating to him that she intended to marry him, promised to do so, and failed to fulfill the promise.

In addition, the defendant relies upon the following evidence. The defendant's testimony is to the effect that she sold her grocery store and house in 1943. She also testified that before she did so, "I told him I'm not ready to marry, I'm not going to marry him or anybody else. I said, 'I wish you would go out and get yourself someone else.'" Further, "After I sold my house I entirely refused to go out with him and have anything to do with him."

The plaintiff takes the position that he did not discover the fraud until he had come to Omaha in September 1946. This action was brought on January 24, 1948.

A review of the instructions discloses that the trial court did not instruct on the issue of the statute of limitations.

This court, on many occasions, has announced the following rule of law: "It is the duty of the court to

instruct on the issues tendered by a defendant in an answer or cross-petition if they are supported by evidence and a failure so to do is prejudicial error." Hamilton v. Omaha & C. B. St. Ry. Co., 152 Neb. 328, 41 N. W. 2d 139.

It is the duty of the trial court, without request, to instruct the jury on each issue presented by the pleadings and supported by evidence. A litigant is entitled to have the jury instructed as to his theory of the case as shown by pleadings and evidence, and a failure to do so is prejudicial. See Krepcik v. Interstate Transit Lines, 154 Neb. 671, 48 N. W. 2d 839. See, also, Borcherding v. Ecklund, 156 Neb. 196, 55 N. W. 2d 643.

Instructions which withdraw from the jury material issues of fact presented by the pleadings and evidence are erroneous. The instructions as a whole omitted a vital issue or withdrew from the jury an issue material to the defense. The answer alleged the cause of action was barred by the statute of limitations. See Nocita v. Guiliano, 130 Neb. 241, 264 N. W. 672.

In the light of the evidence presented in the record and the foregoing authorities, we conclude that the trial court should have presented to the jury the question of fact as to whether or not the plaintiff's action was barred by the statute of limitations. Failure of the trial court to do so constituted prejudicial error.

The defendant predicates error on the part of the trial court in giving instructions Nos. 4 and 5 to the jury.

The defendant's amended motion for a new trial predicated error on the giving of instructions Nos. 4 and 5. The trial court, in instruction No. 4, informed the jury that the burden of proof was upon the plaintiff "to establish, by a preponderance of the evidence, all of the material allegations of his petition not admitted to be true by the answer of the defendant. Therefore, before the plaintiff can recover he must establish, by a preponderance of the evidence:

"1. That the defendant Anna Czyz Mishak made certain promises to the plaintiff concerning marriage to him in the future.

"2. That the said promises were false and fraudulent.

"3. That the defendant Anna Czyz Mishak at the time of making said promises had no intention of fulfilling them.

"4. That the plaintiff relied upon said promises and believed them to be true.

"5. That by reason of said promises the defendant obtained from the plaintiff certain sums of money and things of value, and that the plaintiff expended certain sums of money upon said defendant by way of entertainment and recreation.

"If the plaintiff has established all of the foregoing propositions by a preponderance of the evidence, then your verdict should be for the plaintiff and against the defendant in some amount. If, however, the plaintiff has failed to establish any one of the foregoing propositions by a preponderance of the evidence, then he cannot recover and your verdict should be for the defendant."

In instruction No. 5, the court instructed: "If you find by a preponderance of the evidence that the purpose and intent of the defendant at all times was to defraud the plaintiff by leading him to believe that she would marry him at some future date in order to secure money and things of value from him, then the amount of his recovery will be that amount that you find by a preponderance of the evidence that he gave to the defendant for safekeeping, if any; that amount, if any, that you find by a preponderance of the evidence that he expended upon her for clothing and wearing apparel; and that amount, if any, that you find from a preponderance of the evidence he expended upon her for entertainment and recreation. In addition thereto you should allow the plaintiff a fair and reasonable sum for his mental anguish and humiliation, if any, if you find

this to have been established by a preponderance of the evidence.

"However, if you find from a preponderance of the evidence that the defendant did not intend to defraud the plaintiff, but if you do find that the plaintiff did entrust to the defendant for safekeeping certain sums of money, then you should determine the amount of said money so entrusted, if any, to the defendant by the plaintiff and return a verdict in favor of the plaintiff for that amount.

"If you find for the defendant you will simply say so by your verdict."

The trial court, in instruction No. 4, properly instructed the jury on the burden of proof required of the plaintiff before the plaintiff would be entitled to recover in this action. In the next instruction, No. 5, the trial court told the jury, in effect, that it was not necessary to establish all of the elements as the same appeared in instruction No. 4, and even though some of the elements as set forth in instruction No. 4 were missing, the plaintiff could still recover. We conclude that these instructions were in conflict and would have the effect of confusing and misleading the jury.

"Instructions which state conflicting propositions of law and tend to confuse the jury are erroneous." Sanderson v. Huffman, 132 Neb. 321, 271 N. W. 870. See, also, Bryant v. Modern Woodmen of America, 86 Neb. 372, 125 N. W. 621, 27 L. R. A. N. S. 326.

"An instruction which conflicts with a proposition of law properly and correctly stated in another instruction in the same charge on a vital issue of fact and tends to mislead or confuse the jury in deliberating on conflicting evidence is erroneous and prejudicial." Hief v. Roberts Dairy Co., 138 Neb. 885, 296 N. W. 331. See, also, Robison v. Union Transfer Co., 141 Neb. 574, 4 N. W. 2d 558; Chard v. New York Life Ins. Co., 145 Neb. 429, 16 N. W. 2d 858; Umberger v. Sankey, 151 Neb. 488, 38 N. W. 2d 21.

The trial court committed prejudicial error as contended for by the defendant.

With reference to the measure of damages in a case such as the instant case, the following becomes pertinent.

"The general rule applicable to the measure of damages for fraud is that such an amount should be awarded to plaintiff as will compensate him for the loss occasioned by the fraud, or, as it has been expressed, plaintiff is entitled to recover damages adequate to the injury which he has sustained. Plaintiff can recover the entire amount of his loss occasioned by the fraud, but the recovery must be limited to the actual loss." 37 C. J. S., Fraud, § 142, p. 470.

As a general rule, one injured by the commission of fraud is entitled to recover such damages as will compensate him for the loss or injury actually sustained and place him in the same position that he would have occupied had he not been defrauded. See 24 Am. Jur., Fraud and Deceit, § 217, p. 47. See, also, Campbell v. C & C Motor Co., 146 Neb. 721, 21 N. W. 2d 427; Jakway v. Proudfit, 76 Neb. 62, 106 N. W. 1039.

The petition, when filed, contained an allegation with reference to mental anguish and humiliation suffered by the plaintiff by reason of the conduct of the defendant on and after September 5, 1946, because of fraud which the defendant had perpetrated against him in not keeping her promise to marry him. On motion, this allegation was stricken from the petition. At the conclusion of the trial, upon request of counsel for the plaintiff, the petition was amended to include recovery for mental anguish and humiliation. In instruction No. 5, the trial court informed the jury that in addition to other elements of damage, the jury should allow the plaintiff a fair and reasonable sum for his mental anguish and humiliation, if any.

In an action for a breach of promise of marriage, the following rule as to the recovery of damages is pertinent: In awarding compensatory damages the jury may con-

sider the injury to the plaintiff's health, the effect of the breach on the plaintiff's feelings, mental suffering, wounded pride, humiliation, pain, and mortification. See 8 Am. Jur., Breach of Promise of Marriage, § 26, p. 866. See, also, 11 C. J. S., Breach of Marriage Promise, § 40, p. 809.

We have previously in this opinion set forth the measure of damages in cases of fraud. As we view the instant case and the theory on which it was tried, it is not a breach of promise of marriage action, but is an action in fraud as heretofore indicated, and an instruction which permits recovery for mental anguish and humiliation constitutes prejudicial error.

The trial court should instruct the jury on the proper measure of damages, and failure to do so is error. See, Hickman-Williams Agency v. Haney, 152 Neb. 219, 40 N. W. 2d 813; Omaha Coal, Coke & Lime Co. v. Fay, 37 Neb. 68, 55 N. W. 211; 64 C. J., Trial, § 557, p. 624.

The defendant contends that instruction No. 1, presenting the issues to the jury, was in effect copying the pleadings, and that the instruction should be a simple and concise summary of the proceedings, citing cases to such effect. Inasmuch as a new trial must be had in this case, we deem a discussion of this contention unnecessary. Also, for the same reason, other assignments of error need not be discussed.

For the reasons given in this opinion, the verdict of the jury and the judgment entered thereon is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

CARTER, J., participating on briefs.

IN RE SERVICE OIL COMPANY. NEBRASKA STATE RAILWAY COMMISSION, APPELLEE, V. SERVICE OIL COMPANY, APPELLANT, JOHN JACK ROMANS, DOING BUSINESS AS ROMANS TRANSFER, INTERVENER-APPELLEE.

61 N. W. 2d 381

Filed December 11, 1953. No. 33343.

1. **Public Service Commissions.** The Nebraska State Railway Commission is required to state in a certificate of convenience and necessity issued by it the type and scope of service the carrier named therein is authorized to perform.
2. **Public Service Commissions: Motor Carriers.** The Nebraska State Railway Commission is authorized to classify carriers by motor vehicle as regular or irregular route operators and it may test the operations of a certificate holder by the classification made by it.
3. ———: ———. The Nebraska State Railway Commission has power to suspend, change, or revoke a certificate of convenience and necessity in whole or in part for a willful failure of the holder thereof to observe and comply with the Motor Carrier Act or any lawful order or regulation of the commission or any term, condition, or limitation of the certificate.
4. ———: ———. Willful failure, as used in section 75-238, R. R. S. 1943, is such behavior as justifies a belief that there was an intent entering into and characterizing the failure complained of.
5. **Public Service Commissions.** The Nebraska State Railway Commission is authorized to govern its proceedings and in the absence of statutory or constitutional inhibition to adopt and pursue its own rules and course of procedure.
6. **Public Service Commissions: Appeal and Error.** The matter for decision in an appeal from an order of the Nebraska State Railway Commission, while acting within its jurisdiction, is that the order is or is not unreasonable or arbitrary.

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

Swenson, Viren & Turner, for appellant.

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

Manasil & Erickson, for intervener-appellee.

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

BOSLAUGH, J.

This appeal concerns an order of appellee restricting operations of appellant as a common carrier of property intrastate by authority of a certificate of convenience and necessity previously issued to it by appellee.

The certificate issued to appellant January 17, 1938, authorized it to transport commodities generally, except those requiring special equipment, as a common carrier by motor vehicle in intrastate commerce by "Irregular routes from Ord and within a 50-mile radius thereof, to and from local points, occasionally to and from Omaha, Kimball, intermediate points and points generally throughout the State of Nebraska, on a statewide basis." Appellant was engaged for many years thereafter principally in transporting livestock from Ord and the surrounding territory to Omaha. It required and used three stock trucks in these operations. It later acquired an insulated van-type reefer trailer and inaugurated and conducted a refrigerated service between Ord and Lincoln and Omaha and Ord.

Appellee by an order of October 17, 1950, required appellant to show cause on a named date why its certificate of convenience and necessity, herein designated certificate, should not be suspended, changed, or revoked because of its willful failure to observe the classification of carriers established and published by appellee; its failure to confine its operations to those authorized by its certificate in violation of an order of appellee; and its failure to comply with the provisions of general order No. 82, supplement No. 2, of appellee by conducting regular route operations when its certificate authorized only irregular service. A hearing had before an examiner resulted in a report that appellant had been and was performing regular route motor carrier operations as to particular transportation; that its certificate

authorized only irregular route operations; and that appellant had been and was guilty of willful failure to confine its operations to those authorized by its certificate. It was recommended that its certificate be suspended for a period of 60 days and that it be ordered to cease and desist the operations found to be regular route in character. The exceptions to the report filed October 8, 1951, by appellant were not immediately ruled on by the commission.

A second order was made by the commission on May 16, 1952, requiring appellant to show cause by June 23, 1952, why its certificate should not be suspended, changed, or revoked because of its: Violation during the period September 6, 1951, through April 21, 1952, of the provisions of section 75-228, R. R. S. 1943, in that it had engaged as a common carrier in intrastate commerce not authorized by its certificate; failure during the period designated to perform only operations described in and authorized by its certificate; failure to observe the classification of carriers made by appellee; and failure during the period stated to confine its operations to those authorized by its certificate in violation of an order of the commission.

The pleading of appellant to the order to show cause was in substance a denial of the charges made against it and a request, in the event that the commission found the operations conducted by appellant violated the law of the state or the rules and regulations of the commission, that an application of appellant attached to and made a part of its pleading for a certificate granting it "authority to operate as a regular route operator between Ord, Nebraska, and Omaha, Nebraska" as specifically set forth in the application be approved and granted by the commission, and that a new certificate be issued to appellant as a regular route common carrier with the rights and authority described and requested in the application.

A hearing was had before an examiner and he reported

to the commission that the evidence established that appellant had transported meat from Omaha to consignees in Ord on Mondays and Thursdays from September 6, 1951, through April 21, 1952; from Omaha to consignees in Scotia and North Loup on Tuesdays from February 19 through April 15, 1952; from Omaha to consignees in Ord and Scotia on Mondays and Thursdays from February 7 through April 7, 1952; and that appellant had transported automobile parts from Omaha to consignees at Ord and Burwell almost daily from October 1 through December 28, 1951. The examiner recommended that the commission find that appellant had been and was "performing regular route common carrier operations within the meaning of General Order No. 82, Supplement No. 2, as to the particular movements under consideration"; that the certificate be in part revoked; and that operations of appellant be authorized only "From Ord and within a 50-mile radius thereof, to and from local points, over irregular routes."

The commission found that the certificate of appellant should be revoked and canceled in part for willful violation of the Nebraska Motor Carrier Act and the rules and regulations of the commission; and that the certificate should be changed to authorize transportation by appellant as a common carrier of property by motor vehicle in Nebraska in intrastate commerce of all commodities, except those requiring special equipment, over "Irregular routes from Ord and from within a 50-mile radius thereof, to and from local points, occasionally to and from Omaha, Kimball, intermediate points and points generally throughout the state of Nebraska, on a state-wide basis. RESTRICTION: No meat nor meat products to be transported between Ord, and points within a 50-mile radius thereof, on the one hand, and Omaha, on the other hand." The commission ordered that the certificate of appellant be changed to authorize only the operations as described above. A motion for rehearing was overruled and the commission

ordered appellant to cease and desist from transporting for hire meat or meat products between Ord and points within a 50-mile radius thereof on the one hand and Omaha on the other hand.

There is evidence of these facts: Appellant, a corporation with a place of business in Ord, is and has been for many years in the commercial trucking business. Its principal engagements in the earlier years of its experience were the movement of livestock from Ord and its surrounding territory to Omaha. It acquired and has used three stock trucks for this purpose. On the return trips of the trucks from Omaha any freight it could secure was carried to Ord or points intermediate that it served. Appellant acquired more recently a refrigerated truck described as a 28-foot insulated van-type reefer trailer. It is not refrigerated mechanically but by the use of dry ice. It has been used to transport cream each Sunday from Ord, North Loup, and Scotia to Lincoln. Delivery of the cargo was there made to the Beatrice Creamery Company, now Beatrice Foods Company. The cream was received for transportation at cream stations in the three towns. There were other articles transported on these trips but the principal item was cream. This unit after unloading in Lincoln moved to Omaha and remained there until it acquired a load of freight, including meat and meat products, consigned to Ord or other towns in that vicinity. The meat shipments moved generally on Mondays, Tuesdays, and Thursdays.

Appellant advised Wilson and Company, in answer to its letter of inquiry of August 7, 1950, that "we will give refrigerated service to the following points: Palmer, St. Paul, Elba, Cotesfield, Scotia, North Loup, Ord, Elyria, Burwell, and Taylor. We would like to pick up this meat on Thursday, or we will give twice a week service, if requested." Appellant during 1950 and 1951 advertised "irregular" refrigerated service between Omaha and 10 Nebraska towns, including Ord, all on State Highway No. 11, except Taylor and Palmer. It distributed

cards generally offering service to these points. It has had since July 1950, the services of the Service Exchange Bureau of Omaha. These consisted of telephone service, docking facilities and privileges, and freight pick-up service.

Appellant transported meat or meat products from Omaha to consignees in Ord on Mondays and Thursdays from September 6, 1951, through April 21, 1952; from Omaha to consignees in Scotia and North Loup on Tuesdays from February 19 through April 15, 1952; and from Omaha to consignees in Ord and Scotia on Mondays and Thursdays from February 7 through April 7, 1952. Appellant carried automobile parts from Omaha to consignees at Ord and Burwell very frequently, almost daily, from October 1 through December 28, 1951. The record permits an inference that appellant has continued to serve Ord, Scotia, North Loup, and Burwell in these respects, except the movement of automobile parts was discontinued December 28, 1951.

The single issue is whether or not appellant willfully failed to confine its common carrier operations to the services authorized by its certificate. The certificate permitted transportation by irregular routes from Ord and within a 50-mile radius thereof, to and from local points. Local points as used in the certificate defined places or locations within 50 miles of Ord. The broadest and most liberal interpretation of them would not include Lincoln or Omaha. They may not be considered local to the radial area. They are more than 100 airline miles "from Ord and within a 50-mile radius thereof." The subsequent language of the certificate occasionally to and from Omaha and points generally in Nebraska excludes these cities from the ones intended and described as local points. Any service that was authorized by the provision of the certificate occasionally to and from Omaha, Kimball, intermediate points, and points generally throughout the State of Nebraska on a state-wide basis was qualified by the word occasionally.

This word must be considered in context and with the provisions of general order No. 82, supplement No. 2, of the commission. It classifies all certificate holders as either regular or irregular route common carriers as to particular operations depending upon which of the categories stated in the order fairly characterizes the particular operations. A consideration of the entire certificate makes it certain that Ord and within a 50-mile radius thereof was established as a primary or base area and that two specified points outside of it were named all of which is characteristic of irregular route radial service. It logically follows that the service which was intended and authorized to Omaha was on an irregular route basis and limited and qualified by the word occasionally. The word occasionally was discussed in In re Application of Meyer, 150 Neb. 455, 34 N. W. 2d 904, in this manner: "* * * if this court permitted the appellants to haul freight to and from all parts of the state, even occasionally, as they contend their certificate permitted them to do, it would rewrite their certificate so that it would contain no limitation or restriction on the business they could conduct under it. If the commission allowed one carrier to thus broaden its rights and territory granted in its certificate to the unlimited extent claimed in the case at bar, it would be impossible for the commission to properly regulate such carriers in our state." See, also, In re Application of Canada, 154 Neb. 256, 47 N. W. 2d 507; Black v. Palmer, 293 Ky. 231, 168 S. W. 2d 752. The authority of appellant as a carrier was specifically limited by its certificate to irregular route operations. Whatever occasional irregular permission was given it by the certificate must necessarily mean something less than an unqualified irregular route operation.

The commission had a mandate to specify in the certificate the service appellant was authorized to perform. § 75-231, R. R. S. 1943. It had the authority to classify the appellant as an irregular route operator. § 75-225,

R. R. S. 1943. It had the power to test the operations of appellant as a certificate holder by the terms and provisions of its classification. General order No. 82, supplement No. 2; § 75-225, R. R. S. 1943.

In deciding whether or not appellant carried on its transportation operations within the authority granted it an important consideration is the type of service which it performed. The language in Transportation Activities of Brady Transfer and Storage Co., 47 M. C. C. 23 (affirmed by a per curiam decision of the United States Supreme Court in 335 U. S. 875, 69 S. Ct. 239, 93 L. Ed. 418), is appropriate: "There is no proposal now, nor has there ever been, to limit the frequency or quantity of service which respondent or any other irregular-route carrier may render in bona fide irregular-route service, and our power so to do is not in issue in this proceeding. But we do have the power * * * to describe and fix by description the type of service which respondent may render. Its unquestioned right to increase the frequency or quantity of its service is subject at all times to the limitation in its certificate on the type of service which it is authorized to perform."

General order No. 82, supplement No. 2, of the commission, effective March 15, 1948, contains the following:

"1. Classification—All common and contract carriers undertaking to transport property, or any class or classes thereof, for hire upon highways in Nebraska Intrastate Commerce by motor vehicle, are either regular or irregular route common or contract carriers, as to particular operations, depending upon which of the categories hereinafter set forth fairly reflect such operations.

"2. Regular Route Common or Contract Carriers.

A. Regular Route Common or Contract Carriers are characterized by operating (1) between fixed termini, (2) over fixed routes, (3) upon established schedules or at intermittent intervals constituting continuity of service.

B. Motor Carriers whose operations amount to

continuity of service, as evidenced by (1) habitual or recurrent use of certain routes or highways or frequent service of certain areas, or (2) repeated stops at the same point or points or a substantial portion thereof, or (3) other evidence tending to indicate regularity of route, time or service, are regular route common or contract carriers as to such operations."

The proof is that appellant operated between Omaha and Elba, Scotia, North Loup, Ord, and Burwell in the transportation of meat and meat products and between Omaha and the towns of Ord and Burwell in the transportation of automobile parts. It followed fixed routes in performing the service and it made recurrent and habitual use of State Highway No. 11. It made repeated stops at the same points or a substantial number of them. The service was performed at intermittent intervals sufficient to constitute continuity of service. There was present in the service performed by appellant all of the characteristics of regular route service as delineated in the classification order of the commission. See Transportation Activities of Brady Transfer and Storage Co., *supra.*

Appellant after it commenced refrigerated service advertised in the Omaha Truck Lines Directory, distributed shipper's cards generally, secured telephone service, docking facilities and privileges, and pick-up freight service in Omaha. These were necessary for the assembly of less-than-truckload shipments of freight, the type of freight normally handled by regular route scheduled operators, but they were not characteristic of the irregular route motor carrier on call at any time or place. The finding that appellant had operated without and beyond the authority of its certificate and that it was conducting transportation which was in fact that of a regular route common carrier is supported by convincing evidence.

Appellant was advised by a letter from the commission as early as September 8, 1950, that it had information

that appellant was conducting regular route operations under a certificate which only authorized irregular route transportation. A copy of general order No. 82, supplement No. 2, was enclosed with the letter. Appellant was instructed and requested to forthwith discontinue all regular route operations, to comply with the Motor Carrier Act and the rules and regulations of the commission, and that if it failed to do so its certificate would be subject to revocation. The entire situation was reviewed with counsel for appellant on September 13, 1950. Appellant continued to perform the type of service it was required to discontinue. It did not seek additional authority for its enlarged and changed type of service. This would have been regular procedure. In Transportation Activities of Brady Transfer and Storage Co., *supra,* it is appropriately said: "Whenever, in the normal development and growth of an irregular-route service, the movement of traffic between particular points becomes so constant in point of time and of such volume as to suggest a public need for an added regular-route service between such points, the act provides a means by which appropriate authority for such an operation may be obtained. Noting a tendency for its operation to fall into regular routes, it is the obligation of every irregular-route carrier either to check the tendency and preserve its status, or to obtain appropriate authority for the conversion." The proof is abundant that appellant willfully disregarded the limitations of its certificate and willfully violated the Motor Carrier Act of the state and the rules and regulations of the commission. In Safeway Cabs, Inc. v. Honer, 155 Neb. 418, 52 N. W. 2d 266, this court said: " 'Willful failure,' as used in section 75-238, R. R. S. 1943, is such behavior through acts of commission or omission which justifies a belief that there was an intent entering into and characterizing the failure complained of. A failure to perform an act for a long period of time, which is required by law to be per-

formed, generally constitutes a willful failure to perform."

The commission is authorized to suspend, change, or revoke any certificate of convenience and necessity in whole or in part for willful failure to comply with any of the provisions of the Motor Carrier Act or with any lawful order, rule, or regulation of the commission or with any term, condition, or limitation of a certificate. § 75-238, R. R. S. 1943; General order No. 81 of the commission made on June 19, 1942.

The order of the commission involved in this appeal was made September 5, 1952, and changed the certificate of appellant only to the extent that it could not thereafter transport meat or meat products between Ord and points within a 50-mile radius thereof and Omaha. The transportation of automobile parts had been discontinued by appellant on December 28, 1951. The essence of the change made in the certificate was to prevent the regular route service then being performed by appellant. The record indicates that the commission was lenient with the appellant. It could have entirely revoked its certificate.

Appellant complains of the action of appellee in refusing to consolidate the proceedings originated by the order to show cause with the application attached and made a part of the response of appellant to the order to show cause for a new certificate of convenience and necessity authorizing it to conduct a regular route transportation service. The commission is authorized to govern its proceedings and in the absence of statutory or constitutional inhibition to adopt and pursue its own rules and course of procedure. §§ 75-107 and 75-109, R. R. S. 1943; In re Yellow Cab & Baggage Co., 126 Neb. 138, 253 N. W. 80; In re Application of Chicago, B. & Q. R. R. Co., 154 Neb. 281, 47 N. W. 2d 577. The commission did not abuse its discretion in this regard.

The matter for decision in an appeal from an order of the railway commission, while acting within its jur-

isdiction, is that the order is or is not unreasonable or arbitrary. In re Application of Canada, *supra*. The commission had jurisdiction to change the certificate of appellant. There is evidence supporting the order that it made. The order is not unreasonable or arbitrary. It should be and it is affirmed.

AFFIRMED.

NORMAN A. RICENBAW, APPELLEE, V. EMIL E. KRAUS ET AL., APPELLANTS.
61 N. W. 2d 350

Filed December 11, 1953. No. 33359.

1. **Licenses.** Mere use under a naked license, however long continued, cannot ripen into a prescriptive right.
2. ———. It is an ancient and well-settled doctrine of the common law that a mere license, whether by deed or by parol, is revocable at pleasure.
3. ———. But to the foregoing rule there have always been two recognized exceptions; that is, where the license is executed, and where, by reason of expenditures by the licensee on the strength of the license, it would otherwise be inequitable to permit the licensor to effect a revocation.
4. **Easements.** An existing easement to use an underground tile line obtained by implication or by prescription is not extinguished by a subsequent sale of the servient estate to a bona fide purchaser without knowledge or actual or constructive notice.
5. ———. Every easement carries with it by implication the right of doing whatever is reasonably necessary for the full enjoyment of the easement itself.
6. ———. The dominant owner has the right of access to make repairs and may enter upon the servient estate for this purpose. He may not, however, inflict any unnecessary injury.
7. **Waters.** A proprietor may not collect surface waters on his estate into a ditch or drain and discharge them in a volume on the lands of his neighbor, nor can he divert them so they go in a direction different from the natural flow.
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.

9. ———. Where surface water resulting from rain and snow flows in a well-defined course, whether it be a ditch, swale, or draw in its primitive condition, its flow cannot be arrested or interfered with by a landowner to the injury of neighboring proprietors.

10. **Crops: Damages.** The general rule is that the measure of damages for the destruction of a growing crop is the value thereof in the condition in which it exists at the time of its destruction.

11. ———: ———. Damages based upon the value of unmatured crops are analogous to profits lost, and are governed by the same rule precluding recovery in cases of either uncertainty or remoteness. The question of whether damages based on the result of an unmatured crop are speculative must be determined by whether there is sufficient data to determine with reasonable certainty the probable value it would have had if matured.

APPEAL from the district court for Seward County: CLOYDE B. ELLIS, JUDGE. *Affirmed in part, and in part reversed and remanded.*

Russell A. Souchek, William L. Walker and *Earl Ludlam,* for appellants.

McKillip, Barth & Blevens, 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 Seward County. It involves the appellee's, Norman A. Ricenbaw, right to maintain a dual system of drainage across appellants', Emil E. Kraus and Josephine H. Kraus, husband and wife, land.

Appellee is the owner of the northwest quarter and appellants are the owners of the northeast quarter of Section 23, Township 9, Range 1 East of the 6th P. M., in Seward County. The natural drainage of the moisture falling on the east side of appellee's land and on appellants' land is toward the east, although it is slightly toward the northeast as it crosses appellants' land. It

ultimately flows into the Blue River. Since 1901 the natural surface drain of a small area or pocket on appellee's land, consisting of about 2 acres, has been supplemented by a tile drain. This pocket is just west of the parties' line fence and about 60 rods north of appellee's south line. It collects surface water from about 50 to 60 acres of appellee's land and when it fills with water from rain or melting snows it overflows through a small swale at the parties' line fence.

In regard to the tile drain the trial court decreed: "IT IS THEREFORE, Ordered, Adjudged and Decreed that the plaintiff has an easement over the defendants' land, * * * which is an appurtenance of the plaintiff's land, * * * where the tile drain is located, with the right to maintain said tile drain, including the right to go upon the defendants' land, solely, however, as may be necessary, for the purpose of opening and restoring said tile drain to a functioning condition, and to maintain the same in a functioning condition, with the obligation on the plaintiff and his successors in title, after any work on said tile drain, to restore the surface of defendants' land to substantially the same condition as before performance of said work.

"IT IS FURTHER, Ordered, Adjudged and Decreed that the defendants are hereby enjoined from interfering with or molesting said tile drain and from interfering with the plaintiff in the restoration and maintenance of the same in a functioning condition; * * *."

In considering this appeal we apply the following principle: "It is the duty of this court in an equity case to try the issues de novo and to reach an independent decision without being influenced by the findings of the trial court except if the evidence is in irreconcilable conflict this court may consider that the trial court saw the witnesses, observed their manner of testifying, and accepted one version of the facts rather than the opposite." Keim v. Downing, *ante* p. 481, 59 N. W. 2d 602.

The evidence shows that in 1900 Oscar Knutson was

the owner of the northeast quarter. That fall A. L. Hannah bought the northwest quarter. After buying the northwest quarter Hannah obtained oral permission from Knutson to put a tile across Knutson's land in order to drain this small pocket which then existed on the land Hannah had purchased. This permission was given with the understanding that the tiling was to be done in such a manner that it would not bother Knutson in the farming of his land, that is, Hannah was to level off the ground after laying the tile and thereafter take care of it.

Hannah, who was from Illinois, moved to Nebraska in the spring of 1901. He brought with him 400 four-inch tile. These he used to drain this pocket. He started laying the tile at the low point of the pocket, which was some 100 to 110 feet west of the line fence. In laying the tile Hannah followed the natural drain, as evidenced by a small swale, onto and across Knutson's land for a distance somewhere between 160 and 250 feet. The tile were laid to where the swale ended, thus emptying the water flowing therefrom into a draw. The tile successfully drained this pocket until the spring of 1952 when appellant Emil Kraus, because of other difficulties with appellee, either plugged, or caused to be plugged, the outlet thereof which is located on his land.

As stated in Walsh v. Walsh, 156 Neb. 867, 58 N. W. 2d 337, by quoting from 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.' "

And as stated in Bone v. James, 82 Neb. 442, 118 N. W. 83: "* * * if the use of this way was commenced and continued by license or permission had from the plaintiff, then no right by prescription could be acquired, however long such use was continued."

But here, after obtaining from Knutson the oral license or permit to use his land to drain this pocket, Hannah went to the trouble and expense of actually putting

in the tile. As stated in Fitzsimmons v. Gilmore, 134 Neb. 200, 278 N. W. 262: " 'It is an ancient and well-settled doctrine of the common law that a mere license, whether by deed or by parol, is revocable at pleasure.' 17 R. C. L. 576, sec. 89. But, to this rule there always has been two recognized exceptions, viz: Where the license is executed, and where by reason of the expenditures by the licensee on the strength of the license, it would otherwise be inequitable to permit the licensor to effect a revocation. 17 R. C. L. 576, sec. 89." See, also, Arterburn v. Beard, 86 Neb. 733, 126 N. W. 379; Magnuson v. Coburn, 154 Neb. 24, 46 N. W. 2d 775.

As said in Magnuson v. Coburn, *supra,* quoting from 3 Tiffany, Real Property (3d ed.), c. 15, § 834, p. 416: " 'Accordingly, the decisions that a license cannot be revoked after the making of improvements on the faith thereof appear properly to involve merely the assertion of a rule of construction, that an oral permission to make a particular use of land, which use is such that it will be necessary or desirable to make expenditures in order to avail oneself of the permission, is to be construed as an attempt orally to grant an easement in the land, which is absolutely invalid as a grant, but operates by way of equitable estoppel in favor of the intended grantee if he subsequently makes expenditures on the assumption that he acquired an easement thereby, although, as a matter of fact, he originally acquired, by reason of the invalidity of the grant, merely a license."

We find, under the circumstances here shown, that Hannah, by reason of putting in the tile drain, obtained an irrevocable easement appurtenant to the northwest quarter.

Appellants claim they are purchasers for value without notice of their land being burdened with this tile drain and consequently take their title free from the burden thereof. The evidence shows that before buying the northeast quarter in July of 1942, appellant Emil Kraus inspected the lands but did not notice or become

aware of the tile drain thereon. He did not discover it until sometime in May of 1943 after appellants had moved onto the premises.

There is authority supporting appellants' contention but we think the rule announced in McKeon v. Brammer, 238 Iowa 1113, 29 N. W. 2d 518, 174 A. L. R. 1229, is the sounder rule. Therein it was held that an existing easement to use an underground tile line obtained by implication or by prescription is not extinguished by a subsequent sale of the servient estate to a bona fide purchaser without knowledge or actual or constructive notice. For a full discussion of the subject see McKeon v. Brammer, *supra*. As therein stated: "The grantor of the servient estate has no more right to convey the estate free from a nonapparent easement than he has to convey free from an apparent easement. In either instance he fails to convey a property right that he does not own—one that has passed to the owner of the dominant estate and runs with that land. The purchaser of the servient estate takes no greater title than his grantor had."

In regard to appellee's right to maintain this easement, since appellants will not permit him to go on their land for that purpose, the rule is:

" 'Every easement carries with it by implication the right, . . . of doing whatever is reasonably necessary for the full enjoyment of the easement itself.' 28 C. J. S., Easements, p. 754, § 76." Scheeler v. Dewerd, 256 Wis. 428, 41 N. W. 2d 635.

"The dominant owner has the right of access to make repairs and may enter upon the servient estate for this purpose. He may not, however, inflict any unnecessary injury." 17 Am. Jur., Easements, § 108, p. 1004.

And as stated in 169 A. L. R. 1147, in discussing this subject: "As a general rule, in the absence of an agreement, the owner of land subject to an easement of a nature which requires the maintenance of means for its enjoyment is not bound to keep such means in repair or

to sustain any expense in maintaining them in a proper condition. The duty and privilege of constructing an easement or of making repairs for its use or enjoyment rests upon the owner of the dominant tenement, since the easement itself is his particular property. * * * The dominant owner has the right of access to make repairs and may enter upon the servient estate for this purpose. He may not, however, inflict any unnecessary injury. 17 Am. Jur. 1003, Easements, § 108."

See, Barr v. Lamaster, 48 Neb. 114, 66 N. W. 1110, 32 L. R. A. 451.

As to the surface drain from this pocket the trial court decreed: "* * * that the defendants are hereby ordered and directed within thirty days from this date to remove the dam or dirt obstruction placed by them on the East side of the boundary fence between plaintiff's and defendants' premises and directly east of the depression on the plaintiff's land, and within the same time to otherwise grade and level their said land immediately east of said boundary fence and eastward therefrom over an area twelve feet wide extending from an east and west line drawn from a point six feet to the north, and to an east and west line drawn from a point six feet to the south of the point marked and designated 'bench mark' on Exhibit No. 30 of the evidence, * * * so that no part of said land within the area so described and between the said boundary fence and the outlet of said tile drain shall have an elevation higher than the elevation of the ground at the location of said 'bench mark' or, in the alternative, so that no part of said area of land above described, shall have an elevation more than .65 of a foot higher than the highest elevation within a circle having as its center the opening or upper end of said tile drain, and a radius of three feet; * * *.

"IT IS FURTHER Ordered, Adjudged and Decreed by the Court that defendants shall grade their said premises as herein before provided so that a part of the surface water which accumulates in the depression herein

referred to on plaintiff's premises, and which normally drained eastward over the top of defendants' land prior to the time when said tile drain became clogged, and prior to the time of the erection of the aforementioned embankment by the defendants, shall drain off the surface of defendants' land substantially as before."

The evidence shows there has always been a small swale running slightly southwest from the draw in appellants' land, where the tile drain empties, to the parties' line fence and then under it. It is through this swale that the excess or overflow water from this pocket has always drained. While normally the tile drain has taken care of the water collecting in this pocket, however, whenever it was insufficient for that purpose this swale has carried all excess. It is this swale that appellant Emil Kraus caused to be dammed at a point just east of the line fence. He thus prevented the water from flowing east therein onto his lands.

It is, of course, true that: "A proprietor may not collect surface waters on his estate into a ditch or drain and discharge them in a volume on the lands of his neighbor, nor can he divert them so they go in a direction different from the natural flow." Schomberg v. Kuther, 153 Neb. 413, 45 N. W. 2d 129.

"'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* (151 Neb. 392, 37 N. W. 2d 616)." Rudolf v. Atkinson, 156 Neb. 804, 58 N. W. 2d 216.

In Muhleisen v. Krueger, 120 Neb. 380, 232 N. W. 735, we quoted from Town v. Missouri P. R. Co., 50 Neb. 768, 70 N. W. 402, as follows: "'Surface waters may have such an accustomed flow as to have formed at a certain place a channel or course, cut in the soil by the action of the water, with well-defined banks, and having many of the distinctive attributes of a water course; and

though there are no exceptions to the general rule except from necessity, this may constitute an exception, and if the flow is stopped by the erection of an embankment across and in the channel, some provision may be necessary for the allowance of the regular flow of the surface waters.' "

But here the water, whenever the pocket filled, both before and after the tile drain was put in, always drained through this swale across the northeast quarter.

As stated in Schomberg v. Kuther, *supra*: "Where surface water resulting from rain and snow flows in a well-defined course, whether it be a ditch, swale, or draw in its primitive condition, its flow cannot be arrested or interfered with by a landowner to the injury of neighboring proprietors." See, also, Purdy v. County of Madison, 156 Neb. 212, 55 N. W. 2d 617; Bussell v. McClellan, 155 Neb. 875, 54 N. W. 2d 81.

The evidence fully supports the order of the court. While we think the low area at the fence line, as evidenced by the two surveys made by the county surveyor of Seward County, to be 8.55 and not 9.00, as it relates to his bench mark, however, since the appellee has taken no appeal from the decree of the trial court, we affirm its action in that respect.

Appellants complain of the trial judge's refusal to view the premises, request for him to do so having been made by them. This request the court did not grant because he thought the evidence was sufficient to determine the issues and that nothing could be gained thereby.

The trial court had a right to grant this request and to view the premises but such right was discretionary and this court will not reverse a judgment for refusing to do so unless it is apparent from the record that there has been an abuse of such discretion. See, § 25-1108, R. R. S. 1943; Carter v. Parsons, 136 Neb. 515, 286 N. W. 696; Birdwood Irr. Dist. v. Brodbeck, 148 Neb. 824, 29 N. W. 2d 621. No abuse of this discretion is here shown. Ap-

pellants suggest that this court view the premises. This suggestion must be of necessity be denied for we consider and review a case brought here on appeal solely on the record made in the court where the trial thereof was had.

The trial court awarded appellee damages of $156.25 for loss of about 3 acres of wheat which occurred during the year 1952. The loss of the crop resulted from appellant Emil Kraus' conduct and for which he is unquestionably liable.

In Berard v. Atchison & N. R. R. Co., 79 Neb. 830, 113 N. W. 537, we said: "The authorities are quite uniform that the rule of damage for the loss of a growing crop is the value of the crop at the time of its destruction or of the damage sustained."

"The general rule is that the measure of damages for the destruction of a growing crop is the value thereof in the condition in which it exists at the time of its destruction." Pulliam v. Miller, 108 Neb. 442, 187 N. W. 925.

" 'The general rule is that damages, to be recoverable, must be direct and certain. Contingent, remote, or speculative damages, such as the loss of speculative profits, will not be allowed.' 20 C. J. 764." Gledhill v. State, 123 Neb. 726, 243 N. W. 909.

In Snyder v. Platte Valley Public Power & Irr. Dist., 144 Neb. 308, 13 N. W. 2d 160, 160 A. L. R. 1154, we said: "Damages based upon the value of unmatured crops are analogous to profits lost, and are governed by the same rule precluding recovery in cases of either uncertainty or remoteness. The question of whether damages based on the result of an unmatured crop are speculative must be determined by whether there is sufficient data to determine with reasonable certainty the probable value it would have had if matured." See, also, Faught v. Dawson County Irr. Co., 146 Neb. 274, 19 N. W. 2d 358; Faught v. Platte Valley Public Power & Irr. Dist., 147 Neb. 1032, 25 N. W. 2d 889.

In Hopper v. Elkhorn Valley Drainage Dist., 108 Neb.

550, 188 N. W. 239, we approved the following language of an instruction: " 'Where a growing crop is injured but not rendered entirely worthless as a direct result of the acts and omissions of the defendant, the damage to it may be measured, under these rules, by the difference between the value at maturity of the probable crop, if there had been no injury, and the value of the actual crop at that time, less the expense of fitting for market that portion of the probable crop which was prevented from maturing by the injury.' "

As stated in Pulliam v. Miller, *supra:* "In case the crop is matured the value is usually proved by showing the market value, less the necessary cost of harvesting, threshing, and transporting to market."

Appellee's evidence shows the loss of about 3 acres of wheat; that the balance of the field yielded about 40 bushels per acre; and that wheat was worth $2.25 per bushel. It does not show what would have been the reasonable expense of fitting for market that portion of the probable crop which was prevented from maturing by reason of the flooding.

It is appellee's thought, since the evidence he adduced would support a finding that if the 3 acres of wheat destroyed had matured the yield therefrom would have been about 120 bushels and worth $270 on the market, the trial court must have taken judicial notice of what would have been the fair and reasonable cost of harvesting the crop therefrom and deducted it in arriving at the sum of $156.25. We do not think it is a fact of which a court can take judicial notice as it may vary greatly under different circumstances. It is a fact which must be proved.

In the absence thereof any judgment for damages would be speculative, conjectural, and uncertain.

Complaint is made of the trial court taxing all costs to appellants. This contention is based primarily on the fact that the trial court accepted appellants' evidence as to the fence line elevation. We think the trial

court's decree was in favor of appellee and sustained his position, rather than appellants', in regard to his right to flow this water through a dual system of drainage. Under this situation the trial court did not abuse its authority as granted to it by section 25-1711, R. R. S. 1943.

However as to costs in this court we think, in view of our holding as to damages, they should be taxed to appellee. § 25-1933, R. R. S. 1943.

In view of what we have herein said, other contentions made by appellants will not be discussed as it would serve no useful purpose to do so.

We affirm the action of the trial court in all matters except its award of damages; the latter is reversed. Costs in this court are taxed to appellee.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED.

IN RE ESTATE OF FRANK TETSCHNER, DECEASED. OTTO TETSCHNER ET AL., APPELLANTS, V. A. I. CRAM, EXECUTOR OF THE ESTATE OF FRANK TETSCHNER, DECEASED, APPELLEE.
61 N. W. 2d 378

Filed December 11, 1953. No. 33375.

1. **Cemeteries.** Where a cemetery association is shown by appropriate records to have been organized under Chapter 16, section 45, Comp. St. 1893, now section 12-501, R. S. 1943, a presumption of its continued existence arises.
2. ———. A cemetery association organized under Chapter 16, section 45, Comp. St. 1893, is authorized to create a perpetual care fund and to receive property as trustee for the purpose of providing for the care of burial lots, graves, and the like, under sections 12-509 to 12-512, R. S. 1943.
3. **Wills: Cemeteries.** A bequest of the property of a testator to an existing cemetery association, directing that it be used for the purpose of maintaining its cemetery in proper condition and requesting that the graves of his family and relatives have preference and be properly cared for, constitutes a valid bequest in trust for the purposes indicated as authorized by section 12-510, R. S. 1943.

APPEAL from the district court for Garfield County: ERNEST G. KROGER, JUDGE. *Affirmed.*

Davis & Vogeltanz, for appellants.

Manasil & Erickson, for appellee.

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

CARTER, J.

This is an appeal from the judgment of the district court for Garfield County sustaining the validity of a bequest contained in the will of Frank Tetschner, deceased, by which the Burwell Cemetery Association was bequeathed all of his estate for the purpose of maintaining the Burwell Cemetery.

The deceased executed his last will on May 27, 1946. He died on May 30, 1950. The will was properly admitted to probate. The will gave all the property of the deceased to his wife if she was alive at his death. The wife, however, predeceased the testator. The will provided for such contingency in the following language: "If my said wife, Nancy Tetschner, preceeds me in death then in that case I will and bequeath to the Burwell Cemetery Association all of my property of every kind and description, and direct that the same be used and the income thereof be used for the purpose of maintaining and keeping in proper condition the said Burwell Cemetery, and request that any grave of any of my family or relatives have the preference and be properly cared for. Said funds are to be used and handled by the Cemetery Board of the Burwell Cemetery Association and I trust that they will be governed by the above request."

The record shows that the Burwell Cemetery Association filed its articles of incorporation on April 10, 1896. Amended articles were filed on December 11, 1925. The minutes of the association for August 30, 1943, show that a resolution was adopted to the effect

that it would be to the best interests of the association to transfer all of its property to the village of Burwell and that the village should operate and care for the Burwell Cemetery if such village would by proper resolution assume the responsibility of the association. On November 9, 1943, the village adopted such a resolution. The record does not disclose that any of the association's property was ever transferred to the village. It appears, however, that the village, now a city of the second class, did undertake the supervision of the cemetery. The minutes of the village board under date of April 5, 1944, contain the following statement with reference thereto: "Hereafter the Burwell Cemetery will be under the management of the Village Board." The record discloses nothing further with reference to the assumption of the powers of the cemetery association by the village board.

It is the contention of the appellants that the cemetery association was dissolved and no longer existed as a corporation. The only testimony in the record tending to support this contention is the evidence of the executor of the estate, who was a stockholder of the Burwell Cemetery Association on August 30, 1943. He stated on cross-examination with reference to the August 30, 1943, meeting as follows: "I think we had a meeting after that. Well, just resolutions, I would have to look up the record to give it to you. We was together at Mr. Laverty's office and declared the association dissolved, to that Mr. Laverty can testify." Guy Laverty later testified that he was chairman of the board of the Burwell Cemetery Association on August 30, 1943, that he is still the chairman of the board, and that he knows of no attempt to dissolve the corporation. No minutes of the cemetery association board indicating an attempt to dissolve the corporation are contained in the record.

We are of the opinion that the evidence will not sustain a finding that the Burwell Cemetery Association was dissolved. It is not questioned that the Burwell

Cemetery Association was duly incorporated prior to August 30, 1943. The presumption of its continued existence has not been overcome. It holds title to the lands used for cemetery purposes at the present time so far as the record shows. It attempted to divest itself of its property in favor of the village of Burwell on or about August 30, 1943, but it does not appear that it ever did so. It still has a bank account in the Bank of Burwell that is not wholly inactive. In any event, the transfer of its property does not of itself dissolve a corporation. The ownership or possession of property is not necessary to the existence of the corporate entity.

The cemetery association was organized under Chapter 16, section 45, Comp. St. 1893, which now exists in substantially the same form as section 12-501, R. S. 1943. It has authority to create a perpetual care fund and to receive property as trustee for the purpose of providing for the care of burial lots, graves, and the like. §§ 12-509 to 12-512, R. S. 1943. Section 12-512, R. S. 1943, specifically provides that "No payment, gift, grant, bequest, or other contribution for such purpose shall be deemed to be invalid by reason of any indefiniteness or uncertainty of the persons designated as beneficiaries in the instruments creating such funds, * * *."

The Burwell Cemetery Association is an existing corporation insofar as this record shows. It has ample authority to receive the funds in the hands of the executor for the purposes stated in the will of Frank Tetschner, deceased. Frank Tetschner, his wife, and many close relatives are buried in the Burwell Cemetery. The evidence is ample to show that this was the cemetery that the deceased intended to favor by his bounty. The Burwell Cemetery Association was an existing, competent trustee, endowed with all the powers necessary to receive and administer the funds in the hands of the executor. The trial court correctly held that the Burwell Cemetery Association was entitled to the money remaining in the hands of such executor. In view of the con-

clusion reached it becomes unnecessary to consider the questions raised which are based on the assumption that the Burwell Cemetery Association was a dissolved corporation.

AFFIRMED.

RALPH GOMEZ, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA EX REL. SHIRLEY LAREZ, DEFENDANT IN ERROR.
61 N. W. 2d 345

Filed December 11, 1953. No. 33391.

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 situations the only issue that will be considered on appeal to this court is sufficiency of the pleadings to support the judgment.
2. **Courts: Appeal and Error.** Where the court does not have jurisdiction over the subject matter of an action that question may be raised at any stage of the proceedings, even on appeal, or in a collateral action.
3. **Children Born out of Wedlock.** Within the meaning of the statutes of this state a "child born out of wedlock" is one whose parents were not married to each other at the time of the birth of the child.
4. ———. Within this meaning the mother of a "child born out of wedlock" may be at the time of conception and birth of the child a married woman.
5. **Statutes.** It is to be presumed that the Legislature in using language in a statute gave to it the significance that had been previously accorded to it by the pronouncements of this court unless a different meaning has been provided by the context of the statute.
6. **Children Born out of Wedlock.** The mother of a "child born out of wedlock" is by statute a proper party to make complaint under the statute.

ERROR TO the district court for Scotts Bluff County: EDMUND P. NUSS, JUDGE. *Affirmed.*

Mothersead, Wright & Simmons, for plaintiff in error.

Bertrand V. Tibbels, for defendant in error.

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

YEAGER, J.

The action out of which the appeal here arose originated in the county court of Scotts Bluff County, Nebraska. In an action in that court on May 10, 1952, in the name of the State of Nebraska ex rel. Shirley Larez, plaintiff, v. Ralph Gomez, defendant, Shirley Larez, who will hereinafter be referred to as plaintiff, filed a complaint containing the following charge: "Shirley Larez, being first duly sworn upon her oath, deposes and says that she is now pregnant with child, which will be born out of wedlock, and that Ralph Gomez, is the father thereof."

Ralph Gomez, who will be hereinafter referred to as the defendant, was arrested and brought before the county court where he entered into a recognizance for his appearance before the district court.

Subsequently on February 18, 1953, an information signed by plaintiff was filed in the district court. The charge in the information is as follows: "Of the Regular October, 1952 Term of the District Court of Scotts Bluff County, Nebraska, in the year A. D. 1953, comes Shirley Larez, relatrix, of Scotts Bluff County, Nebraska, prosecuting in the name of the State of Nebraska, information makes and gives the court to understand and be informed that she is the mother of a child born out of wedlock, and defendant is the father thereof."

On the same day the defendant was taken into custody and brought before the district court.

From recitals in a journal entry it appears that on the same day the defendant was given a hearing in the district court. The journal entry however was not filed until February 25, 1953.

It appears from the findings contained in the journal entry that on February 18, 1953, the defendant was arraigned, waived time to plead to the information, and admitted the paternity of the child in question, a female

born on August 1, 1952. A finding was made by the court in accordance with the admission of the defendant.

In pursuance of the findings the court ordered the defendant to pay for physicians' services $63.50, for hospital expenses $57, and $50 into court instanter for maintenance of the child and a like sum each month commencing March 1, 1953, and continuing until the child shall attain the age of 18 years or until marriage, whichever event occurs first. Defendant was also ordered to pay court costs in the amount of $34.

By order of court, the defendant was cited to appear on March 2, 1953, and show cause why he should not be punished for contempt of court for failure to make the payments required by the previous order.

On March 11, 1953, a hearing was had on the citation and the defendant was found and adjudged to be in contempt of court and he was remanded to the custody of the sheriff until he had purged himself of contempt by compliance with the order of the court.

On March 11, 1953, and presumably before the hearing, the attorney for defendant filed an affidavit in the nature of a pleading in which it was set forth in substance, among other things, that at the time of conception and birth of the child in question the plaintiff was a married woman and the wife of Ray Larez.

In the order in which the court adjudicated that the defendant was guilty of contempt of court the court found, as was asserted in the affidavit, that the plaintiff was a married woman.

The plaintiff concedes in her brief that the finding in this respect is correct and that at the time of conception and birth of the child in question she was a married woman.

Regardless of the admission however the finding of the court in this respect must be accepted as established since this case comes to this court without a bill of exceptions. In Goger v. Voecks, 156 Neb. 696, 57 N. W. 2d 621, it was said: "In the absence of a bill of ex-

ceptions 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." See, also, Horn v. Gooch Feed Mill Co., *ante* p. 125, 58 N. W. 2d 626.

No contention is made on this appeal that the question of the marital status was not sufficiently presented by pleading in the contempt proceedings.

The court found in this connection that the question of whether or not plaintiff was married could not be considered since it had not been previously raised; that the question was res judicata.

The defendant contends that the court at no time had jurisdiction over the subject matter of this action, therefore no order or adjudication made had any legal force and effect, and in consequence the finding of res judicata and the adjudication of contempt were erroneous.

It is correct to say that where the court does not have jurisdiction over the subject matter of an action that question may be raised at any stage of the proceeding, even on appeal, or in a collateral action. In re Estate of Hansen, 117 Neb. 551, 221 N. W. 694; Lippincott v. Wolski, 147 Neb. 930, 25 N. W. 2d 747, 169 A. L. R. 1236; Drieth v. Dormer, 148 Neb. 422, 27 N. W. 2d 843.

Whether or not the court had jurisdiction of the subject matter in this case inheres in a decision upon the primary question presented by this appeal. The primary question is that of whether or not a married woman under sections 13-101, R. S. 1943, and 13-113, R. S. Supp., 1951, may be heard to say that a man other than her husband is the father of a child of hers, born out of wedlock, and through legal processes compel support of such child. A determination of this question requires an examination of Chapter 13, R. S. 1943, as amended,

the antecedent legislation, and the earlier decisions of this court relating to the subject to which this chapter pertains.

Chapter 13, R. S. 1943, as amended, pertains to the subject of support of children born out of wedlock and processes to obtain support for such children. Section 13-113, R. S. Supp., 1951, permits a woman pregnant with a child which if born alive will be born out of wedlock or the mother of a child born out of wedlock to file a complaint accusing on oath or affirmation any person of being the father of the child. Such an accusation was filed herein by plaintiff with the defendant as the accused person. Nothing need be said about the processes immediately following the accusation here except that they appear to have been followed. This section contains no description or definition of a child born out of wedlock.

For the purposes of this case section 13-101, R. S. 1943, defines a child born out of wedlock as follows: "For the purposes of sections 13-101 to 13-116 a 'child born out of wedlock' is one whose parents were not married to each other at the time of its birth; * * *."

It conclusively appears as has already been made clear that plaintiff and defendant were not married to each other at the time of the birth of the child in question here.

Notwithstanding the language of the statute the defendant contends that there was no intention on the part of the Legislature to permit the mother of a child conceived and born during the time when she was married to assert and prove that the child was conceived and born out of wedlock within the meaning of this statute.

The legislative intent in this connection must be ascertained from what is contained in the act together with an analysis of previous legislation on the subject and the presumptive regard which was given to earlier pronouncement of this court since there is no record

in the legislative journals otherwise evincing the intention of the Legislature.

Section 13-113, R. S. Supp., 1951, is a provision amendatory of section 13-113, R. S. 1943, which in all particulars of consequence or concern here is the same as it was before amendment. The section was first enacted in 1941. Prior to that time there were statutory proceedings to deal with the subject matter contemplated by this section. The first procedure came into being in 1869. The provision appears as Chapter 28, sections 1 to 5, inclusive, of the General Statutes of 1873. The proceeding was termed a bastardy proceeding. Section 1 contains the following: "That on complaint made * * * by any woman * * * who shall hereafter be delivered of a bastard child, or being pregnant with a child, which, if born alive may be a bastard, accusing any person of being the father of such child, the justice of the peace shall take such accusation in writing, under oath, and shall thereupon issue his warrant * * *."

This provision remained in full force and effect until it was amended in 1875. The pertinent part of the provision as it appeared after 1875 was as follows: "On complaint made * * * by any unmarried woman * * * who shall hereafter be delivered of a bastard child, or being pregnant with a child which, if born alive, may be a bastard, accusing on oath or affirmation any person of being the father of said child, the justice shall take such accusation in writing, and thereupon issue his warrant * * *." § 9-101, Comp. St. 1929.

It is to be observed that the only significant difference between the quoted portion of the 1869 and the 1875 statutes is that in the former the rights under the statute are extended to "any woman" whereas in the latter they are extended to "any unmarried woman."

By legislative act of 1941 section 9-101, Comp. St. 1929, was repealed. This repeal of course carried with it the

description of the class of women, that is "unmarried woman" of the act of 1875.

Thus by the act of 1941 it was provided again by the liberal terms of the statute, as was true prior to 1875, that "any woman" be she married or unmarried, could make complaint that a man other than her husband was the father of child with which she was pregnant or which had been born to her alive.

The only significant difference in the law in this respect is that prior to 1941 children of the circumstances under consideration were denominated "bastards" whereas since that time they have been denominated "children born out of wedlock."

If therefore the literal language of the present statute is to be accepted as expressing the true intention of the Legislature it must be said that complaint and the processes of the statute were available to the plaintiff.

The defendant urges however that it was never the intention of the Legislature that a woman married at the time of conception or birth of her child should be able under section 13-113, R. S. Supp., 1951, to contend that her child was the child of a man not her husband.

We have been unable to find a case in this jurisdiction wherein this question was considered where it was directly at issue. However the question was discussed and very definite conclusions arrived at in a case wherein, under the act of 1875, the question of whether or not a woman who had conceived and given birth to a child while unmarried could make complaint under the statute that her child was a bastard after being subsequently married. The subject is considered in two opinions, appearing as Parker v. Nothomb, 65 Neb. 308, 91 N. W. 395, 60 L. R. A. 699, and on rehearing as 65 Neb. 315, 93 N. W. 851, 60 L. R. A. 701.

In the second opinion, on the question of whether or not a married woman could under the 1869 statute maintain such an action as this, the court said: "In that act it was provided that on complaint made by 'any woman'

etc., proceedings should be had for the purpose of compelling the father to support his illegitimate offspring. By the wording of the statute as then enacted, the question of the status of the woman making the complaint, with reference to her being married or unmarried at the time of the birth of the child, was not made the test of her right to maintain an action against the putative father for its support. Under such statute the questions to be determined were whether the woman, be she married or unmarried, had been delivered of a bastard child or was pregnant with a child which if born alive would be a bastard. * * * Thus by the old statute a married woman, although such at the time a bastard child was begotten and born, could maintain an action in bastardy for the support of such child. * * * To avoid this possible condition of things, we apprehend, was the sole aim and object of the legislature in amending the law as it did in 1875 by inserting the word 'unmarried' after the word 'any' so that the section should read that on complaint made by 'any unmarried woman,' instead of 'any woman,' as originally existing."

This case was decided in 1903. Two syllabus points in this case are based upon the legal propositions contained in this quotation from the opinion. They have not since been considered by this court according to the research which we have made. Therefore unless the statement be regarded as pure obiter dicta and therefore was not considered of any force and effect by the Legislature it is to be reasonably though not conclusively presumed that the act of 1941 was enacted with reference to and with the pronouncement in contemplation.

In State ex rel. Howard v. Marsh, 146 Neb. 750, 21 N. W. 2d 503, this court, in construing a constitutional provision which was unchanged after an opportunity had been afforded to do so, said: "There is another and persuasive, while not controlling, reason for following the precedent of this court. The interpretation by the court of the provision of the Constitution of 1875 in State

ex rel. McKelvie v. Wait, *supra,* (95 Neb. 806, 146 N. W. 1048) antedated the amendment to the Constitution of 1920 by six years. The constitutional convention which promulgated the amendment to this section of the Constitution for submission in 1920 had for its use and benefit the interpretation. It appears a reasonable presumption that if the convention was not satisfied with the interpretation it would have made clear its dissatisfaction by such change as was necessary to that end. We think this reasoning is especially sound since the convention did make changes in the provisions to meet the exigencies created by the constitutional changes."

It is true that legislative rather than constitutional change is involved here but the same rule applies in statutory interpretation and application. See, Kendall v. Garneau, 55 Neb. 403, 75 N. W. 852; Franzen v. Blakley, 155 Neb. 621, 52 N. W. 2d 833.

Also it is difficult to see how the reasoning should apply to failure to change and not as here to change.

We think that this rule must be regarded as having persuasive effect in the determination of the intent of the Legislature in the enactment of the act of 1941. The effect is to say that there was a restoration of the status which the court said existed prior to 1875 in the interpretation of the act of 1869.

It is urged by the defendant that this court has placed an interpretation upon the term "child born out of wedlock" as used in the act of 1941 which defeats the right of plaintiff as a married woman to maintain this action. In Campion v. Lattimer, 70 Neb. 245, 97 N. W. 290, a case decided in 1903, it was said: "The word 'bastard' in our language, both in its legal signification and in its literary use, has a well defined meaning. Webster defines it as follows: 'A natural child; a child begotten and born out of wedlock.' Now, in order that the child be begotten and born out of wedlock, it follows that the mother is an unmarried woman. In law the word is defined as follows: 'A child whose parents were not married to

each other at the time of its birth.' " The definition had no relation to any question for decision in the case.

The defendant substantially contends that the words "Now, in order that the child be begotten and born out of wedlock, it follows that the mother is an unmarried woman," expressed the intention of the Legislature in the act of 1941 when it employed the words "child born out of wedlock."

With this contention we are unable to agree. It could have had reference only to the law relating to bastards as it was declared to be by the court in 1903. This becomes abundantly clear from the fact that the case of Parker v. Nothomb, *supra,* was cited in the opinion. In 1903 a child could not be termed a bastard unless it was conceived by and born of an unmarried woman.

It follows then that the court had jurisdiction of the subject matter of the action.

The defendant charges that there was no valid complaint because it was signed by plaintiff, a married woman. In the light of what has been said with regard to her right to maintain the action and the right granted to her by the statute it must be said that this contention is without merit. Section 13-113, R. S. Supp., 1951, specifically grants the right to her to make complaint.

The remaining questions argued relate to matters of an evidentiary nature. They may not be considered here since there is no bill of exceptions. As already pointed out the findings of the court for this reason must be accepted as having been supported by the evidence.

The judgment of the district court is affirmed.

AFFIRMED.

JOHN J. KNOUSE, APPELLEE, V. BEN F. KNOUSE ET AL., APPELLEES, J. R. SWENSON, INTERVENER-APPELLANT.
61 N. W. 2d 388

Filed December 11, 1953. No. 33392.

1. **Judicial Sales.** A successful bidder at a judicial sale becomes a party to the proceedings and may appear and urge confirmation and appeal from an order setting the sale aside.
2. **Partition.** A referee in partition is an officer of the court, subject to its lawful orders and directions, and every person who buys from a referee takes with knowledge that the contract of sale is not binding on the referee until the entire transaction is properly presented to and approved by the court.
3. ———. In partition proceedings, it is the duty of referees and trial courts to endeavor to secure the highest possible price for property sold for the benefit of those persons lawfully entitled to the proceeds of the sale.
4. **Judicial Sales: Partition.** Where a substantially increased offer is made at a hearing in open court before the confirmation of the sale to the highest bidder and both the highest bidder and the person making the offer are present with their attorneys, there is sufficient evidence to support a finding of the trial court in the exercise of its judicial discretion in confirming the sale of the property to the person making the highest offer at the hearing.
5. **Partition: Witnesses.** Ordinarily, property owners who have lived for some time in the vicinity and are conversant with land sold at a referee's sale as to its situation, soil, and advantages may be permitted to testify at a hearing to determine whether or not the land sold for the best price that could be realized.
6. ———: ———. The determination of the qualifications of witnesses to testify as to the value of land sold at a referee's sale is one resting in the sound discretion of the trial court.

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

Swenson, Viren & Turner and *C. G. Claesson Uggla,* for intervener-appellant.

W. L. Brennan, for appellee.

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

MESSMORE, J.

This is a partition suit. The property involved is 320 acres of farm land in Boyd County, Nebraska, hereinafter referred to as the Knouse land. The referee reported that the land could not be divided in kind to make a proper apportionment of shares to the respective parties, and recommended sale of the same. The report of the referee was approved by the trial court and the referee was ordered to sell the property at public sale. On March 9, 1953, the sale was had, and J. R. Swenson was the highest bidder at the sale. He bid the amount of $22,300 for the land. On March 17, 1953, Robert Dean Classen made an increased bid of $500 which was deposited with the referee as an upset bid. On March 20, 1953, the highest bidder at the sale moved for confirmation of the sale. On the same day John J. Knouse, plaintiff herein, moved the trial court to set aside and vacate the sale, and filed objections to the confirmation on the grounds that the property did not sell for its reasonable market value; that it was of the reasonable worth and actual value of $28,000, being a 320-acre combination grain and stock farm, with a good set of improvements, with 220 acres of farm land with very good classification as to productivity. The trial court, on the same day, held a hearing upon the report of the referee, the motion of the highest bidder at the sale to confirm the sale, and the motion of the plaintiff and his objections to the confirmation of the sale. The plaintiff and J. R. Swenson both adduced evidence at the hearing. The court entered a finding that at the sale the property did not sell for its fair and reasonable value under the circumstances and conditions of the sale, and that the sale should be set aside and reopened in court to permit further bidding. The trial court set aside the sale of the referee, offered the land for sale in open court, and sold the same to Robert Dean Classen for the sum of $23,500, or $1,200 more than the highest bidder offered at the sale. The highest bidder was pres-

ent and stated that he would not offer more nor raise his bid. The court further found that the sale had been conducted in all respects according to law; that the property sold for its fair and reasonable value under the circumstances and conditions of the sale; and that a subsequent sale would not realize a greater amount. The court approved and confirmed the sale in Robert Dean Classen. J. R. Swenson then moved to set aside the sale of the property to Robert Dean Classen, which motion was overruled. From the order setting aside the sale and reselling the property, J. R. Swenson appealed.

The issue tried in the district court was the reasonableness of the price realized at the referee's sale.

The record discloses that Robert Dean Classen testified that he was familiar with the land involved in the sale, was a bidder at the sale, and at the present time would increase his offer to $23,500. He was desirous of purchasing the land. He made next to the highest bid at the sale and could make no further offer at that time due to financial circumstances which he subsequently was able to manage to permit him to offer the amount testified to by him. He opened the bidding of the sale at $16,000. His last bid at the sale was $22,200. He had read about the sale, it having been advertised in a newspaper about a month prior to the time it occurred. He had lived in the neighborhood of the Knouse farm for 25 years and had been over the land, there being just a section line between his land and the land here involved. He gave a detailed description of the house on the premises, stating that it was a large house. He described the improvements and the condition of the same, and stated that there was plenty of water on the premises, that the soil was heavy with no sand, and that the pasture was excellent.

Louis Klasna, engaged in the insurance and real estate business in Spencer, Nebraska, testified that 10 or 12 sales of land had been made in Boyd County in the 18-month period prior to the time of this sale. He par-

ticipated in 50 percent or more of these sales. He further testified that he was familiar with the Reo property just west of Spencer, consisting of 680 acres, 325 acres of which were crop land and the balance in pasture, located on the hard-top road, with very good improvements, except the house was not as big as that on the Knouse land; and that this property did not sell for over $73 an acre. In addition, he sold a quarter section of land that was owned by his brother for $12,000, which land compared favorably with the Knouse land. Generally, a quarter section of land would sell to better advantage than a half section. He also sold the Ivan Johnson quarter section of land northwest of Spencer that was not quite as good in productivity in comparison with the Knouse land but the bushel yield was about the same. This farm sold for $10,000. He also sold his parents' homestead consisting of 480 acres of land, 120 acres of which was good farm land, 20 acres of fair land in the hills, and the productivity of the 120 acres was about the same as the Knouse land. This sale averaged about $52.50 an acre. He was also involved in the sale of the Velder half section on the highway south of Spencer which consisted of 100 acres of brome and alfalfa. The balance was pasture. It sold for $9,300. He was involved in the sale of the Manholder land consisting of 400 acres, 95 acres of which was under cultivation and the rest was pasture. The crop land was about the same as the Knouse land. The pasture was quite rough. It sold for $16,000. He was also involved in the sale of the Swan P. Johnson land consisting of 240 acres north of Spencer which was sold at public auction about 2 years previous to the sale of the land in question. One hundred and sixty acres of this land was under cultivation, and it sold at about $65 an acre. Eighty acres of this land was more productive than the Knouse land, a quarter section was not quite so good, but the overall productivity was about the same. The improvements were just as good or better

than those on the Knouse land, with the exception of the house which was small. He further testified that he was familiar with the soil on the Knouse land by going on the land and looking at it; that this land was situated on a dirt road; and that the south quarter section was better than the north quarter section, the latter being on higher ground and having more sandy loam. He believed that there was 190 acres of good land under cultivation. He understood the price offered for the land to be $22,300, and that was within the range of figures that he would consider a reasonable price at that time. He also testified that the trend of prices for farm land had gone down in the last 6 months due primarily to the decline in the price of farm products and cattle. He was also familiar with the Jenson farm located 2 or 3 miles from the Knouse land, which sold for $100 an acre, and the Lundquist land 3 or 4 miles from the Knouse land which sold for $19,600, or $122 to $123 an acre. This land, in productivity, was somewhat analogous to the Knouse land. In addition, he was familiar with the Patton half section, the south quarter of which was sandier than the Knouse land. The Knouse land was much better than the Patton place, which sold for $28,500. He further testified that these lands were sold to neighbors desirous of purchasing them, and who were wealthy persons. He considered such sales special sales, rather than the usual kind of sales. He further testified that no particular yardstick could be used in determining the price of farm land, it depended upon the neighbors, the location, and other matters, and the desire of the purchaser to purchase it. There was also some testimony in comparison of these lands with the Knouse land. Some of the land that this witness testified about was located in the brakes of the Missouri River or one of its tributaries. He would place the value of the Knouse land at $70 to $75 an acre.

The referee testified to the sale being advertised;

that he had a few inquiries about it; and that the sale was attended by 50 to 75 persons, and was open for an hour and 15 minutes.

The appellant predicated as error (1) that the trial court erred in refusing to confirm the referee's sale; (2) that the trial court erred in considering the upset bid filed by an unsuccessful bidder at the referee's sale in determining the reasonableness of that sale; and (3) that the trial court erred in allowing Robert Dean Classen to testify as to the amount he would be willing to pay for the property.

We have held that a successful bidder at a judicial sale becomes a party to the proceeding, may appear and urge confirmation, and may appeal from an order setting the sale aside. See, State ex rel. Sorensen v. Denton State Bank, 126 Neb. 486, 253 N. W. 670; Dawson County v. Whaley, 134 Neb. 509, 279 N. W. 164; Siekert v. Soester, 144 Neb. 321, 13 N. W. 2d 139, 152 A. L. R. 527; County of Nance v. Thomas, 146 Neb. 640, 20 N. W. 2d 925; County of Lancaster v. Schwarz, 152 Neb. 15, 39 N. W. 2d 921.

In Siekert v. Soester, *supra,* this court held: "Substantially increased offers to a referee for property sold by him, made before confirmation of the sale to the highest bidder, are sufficient evidence to support a finding of the trial court in the exercise of its judicial discretion that confirmation should be denied and a new sale ordered." The court set forth the three doctrines as to the effect of the receipt of a higher bid after property has been struck off at a judicial sale, and explained each of such doctrines, then went on to say: "* * * where there has been an advanced bid before confirmation, the entire matter of confirmation of judicial sales is left with the trial court, to be confirmed or not according to its judicial discretion. This doctrine is the one heretofore approved and adopted by this court. True, in several cases it has been held by this court that a judicial sale will not be set aside on account of mere

inadequacy of price, unless such inadequacy is so gross as to make it appear that it was the result of fraud or mistake, or to shock the conscience of the court. But in these cases there was no evidence that others were willing to pay more. See State ex rel. Sorensen v. Denton State Bank, supra."

Under the law, a referee in partition is an officer of the court (section 25-2180, R. R. S. 1943), subject to its lawful orders and directions, and every person who buys from a referee takes with knowledge that the contract of sale is not binding on the referee until the entire transaction is properly presented to and approved by the court. By analogy, from our own cases, in partition proceedings it is the duty of referees and trial courts to endeavor to secure the highest possible price for property sold for the benefit of those persons lawfully entitled to the proceeds of the sale. Therefore, substantially increased offers to a referee for property sold by him, made before confirmation of the sale to the highest bidder, are sufficient evidence to support a finding of the trial court in the exercise of its judicial discretion that confirmation should be denied and a new sale ordered. See, Siekert v. Soester, *supra;* State ex rel. Sorensen v. Denton State Bank, *supra;* State ex rel. Spillman v. American State Bank, 122 Neb. 42, 239 N. W. 214.

In Criswell v. Criswell, 230 Iowa 27, 300 N. W. 533, it was said that it was within the trial court's discretion, as long as such discretion was not arbitrarily exercised, to reject the highest bid at a public sale ordered in partition proceedings, and to reopen the sale for further offers for the property where subsequently to the sale a substantially higher bid was filed in court. The court has much discretion as to the method of sale, and there are no restrictions upon the means by which the court may determine the adequacy of the price. See, also, State ex rel. Sorensen v. Denton State Bank, *supra;* Crews v. Alberts, 124 Neb. 671, 247 N. W. 602.

In the case of First Nat. Bank v. First Trust Co., 145

Neb. 147, 15 N. W. 2d 386, a bid was made in open court in a partition action of $1,000 more than the property had sold for at public sale. A resale was ordered. Siekert v. Soester, *supra,* was cited.

As stated in Siekert v. Soester, *supra*: "* * * when all the parties were present in open court, the trial court could with judicial discretion have accepted such increased bid and then and there confirmed the sale. See State ex rel. Spillman v. American State Bank, supra."

In the instant case, under the authorities above cited, it becomes apparent that the trial court could and did accept the increased bid made by Robert Dean Classen, and by so doing he did not abuse his judicial discretion.

The appellant contends that the testimony of Robert Dean Classen as to the amount he would be willing to pay for the property as evidence of the unreasonableness of the price realized at the referee's sale was opinion testimony and was inadmissible without prior qualification of the witness. We believe the record to be sufficient to permit this witness to testify as to what he would be willing to offer for the Knouse land. It is apparent that he is a farmer, that he had been over the land, and that he had lived in close proximity to it.

Where persons are shown to be familiar with the value of a particular piece of land, they may be permitted to testify as to the value of such tract. Ordinarily, property owners who have lived for some time in the vicinity and know the property are qualified to testify to its value. Either lay or expert witnesses may be used if proper foundation is laid showing they have an acquaintance with the property and are informed as to the state of the market, the weight and credibility of their testimony being for the jury. In the instant case, the weight and credibility are for the court. See, Langdon v. Loup River Public Power Dist., 144 Neb. 325, 13 N. W. 2d 168; Medelman v. Stanton-Pilger Drainage Dist., 155 Neb. 518, 52 N. W. 2d 328; 20 Am. Jur., Evidence, § 897, p. 754; DeVore v. Board of Equalization, 144 Neb. 351, 13

N. W. 2d 451; Annotation, 159 A. L. R. 11.

"A farmer, conversant with the land as to its situation, soil, advantages, etc., is competent as a witness to the value, as having particular knowledge of the facts in issue." Leroy & W. R. R. Co. v. Ross, 40 Kan. 598, 20 P. 197, 2 L. R. A. 217.

Farmers generally know the value of farm land, and may testify to its value where they know how such lands are valued in the vicinity. See, Himlar Coal Co. v. Kirk, 224 Ky. 383, 6 S. W. 2d 480; Saulsberry v. Kentucky & W. Va. Power Co., 226 Ky. 75, 10 S. W. 2d 451.

For the reasons given in this opinion, the judgment of the trial court is affirmed.

AFFIRMED.

YEAGER, J., dissents.

AILEEN JUNE ROSSMILLER, APPELLEE, V. ROBERT BECKER, APPELLANT.

61 N. W. 2d 393

Filed December 11, 1953. No. 33396.

1. **Children Born out of Wedlock.** In a proceeding by the mother of a child born out of wedlock, brought under section 13-113, R. S. Supp., 1951, the necessary allegations of the complaint are that plaintiff is a resident of the state where the complaint was filed, that on a day certain she was delivered of a child born out of wedlock, and that the accused is its father.
2. **New Trial.** To make a sufficient showing for a new trial upon the ground of newly discovered evidence, the proof in support thereof must show that the evidence came to the moving party since the trial and was not equally available to him previous thereto, and that it could not have been discovered or procured before the trial by the exercise of due diligence.
3. **Trial: Appeal and Error.** Where the record contains competent evidence from which the jury may have reasonably arrived at its verdict, the judgment thereon will not be reversed for want of evidence to sustain it.

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

W. O. Baldwin and *Jack Devoe,* for appellant.

Robert B. Waring, for appellee.

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

CARTER, J.

The plaintiff brought this proceeding alleging that she was delivered of a child out of wedlock on February 3, 1952, and that the defendant is the father of the child. The defendant entered a plea of not guilty. A jury determined this issue in favor of the plaintiff, and the defendant appeals.

The plaintiff was a single girl about 27 years of age. She came to Lincoln in 1950 where she was gainfully employed during the times herein mentioned. She met the defendant shortly thereafter and started keeping company with him in February 1951. He was a single man about 29 years of age and engaged in the operation of a gasoline and oil station in Lincoln. The plaintiff testifies that they engaged in sexual relations sometime after they commenced keeping company and that they continued to engage in them until the middle of June 1951. The defendant admits keeping company with the plaintiff, as she testifies, but denies that he ever had sexual relations with her.

The plaintiff was able to conceal her pregnancy from her sister with whom she lived, as well as from her mother with whom she visited frequently. The defendant was not informed of her condition until after the child was born. The evidence shows that plaintiff and her sister drove to Chester, Nebraska, on Friday, February 1, 1952, to visit their mother. After the birth of the child on the following Sunday plaintiff disclosed for the first time that the defendant is the father of the child. A brother and sister of the plaintiff drove to Lincoln

on that day and informed the defendant of the birth of the child and plaintiff's claim that he is the father. He returned to Chester with them and visited with the plaintiff. She testifies that he said he was willing to help her out, but did not state how he would do so. He agreed to return the following Wednesday, which he did. At that time he refused to talk about any amicable settlement of the matter. Plaintiff's evidence does not show that the defendant either expressly admitted or denied that he is the father of the child on either of his two trips to Chester. It appears that there was no issue on this point between the defendant and the plaintiff and the plaintiff's family on either of his visits to Chester, except that defendant now says he denied the charge. Defendant admits that he agreed to help plaintiff out, but now claims that this offer was merely the result of sympathy and friendship. There are other conversations and circumstances in the record which tend to corroborate plaintiff's claim. There was an issue raised concerning defendant's ownership of a Packard automobile. Plaintiff contends that she had sexual intercourse with the defendant in his Packard car. He contends that he never had a Packard car until June 21, 1951. His certificate of ownership, however, bears the date of May 21, 1951. This collateral issue was before the jury and we must assume that it was given the weight to which it was entitled.

Plaintiff testifies that she had sexual relations with no other man. The defendant admittedly was keeping company with the plaintiff during the period when the child could have been conceived. Although the defendant denies having sexual relations with the plaintiff, there are other facts and circumstances which the jury could properly consider. Defendant told plaintiff's brother that he did not know whether the baby is his or not and that he did not know if he would do anything about it. His offer to help the plaintiff does not appear consistent with the conduct of one falsely ac-

cused of so serious a charge. The evidence clearly shows that he remained silent and refused to talk on many occasions when an innocent man would ordinarily be vehement in his denials. The evidence is sufficient to sustain the finding of the jury that he is the father of plaintiff's child.

Defendant contends that the trial court erred in overruling the motion of the defendant to require the plaintiff to make her complaint more definite and certain by setting forth the date, place, and time of the act of sexual intercourse resulting in the conception of the child. The complaint is in the language of the statute authorizing the proceeding. § 13-113, R. S. Supp., 1951. This is all that is required. Campion v. Lattimer, 70 Neb. 245, 97 N. W. 290. The rule is: In a proceeding by the mother of a child born out of wedlock, brought under section 13-113, R. S. Supp., 1951, the necessary allegations of the complaint are that plaintiff is a resident of the state where the complaint was filed, that on a day certain she was delivered of a child born out of wedlock, and that the accused is its father. The trial court did not err in overruling the motion to make the complaint more definite and certain.

Defendant complains of the refusal of the trial court to admit exhibit No. 3 into evidence at the hearing on the motion for a new trial. This exhibit is an affidavit by one Glen G. Grunke, who stated therein that he sold a Packard automobile to the defendant on June 21, 1951, and that he did not deliver possession of it to the defendant before that date. He offered therein to testify to this fact. There was no evidence of reasonable diligence on the part of the defendant to procure this evidence at the trial. We fail to see any reason why this witness could not have been produced. The defendant knew from whom he purchased the car and, for aught the record shows, he was at all times available. The rule is stated in Wiegand v. Lincoln Traction Co., 123 Neb. 766, 244 N. W. 298: "Defendant must show that the evi-

dence came to him since the trial, and was not equally available to him previous to that trial, and was not simply discovered by exercise of belated diligence." See, also, In re Guardianship of Carstens, 151 Neb. 425, 37 N. W. 2d 581. The trial court committed no error in refusing to admit exhibit No. 3 as evidence under the circumstances shown.

We find no prejudicial error in the record and the judgment is affirmed.

AFFIRMED.

EDNA A. PALMER, APPELLANT, V. CAPITOL LIFE INSURANCE COMPANY, APPELLEE.

61 N. W. 2d 396

Filed December 11, 1953. No. 33407.

1. **Trial: Judgments.** 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.
2. ———: ———. The court examines the evidence on motion for summary judgment, not to decide any issue of fact, but to discover if a real issue of fact exists.
3. **Appeal and Error.** In the absence of a bill of exceptions, no question will be considered, a determination of which requires an examination of the evidence produced in the district court.
4. ———. Any assignment of error that requires an examination of evidence cannot prevail on appeal in the absence of a bill of exceptions.
5. ———. If there is no bill of exceptions, it is presumed in this court that an issue of fact raised by pleading was sustained by evidence and that it was correctly decided by the district court.
6. **Insurance.** An unambiguous insurance policy must be enforced like any other contract according to the terms used.
7. ———. A provision in a group insurance policy, that irrespective of any other mode of termination the insurance upon the life of any person insured thereunder shall cease and determine upon termination of the employment of such person with the employer, is clear and unambiguous and must be enforced.

8. ———. The provision of a policy of group insurance which gives a former employee after termination of employment, which by the terms of the policy terminates the insurance, an option to continue insurance upon application within 31 days and the payment of necessary premium, without any examination as to insurability, does not extend the coverage of the policy to a former employee who died during that period, without having made such application.

APPEAL from the district court for Morrill County: DAYTON R. MOUNTS, JUDGE. *Affirmed.*

Holtorf & Harris, for appellant.

Mothersead, Wright & Simmons, for appellee.

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

BOSLAUGH, J.

Appellee issued to Great Western Sugar Company, herein identified as the company, a group life insurance policy for the benefit of certain of its employees during their period of employment. Lee Otto Palmer, herein designated as Palmer, was on and prior to April 14, 1952, one of the employees covered by the indemnity of the contract of insurance. He was given a certificate of insurance on his life under and subject to the terms and conditions of the group life insurance contract made by appellee with the employer in which appellant was designated as beneficiary. Her husband died. She brought this action to recover from appellee the amount of the certificate of insurance.

The cause of action alleged by appellant was: That on September 1, 1951, appellee issued to Palmer a certificate of insurance on his life under and subject to the terms of the group life policy made by it with the company in the sum of $2,915, and on that date an endorsement of that fact was made on the policy; that a copy of the certificate was made a part of the petition by the attachment of it to the pleading; "That on the 14th day of April, 1952, the insured, Lee Otto Palmer

was paid by Great Western Sugar Co., based upon his regular pay rate up to the 29th day of April, 1952 inclusive"; that he died on April 21, 1952; and that appellant was the beneficiary of the policy of insurance. The certificate contained provisions, as shown by the copy thereof made a part of the petition, that the insurance afforded the employee by the group life policy would continue until his employment by the employer terminated, and if the employment terminated the insurance should terminate at the same time without regard to the cause of termination of the employment.

The answer of appellee contained these matters: Admitted that appellee issued the certificate of insurance on the life of Palmer in the amount and manner substantially as claimed by appellant, and that she was named therein as beneficiary; alleged that the insured was on and prior to April 14, 1952, an employee of the company; that at the end of the shift on that date he left the employment of his employer voluntarily; that the insured was thereafter paid by the company all sums to which he was entitled by reason of his contract of employment; that he was paid and he accepted and retained the wages earned by him in the pay-roll period prior to April 14, 1952, less deductions required by law; that the insured was paid an additional amount by check, 80 times his hourly rate of pay, less lawful required deductions, which was earned by him before April 14, 1952, and became due to him upon the termination of his employment; that he accepted, endorsed, and retained the check until his death; that thereafter appellant endorsed and presented the check for payment, and she received and has retained the proceeds thereof; that from and after April 14, 1952, Palmer was not an employee of the company; that all matters between him and the company terminated with the payments aforesaid; that the relationship of employee and employer terminated on April 14, 1952; that Palmer thereafter died on April 21, 1952; that there was no insurance in force

on his life at the time of his death; that Palmer was not entitled to receive from the company any amount in addition to his regular wage rate during the preceding pay-roll period unless his employment was terminated; that he received and retained the amount as stated above; that he and appellant or either of them was not entitled to the check described above issued by the company to him or the proceeds thereof, unless his employment with it was terminated; and that by reason of its acceptance and its reduction to cash appellant was estopped to deny that the employment of her husband by the company terminated on April 14, 1952. Appellee denied the matters alleged in the petition not by it admitted by its answer to be true.

Appellant by reply admitted the payment of wages to Palmer as stated in the answer on April 16, 1952; admitted that he received on April 18, 1952, the check for 80 times his hourly rate of pay appellee claimed was issued by the company to him after April 14, 1952; that it was for vacation pay and paid him to and including April 29, 1952; and that during that period he was on vacation and was an employee of the company until the end of that period. The appellant denied the matters set forth in the answer which were not admissions of allegations of the petition.

Appellee made a motion for summary judgment as authorized by and in accordance with the Summary Judgment Act. §§ 25-1330 to 25-1336, R. S. Supp., 1951. The motion was heard by the court. An affidavit and deposition were offered and received in evidence. The court found that Palmer resigned his employment with the company on April 14, 1952, and his employment then terminated; that the termination of the employment terminated the group life insurance policy; that no issue of fact existed; and that defendant's motion for summary judgment should be sustained. The motion was sustained, a judgment of dismissal rendered, and the motion of appellant for new trial was denied.

The formal issue of fact made by the pleadings was whether Palmer was or was not an employee of the company at the time of his death on April 21, 1952. The fact in that regard was obviously a material one. The motion for a summary judgment challenged the existence of the issue as a real or genuine one. The provisions of the Summary Judgment Act important to this case are: "* * * The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. * * *" § 25-1332, R. S. Supp., 1951. The function and duty of the court in disposing of the motion were to determine not the issue of fact made by the pleadings but whether or not it was a genuine issue of fact. If it was not then the appellee was entitled to a judgment as a matter of law, and the motion was properly sustained and the litigation was legally terminated. In Dennis v. Berens, 156 Neb. 41, 54 N. W. 2d 259, it was determined: "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."

It required proof to determine that the issue made by the pleadings was only formal and was not real and genuine. The record shows that there was introduced and received in evidence on the hearing of the motion in the trial court an affidavit by the appellee and a deposition on the offer of it by appellant and by the appellee. The court found from the proof made that there was no genuine issue of fact; that Palmer, the employee and the insured, resigned his employment with the company on April 14, 1952; that his employment then terminated; that the termination of it ended

the group life insurance policy procured by the company from appellee on the life of Palmer; and that appellee was entitled to a judgment as a matter of law. The evidence presented to and considered by the trial court has not been preserved and submitted to this court in the manner which is indispensable to its consideration. There is no bill of exceptions. It was said in Wabel v. Ross, 153 Neb. 236, 44 N. W. 2d 312: "In the absence of a bill of exceptions, no question will be considered, a determination of which requires an examination of the evidence produced in the trial court. It follows that any assignment of error that requires an examination of evidence cannot prevail on appeal in the absence of a bill of exceptions. In re Estate of Abts, 122 Neb. 714, 241 N. W. 270; Bednar v. Bednar, *supra* (146 Neb. 726, 21 N. W. 2d 838)." In National Fire Ins. Co. v. Evertson, *ante* p. 540, 60 N. W. 2d 638, it was said: "In the absence of a bill of exceptions, it is presumed that an issue of fact raised by the pleadings was sustained by the evidence, and that it was correctly determined."

The consideration of evidence is indispensable to a decision that the specifications of error made by appellant have merit or that they lack substance except the charge that the judgment is contrary to law and that the trial court was wrong in its conclusion that the insurance policy on the life of Palmer was terminated by and at the time of the termination of his employment with the company. The motion for summary judgment presented the question that there was no genuine issue in the case. The judgment is sustained by pleading.

Appellant argues that the judgment is contrary to law, and that the holding of the district court that the insurance on the life of Palmer terminated when his employment with the company ended is without support in law. Appellant caused the record to show, and appellee agrees, that the policy of insurance, under which appellant claims, contained the provision that if the employment of the employee by the employer should ter-

minate "such insurance shall terminate at the same time"; and that the contract of insurance also had a conversion privilege which was in substance that if the employment terminated the employee should be entitled to have issued to him by appellee without further evidence of insurability a policy of life insurance, other than term insurance, on any of the forms usually issued by appellee, in an amount equal to his life insurance under the group life policy at the time his employment terminated, if he made application to appellee for it within 31 days after his employment ceased and if he paid to appellee within that period the premium at his then attained age applicable to the class of risk to which he belonged and the form and amount of such policy of life insurance for which he made application.

Specifically appellant asserts that Palmer was indemnified by the group life insurance policy while he was employed by appellee and for 31 days after his employment terminated, and consequently the life insurance, the subject of this litigation, was in force at the time of the death of the husband of the appellant. There are decisions of some courts which agree with this interpretation of a provision of this character in group life insurance policies. In some jurisdictions the doctrine has been adopted that in a suit against an insurance company the usual rules concerning the binding nature of undertakings are so far relaxed in favor of the insured and against the insurer that a gratuitous offer made by the latter not acted upon by the former binds the insurer. This is the minority view. The greater number of courts and the better reasoned cases have arrived at an opposite conclusion.

The contract of insurance states that the insurance shall cease to exist contemporaneously with and at the identical time when the employment terminates. The authorities generally agree that this is a valid condition. Bradley v. Prudential Ins. Co. of America, 70 F. 2d 988. This is simply a method of designating an event that de-

termines the end of the term of the insurance. The conversion privilege clause or as it is sometimes styled, the privilege of continuance clause, does not concern or affect the former employer of the insured. It is in all events unimportant and incapable of being accepted or made effective until after the relationship of employer and employee has wholly terminated. It is only a gratuitous offer of the insurance company to the former employee and is wholly without significance until its conditions are complied with by the former employee within the period limited by the offer. This provision did not automatically extend the policy in effect for 31 days after the termination of the employment. It was merely a privilege of conversion given to the insured and for him to have any advantage of the clause it was necessary for him to select the form policy he desired, make application for it, and pay the premium on the policy in advance. The conversion privilege given by the policy held by the company is wholly unimportant to this case because nothing was done by Palmer to comply with and make it effective within the time limited by its terms.

In Duval v. Metropolitan Life Ins. Co., 82 N. H. 543, 136 A. 400, 50 A. L. R. 1276, the court said: "A certificate issued to an employee under such group insurance plan and stating that he is insured 'while the employee is in the employ of the employer' and further setting forth a 'privilege of continuance,' stating therein that 'in the event of the termination of the employment for any reason . . . the employee shall be entitled to have issued to him by' the insurer 'without further evidence of insurability and upon application made . . . within thirty-one days after such termination and upon the payment of the premium . . . a policy of life insurance,' etc., does not keep the original insurance in force for such thirty-one days without any action taken by the assured, but merely offers him a privilege of procuring insurance without medical examination." See, also, Szymanski v. John Hancock Mutual Life Ins. Co., 304 Mich. 483, 8

N. W. 2d 146, 145 A. L. R. 947; Aetna Life Ins. Co. v. Catchings, 75 F. 2d 628; Aetna Life Ins. Co. v. Carroll, 188 Ark. 154, 65 S. W. 2d 25; Schooley v. Metropolitan Life Ins. Co. (Tex. Civ. App.), 77 S. W. 2d 886; Missouri State Life Ins. Co. v. Hinkle, 18 Tenn. App. 228, 74 S. W. 2d 1082; Cutledge v. Aetna Life Ins. Co., 53 Ga. App. 473, 186 S. E. 208; Annotations, 63 A. L. R. 1037, 85 A. L. R. 1472, 145 A. L. R. 951; 29 Am. Jur., Insurance, § 1378, p. 1031.

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

AFFIRMED.

ARTHUR JENNINGS HANSON ET AL., APPELLANTS, V. CITY OF OMAHA ET AL., APPELLEES.

61 N. W. 2d 556

Filed December 18, 1953. No. 33311.

SUPPLEMENTAL OPINION

Statutes. Where one statute refers to another, which is subsequently repealed, the statute repealed becomes a part of the one making the reference and remains in force so far as the adopting statute is concerned.

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

Swenson, Viren & Turner and *Neal H. Hilmes,* for appellants.

Wells, Martin & Lane, Edward F. Fogarty, Herbert M. Fitle, James M. Paxson, and *Bernard E. Vinardi,* for appellees.

William R. King, amicus curiae.

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

MESSMORE, J.

Our opinion is reported *ante* p. 403, 59 N. W. 2d 622. The appellants, in their motion for rehearing, request reconsideration of that part of our opinion wherein it is stated: "With reference to section 14-379, R. S. 1943, being repealed, as set forth by appellants, any appeal substituted for section 14-379, R. S. 1943, was available to the appellants in this action had they seen fit to pursue the same."

Section 14-375, R. S. 1943, provides for a committee to assess the damages caused to the owners and parties interested in property affected by the vacation of any street or alley and that they shall make and file with the city clerk a report thereof in writing. These provisions are followed by this language: "Any owner or party interested in property affected by such vacation, who shall file a written protest with such committee, may appeal from the adoption by the council of such appraisers' report in the manner provided in section 14-379 * * *."

Section 14-379, R. S. 1943, was repealed by the Uniform Eminent Domain Act, Laws 1951, c. 101, pp. 451-506. No appeal procedure was substituted therefor in section 14-375, R. S. 1943. The appellants assert this being true, they have been denied the right of appeal or review of their claims for damages by the action of the Legislature.

As stated in the opinion: "* * * the rights of the owners and parties interested in property that may be affected by the vacation are protected by the clear language of section 14-375, R. S. 1943, which provides that a committee of three members of the council shall assess the damages after notice and file their report in writing with the city clerk. In addition, provision for appeal to the district court is made."

The appellants had a method and right of appeal to the district court in the manner provided by section 14-379, R. S. 1943, notwithstanding the repeal thereof because of the adoption of a part of that section by the lan-

guage of section 14-375, R. S. 1943. The repeal of section 14-379, R. S. 1943, by the Laws of 1951, c. 101, p. 451, did not destroy either the right of appellants to appeal from the adoption by the council of the appraisers' report in reference to the assessment of damages caused by the vacation of part of the street and alley, or the procedure provided by section 14-375, R. S. 1943, to accomplish an appeal to the district court. The manner of taking an appeal was detailed in section 14-379, R. S. 1943. This was by specific and descriptive reference thereto in section 14-375, R. S. 1943, made a part of that section and as such it continued in force after the repeal of section 14-379, R. S. 1943. The applicable rule of law in this situation is as follows: Where one statute refers to another, which is subsequently repealed, the statute repealed becomes a part of the one making the reference and remains in force so far as the adopting statute is concerned. See Shull v. Barton, 58 Neb. 741, 79 N. W. 732.

"Where the provisions of a statute are incorporated, by reference, in another; where one statute refers to another for the powers given or rules of procedure prescribed by the former, the statute or provision referred to or incorporated becomes a part of the referring or incorporating statute; and if the earlier statute is afterwards repealed, the provisions so incorporated, the powers given, or rules of procedure prescribed by the incorporated statute, obviously continue in force, so far as they form part of the second enactment." Endlich on Interpretation of Statutes, § 492, p. 695. See, also, State ex rel. Thompson v. Majors, 85 Neb. 375, 123 N. W. 429; State ex rel. Sayer v. Junkin, 87 Neb. 801, 128 N. W. 630; Sheridan County v. Hand, 114 Neb. 813, 210 N. W. 273; Annotation, 168 A. L. R. 629; 50 Am. Jur., Statutes, § 39, p. 58; 1 Sutherland, Statutory Construction (3d ed.), § 2041, p. 521.

The language appearing in the opinion with reference to section 14-379, R. S. 1943, being repealed, as set

forth by appellants "any appeal substituted for section 14-379, R. S. 1943, was available to the appellants in this action had they seen fit to pursue the same" is eliminated from the opinion, and the language appearing in this supplemental opinion announces the clarification and correction of the original opinion which in effect holds that the appellants were not deprived of an appeal by any inadequacy of the law.

The motion for rehearing is denied.

MOTION FOR REHEARING DENIED.

WALTER A. SNYDER, APPELLANT, V. FARMERS IRRIGATION DISTRICT, APPELLEE.

61 N. W. 2d 557

Filed December 18, 1953. No. 33342.

1. **Trial: Appeal and Error.** The proper method of presenting a case to the jury is a clear and concise statement by the court of those issues which find support in the evidence and not by substantially copying the pleadings of the parties and if, by doing the latter, it results in prejudice to the complaining party it is a sufficient ground for reversal.
2. **Negligence.** 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.
3. ———. Act of God does not necessarily mean an operation of natural forces so violent and unexpected that no human foresight or skill could possibly have prevented its effects. It is enough that the accident should be such as human foresight could not be reasonably expected to anticipate; and whether it comes within this description is ordinarily a question of fact.
4. **Trial.** Where different minds may draw different inferences or conclusions from the facts proved, or if there is a conflict in the evidence, the matter at issue must be submitted to the jury to be determined; but, where the evidence is undisputed, and but one reasonable inference can be drawn from the facts, the question is one of law for the court.
5. **Appeal and Error.** It is not the province of this court in reviewing the record in an action at law to resolve conflicts in or weigh the evidence.

6. ———. It is presumed in such an action that controverted facts were decided by the jury in favor of the successful party, and its finding based on conflicting evidence will not be disturbed unless clearly wrong.

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

Mothersead, Wright & Simmons, for appellant.

Neighbors & Danielson, for appellee.

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

CHAPPELL, J.

A petition containing 10 comparable causes of action was filed by plaintiff Walter A. Snyder in his own behalf and as assignee of other named persons who all lived north of the railroad tracks in the westerly portion of Bayard, Nebraska. Plaintiff sought recovery of damages to both described personal and real property caused by an overflow of flood waters on August 25, 1950, alleged to have been proximately caused by negligence of defendant, Farmers Irrigation District. Generally, plaintiff alleged that defendant failed to properly maintain and operate its irrigation system, particularly an artificial drainage ditch known as Wild Horse Drain, in such manner as to carry a volume of water which would be reasonably anticipated to flow therein. Defendant for answer admitted that on said date the ditch overflowed its banks upon some of the described property. It otherwise denied generally and alleged that any damages suffered by plaintiff and his assignors were proximately caused by an act of God, that is, by an unprecedented rain storm of flood proportions which occurred above and north of defendant's main canal and suddenly without warning overflowed therein, causing a break in its lower bank, which, together with such rain as fell below its canal flowed into the drainage ditch here involved, causing it to overflow within the corporate

limits of Bayard. Defendant further alleged that plaintiff and his assignors were warned of the approaching great flood danger in ample time to have removed or protected their personal property, but they negligently failed to heed such warning and make any reasonable effort to do so, which proximately caused the damages thereto. Insofar as important here, plaintiff's reply admitted that on August 25, 1950, a break occurred in the lower bank of defendant's main canal, but otherwise denied generally.

Upon trial to a jury, the court overruled defendant's motion to direct or dismiss made at conclusion of plaintiff's evidence, which was renewed at conclusion of all the evidence, and also refused to give plaintiff's requested instruction No. 1, which in effect would have instructed the jury that defendant was proximately negligent as a matter of law, and the only issue for its determination was the amount of damages sustained by plaintiff. Thereafter the issues of negligence, act of God, and proximate cause, together with the respective burdens of proof with relation thereto, were submitted to the jury, whereupon it returned a verdict for defendant. Plaintiff's motion for new trial was overruled, and judgment was rendered on the verdict. Therefrom plaintiff appealed, assigning that the trial court erred prejudicially in refusing to give his requested instructions Nos. 1 and 3, and in giving instructions Nos. 3, 6, 7, 8, 9, 10, 11, and 18 on its own motion. We conclude that the assignments should not be sustained.

In that regard, the substance of plaintiff's requested instruction No. 3, refused by the trial court, was contained in and adequately presented by instructions Nos. 6, 7, and 8 given by the court on its own motion, so that its refusal does not require further particular discussion. In the final analysis the force of plaintiff's assignments was to contend that the trial court prejudicially erred in submitting any issue except the amount of plaintiff's damages, and in submitting to the jury defendant's al-

leged issue of warning contained in instruction No. 3 given by the trial court on its own motion.

As we view it, the latter contention is the more serious question and will be first discussed. Such instruction No. 3 was a resumé of defendant's answer, which sets forth not only defendant's general denial and its allegations that plaintiff's damages were proximately caused by an act of God, but also those relating to warnings given to plaintiff and his assignors, with regard to their personal property, as heretofore set forth. Plaintiff argued that the latter allegations therein set forth presented an issue not supported by any evidence, and that the submission thereof was prejudicial to plaintiff. We conclude otherwise.

In that regard, plaintiff relies upon Weisenmiller v. Nestor, 154 Neb. 839, 49 N. W. 2d 679, which is clearly distinguishable, and Conley v. Hays, 153 Neb. 733, 45 N. W. 2d 900, which held that: "It is error to set forth literally or substantially the pleadings in an action when to do so is to place before the jury issuable matters which find no support in the evidence." The situation in that case was comparable with the one at bar in some respects, but there as here it was finally concluded that the instruction, although erroneous, was not prejudicial requiring a new trial.

As held in Franks v. Jirdon, 146 Neb. 585, 20 N. W. 2d 597: "The proper method of presenting a case to the jury is a clear and concise statement by the court of those issues which find support in the evidence and not by substantially copying the pleadings of the parties and if, by doing the latter, it results in prejudice to the complaining party it is a sufficient ground for reversal." In that opinion, involving a comparable situation, it was said: "This court has frequently criticized the practice of copying the pleadings as a method of stating the issues to a jury and where they contain allegations not supported by evidence it may be reversible error to include such allegations in defining the issues if the reviewing

court is satisfied that the jury may have been misled thereby. See Hutchinson v. Western Bridge & Construction Co., 97 Neb. 439, 150 N. W. 193; McClelland v. Interstate Transit Lines, 139 Neb. 146, 296 N. W. 757. However, the fact that the court copied the pleadings in presenting the case to the jury is not alone sufficient to cause a reversal unless it can be said that the complaining party was prejudiced thereby. See Scott v. New England Mutual Life Insurance Co., 128 Neb. 867, 260 N. W. 377; Merritt v. Ash Grove Lime & Portland Cement Co., 136 Neb. 52, 285 N. W. 97. * * * The court instructed the jury that these instructions merely set forth the contentions of the parties and were not to be considered as evidence. The issues were subsequently limited and defined in other instructions. While it would have been better to have left out of instruction No. 2 the allegations discussed under the first and third phases of the criticized language, however, we do not think the jury could have been misled by the language used in view of the instructions as a whole and therefore come to the conclusion that it does not constitute prejudicial error." See, also, Shiers v. Cowgill, *ante* p. 265, 59 N. W. 2d 407.

In the case at bar, following a resumé of the pleadings, instruction No. 5 said: "The above instructions merely set forth the contentions of the parties in this case as disclosed by the pleadings filed and in no manner are to be considered by the jury as evidence in the case." The issue of warning, if legally operative to mitigate plaintiff's damages, could not have had any bearing in any event unless it was first found that defendant was negligent and not entitled to the defense of act of God. The issue was never again specifically mentioned or elaborated upon in any manner by any other instructions, and no requests were made therefor either by plaintiff or defendant, who ultimately obtained a verdict. Also, concededly, as alleged by defendant, ample timely warning of the magnitude of the flood was personally given to at least three of plaintiff's assignors, and the record

discloses that city police or firemen went to every home endangered and so warned all persons who were there. True, there is evidence that plaintiff himself was not at home at the time, although his wife and daughter were. It therefore appears that there was some competent evidence in the record to support such issue as against at least some of plaintiff's assignors. However, its operative legal force or effect as to them we are not required to discuss or decide.

That is true because in any event other instructions clearly defined and otherwise specifically and expressly limited the only issues presented for determination by the jury in a manner which could not have been prejudicial to plaintiff. In that connection, instruction No. 6 substantially told the jury that the burden was upon plaintiff to prove by a preponderance of the evidence: (1) That defendant in some manner negligently operated and maintained its irrigation works, particularly the ditch involved; (2) that plaintiff's damages were proximately caused by such negligence; and (3) the amount of plaintiff's damages, if any. The jury was then told that if plaintiff established each and all of such propositions by a preponderance of the evidence, it should find for plaintiff and against defendant for such amount as it found from the evidence plaintiff's damages to be, but that if the evidence upon any one or more of such propositions was evenly balanced or preponderated in favor of defendant, then plaintiff could not recover. The instruction then said: "The defendant contends that the *sole and proximate cause* of the damage to the plaintiff was occasioned by an Act of God, and in that connection the jury's attention is directed to Instructions No. 7 and No. 8 of these instructions." (Italics supplied.) Instruction No. 13 properly defined proximate cause. Instruction No. 7 read: "You are instructed that by the term, 'An Act of God', as the term is known to the law, is such an unusual and extraordinary manifestation of the forces of nature that it could not under normal conditions have

been anticipated or expected. For a loss occasioned by an 'Act of God', the defendant is not liable provided its own negligence has not contributed to the damage. Where the defendant relies upon an Act of God as a defense, the defendant assumes the burden of proof to the extent that it must prove by a preponderance of the evidence that the storm was of such a violent and unprecedented nature, that no ordinary or reasonable amount of care would have prevented the damage." Also, instruction No. 8 read: "If the plaintiff has established by a preponderance of the evidence that the defendant was guilty of negligence in the maintenance of the drainage ditch and that the plaintiff was damaged as a result of the flood waters coming down said ditch, then the burden of proof is upon the defendant to prove by a preponderance of the evidence, not only that the flood resulted from an Act of God, but also that the flood was of sufficient force to have caused the damage to the plaintiff without the occurrence of such negligence on the part of the defendant; in other words, that the damage would have resulted to the plaintiff even though the drainage ditch had been properly maintained."

Instructions Nos. 9, 10, and 11 simply elaborated in a proper manner upon defendant's liability not as an insurer but for negligence, and they will not be recited at length here. We conclude that under the aforesaid circumstances, instruction No. 3 was not prejudicially erroneous.

We turn then to a consideration of the sufficiency of the evidence to sustain submission of the issues of negligence, act of God, and proximate cause to the jury, and the propriety of instructions given with relation thereto. As late as Hilzer v. Farmers Irr. Dist., 156 Neb. 398, 56 N. W. 2d 457, following Fairmont Creamery Co. v. Thompson, 139 Neb. 677, 298 N. W. 551, as did Krichau v. Chicago, B. & Q. R. R. Co., 150 Neb. 498, 34 N. W. 2d 899, this court held: "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." Such definition was given in instruction No. 7, and plaintiff argued that the word "unprecedented" should have been used instead of "unusual and extraordinary."

In 1 C. J. S., Act of God, p. 1423, it is said: "The most comprehensive definition of the term is any accident, due directly and exclusively to natural causes without human intervention, which by no amount of foresight, pains, or care, reasonably to have been expected, could have been prevented." We approved that rule in Amend v. Lincoln & N. W. R. R. Co., 91 Neb. 1, 135 N. W. 235. As stated in Pollock on Torts (14th ed.), p. 393, quoted with approval in Jacoby v. Town of the City of Gillette, 62 Wyo. 487, 174 P. 2d 505, 169 A. L. R. 502, citing Nebraska cases: "'And the act of God does not necessarily mean an operation of natural forces so violent and unexpected that no human foresight or skill could possibly have prevented its effects. It is enough that the accident should be such as human foresight could not be reasonably expected to anticipate; *and whether it comes within this description is a question of fact.*' (Italics supplied)."

We discover that while the term "act of God" has received a variety of definitions, they generally differ rather in the mode of expression than in their substance. Some cases have used the word "unprecedented" instead of "unusual and extraordinary" which we have accepted as more nearly correct. In that regard, as early as Kearney Canal & Water Supply Co. v. Akeyson, 45 Neb. 635, 63 N. W. 921, this court said: "The criticism on this instruction is the use of the word 'unprecedented.' It is said that this really means such a rainfall as was never known before,—a rainfall without precedent. We think the instruction would have been better had the court used the word 'extraordinary' or 'unusual' instead of 'unprecedented;' * * *." The judgment therein, however, was not reversed upon that ground because other

instructions used the word "unusual" as requested by defendant therein, so it was concluded that use of the word "unprecedented" was not prejudicially erroneous. Conversely here, instruction No. 7 in imposing the burden of proof upon defendant, used the word "unprecedented" so that plaintiff could not in any event have been prejudiced by the definition therein recited.

In City of McCook v. McAdams, 76 Neb. 1, 106 N. W. 988, with two other opinions upon rehearing thereof reported at pages 7 and 11, recovery was sought from the city for flood damage because it was alleged to have negligently maintained ditches or drains. The defense was a general denial and act of God. In the third opinion, this court held in part: "The jury were instructed in substance that, if they found that the defendant was guilty of negligence in failing to keep the drainage system in repair, the burden of proof was, in that event, upon the defendant to establish by a preponderance of the evidence that the storm was of sufficient violence to have caused the damage sustained by the plaintiff without the concurrence of such negligence. Held, That such instruction was not erroneous." In the opinion it was said: "While the burden is on the plaintiff to show that his loss is the result of the defendant's negligence, when he has established the facts of negligence on the part of the defendant and that his loss occurred directly therefrom, he has met all of the conditions the law imposes upon him in order to recover, before any evidence is produced by the defendant. He is not required to go further, and to anticipate and disprove all defenses which the other party may have pleaded or may introduce evidence to support under a general denial. When the plaintiff has closed his case, the defendant may show that it was not guilty of the negligent act complained of by either direct or indirect proof which negatives the proof offered by the plaintiff as to the fact of its negligence or the plaintiff's damage. Further than this, the defendant may plead and offer proof of matters in ex-

cuse or justification, as that the injury complained of would have occurred in any event without the concurrence of the defendant's negligence, or that some outside, independent force, of such nature that the defendant in its duty of observing care could not reasonably have anticipated or guarded against, was the proximate cause of the injury. Such defenses, while not technically confession and avoidance, partake of the nature of such defense. While not confessing the cause of action, they seek to avoid its effect by proof of other and new matter which bars the plaintiff's right to recover, and they must be established by the defendant in order to overcome the evidence on the part of the plaintiff, which, unexplained, would establish the defendant's negligence. They are affirmative in their nature and the burden of proving them is upon the person asserting them. * * * The burden was placed upon the plaintiff by the instruction to prove the defendant's negligence of duty and his damage. After he had made his case, in order to escape the logical result of this proof, the defendant was required to show that the loss was inevitable under the circumstances. We think this was proper. After its negligence was established it had the laboring oar. The burden did not rest upon it to disprove negligence, but upon the plaintiff to prove it, but, negligence being proved against it, it did have the burden of showing an independent cause for the injury, by reason of which it was released from liability." Instructions Nos. 6, 7, and 8 given by the trial court in the case at bar were comparable in every respect with those approved in that case, which was cited with approval in Randall v. City of Chadron, 112 Neb. 120, 198 N. W. 1020.

It has long been the rule that: "Where different minds may draw different inferences or conclusions from the facts proved, or if there is a conflict in the evidence, the matter at issue must be submitted to the jury to be determined; but, where the evidence is undisputed, and but one reasonable inference can be drawn from the

facts, the question is one of law for the court." Chew v. Coffin, 144 Neb. 170, 12 N. W. 2d 839. As held in James v. Hogan, 154 Neb. 306, 47 N. W. 2d 847: "It is not the province of this court in reviewing the record in an action at law to resolve conflicts in or weigh the evidence.

"It is presumed in such an action that controverted facts were decided by the jury in favor of the successful party, and its finding based on conflicting evidence will not be disturbed unless clearly wrong."

In the light of the foregoing rules, we have examined the record which is so voluminous that only a brief summary of relevant parts may be recited here.

Wild Horse Drain was constructed about 1918 or 1919 by the United States Reclamation Service pursuant to a contract between the United States, Alliance Irrigation District, City of Bayard, and defendant district. The parties thereby became tenants in common of the ditch. Each party obtained certain sections of the right-of-way, and paid a percentage of the cost of construction, operation, and maintenance. The extent and character of operation and maintenance was determined by a board consisting of a representative of each of the parties, but defendant assumed the duty of operation and maintenance subject to the direction of said board. Subsequently, Pathfinder Irrigation District succeeded to all rights and obligations of the United States. There are numerous maps, drawings, blueprints, graphs, and photographs in the record, but none of them reflect the original plans or specifications of the ditch. However, the record reflects that the purpose of its construction was for the drainage of waste and seepage water which passed through, under, and around the city of Bayard, situated within the drainage area, and to provide the city with appropriate wasteway conduits and sewer outlets. Sometime before its construction a so-called plow ditch about 1 foot deep and 3 feet wide had been constructed from a point some distance northwest of the city to a point where it approached the railroad south thereof, thence

east across to Main Street, north of the depot. In that situation and theretofore as well, water would often accumulate on lands west of Bayard and run across its sidewalks and main street as much as 1½ blocks or more wide, and too deep for ordinary pedestrian travel across it.

At a point 5 or 6 miles north of Bayard, East Wild Horse Drain goes under defendant's main irrigation canal and proceeds toward the south, thence southeast for some distance, thence southwest. West Wild Horse Drain passes under such canal about a mile west thereof, and runs toward the south for some distance, thence southeast. These two drains then converge at a point about 1 mile north of Bayard, thence proceed south and under the railroad tracks west of Bayard, thence east along the southerly portion of the city, and on into Red Willow Creek which empties into the North Platte River about 1 mile south thereof. There is competent evidence, although some conflicting therewith, that the drains generally followed the natural course of drainage. The banks of defendant's main irrigation canal were patrolled by ditch riders about 3 times each day. On August 25, 1950, a rain storm of cloudburst proportions, more than 3 inches, and as much as 5½ inches or more, greater than any theretofore seen in that territory, extending from about 10 miles north to south within about 3 miles of Bayard, fell in approximately 30 minutes. There was but little rain fell in the city itself. Presently a great wide and deep wall of water, carrying trees and other debris, including a 16-foot highway bridge, came down from the north into and across defendant's main canal, breaking the upper bank thereof and obstructing its flow. Thereupon the headgate was closed and water was wasted out of the canal at all wasteways, but nevertheless such wall of water went on over, breaking through the lower bank of the main canal into the East and West Wild Horse Drains, overflowing their banks in a wide, deep wall of water out into and over the

lands north of Bayard, and on over the railroad tracks for some 300 yards. As a result plaintiff's land and personal property to the north and west thereof was engulfed by the flood and damaged thereby.

At a point just above East Wild Horse Drain, the storm water crest was flowing at a rate of 13,569 cubic feet per second, and at a point just above West Wild Horse Drain, it was flowing at a rate of 2,117 cubic feet per second. Further, an automatic recorder showed that the crest of water at the point where Wild Horse Drain flows into Red Willow Creek, to which the flood did not extend, was less than 100 second feet at 5 p. m., but had reached 1,780 second feet at 11 p. m. The ditches had been inspected by the board shortly before the flood, but no recommendation for repairs or maintenance work had resulted therefrom, and none had been previously done for some period of time.

A civil engineer with many years of experience in the field of drainage and irrigation testified as an expert for plaintiff. During that period he had served as city engineer for Bayard several years before and after 1918. In October 1951, after the flood, he made a topographical survey of Wild Horse Drain. Prior thereto, some maintenance work had been done on the ditch after the flood to remove trees, a bridge, silt, and other debris, and repair its banks. At that time, in October 1951, the ditch, running bank full, would carry 1,800 second feet of water above the factory road, and 1,289 second feet below that point. There is evidence adduced by defendant that since the flood the capacity of the ditch had been increased not more than 10 percent. Plaintiff's expert witness testified in response to hypothetical questions that in his opinion the ditch had not been properly constructed as to slope, thereby permitting it to fill somewhat in the lower region, and that it had not been properly maintained thereafter prior to the flood. However, he gave as his opinion that over the area involved drainage should only be provided normally for a reason-

ably anticipated 2-inch rainfall in 1 hour over the entire area. In other words: "For that area two inches would be considered the normal rain to take care of—two inches in one hour over the entire area." Also, "that a drainage project should be constructed and maintained so it will carry off at least that much water." Such "a two-inch rain would put down 1470 second feet flow" which was in his opinion all "that ditch could be reasonably expected to carry." He also testified that if several thousand second feet came down, as could reasonably be concluded from the evidence, that would be more than anyone would anticipate that the ditch would ever have to carry, and that if that much came down you would expect the ditch to overflow and break out even though it was properly maintained in every respect.

There is evidence that previously some other small floods had occurred, and that on May 20, 1932, a rain of cloudburst proportions fell over an area in and north of Bayard about 4 miles or more, which caused a flood to spread out over a wider area of the city than the flood here involved. However, the witness who so testified saw the 1950 flood at the sugar factory road about 5 or 6 p. m., but did not thereafter see the crest thereof, which was not reached until about 8 or 9 p. m., or later.

There is no evidence of the volume of 1932 flood water in second feet except that such flood extended to Red Willow Creek, and the total discharge thereof at the North Platte River was only 1,320 second feet. Also, at the time of the 1932 flood, the ditch had only 5 by 8 foot easily obstructed cement culverts with which to carry the water under the roads at the sugar factory and main street. They were thereafter replaced by bridges 50 to 60 feet long. Further, the water flowed over the railroad tracks for about 1,000 feet in 1932 and washed out the tracks, but thereafter the railroad tracks were raised, and still the water flowed over them in the 1950 flood for about 900 feet, washing out its ballast. In other words, the area of the storm and the physical conditions were

not the same at the time of the two floods, and under the evidence here it could not be said without contradiction, as argued by plaintiff, that the 1932 flood was larger in volume than the 1950 flood. An engineer employed by the United States Reclamation Service testified as an expert for defendant that the water from the East and West Wild Horse drainage ways would have converged north of Bayard and flowed into the city, especially the western part, even in the absence of any ditches. In other words, without the drainage ditches, the waters from the last flood would have flooded the city and plaintiff's properties. There is other evidence in the record bearing upon the issues of defendant's alleged negligence and defendant's contention that an act of God was the sole and proximate cause of plaintiff's damages. However, as we view it, the evidence herein is either directly conflicting, or, if undisputed, more than one reasonable inference could be drawn therefrom.

There was competent evidence from which the jury could have reasonably concluded that defendant negligently maintained the ditch as argued by plaintiff, but as argued by defendant there was also ample competent evidence from which the jury could have reasonably concluded that even if defendant were negligent, it did not proximately cause or contribute in any manner to the flood and plaintiff's damages. In other words, there was ample competent evidence from which the jury could have reasonably concluded that the rain storm was so unusual and extraordinary in character and of such violence and volume as to have caused plaintiff's damages without any concurrent negligence of defendant, thus an act of God was the sole and proximate cause of plaintiff's damages.

We conclude that the verdict and judgment were sustained by competent evidence, and that there was no prejudicial error in the record. Therefore, the judgment should be and hereby is affirmed.

AFFIRMED.

JAMES ORVILLE KERNS, APPELLANT, V. NORMAN E. KERNS ET AL., APPELLEES.

61 N. W. 2d 405

Filed December 18, 1953. No. 33357.

1. **Deeds: Mortgages.** Where it is sought to vary the effect of a deed absolute on its face by parol testimony, so as to declare it to be a mortgage, the evidence must be clear, convincing, and satisfactory before a court is warranted in adjudging it to be a mortgage.
2. **Appeal and Error.** Actions in equity are triable de novo in this court subject to the rule that when the evidence on material questions of fact is in irreconcilable conflict, this court in determining the weight of the evidence considers 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.
3. **Deeds.** Acts and declarations of a grantor in hostility to a deed, subsequent to the time of the delivery of the deed, are incompetent as against the grantee.
4. **Evidence.** Hearsay testimony which is incompetent is not made admissible by reason of the death of the person who made the statement sought to be proved.
5. **Deeds.** A deed, delivered to grantee in grantor's lifetime, is operative, though enjoyment of estate conveyed is postponed until grantor's death, as present estate or interest is transferred by such delivery.

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

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

Beghtol, Mason & Anderson, Nate C. Holman, Richard A. Knudson and *Roger V. Dickeson,* for appellees.

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

SIMMONS, C. J.

This is an action in equity, in substance, to have a deed declared to be a mortgage, to have an accounting, and to be allowed to redeem. The trial court found for the defendants and against the plaintiff, and dismissed

the action with prejudice. Plaintiff appeals. We affirm the judgment of the trial court.

The following facts are not in dispute. Plaintiff is a son of the grantors in the deed, and the devisee of the property by the will of his mother, if the deed is set aside. Defendant Norman E. Kerns is also a son of grantors. Kathryn F. Kerns is his wife. Defendants herein will be referred to as such, except when necessary they will be referred to by their first names. The grantors will be referred to as such, except where necessary they will be referred to as the father or mother or parents.

The property involved here is a city lot and house which, beginning about 1915, was the homestead of the grantors.

In 1937 the grantors were of advanced years, unemployed, without income, and in debt, both by a secured debt on the home and unsecured debts. Taxes were delinquent on the home. Title to the property was in the name of the mother. On September 1, 1937, she made written application to a trust company for a loan of $2,000. This application was rejected because of the age of the father and mother and lack of potential ability to repay it.

Thereafter conferences were had by the grantors with the defendants. On October 15, 1937, defendant, Norman, made application to the same trust company for a loan of $2,000 on the property. He was well employed, had property, and potential ability to pay. The loan was approved. On October 19, 1937, the parents, as grantors by warranty deed, conveyed the property to defendants as joint tenants, with right of survivorship. The defendants executed and delivered their note to the trust company and on October 20, 1937, executed and delivered a mortgage on the property to the trust company to secure the same. The trust company, from the proceeds of the mortgage, paid off the existing mortgage

on the property, paid delinquent and due city and county taxes, paid two unsecured debts of the father, paid expenses of the loan, and paid the balance in the sum of $433.10 to the defendant Kathryn, who in turn deposited it to the credit of the mother.

Thereafter the defendants paid the taxes on the property, kept it insured, and made substantial repairs. From time to time defendants made payments on the indebtedness secured by the mortgage and completed payment in 1946.

The grantors continued to reside in the home. The father died in July 1942, and the mother died in January 1949.

Prior to June 1938, the plaintiff had been living in Illinois. He came home at that time and thereafter lived in the home with the parents and contributed to their support, as did also the defendants. The plaintiff made repairs to the home from time to time. The parents were at no time in need or neglected by either plaintiff or defendants.

After the death of the mother, a forcible detainer action was brought by the defendants. The prosecution of that action was restrained during the pendency of this action. The restraining order was dissolved by the trial court in its decree.

Plaintiff alleged that it was agreed between the father and mother and the defendants that they would convey the property by deed to the defendants; that the defendants would hold the property under the deed as security for their liability under the mortgage; and that the property was conveyed and the subsequent transactions had pursuant to that agreement.

The rule is: "Where it is sought to vary the effect of a deed absolute on its face by parol testimony, so as to declare it to be a mortgage, the evidence must be clear, convincing, and satisfactory before a court is warranted in adjudging it to be a mortgage." Anderson v. Lincoln Joint Stock Land Bank, 131 Neb. 150, 267 N. W. 355.

There is no one who testifies directly to such an agreement.

To meet that burden plaintiff offered evidence that defendant, Norman, was indebted to his father at the time of the transaction. That evidence was in large part thoroughly discredited by plaintiff's own testimony, as well as denied and explained by defendant Norman. It does not merit extended discussion.

Plaintiff testified that he came home in June 1938, had discussions with his parents, examined the records, and found that the conveyance had been made; that he then demanded of the defendant, Norman, in his office that the property be reconveyed to the mother; and that he made the same demand of the defendant, Kathryn, in the parents' home and in their presence.

The repeated statements of the form of that demand clearly show that it was plaintiff who sought the reconveyance, not the parents; and that it was plaintiff, not the parents, who was dissatisfied with the conveyance to the defendants. The father lived 4 years and the mother lived 10 years after those demands were made; for aught that appears in this record they retained their mental capacities, yet they took no action to implement the demands made by the plaintiff.

Plaintiff testified as to two alleged admissions against interest made in 1938, which he contends sustain his position and, together with the circumstances of the transaction, meet the requirements of the rule as to burden of proof. He testified that the defendant, Norman, in response to a demand that he reconvey the property to the mother, said, "I have taken the deed to the property to secure the liability on the note which I have signed for the two-thousand dollar mortgage." He further testified that Kathryn, in response to a similar demand, said, "we don't want the property. All we want is to be secured for the two-thousand dollar note we signed," and that that was the reason they took a deed to the property. As to the statement attributed

to the defendant, Kathryn, there is a denial by her and a conflict of the evidence as to that matter unsupported by other evidence as to either statement. As to the statement attributed to the defendant, Norman, there is a positive denial by him and a conflict of the evidence as to that matter. However, the plaintiff rather definitely fixed the time and place in Lincoln where that statement was alleged to have been made. Defendant testified that he was not in Lincoln at the time stated and produced expense account records of his employer supporting his evidence. Plaintiff's testimony on other matters was self-discredited several times; and his testimony on other matters was discredited by two disinterested witnesses, one of whom was sustained by records of plaintiff's employer. The three persons whose evidence is in conflict testified before the trial court.

In this situation we follow the rule that actions in equity are triable de novo in this court subject to the rule that when the evidence on material questions of fact is in irreconcilable conflict, this court in determining the weight of the evidence considers 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. Hall v. Modern Woodmen of America, 153 Neb. 600, 45 N. W. 2d 630.

We reach the same conclusion as obviously did the trial court as to that evidence.

The plaintiff offered in evidence the will of the mother, executed on December 12, 1947, in which she devised this property to the plaintiff. The will had been admitted to probate. The will contained a recitation of the mother as to the transaction here involved, which it is contended sustains plaintiff's position. The trial court admitted the will in evidence for the limited purpose of showing that plaintiff had succeeded to whatever interest the mother had in the property. Plaintiff assigns this as error, contending that it should have been admitted generally.

This contention is answered in Colbert v. Miller, 149 Neb. 749, 32 N. W. 2d 500, wherein we held that: Acts and declarations of a grantor in hostility to a deed, subsequent to the time of the delivery of the deed, are incompetent as against the grantee. Hearsay testimony which is incompetent is not made admissible by reason of the death of the person who made the statement sought to be proved. We find no error in the ruling of the court.

Defendants testified as to the transaction; and that it was agreed with the grantors that the deed was to be an absolute conveyance subject to an understanding that the grantors in effect retained a life estate. Plaintiff contends that this sustains his case.

The rule is: "A deed, delivered to grantee in grantor's lifetime, is operative, though enjoyment of estate conveyed is postponed until grantor's death, as present estate or interest is transferred by such delivery." Colbert v. Miller, *supra*. See, also, Cerveny v. Cerveny, 154 Neb. 1, 46 N. W. 2d 632.

We find as did the trial court that plaintiff's evidence fails to sustain his contentions.

The judgment of the trial court is affirmed.

AFFIRMED.

KATHRYN GEORGE, APPELLANT, V. SCHOOL DISTRICT NO. 24 OF RED WILLOW COUNTY, APPELLEE.

61 N. W. 2d 401

Filed December 18, 1953. No. 33387.

1. **Schools.** Section 79-491, R. R. S. 1943, requiring that all claims for transportation allowance shall be filed for payment monthly is a mandatory prerequisite to the recovery of school pupil transportation by the person claiming the same.
2. ———. That such claims for transportation "shall be" so "filed for payment monthly" means that they must be filed in writing with the proper district school board either at a meeting or with some member thereof, preferably the secretary, during

the calendar month following the one in which the claimed transportation services were performed.

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

Van Pelt, Marti & O'Gara, Robert D. McNutt and *LaFayette D. Hurley,* for appellant.

Fred T. Hanson, for appellee.

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

CHAPPELL, J.

Plaintiff, Kathryn George, originally filed this action in county court seeking recovery of allowance for school pupil transportation from defendant, School District No. 24 of Red Willow County, under the provisions of section 79-490, R. R. S. 1943. Her petition contained two causes of action, one upon a claim in her own behalf, and the other upon a claim of W. K. Coghill, who assigned the same to plaintiff. Fundamentally, the two claims are identical in principle and controlled by like propositions of law. Hereinafter the parties will be designated as plaintiff and plaintiff's assignor, or Mr. Coghill, and defendant district.

The county court, after hearing, rendered a judgment for defendant, and plaintiff appealed to the district court. There, after a hearing, jury waived, the trial court also rendered judgment for defendant and dismissed plaintiff's action primarily upon the ground that plaintiff and her assignor had failed to file their claims with defendant's district board for payment monthly, as required by section 79-491, R. R. S. 1943. Plaintiff's motion for new trial was overruled, and she appealed, assigning insofar as important here that the trial court erred in finding that the aforesaid statute was mandatory and that plaintiff and her assignor, having failed to file written claims for transportation allowances for payment monthly, could not recover. We conclude that the assignment has

no merit. There were other assignments of error but discussion thereof is not required in order to dispose of the case upon its merits. In other words, whether or not under the circumstances plaintiff and her assignor could have selected any other school except district No. 4 at the expense of defendant district the trial court was not and this court is not required to answer in order to pass upon and dispose of plaintiff's right to recover. No claim for tuition is involved in this case.

The pertinent controlling facts are not in dispute. Plaintiff and her assignor were both residents in and electors of defendant district. Plaintiff, who is divorced, had a daughter in beginner's grade and Mr. Coghill had a son in second grade. Plaintiff lived from 2 to 2½ miles one way from the school house in defendant district, and 2 miles one way from the school house in district No. 4, where, as hereinafter observed, her child could have attended school during the 1949-1950 school year. However, plaintiff was a teacher in district No. 121 and had personally arranged with its board to have her child attend that school. The child was in fact one of plaintiff's students there. Such school was 7 miles one way from plaintiff's home, so she transported her child back and forth to and from that school, and herein sought recovery for such transportation.

Mr. Coghill, plaintiff's assignor, lived from 1¼ to 1½ miles one way from the school house in defendant district, and 1 mile one way from the school house in district No. 4, where, as hereinafter observed, his son could have attended school during the 1949-1950 school year. However, he had personally arranged with the school board of district No. 121 to have his son attend that school. His son was also one of plaintiff's students. Such school was 6 miles one way from Mr. Coghill's home, so his child was transported back and forth to and from that school, and plaintiff, as assignee of his claim, herein sought recovery for such transportation.

Defendant district had discontinued conducting school

about 15 years previously, and at that time had made a written contract for instruction of its pupils in and with school district No. 4. However, ever since that time they have not made written contracts as required by section 79-486, R. R. S. 1943, but have each year made oral agreements with such district for their instruction. Minutes of some of the intervening regular annual meetings appear in the record, including that held in June 1949, which minutes show that: "We agreed to send to Marion as we have for several years and pay 10¢ per mile per family." "Marion" was simply another name by which district No. 4 is known.

In that connection, there is competent evidence that at the June 1949 annual meeting of defendant district, a majority present voted to contract with school district No. 4 for the instruction of defendant district's pupils during the 1949-1950 school year, and at that meeting Mr. Coghill was elected treasurer of defendant district's school board. Be that as it may, he had sent his son to district No. 121 the year before, and had, before defendant district's annual meeting, already decided to send his son there again during the 1949-1950 school year. At that meeting he told those present that he was going to send his son there again whether or not defendant district had school or decided to send its pupils to district No. 4.

Pursuant to the action at such meeting and within about one week thereafter, the board of defendant district made an oral contract with the board of district No. 4 whereby the latter agreed to furnish instruction to defendant district's pupils. Thereafter, district No. 4 held school during the 1949-1950 school year, and was at all times ready and willing to furnish instruction to the children of both plaintiff and Mr. Coghill or to any other pupils from defendant district who presented themselves for such instruction. As a matter of fact, district No. 4 did furnish such instruction to at least one pupil from defendant district for at least part of that year.

Nevertheless, plaintiff and her assignor took their children to school district No. 121. In that regard, no statements of attendance or transportation trips actually made were ever filed monthly with the board of defendant district or the secretary thereof by the teacher of district No. 121, but a record of their attendance for the entire school year, executed and signed by the superintendent of schools, at plaintiff's request, was presented to Mr. Coghill, treasurer of defendant district, on May 23, 1950, prior to the 1950 annual meeting. It is clear, however, that such attendance record was in no actual sense or legal effect a claim for transportation services. There is some evidence that about once a month plaintiff made oral demands upon Mr. Coghill, the treasurer, and he likewise made oral demands upon certain members of defendant district's board for payment of transportation, but, without any logical reason or excuse therefor, neither plaintiff nor Mr. Coghill ever filed or attempted to file any written claims for transportation monthly or otherwise with defendant's board or any member thereof, and the board consistently refused to recognize the validity of their demands.

In 1941, section 79-1902, C. S. Supp., 1939, was amended among other things to include the provision: "Provided, all claims for transportation allowance shall be filed for payment monthly; and provided further, no action for recovery on any claim for transportation allowance shall be brought after twelve months from the last day of any month of actual attendance for which attendance is claimed; * * *." Laws 1941, c. 163, § 1, p. 650.

It appears, however, that Laws of Nebraska, 1949, c. 256, p. 689, revised, adopted, and established a code of laws for the state relating to schools, provided for their administration and enforcement, and repealed certain designated statutes, including "all of Chapter 79, Revised Statutes of Nebraska, 1943," and "all amendments thereof contained in the Revised Statutes Supplement, 1947, * * *." In that part of such code having applica-

tion to all schools, now designated as Chapter 79, article 4, R. R. S. 1943, appears a separately reenacted section 129, now designated as section 79-491, R. R. S. 1943, which reads: "All claims for transportation allowance shall be filed for payment monthly. No action for recovery on any claim for transportation allowance shall be brought after twelve months from the last day of any month of actual attendance for which attendance is claimed." Such section was doubtless originally enacted and reenacted to make more workable and clarify provisions relating to transportation allowances, to give school boards timely opportunity to investigate, audit, and act upon such claims, to eliminate the possibility of litigation arising thereunder, such as that at bar, and to permit districts to stay within their expense estimates.

As we view it, section 79-491, R. R. S. 1943, is now all-inclusive of all such claims for school pupil transportation under whatever section of the related statutes the claims therefor are made. It is not ambiguous in any logical sense when read and considered in connection with other sections in pari materia therewith, as must be done. Clearly, an oral claim cannot be filed, so it must be in writing and actually timely filed with the proper district board either at a meeting or with some available member thereof, preferably the secretary, who prepares an accurate account of all expenses incurred, to be audited by the president and treasurer and paid out of the general fund on their written order (§ 79-440, R. R. S. 1943), who is clerk of the district board and of all district meetings (§ 79-456, R. R. S. 1943), and who records all proceedings of the district in a book furnished by it, kept for that purpose, and safely preserves and keeps all books and papers belonging to his office (§ 79-457, R. R. S. 1943).

That such claims for transportation "shall be" so filed for payment monthly" clearly means that they must be filed for payment during the calendar month following

the one in which the claimed transportation services were performed.

The decisive question presented then is whether or not that part of section 79-491, R. R. S. 1943, requiring that: "All claims for transportation allowance shall be filed for payment monthly" is a mandatory prerequisite to the recovery of transportation by the person claiming the same. We conclude that it is.

In that connection, we have no case directly controlling the question, but other states have, and by analogy from them and our own cases involving different but comparable statutes, we arrive at the same result by applying like principles.

In Schaut v. Joint School District, 191 Wis. 104, 210 N. W. 270, which involved dismissal of a claim for pupil transportation, it was said: "It is a fundamental rule that where statutes confer a new right, privilege, or immunity and prescribe a mode for the acquisition, preservation, enforcement, or enjoyment, such statutes are mandatory and must be strictly complied with, and where the statute provides the manner and form in which the right to be enjoyed may be acquired, such provisions are likewise mandatory, and if not complied with no right exists. 2 Lewis' Sutherland, Stat. Constr. (2d ed.) § 632, and cases cited; Wilcox v. Porth, 154 Wis. 422, 143 N. W. 165." The statute there involved was different in character but the controlling principle was comparable with that at bar. Harlow v. School District, 143 Kan. 162, 53 P. 2d 467, is almost, if not directly in point. See, also, 79 C. J. S., Schools and School Districts, § 433, p. 324.

This court likewise approved and applied the foregoing principle in Bryant v. Dakota County, 53 Neb. 755, 74 N. W. 313; Swaney v. Gage County, 64 Neb. 627, 90 N. W. 542; Wheeler v. City of Omaha, 111 Neb. 494, 196 N. W. 894; Consolidated Chemical Laboratories v. Cass County, 141 Neb. 486, 3 N. W. 2d 920; Verges v. Morrill County, 143 Neb. 173, 9 N. W. 2d 221. In such last-

cited case, it was said: "It is clear that the claims of plaintiffs are claims which must be examined and settled or 'audited and allowed.' The word 'must' as used in the statute is mandatory both as to the filing and the time within which the filing must be made. See Consolidated Chemical Laboratories v. Cass County, 141 Neb. 486, 3 N. W. (2d) 920. There is no question but that these claims were never filed with the county clerk, nor was an attempt made to file them with the county clerk, nor is there any record of action taken by the county board. This is not a case such as State v. Board of County Commissioners of Cass County, 60 Neb. 566, 83 N. W. 733, where the claim was delivered to the county clerk and that official failed to indorse upon the claim the fact and time of filing. Nor is it similar to Gibson v. Sherman County, 97 Neb. 79, 149 N. W. 107, where there was a record showing action by the board 'which could not have been done unless it was filed before them.' There the record was silent as to filing. Here the record affirmatively shows that there was no compliance with the mandatory provision of the statute."

We therefore conclude that statutes such as that granting allowances for transportation of school children under certain circumstances which confer a new right and prescribe a mode for the acquisition, enforcement, or enjoyment thereof, are mandatory and must be strictly complied with by the party claiming the same before any right of recovery thereunder exists. Plaintiff and her assignor having failed to comply therewith, no recovery can be permitted.

For reasons heretofore stated, the judgment dismissing plaintiff's action should be and hereby is affirmed.

AFFIRMED.

FRANK PONGRUBER, APPELLEE, V. JOHN PATRICK, APPELLEE, IMPLEADED WITH LAWRENCE P. PATRICK, APPELLANT.

61 N. W. 2d 578

Filed December 18, 1953. No. 33401.

1. **New Trial.** The purpose of a new trial is to enable the court to correct errors that have occurred in the conduct of the trial.
2. ———. The alleged errors that may be considered in the district court are those which appear in the record of the proceedings which resulted in the verdict and judgment about which complaint is made and which are called to the attention of the trial court by the motion or appropriate pleadings.
3. ———. The power of judicial discretion authorizes and requires the court to determine the question as to whether or not a legal reason exists for the granting of a new trial. If a legal reason exists and the complaining party makes his application in writing within the time fixed by statute, the court has no discretion in the matter and the motion must be sustained.
4. **New Trial: Appeal and Error.** If the trial court gave no reasons for its decision, then the appellant meets the duty placed upon him when he brings the record here with his assignments of error and submits the record to critical examination with the contention that there was no prejudicial error. The duty then rests upon the appellee to point out the prejudicial error that he contends exists in the record and which he contends justifies the decision of the trial court. The appellant then in reply has the right, if he desires, of meeting those contentions.
5. ———: ———. Those errors will then be considered and determined here so far as necessary to the appeal, subject, of course, to the right to notice and consider plain errors not assigned.
6. **Trial: Evidence.** The question whether negative evidence is sufficient to take the case to the jury is to be decided according to all the circumstances of the case. No absolute rule can be laid down in regard thereto, and different results will necessarily be reached, as the facts of each case differ.
7. **Trial: Negligence.** It is the duty of the trial court, without request, to submit to and properly instruct the jury upon all the material issues presented by the pleadings and the evidence. This rule applies to the affirmative defense of contributory negligence.
8. **Automobiles: Negligence.** There is no presumption or inference as to the negligence of a driver of an automobile arising from the mere fact that it collided with another vehicle.

9. ———: ———. A driver of an automobile should have his car under such reasonable control as will enable him to avoid collision with other vehicles, assuming that the drivers thereof will exercise due care.
10. ———: ———. Reasonable control by drivers of motor vehicles is such as will enable them to avoid collision with other vehicles operated without negligence in streets or intersections, and with pedestrians in the exercise of due care.

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

Kennedy, Holland, DeLacy & Svoboda and *Donald P. Lay,* for appellant.

Wear & Boland, for appellee.

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

MESSMORE, J.

This is an action at law brought by the plaintiff, Frank Pongruber, against John Patrick and Lawrence P. Patrick, defendants, in the district court for Douglas County. The defendant John Patrick, father of Lawrence P. Patrick, was dismissed from this action as a party defendant. The plaintiff seeks to recover damages resulting from an intersection accident by the collision of an automobile driven by him and an automobile driven by the defendant Lawrence P. Patrick. The case was tried before a jury, resulting in a verdict in favor of the defendant on the plaintiff's petition, and for the plaintiff on the defendant's counterclaim, with no damages to either party. The plaintiff moved for a new trial which was sustained. From the order granting the new trial, the defendant has appealed to this court.

The appellant assigns as error that the trial court was in error in granting a new trial, for the reason that the record in this case discloses no legal reason why a new trial should be granted, and the granting of a new trial constituted an abuse of discretion on the part of the trial judge.

The appellee filed his motion for new trial within the time provided, specifically set forth the grounds therefor in accordance with section 25-1142, R. R. S. 1943, and specifically challenged each and every instruction given by the trial court.

The appellant cites Greenberg v. Fireman's Fund Ins. Co., 150 Neb. 695, 35 N. W. 2d 772, and quotes therefrom the following language: "A new trial is to be granted for a legal cause and where it appears that a legal right has been invaded or denied. A new trial is not to be granted for arbitrary, vague, or fanciful reasons. * * * Where a party has sustained the burden and expense of a trial and has succeeded in securing the judgment of a jury on the facts in issue, he has a right to keep the benefit of that verdict unless there is prejudicial error in the proceedings by which it was secured." See, also, Scherz v. Platte Valley Public Power & Irr. Dist., 151 Neb. 415, 37 N. W. 2d 721; In re Estate of Kinsey, 152 Neb. 95, 40 N. W. 2d 526; Keiserman v. Lydon, 153 Neb. 279, 44 N. W. 2d 513.

In the instant case the trial court gave no reasons for its decision. In this connection, the appellant cites from Greenberg v. Fireman's Fund Ins. Co., *supra,* as follows: "If, as in the instant case, the trial court gave no reasons for its decision, then the appellant meets the duty placed upon him when he brings the record here with his assignments of error and submits the record to critical examination with the contention that there was no prejudicial error. Under these circumstances the appellant is not required to establish a negative. The duty then rests upon the appellee to point out the prejudicial error that he contends exists in the record and which he contends justifies the decision of the trial court. The appellant then in reply has the right, if he desires, of meeting those contentions.

"By that process the questions to be determined here are presented in a practical manner. Those errors will then be considered and determined here so far as neces-

sary to the appeal, subject, of course, to our right to notice and consider plain errors not assigned Such a procedure fully protects the rights of the parties." See, also, Keiserman v. Lydon, *supra;* In re Estate of Fehrenkamp, 154 Neb. 488, 48 N. W. 2d 421.

The appellee makes reference to section 25-1142, R. R. S. 1943, which provides: "A 'new trial' is a re-examination in the same court of an issue of fact after a verdict by a jury, report of a referee, or a decision by the court. The former verdict, report or decision shall be vacated and a new trial granted on the application of the party aggrieved, for any of the following causes, affecting materially the substantial rights of such party; (1) irregularity in the proceedings of the court, jury, referee or prevailing party, or any order of the court or referee, or abuse of discretion, by which the party was prevented from having a fair trial; * * * (8) error of law occurring at the trial and excepted to by the party making the application."

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. As used in this connection judicial discretion means the application of statutes and legal principles to all of the facts of a case. If a legal reason exists and the complaining party makes his application in writing within the time fixed by statute, the court has no discretion in the matter and the motion must be sustained. See Sautter v. Poss, 155 Neb. 62, 50 N. W. 2d 547; Greenberg v. Fireman's Fund Ins. Co., *supra.*

The record discloses that at the time of the accident the appellee was engaged as a boiler gas maker for the Metropolitan Utilities District in Omaha, and had been so employed for 23 years. He was 64 years old at the time of the accident, and owned a 1931 Victoria type model A Ford automobile, in good mechanical condition. The Metropolitan Utilities District plant is located at Twentieth and Center Streets in the city of Omaha.

The appellee worked the midnight shift from 11 p. m. to 7 a. m. He did not always wait until 7 a. m., but would leave the plant when his relief arrived.

The appellant, Lawrence P. Patrick, was 21 years of age at the time of the accident and resided in Carson, Iowa, but was working in the city of Omaha for the Wilson Packing Company. He lived at 3510 Dodge Street where two of his friends from Carson, Iowa, also lived. They were also employed in packing plants. The appellant was the owner of a 1947 eight cylinder Oldsmobile which was in good mechanical condition and equipped with four-wheel hydraulic brakes.

The accident occurred at the intersection of Thirty-second Avenue and Center Street in Omaha at about 6:30 a. m., January 15, 1951. It was dark, the temperature was 35 degrees Fahrenheit, and the pavement was dry. The street lights were still on, and the lights of both the appellant's and appellee's automobiles were on. The topography of the intersection is briefly as follows: Thirty-second Avenue is 43 feet wide from curb to curb and slopes gently downward in a north-south direction so that the view is not obstructed for a driver coming from either direction toward Center Street which is 40 feet wide and almost level and comes from the west into Thirty-second Avenue, but not through Thirty-second Avenue. This intersection is commonly known as a "T" intersection. There were no slow signs near the intersection, but there were signs indicating to traffic approaching Center Street from the north that the speed limit was 25 miles an hour at the time of the accident.

On the morning in question, the appellee left the gas plant at 6:20 or 6:22 a. m. He testified as to the course he took to arrive on Thirty-second Avenue, then to proceed north to Center Street. He was driving alone. The window on the left side of his car was open when he approached the intersection of Thirty-second Avenue and Center Street. He was traveling about 25 miles an hour, and as he approached the intersection he was about

in the middle of the street. He testified that when he was about 100 feet distant from the intersection of Thirty-second Avenue and Center Street he held his hand out in a horizontal position to indicate that he was going to make a left turn, or turn to the west, from Thirty-second Avenue into Center Street. At that time he was driving at a rate of speed of 15 miles an hour. When he made the turn, he was 3 or 4 feet from the north curb of Center Street. He made a "square" turn. He observed a car approaching from the north proceeding south on Thirty-second Avenue as he approached Center Street. At that time the appellee was 100 feet south of the intersection, and that is the time when he gave the signal. The other car, which turned out to be the appellant's car, was at that time about 200 feet north of the intersection. The appellee saw the headlights on the appellant's car. When the appellee turned west onto Center Street, he testified that half of his car was in the intersection and the other half out, but that it was going straight west when it was struck by the appellant's car.

A witness, H. M. Reynolds, a bricklayer and employee of the Metropolitan Utilities District and acquainted with the appellee, testified that on the morning of the accident he was driving his 1929 Nash automobile in the vicinity of Thirty-second Avenue and Center Street at a rate of speed of 15 or 20 miles an hour. He had come from his home and was proceeding to work, driving on Center Street, traveling from the west on the right side of the street. When about 100 feet from the intersection he observed the headlights of a car turn into Center Street toward him on the opposite side of the street. This car seemed to be pretty far over on its own side of the street, about 5 feet distant from the north curb. This witness pulled his car into the curb after he heard a crash, and at that time was 60 or 70 feet from where the collision occurred. He went to the scene of the accident to see if anybody was hurt, and noticed a man leaning on the steering wheel. He endeavored to jerk

the door of the car open. The man did not talk. He pulled him out of the car. The appellee's car was standing on Thirty-second Avenue, headed south, about 7 feet from the corner curbline. No part of this car was in Center Street. Two wheels of the car were over the west curb of Thirty-second Avenue. The appellant's car was 100 feet down Thirty-second Avenue, parked against the curb.

The appellant testified that it was necessary for him to be at work at 7 a. m. in the Wilson packing plant, and that he usually got up at 6 a. m. and had breakfast at Harkert's at Thirty-fifth and Farnam Streets. Normally, after leaving that point he would proceed south on Thirty-second Avenue. He was driving his car about 10 feet from the west curb of Thirty-second Avenue at a speed of 25 or 30 miles an hour. His headlights were on, and would illuminate an object at a distance of 150 feet ahead of him. He was looking straight ahead. He observed a car approaching when he was approximately half a block north of Center Street. He could only see the headlights of the car. He saw no hand signal of the intention on the part of the driver of that car to make a left turn, or west turn, into Center Street. When he was 5 feet north of the curbline of the intersection of Center Street, the appellee crossed ahead and in front of his car. At that time the appellee was on the south side of Center Street, heading in a northwesterly direction. The appellant testified that when he saw the appellee's car he put on his brakes and slid a distance of 6 or 8 feet before the brakes took hold. The impact occurred about the center of the intersection, and the right front of the appellant's car came in contact with the appellee's car. After the impact, appellant's car was 20 feet from the intersection headed south at a slight angle; the appellee's car was 15 feet north of the appellant's car. After the accident the appellant went back to the place where it had occurred and observed skid marks 6 or 8 feet in length north of the center line of

Center Street. There was debris at the point of impact at about the center of the intersection, but none of the debris was on Center Street. While he was proceeding south on Thirty-second Avenue, his friend Lyle McClean was following him at a distance of approximately 100 feet. He further testified that he did not notice the headlights on the appellee's car when it turned left, or west. He did not sound his horn, nor did he turn either to the right or left. When his car struck the appellee's car it was headed slightly in a northwesterly direction, and when the accident was over, the appellee's car was headed south. The back of it was approximately 5 feet from the south curbline of the intersection. When the appellee made his turn to the left or west he was not in the appellant's line of vision. The appellant noticed no visible sign of the appellee's intention to make the left turn. The front end of his car came in contact with the appellee's car. The grille and radiator were substantially damaged, as well as other parts of the car, and the right front tire was blown out.

The appellee's car, it appears, was struck at the right hand door. The right front fender was bent in, the right rear fender was torn up, and both the right rear tire and the right front tire were down.

The witness Lyle McClean testified that he roomed at the same rooming house as the appellant, and ate breakfast at the same place. He was employed at Armour's packing plant, and reported for work at 7 a. m. On this day he proceeded south on Thirty-second Avenue right behind the appellant's car. As they approached the intersection of Thirty-second Avenue and Center Street, the appellant was about a block ahead of him. His opinion was that they were both driving at a rate of speed of 25 miles an hour, and kept close to that speed, with the exception that there might have been some slight variance in the speed of the appellant's car. He noticed the appellee's car when it turned left, or to the west, at the intersection. It was right in the intersection when

he heard the crash. The appellant's car was right at the intersection. The appellee's car was hit right at the door. After the accident this witness brought his car to a stop in front of the appellant's car and then went back to see how the appellant was. There was no one else there. He was the first to see the appellant who appeared to be dazed and could not stand up. After turning the lights off on the appellant's car, he walked to the other car. He noticed the appellee in his car, on his knees, moaning. The next person to arrive at the scene of the accident was a cab driver. This witness requested him to take him to a telephone. The cab driver stated that he had a phone in his cab and would call the police. This witness further testified that the appellee's car was 5 feet from the curbline, facing south, and no part of it was over the curb. The appellant's car was sitting at an angle; the right front wheel was hitting the curb and the back of the car extending out from the curb 6 or 8 feet. He noticed debris to the south side of the intersection, and none to the north thereof to amount to anything. When he first noticed the lights on the appellee's car, it was not in the intersection. This witness was about 300 feet north of the intersection when the appellant was in the intersection. He saw the appellant's car hit the appellee's car, and it looked like the appellee's car swerved to the left. It was knocked around in that position, or spun to the south, that is, the front end of the appellee's car. He told about the parties being taken to the hospital and that he subsequently took the appellant home.

The appellee predicates error on the giving of certain instructions by the trial court to the jury, which we set out in substance.

The trial court, by instruction No. 3, informed the jury: "* * * The defendant further says that the collision was in no wise the result of any negligence on his part but was the direct and proximate result of negligence of the plaintiff himself, which negligence was more than

slight and was as follows: 1. In plaintiff's making a left turn at the intersection of 32d Avenue and Center without giving a visible signal at a time when the defendant was so close to the intersection that defendant's car created an immediate hazard."

In instruction No. 8, the trial court informed the jury: "* * * The driver of a vehicle approaching but not having entered an intersection shall yield the right-of-way to a vehicle within such intersection and turning therein to the left across the line of travel of such first-mentioned vehicle, provided the driver of the vehicle turning left has given a plainly visible signal of intention to turn. * * * A signal of intention to turn right or left shall be given continuously during not less than the last 50 feet traveled by the vehicle before turning. All signals required shall be given by the hand and arm from the left side of the vehicle in the following manner: left turn, arm and hand extended horizontally."

The appellee's contention is that such instructions were erroneous and constitute prejudicial error for the reason that the trial court submitted the issue of appellee's contributory negligence in making a left turn when there was not sufficient evidence from which the jury could find that appellee failed to give a visible signal, or a "plainly visible signal."

The appellant contends that where two automobiles collide at night, or as in the instant case under conditions of darkness, as the driver of one automobile is making a left turn in front of the other and that driver testified he gave a signal to indicate he was going to turn to the left and the other driver testified he did not see such a signal, there being no other witnesses that could testify with reference to such matter, an issue is formed for the jury as to whether or not an adequate signal was given by the driver of the automobile making the left turn. We will not repeat the evidence on this point previously set out, but direct attention to it.

The appellee cites Nanfito v. Chicago, B. & Q. R. R.

Co., 103 Neb. 577, 173 N. W. 575; Dodds v. Omaha & C. B. St. Ry. Co., 104 Neb. 692, 178 N. W. 258; Oliver v. Union P. R. R. Co., 105 Neb. 243, 179 N. W. 1017; De Griselles v. Gans, 116 Neb. 835, 219 N. W. 235; Miller v. Abel Construction Co., 140 Neb. 482, 300 N. W. 405. These cases are cited by the appellee to sustain his proposition of law as follows: Where there is positive and affirmative testimony by a witness that a signal was given, the fact that there is testimony by a witness that he did not see the signal does not make a disputable issue of fact to be submitted to the jury, where it is not shown that the attention of the witness was directed toward the signal at the time it is said to have been given, and where his position, mental condition, and surroundings were not such as would raise a presumption that he would have seen it if it had been given. These cases deal with the effect of positive testimony as against testimony negative in character and disclose the inherent weakness of negative testimony under the facts shown in the cases.

The appellee cites Annotation, 98 A. L. R. 161, as follows: "The rule in regard to positive and negative evidence is sometimes stated in the form of a 'rule of thumb,' it being said that, where there are two witnesses, one testifying to the occurrence of an event, and the other testifying to its nonoccurrence, and the witnesses are of equal credibility, the testimony of the witness asserting the affirmative of the issue will be accepted."

Appellee also cites Annotation, 140 A. L. R. 530: "It seems to be universally recognized as a general rule that, everything else being equal, affirmative testimony is stronger than negative. 20 Am Jur 1037, Evidence, § 1186; 1 Jones, Evidence, 2d ed § 20. And some courts have even gone to the length of holding that, as against positive evidence, negative testimony is insufficient to create a conflict of evidence sufficient to take the case to the jury or to support a verdict."

It is said in 32 C. J. S., Evidence, § 1037, p. 1084: "Other things, such as opportunity to observe and the credibility of witnesses, being equal, greater weight and probative value should be given to positive and affirmative evidence than to negative evidence; in other words, the testimony of a witness who testifies positively that a certain fact existed, or an event occurred, is, generally speaking, entitled to more weight than the evidence of another witness who swears that the event did not occur, or that he did not observe its occurrence, * * *." Under this rule the case of De Griselles v. Gans, *supra,* and Nanfito v. Chicago, B. & Q. R. R. Co., *supra,* are cited.

Contra to the appellee's contention of the issue being discussed, the appellant cites the following: The question whether negative evidence is sufficient to take the case to the jury is, of course, a question to be decided according to all the circumstances of the case. No absolute rule can be laid down in regard thereto, and different results will necessarily be reached, as the facts of each case differ. See, Annotation, 98 A. L. R. 167; Hook v. Payne, 109 Neb. 252, 190 N. W. 581.

In addition, to sustain his contention that the evidence in this case was sufficient to submit the question to the jury on this issue, the appellant cites McGill v. Baumgart, 233 Wis. 86, 288 N. W. 799; Grasser v. Anderson, 224 Wis. 654, 273 N. W. 63; Nold v. Higgins Lumber Co., 276 Pa. 195, 119 A. 919; Silfies v. American Stores Co., 357 Pa. 176, 53 A. 2d 610; Wilburn v. Simons, 302 Ky. 752, 196 S. W. 2d 356. It would serve no useful purpose and unnecessarily lengthen this opinion to distinguish the cases cited by the appellant and the appellee. They are, in a great many respects, different from the facts in the case at bar, and the facts in the case at bar are the facts that must be considered to determine whether or not this issue should be submitted to the jury.

In the case at bar, the appellant was looking and watching the highway ahead. He would be in a position to observe a signal prior to the time that the appellee

made his turn to the left. He testified he did not see the signal. Taking into account the condition of darkness which prevailed at the time of the accident, there are reasons why the signal might have been obscured from the appellant's view either by the headlights of appellee's car or some other cause. In this connection, all of the facts surrounding the sufficiency of the signal, as to whether or not it was in accordance with the ordinances of the city of Omaha and the law of this state should be considered. The trial court must have examined all of the circumstances and facts applying to this issue and concluded it should be submitted to the jury. We conclude the trial court did not commit error in this respect.

The appellee contends that the trial court, in submitting the issue of contributory negligence, placed upon the appellee a greater duty and responsibility than our holdings justify.

In instruction No. 3, the trial court informed the jury that: "* * * The defendant further says that the collision was in no wise the result of any negligence on his part but was the direct and proximate result of negligence of the plaintiff himself, which negligence was more than slight and was as follows: * * * 3. In plaintiff's failing to avoid a collision between his car and the car driven by the defendant."

This court has on numerous occasions held: "It is the duty of the trial court, without request, to submit to and properly instruct the jury upon all the material issues presented by the pleading sand the evidence. This rule applies to the affirmative defense of contributory negligence." Krepcik v. Interstate Transit Lines, 154 Neb. 671, 48 N. W. 2d 839. See, also, Johnson v. Griepenstroh, 150 Neb. 126, 33 N. W. 2d 549.

The appellee asserts that by the giving of the above instruction the jury was free to find the appellee guilty of contributory negligence merely because he failed to

avoid a collision, and therefore it was prejudicially erroneous.

There is no presumption or inference as to the negligence of a driver of an automobile arising from the mere fact that it collided with another vehicle. See, 5 Am. Jur., Automobiles, § 606, p. 838; Bloom v. Bailey, 292 Pa. 348, 141 A. 150, 57 A. L. R. 585.

The appellee cites Adams v. Welliver, 155 Neb. 331, 51 N. W. 2d 739, to the following effect: A driver should have his car under such reasonable control as will enable him to avoid a collision with other vehicles or pedestrians, assuming that the drivers of other vehicles and pedestrians exercise due care. Reasonable control by drivers of motor vehicles is such as will enable them to avoid a collision with other vehicles operated without negligence in the streets or intersections, and with pedestrians in the exercise of due care; but complete control such as will only prevent a collision by anticipation of negligence or illegal disregard of traffic regulations, in the absence of notice, warning, or knowledge, is not required. See, also, Ficke v. Gibson, 153 Neb. 478, 45 N. W. 2d 436; Spomer v. Allied Electric & Fixture Co., 120 Neb. 399, 232 N. W. 767; Thrapp v. Meyers, 114 Neb. 689, 209 N. W. 238, 47 A. L. R. 585; Patterson v. Kerr, 127 Neb. 73, 85, 254 N. W. 704; De Griselles v. Gans, *supra.*

The appellee further contends that in view of the foregoing authorities, the court should have informed the jury that the appellee did not have an absolute duty to avoid a collision under all circumstances; that the appellee was not required to have such complete control of his automobile as could prevent a collision by anticipation of negligence or illegal disregard of traffic regulations; and that the instruction on this issue, under the circumstances and in view of the rule as announced in the foregoing authorities, placed too great a duty upon the appellee.

In Ficke v. Gibson, *supra,* the trial court, by instruc-

tion No. 1, advised the jury as follows: "Plaintiff (appellee here) * * * alleges that the defendant, Sam Staten (appellant here), was negligent in his operation of a truck in the following particulars: * * * 3. By failing to have said truck under control so that he could stop the same before colliding with the plaintiff." In the case at bar the trial court advised the jury that the defendant (appellant here) "says that the collision was in no wise the result of any negligence on his part but was the direct and proximate result of negligence of the plaintiff himself, which negligence was more than slight and was as follows * * * 3. In plaintiff's failing to avoid a collision between his car and the car driven by the defendant." For all practical purposes, the parts of the two instructions above mentioned are substantially identical.

Complete control of an automobile is not required by the laws of Nebraska, as stated in the instruction. In the absence of an instruction which states the correct rule, too great a duty or responsibility is placed upon the appellee in the instant case. The trial court committed prejudicial error as contended for by the appellee.

For the reasons given in this opinion, the judgment of the trial court in granting a new trial should be and is hereby affirmed.

AFFIRMED.

GEORGE C. NICKEL ET AL., APPELLANTS, V. THE SCHOOL BOARD OF AXTELL DISTRICT R-1, KEARNEY COUNTY, NEBRASKA, ET AL., APPELLEES, AND W. H. PORTER ET AL., APPELLANTS, V. THE SCHOOL BOARD OF AXTELL DISTRICT R-1, KEARNEY COUNTY, NEBRASKA, ET AL., APPELLEES.

61 N. W. 2d 566

Filed December 18, 1953. Nos. 33415, 33416.

1. **Quo Warranto.** Quo warranto is employed only to test the actual

right to an office or franchise. It can afford no relief for official misconduct or be used to test the legality of the official action of public or corporate officers.

2. **Constitutional Law.** The Legislature may not delegate to private individuals either legislative or judicial functions.
3. ———. The fixing of boundaries of a political subdivision of a state into counties or districts for public purposes is a legislative function.
4. ———. The Legislature may authorize the organization of districts for public purposes by other governmental bodies, and the proceeding may be proposed or initiated by private individuals.
5. ———. Where it is authorized to be initiated by private individuals there must be some provision for determining whether the particular district is for the public health, convenience, or welfare, and a means by which an aggrieved property owner, whose property is injuriously affected, may have his rights judicially determined.
6. ———. In those instances in which the Legislature may delegate authority, it may place upon the authority so granted such restrictions and limitations as it chooses. It may also prescribe the manner and circumstances of the exercise of such power.
7. ———. Where financial burdens are necessarily imposed on property owners by an exercise of judicial power pursuant to specific terms of a statute due process of law requires notice and an opportunity to be heard.
8. ———. Questions of public policy, convenience, and welfare, as related to the creation of municipal corporations, such as counties, cities, villages, school districts, or other subdivisions, or any change in the boundaries thereof, are, in the first instance, of purely legislative cognizance and, when delegated to any public body having legislative power, any action in regard thereto does not come within the due process clause of either the state or federal Constitutions.
9. ———. But when, as a condition to their creation or change, the public body to which such authority is delegated must find certain facts to exist upon which the Legislature has said depends its authority to declare such subdivision, or any change therein, to exist then the questions presented are of a quasi-judicial character. In such cases a hearing must be had to determine if such facts exist and proper notice thereof must be provided for and given to all parties interested therein.
10. **Schools and School Districts.** In general, a school district or other local school organization must be so formed or laid out as to afford to all the children within its boundaries an opportunity to enjoy with reasonable facility the benefits of the

school; but every reasonable presumption is to be indulged in favor of a district as created and laid out and equal convenience to all the children is not essential, since it is impossible to prevent varying degrees of convenience or inconvenience to children living in different parts of any district.

11. **Estoppel: Municipal Corporations.** The doctrine of estoppel may be invoked against a municipal corporation where there have been positive acts by the municipal officers which may have induced the action of a party and where it would be inequitable to permit the corporation to stultify itself by retracting what its officers had done.

APPEAL from the district court for Kearney County: FRANK J. MUNDAY, JUDGE. *Affirmed.*

Dryden, Jensen & Dier, for appellants.

William H. Meier and *Charles A. Chappell,* for appellees.

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

WENKE, J.

These actions were originally instituted in the district court for Kearney County by the appellants George C. Nickel, Jeannette Nickel, W. H. Porter, and Doris F. Porter. Appellants thereby sought to enjoin certain officials, whose duty it was to do so, from assessing and levying a tax against their lands located in school district R-1 for the support thereof. This district had been established under the Reorganization of School Districts Act passed by the 1949 Legislature. See Laws of Nebraska, 1949, c. 249, p. 673. The claimed right to this relief is based on the contention that the Reorganization of School Districts Act is unconstitutional or, if not unconstitutional, that the acts of the Kearney County Reorganization Committee in establishing the district were improper and, because thereof, school district R-1 should be declared void. Additional relief prayed for will not be set forth as it becomes unimportant in view of what is hereinafter held. Since both actions raise identical issues the

two causes were, in the district court, consolidated for the purpose of trial. The trial court, after a hearing, dismissed both causes of action. The appellants filed separate motions for new trial and have separately appealed from the overruling thereof. We permitted a consolidation here for the purpose of having only one bill of exceptions, brief, and oral argument. Since the issues are the same in both cases we will write but one opinion and consolidate the two appeals for that purpose.

The record shows school district R-1, which includes the village of Axtell, was organized pursuant to and in accordance with the provisions of the Reorganization of School Districts Act, which we will hereinafter refer to as the Act. This Act is set out in R. R S. 1943 as sections 79-426.01 to 79-426.19, inclusive. We will, when referring thereto, do so by section numbers of the original Act. We will not set out the Act in full nor recite all the evidence in detail but will do so only to the extent it is deemed necessary in order to properly discuss the issues raised.

Appellees raise a question as to whether or not injunction is available to appellants in this type of action. This contention is made on the ground that quo warranto provides an adequate remedy at law.

In Osborn v. Village of Oakland, 49 Neb. 340, 68 N. W. 506, we said: "It is a general rule, supported by the decisions of this and other states, that equity will not grant a party relief by injunction, where he has a plain and adequate remedy at law. It is likewise a well established doctrine in this country that quo warranto is the proper remedy to inquire whether a municipal corporation was legally created, as well as to oust persons exercising the privileges and powers of corporate officers when the municipal corporation has no legal existence."

However, in State v. Scott, 70 Neb. 681, 97 N. W. 1021, we said: "The original writ of quo warranto, which has been largely superseded by informations in

the nature of quo warranto, was a high prerogative writ and, like all other extraordinary processes, it generally would only lie when no other adequate remedy would afford the required relief. The rule appears to even go further with reference to quo warranto than with reference to extraordinary proceedings by injunction or mandamus. In the latter, it being the rule that they may be invoked where there is no adequate remedy at law, but in quo warranto it is held that it will not lie where there is even an adequate remedy by bill in equity."

In Schafersman v. School District, 120 Neb. 673, 234 N. W. 791, we held injunction to be a proper remedy to prevent a school district and its officers from assuming jurisdiction over, and taxing land in, another school district under an unconstitutional statute.

We said in State ex rel. Johnson v. Consumers Public Power Dist., 143 Neb. 753, 10 N. W. 2d 784, 152 A. L. R. 480: "* * * quo warranto is employed only to test the actual right to an office or franchise, and it can afford no relief for official misconduct or be used to test the legality of the official action of public or corporate officers. See High, Extraordinary Remedies (3d ed.) 573, sec. 618; State v. Conklin, 127 Neb. 417, 255 N. W. 925; State v. Drainage District, *supra* (100 Neb. 625, 160 N. W. 997); State v. Scott, *supra* (70 Neb. 685, 100 N. W. 812)."

We think the latter has application to the relief here sought and that quo warranto could not afford to appellants all the relief they here seek.

Appellants contend the Act is unconstitutional because it permits complete freedom of choice by a county committee in the selection of the boundaries of any proposed district and thus permits it, by gerrymandering, to discriminate between persons and property.

Black's Law Dictionary (4th ed.), p. 816, defines gerrymander as: "A name given to the process of dividing a state or other territory into the authorized

civil or political divisions, but with such a geographical arrangement as to accomplish a sinister or unlawful purpose, as, for instance, to secure a majority for a given political party in districts where the result would be otherwise if they were divided according to obvious natural lines, or to arrange school districts so that children of certain religions or nationalities shall be brought within the district and those of a different religion or nationality in another district."

We said in Elliott v. Wille, on rehearing, 112 Neb. 86, 200 N. W. 347: "* * * in determining whether any particular legislation which authorizes the creation of such a district is valid, it is proper to examine and ascertain what may be done or accomplished under and pursuant to such statutory provisions."

In Elliott v. Wille, *supra,* wherein the statute involved granted such unrestricted power to private individuals, we held, after discussion of the possibility of gerrymandering, that: "The fixing of boundaries of a political subdivision of a state into counties or districts for public purposes is a legislative function. The legislature may authorize the organization of districts for public purposes by other governmental bodies, and the proceeding may be proposed or initiated by private individuals. Where the latter course is pursued, there must be some provision for determining whether the particular district is for the public health, convenience or welfare, and a means by which an aggrieved property owner, whose property is injuriously affected, may have his rights judicially determined. The legislature may not delegate to private individuals either legislative or judicial functions. Where a legislative act permits the organization of districts, for the construction of a public improvement, by private individuals, to be paid for by a tax on all the property in the district, and no provision is made for a hearing by any tribunal as to the right of property owners who may be injuriously affected or wrongfully included within the district, it may result

in the taking of private property for a public purpose without just compensation, and in the taking of private property without due process of law." See, also, Rowe v. Ray, 120 Neb. 118, 231 N. W. 689, 70 A. L. R. 1056; Ruwe v. School District, 120 Neb. 668, 234 N. W. 789.

But here the fixing of boundaries of a political subdivision of the state for a public purpose is not delegated to private individuals but to a county committee, a public body created by section 5 of the Act.

Article VII, section 6, of the Constitution of the State of Nebraska provides: "The legislature shall provide for the free instruction in the common schools of this state of all persons between the ages of five and twenty-one years."

Article II, section 1, of the Constitution of the State of Nebraska provides: "The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons being one of these departments, shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted."

"It is a rule of general recognition that 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. Among the decisions of this court which recognize this rule are: City of Wahoo v. Dickinson, 23 Neb. 426; State v. Dimond, 44 Neb. 154; City of Hastings v. Hansen, 44 Neb. 704; Bisenius v. City of Randolph, 82 Neb. 520; Winkler v. City of Hastings, 85 Neb. 212; Elliott v. Wille, on rehearing, 112 Neb. 86." Rowe v. Ray, *supra.*

In Seward County Rural Fire Protection Dist. v. County of Seward, 156 Neb. 516, 56 N. W. 2d 700, we approved the following in this regard, from Hunter v. City of Pittsburgh, 207 U. S. 161, 28 S. Ct. 40, 52 L. Ed. 151: " '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.' "

However, we have held that this power can be delegated to the governmental bodies.

" 'The legislature may delegate a part of its power over local subjects to municipal corporations, county

boards and other public bodies within the legislative classification of departments, but not to either of the other departments.' (Searle v. Yensen, 118 Neb. 835, 226 N. W. 464, 69 A. L. R. 257.)" Nebraska Mid-State Reclamation Dist. v. Hall County, 152 Neb. 410, 41 N. W. 2d 397.

" 'The fixing of boundaries of a political subdivision of a state into counties or districts for public purposes is a legislative function. The legislature may authorize the organization of districts for public purposes by other governmental bodies, * * *.' Elliott v. Wille, 112 Neb. 78, 89." Ruwe v. School District, *supra.*

And, as stated in 11 Am. Jur., Constitutional Law, § 214, p. 924: "In those instances in which the legislature may delegate authority, it may place upon the authority so granted such restrictions and limitations as it chooses. It may also prescribe the manner and circumstances of the exercise of such power."

The county committee's duties, in this regard, are fixed by section 8 of the Act as follows: "Each county committee shall receive and consider all plans and procedures submitted to it by the state committee. The county committee shall determine, after thorough study and deliberation, whether or not any change, realignment, or readjustment of school districts or boundaries thereof within the county should be attempted."

The plans and procedures therein referred to as submitted to it by the state committee are provided for by section 7 of the Act. It provides, in this respect, as follows: "It shall be the duty of the state committee to initiate, set up, and recommend to the county committee plans and procedures for the reorganization of school districts within the various counties, and to furnish advice and assistance in connection therewith."

In exercising this authority section 9 of the Act provides: "When the county committee at any time determines that some reorganization of districts is desirable, it shall proceed to prepare a plan or plans, show-

ing which specific changes are recommended. In preparation of a plan for reorganization of school districts, the county committee shall give due consideration (1) to the educational needs of local communities, (2) to economies in transportation and administration costs, (3) to the future use of existing satisfactory school buildings, sites, and play fields, (4) to the convenience and welfare of pupils, (5) to a reduction in disparities in per-pupil valuation among school districts, (6) to the equalization of the educational opportunity of pupils, and (7) to any other matters which, in its judgment, are of importance. The county committee, in preparation of a plan for reorganization, shall take account of any advice or suggestions offered by the state committee."

In this regard section 1 of the Act provides: "* * * The term 'reorganization of school districts' means the formation of new school districts, the alteration of boundaries of established school districts, and the dissolution or disorganization of established school districts through or by means of any one or combination of the methods set out in section 2 of this act;" and "the term 'plan of reorganization' means a concrete proposal for readjustment and realignment of the boundaries of any or all school districts within a county."

The methods provided by section 2 of the Act are as follows: "Reorganization of school districts may be had and accomplished through or by means of any one or more of the following methods: (1) the creation of new districts; (2) the uniting of one or more established districts; (3) the subdivision of one or more established districts; (4) the transfer and attachment to any established district of a part of the territory of one or more districts; and (5) the dissolution or disorganization of any established district for any of the reasons specified by law."

We find the Legislature had authority to delegate to the county committee the authority given it and that the Act provides reasonable limitations and standards

for its proper guidance in carrying them out.

Appellants further contend the Act is unconstitutional because it deprives them of their property without due process of law.

Article XIV, section 1, of the Constitution of the United States provides: "* * * nor shall any State deprive any person of life, liberty, or property, without due process of law; * * *."

Article I, section 3, of the Constitution of the State of Nebraska provides: "No person shall be deprived of life, liberty, or property, without due process of law."

We said in Ruwe v. School District, *supra*: "Due process of law requires notice and an opportunity to be heard, where financial burdens are necessarily imposed on property owners by an exercise of judicial power pursuant to specific terms of a statute."

Section 9 of the Act provides: "When the county committee at any time determines that some reorganization of districts is desirable, it shall proceed to prepare a plan or plans, showing which specific changes are recommended."

In this respect section 10 of the Act provides: "Befor any plan of reorganization is completed by the county committee, it shall hold one or more public hearings. At such hearings, it shall hear any and all persons interested with respect to (1) the merits of proposed reorganization plans, (2) the value and amount of all school property of whatever nature involved in the proposed action, (3) the amount of outstanding indebtedness of each district and proposed disposition thereof, and (4) the equitable adjustment of all property, debts, and liabilities among the districts involved. The county committee shall keep a record of all hearings in the formulation of plans for the reorganization of school districts. Notice of such public hearings of the county committee shall be given by publication in a legal newspaper of general circulation in the county at least ten days prior to such hearing."

A notice was given as provided for by section 10 of the Act. Pursuant thereto a hearing was held on January 15, 1952.

Section 11 of the Act provides: "After public hearing or hearings have been held, the county committee may formulate and complete a plan or plans of reorganization of any or all school districts within the county. Such plan shall contain: (1) A description of the proposed boundaries of the reorganized districts; (2) a summary of the reasons for each proposed change, realignment, or adjustment of the boundaries; (3) a summary of the terms on which reorganization is to be made between the reorganized districts; (4) a statement of the findings with respect to the location of schools, the utilization of existing buildings, the construction of new buildings, and the transportation requirements under the proposed plan of reorganization; (5) a map showing the boundaries of established school districts and the boundaries proposed under any plan or plans of reorganization; and (6) such other matters as the county committee shall determine proper to be included."

Such a plan was prepared. It was dated January 29, 1952. On January 30, 1952, it was forwarded to the state committee. This was done in accordance with the requirements of and for the purpose set forth in section 12 of the Act. As of March 3, 1952, the state committee advised it had approved the plan. The county committee, as required by section 13 of the Act, then submitted the proposed plan at a special election. This special election was held on May 6, 1952, in accordance with the provisions of section 15 of the Act.

Section 15 of the Act provides as follows: "Not less than sixty nor more than one hundred twenty days after receipt by the county committee of the action of the state committee, the proposition of adoption or rejection of the proposed plan of reorganization shall be submitted at a special election to all the electors of districts within the county whose boundaries are in any

manner changed by the plan of reorganization. Notice of such election shall be given by the county superintendent of schools and shall be published in a legal newspaper of general circulation in the county at least ten days prior to said election. The election notice shall (1) state that the election has been called for the purpose of affording the electors an opportunity to approve or reject the plan of reorganization, (2) contain a description of the boundaries of the proposed district, and (3) a statement of the terms of adjustment of property, debts, and liabilities applicable thereto. Such election shall be held and conducted by election officers charged with the duties of holding general elections. In such elections, all the rural territory in the proposed changes shall vote as a unit. If any existing high school district is included in the proposed district, it shall constitute a separate voting unit. Approval of the plan shall require a majority of all electors within each voting unit voting on the proposed plan."

At this election the rural territory, voting as a unit as in this section provided, voted in favor of the proposed new district by a vote of 190 to 45 and school district No. 57 of the village of Axtell, a high school district, voted 183 to 4 for the proposed district.

It becomes evident that under this Act a county committee may only formulate and complete a plan or plans for reorganization of any or all school districts within the county and cannot, by itself, change, realign, or readjust any existing school districts or the boundaries thereof. That power is left with the electorate of the area involved in any proposed plan. They may either approve or reject it.

Questions of public policy, convenience, and welfare, as related to the creation of municipal corporations, such as counties, cities, villages, school districts, or other subdivisions, or any change in the boundaries thereof, are, in the first instance, of purely legislative cognizance and, when delegated to any public body having legis-

lative power, any action in regard thereto does not come within the due process clause of either the state or federal Constitutions. See, Searle v. Yensen, 118 Neb. 835, 226 N. W. 464, 69 A. L. R. 257; Ruwe v. School District, *supra;* Nebraska Mid-State Reclamation Dist. v. Hall County, *supra;* Seward County Rural Fire Protection Dist. v. County of Seward, *supra.*

But when, as a condition to their creation or change, the public body to which such authority is delegated must find certain facts to exist upon which the Legislature has said depends its authority to declare such subdivision, or any change therein, to exist then the questions presented are of a quasi-judicial character. In such cases a hearing must be had to determine if such facts exist and proper notice thereof must be provided for and given to all parties interested therein. See, Searle v. Yensen, *supra;* Ruwe v. School District, *supra.*

Under the situation here the duties of the county committee do not fall within the category to which the due process clause of either the state Constitution or the federal Constitution has application.

But let us assume for the purpose of discussion only, that a hearing and proper notice thereof to all parties interested were required. In regard to the sufficiency of the hearing and the notice thereof provided for by the Act, see State ex rel. Tanner v. Warrick, 106 Neb. 750, 184 N. W. 896. Therein we said: "The terms of the statute which provide for a hearing on the initial question of fixing the boundaries of consolidated districts by the redistricting committee furnish sufficient notice to all parties interested of the proposed boundaries of the district."

We think the requirements of the Act would be sufficient in that regard.

Appellants further contend the Act is unconstitutional because it fails to provide for an appeal from the action of the county committee formulating and completing the plan submitted to the electorate.

In this respect Article I, section 24, of the Constitution of the State of Nebraska provides: "The right to be heard in all civil cases in the court of last resort, by appeal, error, or otherwise, shall not be denied."

We said in Pollock v. School District, 54 Neb. 171, 74 N. W. 393: "The power to change the boundaries of school districts is conferred on the county superintendent by Compiled Statutes, chapter 79, subdivision 1, section 4. To authorize the exercise of such power a petition of voters of the territory affected is requisite. The power so vested in the superintendent is to a certain extent judicial in its character and subject to review. (State v. Palmer, 18 Neb. 644; State v. Clary, 25 Neb. 403.) Section 580 of the Code of Civil Procedure (now section 25-1901, R. R. S. 1943) authorizes the review by the district court, on petition in error, of judgments rendered or final orders made by a probate court, justice of the peace, or any other tribunal, board, or officer exercising judicial functions, and inferior in jurisdiction to the district court. The provision affords an adequate remedy in such cases as the present."

Section 25-1911, R. R. S. 1943, provides for appeal from the district court to the Supreme Court.

If any action taken by the county committee was appealable, a question we need not and do not decide, these statutes fully meet the requirements of the Constitution.

Appellants contend the county committee acted in an arbitrary and unreasonable or grossly unjust manner in exercising its discretion in preparing and submitting the proposed plan and that, because thereof, its action in proposing and submitting the plan should be declared void and any action depending thereon for its legality should be restrained.

"In general, a school district or other local school organization must be so formed or laid out as to afford to all the children within its boundaries an opportunity to enjoy with reasonable facility the benefits of

the school; but every reasonable presumption is to be indulged in favor of a district as created and laid out, and equal convenience to all the children is not essential, since it is impossible to prevent varying degrees of convenience or inconvenience to children living in different parts of any district." 78 C. J. S., Schools and School Districts, § 31, p. 686.

In this respect appellants complain the county committee acted in a wholly arbitrary and illegal manner in connection with its duties as set forth in subdivisions (1), (2), (4), and (6) of section 9 of the Act and in refusing to accept and act on the advice and counsel of the state committee.

Some parts of school district R-1 are somewhat closer to Minden and Kearney than Axtell. Naturally it will take somewhat longer for the children from these areas to go to and from school but the roads used by the school buses in going to and from the school at Axtell are surfaced and in good condition. Mention is made of the fact that the school facilities at Minden and Kearney are better than the facilities at Axtell but no evidence was adduced to sustain that contention. It seems most significant that of the 13 rural school districts in Kearney County that were, by this plan, consolidated with school district No. 57 of the village of Axtell to form school district R-1, all but two had been contracting with district No. 57 for the education of their children and had been doing so for 9 years or more. Of the other two one was at the time of consolidation also doing so. The length of time it had been doing so is not shown. The other, district No. 42, had also been doing so for a part of its children for 3 years. The other children of district No. 42 were provided for by contract with the district which includes Kearney, Nebraska. Under this situation it seems only logical that the county committee would do what the respective school boards of these districts had been voluntarily doing for a long period of time;

that is, providing for the education of their children in the Axtell school.

The tax load on the property of some of the several districts may increase as a result of the consolidation but that is only natural as school taxes differ in different school districts. The evidence does not show any unreasonable burden or hardship created by reason thereof. It is undoubtedly true that the bond issue voted by the district on February 5, 1953, may materially increase this burden but with that we are not here concerned if the district was legally established.

In view of Leeman v. Vocelka, 149 Neb. 702, 32 N. W. 2d 274, there is serious doubt if this issue is before us, as the duties of the county committee were legislative in character. But considering the factual situation in this regard, we do not find any unreasonable or arbitrary action on the part of the committee in doing what it did. We find it acted in good faith and for the best interests and welfare of the children and electors affected. By this change all the electors of the area included were given a voice in the administration of the school where their children had been and were being educated.

It is finally contended that because of certain representations made by a member of the county committee at the public hearing on January 15, 1952, that those in charge of school district R-1 should be estopped from claiming its legal existence.

We said in May v. City of Kearney, 145 Neb. 475, 17 N. W. 2d 448: "* * * while ordinarily a municipality may not be estopped by unauthorized conduct, representations, promises or pledges of the officers, it may, within the limitation of its legal powers, be estopped by its official acquiescence in, and approval of, acts originally unauthorized. 31 C. J. S., sec. 142b, p. 419."

Therein we quoted from People v. Thomas, 361 Ill. 448, 198 N. E. 363, to the effect: "The doctrine of estoppel may be invoked against a municipal corporation where there have been positive acts by the municipal officers

which may have induced the action of a party and where it would be inequitable to permit the corporation to stultify itself by retracting what its officers had done, * * *."

"The doctrine of estoppel in pais has application to municipal corporations, and city councils or public authorities will be estopped or not as justice and right may require." State ex rel. Cox v. McIlravy, 105 Neb. 651, 181 N. W. 554.

As said in City of Grand Island v. Willis, 142 Neb. 686, 7 N. W. 2d 457, by quoting from 10 R. C. L. 688: "'* * * an equitable estoppel rests largely on the facts and circumstances of the particular case, * * *.'"

The proceedings of the public hearing held on January 15, 1952, show the following questions were asked and answers given although it does not show who asked the questions and who gave the answers:

"How about the Phelps Co. districts who want to come in? They can come in by petition signed by 55% of the legal voters, or they may continue to contract.

"Can you petition out? By the same method as above —55% of the voters."

Section 79-402, R. S. Supp., 1951, provides in part: "The county superintendent shall create a new district from other districts, or change the boundaries of any district upon petitions signed by fifty-five percent of the legal voters of each district affected."

By letter dated February 1, 1952, the state committee advised the secretary of the county committee that: "I have received the Kearney County plan which proposes the merger of thirteen school districts in and around Axtell. * * * In reading the account of the public hearing as carried in the clipping which was attached to the proposal, I note in point (b) under 'Questions Varied' the following: 'A given district may petition out of the consolidation by a petition constituted of the names of 55 per cent of the legal voters.' I am wondering if some of the people might have taken this to mean that if the

proposal is approved by the voters, what was originally an existing district might petition out of the new district by obtaining the signatures of 55 per cent of the legal electors within the boundaries of what we (was) once their district. Of course, once the plan is approved the district lines no longer exist. If any *area* wished to withdraw from the new district, it would be necessary that the petition be signed by 55 per cent of the legal voters of the *entire new district.*"

No action in regard to this matter was taken by the county committee and when, as of March 3, 1952, its proposed plan was approved by the state committee it thereafter, within the time provided by the Act, submitted the proposed plan to the electorate thereof.

Appellee cites the principle announced in 19 Am. Jur., Estoppel, § 54, p. 660, that: "The positive assertion of a fact, and not the mere expression of an opinion, is necessary to constitute an estoppel. Likewise, a statement which is honestly made and which is intended or understood to be a mere estimate will not support an estoppel. A fortiori, since it is essential to every estoppel in pais that it relate to some matter of fact, the mere expression of an erroneous opinion on a matter of law raises no estoppel." See, also, Sturm v. Boker, 150 U. S. 312, 14 S. Ct. 99, 37 L. Ed. 1093; Aunt Jemima Mills Co. v. Rigney, 247 F. 407, L. R. A. 1918C 1039; Chautauque County Bank v. White, 6 N. Y. 236, 57 Am. Dec. 442.

If it can be said that the answer given was intended to relate to the then existing districts, we think this principle is controlling for it would relate solely to a matter of law. It can also be said there is no evidence in the record that the electorate, or any part thereof, relied on this statement in voting at the election held on May 6, 1952. It is only contended it is reasonable to assume they may have. Such conjecture or surmise is not sufficient, in any event, to bring into play the equitable doctrine of estoppel.

Other matters appearing in the record, but which are not material to a disposition of the questions here raised, are the following: The fact that after its formation three rural school districts in Phelps County, together with a part of a fourth, all of which are adjacent to school district R-1, joined it by petition; the fact that the 1953 Legislature amended the Act as to the basis for establishing voting units in rural districts as evidenced by Laws of Nebraska, 1953, c. 296, p. 1001; and the fact that prior to the trial of this case on March 27, 1953, a considerable number of property owners and electors living in an area that was formerly three separate rural districts but now within school district R-1, expressed, by their signatures to several petitions, a desire to be either detached therefrom or to no longer be a part thereof.

In view of what we have said we come to the conclusion that the action of the trial court in dismissing these actions should be sustained. We therefore affirm its action in doing so.

AFFIRMED.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1954

IN RE DRAINAGE DISTRICT NUMBER 100 OF GRANT COUNTY, NEBRASKA, A PUBLIC CORPORATION. DOROTHY A. PETERSEN ET AL., APPELLEES, V. MAMIE A. THURSTON ET AL., APPELLANTS.

62 N. W. 2d 68

Filed January 8, 1954. No. 33363.

1. **Drains.** The proceeding for the establishment of a drainage district as a corporate body under Chapter 31, article 3, R. R. S. 1943, is purely statutory as distinguished from an action in court to adjudicate issues.
2. ———. In a proceeding for the establishment of a drainage district as a corporate body under Chapter 31, article 3, R. R. S. 1943, objectors may object to the organization only on the ground that their land will not be benefited by drainage and should not be included.
3. ———. In order that a district may be organized under Chapter 31, article 3, R. R. S. 1943, it must be made to appear that 160 acres or more in a contiguous body of swamp or overflowed lands will be reclaimed and protected from the effects of water by the drainage.
4. ———. The feasibility and route of a drain is not a matter for consideration in the organization of a district under Chapter 31, article 3, R. R. S. 1943.
5. ———. The fact that lands other than those included in the proposed district might be benefited is not a bar to organization.
6. ———. A "contiguous body of swamp or overflowed lands," within the meaning of the statute, includes adjoining lands in the same course of drainage and those bodies of land which

though separated are so close together that each affects the other.

7. ———. The fact that lands which will not be benefited are included in a proposed district may not be regarded as a bar to organization of the district, provided a contiguous body of 160 acres or more which will be benefited remains.

8. ———. Where the owner of lands included in a proposed district seeks to have such lands excluded on the ground that they will not be benefited, the burden is on him to satisfy the court that they will not be benefited.

9. **Trial: Appeal and Error.** Where an inspection of premises is made by the trial court in relation to issues involved such inspection becomes a matter of evidence to be considered by this court on appeal.

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

Charles A. Fisher, for appellants.

Gantz & Williams and *Quigley & Heth,* for appellees.

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

YEAGER, J.

This is an action instituted under the provisions of Chapter 31, article 3, R. R. S. 1943, for the organization of a drainage district. The lands described in the articles of association and application to form the district are situated in Grant County and Cherry County, Nebraska. The larger portion of the lands are in Grant County, hence as required by statute the articles were filed in that county. § 31-302, R. R. S. 1943.

The provisions of the statute were complied with as to the filing of the articles and the issuance and service of process. Six landowners having ownership of 611.5 acres which it is alleged would be benefited by the organization of the district signed the articles and application. These lands were of course included in the proposed district. Also included in the proposed district were 174 acres of land belonging to Mamie A. Thurston and Clyde Thurston. The Thurstons did not sign the

articles but filed objections to the organization. They were designated as objectors and the signers of the application were designated as petitioners.

A trial was had on the application and the objections thereto, at the conclusion of which the objections were overruled, the proposed drainage district was declared organized as a public corporation, and it was adjudicated that all of the real estate described in the application was properly in the district and would be benefited. The designated name of the district was Drainage District Number 100 of Grant County, Nebraska.

From this adjudication Mamie A. Thurston and Clyde Thurston have appealed. They will be referred to hereinafter as appellants. The designated appellees are the owners of the 611.5 acres of land in the district not owned by the appellants. They will be referred to hereinafter as appellees.

At the outset of the consideration of this appeal it is to be observed that the proceeding for the establishment of a drainage district as a corporate body such as the one under consideration is purely statutory and is governed by four sections of the statute, namely, sections 31-301 to 31-304, inclusive, R. R. S. 1943.

It is to be further observed that under the statute objectors may object to the organization only on the ground that their land will not be benefited by drainage, and should not be embraced in the drainage district. § 31-304, R. R. S. 1943.

It is also to be observed that before a district may be organized it must be made to appear that there are 160 acres or more in a contiguous body of swamp or overflowed lands which will be reclaimed and protected from the effects of water by drainage or otherwise. § 31-301, R. R. S. 1943.

Again in case the court shall find that a portion of the land described in the application will not be benefited by the district such portion may be excluded and the remainder declared a district provided the remainder

contains 160 acres or more of land. § 31-304, R. R. S. 1943.

As a ground for reversal the appellants say the court erred in holding that the proposed drain was more feasible than another which was suggested. This subject may not be properly presented in this action. The right to organize, which right depends upon the question of whether or not there will be benefits, is the only subject of which the court may take cognizance in this action. That is the only subject embraced in the four sections of the statute under consideration here.

It is true that feasibility and route of drain is a matter for consideration in a drainage district such as this but that is a matter for engineering determination after the organization of the district. § 31-310, R. R. S. 1943.

It is urged as an objection to the organization of the district that, assuming that the lands of appellants were properly in the proposed district, other lands which would benefit were not included. This is not a valid objection. The fact that lands have not been included which would be benefited by the organization of the district is no bar to organization. A remedy is provided but that remedy is not refusal to allow organization. The remedy is to bring them in after organization. The remedy is provided by section 31-320, R. R. S. 1943.

Another objection is based upon the contention that it was not shown that the application was made by a majority in interest of a contiguous body of swamp or overflowed land within the meaning of section 31-301, R. R. S. 1943.

It is true that there may be doubt as to whether or not some of the land described in the application and owned by certain persons who signed the application may be regarded as contiguous, yet if all such questionably contiguous land is eliminated there still remains a compact body owned by three of the applicants constituting a body of contiguous land sufficient for the organization of a district.

Other tracts are separated from this compact body and from each other by considerable distances. Some of these distances are more than a quarter of a mile. Whether or not they may be regarded as contiguous depends upon the evident purpose of the legislation, a reasonable interpretation of the intent of the Legislature in the use of the term "contiguous," and an application of that intent to the facts as disclosed by the evidence.

The term "contiguous" has not been defined in the statute and it has only received but relative and indefinite definitions at the hands of lexicographers. Webster's New International Dictionary (2d ed.), Unabridged, gives the following definitions: "In actual contact; touching; also, near, though not in contact; neighboring; adjoining; near in succession."

The obvious purpose of the legislation was to provide means for reclamation of waste land and for improvement of the condition of land subject to overflow. This purpose could be accomplished only by a due understanding of and regard for the fundamental factors involved in reclamation from swamp and protection from overflow.

Two inevitably fundamental factors involved are the cause of the condition and the remedy, specifically here, the source or sources of the water producing the conditions and the outlet for relief against it.

The obvious intent of the Legislature was to provide for a practical plan for the effectuation of the purposes of the legislation.

Practically, as everyone knows, the primary source of water collected in swamps and causing overflow in this state is rainfall. Secondarily, in the course of nature, causes are retards inherent in topography and geological formation.

The record here discloses that while the described areas to be benefited are separated yet there is a natural course of flow or drainage from the west in a general

easterly direction for the entire length of the district which course extends in continuity through all of the areas. There is no constant flow of water but it reasonably appears that in times of heavy rainfall, which are very rare, this is the direction and course of natural flow of water through the proposed district. It also reasonably appears that except for the natural topographical retards represented by the elevation of the lands between the separated areas there would be constant drainage over the length of the proposed drainage way.

It further appears that there is no other reasonable outlet available for the drainage of the smaller areas to the west of and separated from the large compact area hereinbefore referred to.

If therefore these separated areas may not be regarded as contiguous to the main and larger area then it must be said that these provisions of statute would provide no means for the effectuation of the purposes of the statute.

If the purposes of the act are to be effectuated then it must be said that the legislative intention was that where swamp lands or lands subject to overflow are in the same course of drainage and though areas are separated but are so close together that each affects the other they must be regarded as contiguous.

The district court concluded that the areas described are contiguous within the meaning of the statute. The same conclusion is reached in this court.

Another contention is that the lands of appellants will not be benefited by the organization of the district. This objection does not relate to the question of whether or not the district shall be organized but only to the question of whether or not the lands of appellant shall be included. § 31-304, R. R. S. 1943.

In case the owner of real estate whose lands are in a proposed district seeks to have such lands excluded on the ground that they will not be benefited the burden

is on him to satisfy the court that they will not be benefited. § 31-304, R. R. S. 1943.

The district court found that the lands of appellants would be benefited and we have found nothing in the record which could properly lead to a different finding here.

The evidence of the witnesses on this question was in sharp conflict but we are inclined to the view that instead of it preponderating in favor of appellants, it preponderates in favor of appellees.

In addition to the evidence of witnesses the court, pursuant to a stipulation of the parties, viewed the area of concern and on the two arrived at its conclusion and decision. This inspection of the premises and the matters involved becomes a matter of evidence to be considered by this court on appeal. Keim v. Downing, *ante* p. 481, 59 N. W. 2d 602.

The appellants contend substantially that the court erred in holding that the district was in the interest of the public welfare and in refusing to hold that it was for the private purpose of parties who signed the application. The assignment is without merit. Public welfare is not made a matter of concern by the statutory provisions which have been considered and which have been proper for consideration herein. Appropriately no finding was made as to welfare.

In the brief is an assignment the effect of which is to say that two of the signers of the application were estopped to join in the application by reason of an agreement relating to drainage from their land to lands of the appellants. The agreement and its incidents will not be elucidated since it is so clearly obvious that private agreements between adjoining landowners with reference to the drainage of the adjoining land are foreign to any right to establish a drainage district under the statutory provisions involved here.

From a consideration of the entire record it is con-

cluded that the judgment of the district court should be and it is affirmed.

AFFIRMED.

SAM W. BROWN, APPELLANT, V. HARRY A. LINCOLN, DOING BUSINESS AS LIBERTY CAR COMPANY, APPELLEE.
61 N. W. 2d 836

Filed January 8, 1954. No. 33405.

Judgments. After the final adjournment of the term of court at which a judgment has been rendered, the court has no power or authority to vacate or modify the judgment except for the reasons stated and the time prescribed by section 25-2001, R. R. S. 1943.

APPEAL from the district court for Douglas County: JAMES T. ENGLISH, JUDGE. *Affirmed.*

Leary & Leary and *Thomas P. Leary,* for appellant.

Wear & Boland, for appellee.

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

CARTER, J.

The issue presented in this case arose out of an order of the district court for Douglas County in refusing to vacate a judgment dismissing the action for want of prosecution. A motion for a new trial was filed and overruled. The plaintiff has appealed.

On August 30, 1945, plaintiff filed his petition for damages in the municipal court at Omaha. On February 8, 1946, plaintiff obtained a judgment in that court. An appeal was thereupon taken to the district court and a transcript from the municipal court filed therein on February 21, 1946. On January 11, 1947, a written stipulation was filed to the effect that the case would be tried on the pleadings filed in the municipal court. On December 3, 1949, the cause was dismissed for want of

prosecution. The term of court at which this order was entered terminated on February 4, 1950. One term of court went by before any further proceedings were undertaken in the case. On July 10, 1950, the district court on an oral application undertook to vacate the dismissal entered on December 3, 1949. The appellee contends that the court had lost jurisdiction to set aside the order of dismissal entered on December 3, 1949, except as provided in section 25-2001, R. R. S. 1943. We think the position of appellee is correct on this point and we will not therefore burden the opinion with a recital of the various motions filed and the orders entered after that date.

After the final adjournment of the term of court at which a judgment has been rendered, the court has no authority or power to modify or vacate the judgment except for the reasons stated and within the time limited in section 25-2001, R. R. S. 1943. Gasper v Mazur, 155 Neb. 856, 54 N. W. 2d 66; Meier v. Nelsen, 156 Neb. 666, 57 N. W. 2d 273. It is plain from the record that no action was taken with reference to the judgment of dismissal during the term at which it was entered. In fact, as hereinbefore stated, one subsequent term of court was permitted to pass by before any attempt was made to have the judgment vacated. No attempt was made to comply with section 25-2001, R. R. S. 1943, and consequently the trial court lost all power or authority to modify or vacate the judgment in the manner in which it purported to do so.

The trial court had jurisdiction of the case when the judgment of dismissal was entered. It had power to enter a judgment of dismissal for want of prosecution. § 25-1149, R. R. S. 1943. It is within the inherent power of the court to do so in any event. The court is authorized to modify or vacate such judgment at the term at which it was entered but thereafter it can be done only by a compliance with section 25-2001, R. R. S. 1943, et seq. As long as the judgment of dismissal of De-

cember 3, 1949, stood unimpaired as to its validity, the court was without power or authority to make any order in the case. The record clearly discloses that the trial court was correct in denying the application to vacate the judgment of dismissal for the reason that proper steps were not taken to vacate the judgment of December 3, 1949, after term time. That judgment being in full force and effect, the court was without authority to make any further order respecting it.

AFFIRMED.

HERMAN HOFFMEYER, APPELLEE, V. ECHO HOFFMEYER, APPELLANT.

62 N. W. 2d 138

Filed January 8, 1954. No. 33408.

1. **Appeal and Error.** This case is here for trial de novo upon the the issues presented on appeal, as in other equity actions.
2. **Divorce.** The court in determining 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.
3. ———. Permanent alimony is founded upon the right of the wife to such support from her husband as she would be reasonably entitled to expect considering all the circumstances. Its amount rests upon the sound discretion of the court.
4. ———. Upon the granting of an absolute divorce the trial court has a legal right to assign the property, both real and personal, acquired during the marriage by the joint efforts of the parties, between the parties as the equities require.
5. ———. In determining the provision to be made in a divorce case for the support of infant children of the parties, their status and situation and all the attendant circumstances should be considered, and an amount fixed in accordance with the best judgment of the court.
6. ———. After a decree of divorce has been granted if the

circumstances of the parties shall change or if it shall be to the best interests of their children the court may on its own motion revise or alter the decree so far as it concerns the care, custody, and maintenance of the children, or any of them.

7. **Courts.** Courts of general jurisdiction have the inherent power to do all things necessary for the proper administration of justice and equity within the scope of their jurisdiction.

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

Harvey W. Hess and *Van Pelt, Marti & O'Gara,* for appellant.

W. O. Baldwin and *Perry & Perry,* for appellee.

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

MESSMORE, J.

This is a divorce action commenced in the district court for Thayer County by Herman Hoffmeyer against Echo Hoffmeyer, for an absolute divorce on the grounds of extreme cruelty, and for an order relative to the custody of the minor children of the parties. The defendant, Echo Hoffmeyer, filed a cross-petition alleging extreme cruelty and praying for the custody of the minor children of the parties, for permanent alimony, and for child support. The trial court entered a decree finding generally in favor of the defendant on her cross-petition and granted her an absolute divorce and the custody of the children until further order of the court. The court further decreed that during the summer vacation period the plaintiff should have the custody of the children as the parties might agree, and if they could not agree as to certain dates, then the court, on application of either of the parties, should fix said dates; that the defendant should be allowed $1,400 permanent alimony, payable $200 each in seven installments, the first installment to be paid June 1, 1953, and each installment of $200 thereafter to be paid 6 months apart from that date until the same is paid; that the defendant

should be allowed the dwelling house located at Deshler, occupied by her and the children; that the defendant should be allowed the household goods situated in this dwelling, which were estimated to be of the value of $1,500; and that the plaintiff pay to the defendant as child support $100 a month commencing March 1, 1953, the subsequent payments of $100 a month to be made on the first day of each month following thereafter. However, the court found that during vacations when the plaintiff has the custody of the children, these payments were to be reduced in proportion to the time he has the custody of the said children. The court allowed the defendant's attorney a fee of $200 for services rendered in the district court, and ordered the plaintiff to pay the costs of the action. From this judgment the defendant appealed to this court.

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

The defendant assigns as error that the trial court erred (1) in allowing an insufficient amount for permanent alimony; (2) in allowing only $100 a month for child support for the four children; and (3) in giving custody of the children during the summer vacation to the plaintiff.

This case is here for trial de novo upon the issues presented by such appeal, as in other equity actions. See, § 25-1925, R. R. S. 1943; Lippincott v. Lippincott, 141 Neb. 186, 3 N. W. 2d 207, 140 A. L. R. 901; Ristow v. Ristow, 152 Neb. 615, 41 N. W. 2d 924; Christoffersen v. Christoffersen, 151 Neb. 763, 39 N. W. 2d 535.

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. See

Wakefield v. Wakefield, *ante* p. 611, 61 N. W. 2d 208.

Permanent alimony is founded upon the right of the wife to such support from her husband as she would be reasonably entitled to expect considering all the circumstances. Its amount rests upon the sound discretion of the court. See Peterson v. Peterson, 152 Neb. 571, 41 N. W. 2d 847.

Upon the granting of an absolute divorce the trial court has a legal right to assign the property, both real and personal, acquired during the marriage by the joint efforts of the parties, between the parties as the equities require. See Waugh v. Waugh, 154 Neb. 325, 47 N. W. 2d 859.

Courts of general jurisdiction have the inherent power to do all things necessary for the proper administration of justice and equity within the scope of their jurisdiction. See, Earle v. Earle, 27 Neb. 277, 43 N. W. 118, 20 Am. S. R. 667; Wassung v. Wassung, 136 Neb. 440, 286 N. W. 340; Jensen v. Jensen, 144 Neb. 857, 15 N. W. 2d 57; Lippincott v. Lippincott, 152 Neb. 374, 41 N. W. 2d 232.

With the foregoing authorities in mind we proceed to a determination of this appeal, to ascertain whether or not the trial court erred as contended for by the defendant.

It appears from the record that the parties were married at Deshler, Nebraska, on June 26, 1938. After the marriage the parties lived with the plaintiff's parents for 5 or 6 months and then moved to a farm of 160 acres which had been deeded to the plaintiff by his father on April 7, 1936. At that time this land was encumbered with a mortgage to a Federal Land Bank in the amount of $6,300. They resided on the farm until the spring of 1951. They purchased a dwelling in Deshler for the amount of $3,600, the title being taken jointly in the names of the parties. There is no encumbrance against this house, and it was paid for by the plaintiff from what he earned on the farm and from other sources.

The plaintiff earned not to exceed $1,900 in 1952.

At the time of the marriage, the defendant was employed in the office of the Deshler Broom Factory as a stenographer, and continued in such employment until January 1, 1939. Her earnings averaged about $75 a month. This salary was used for household expenses. She again worked at the broom factory in the same kind of employment from September 1, 1940, until the middle of May 1941. She again resumed her duties at the broom factory in July 1951, and has continued in such employment ever since.

To this union four children were born, Robert on April 10, 1939, Arland on October 7, 1941, Margaret on February 13, 1944, and Harvey on February 14, 1950. At the time of trial the defendant was 40 years of age and the plaintiff lacked 3 months of attaining the age of 40 years.

The quarter section of land owned by the plaintiff is in a good neighborhood. It is a fairly well improved farm with 133 acres under cultivation and 27 acres in pasture. Several witnesses familiar with the farm and the lands in the same vicinity and the value thereof testified as to its value ranging from $25,000 to the value of $19,000 to $20,000 placed upon the farm by the plaintiff. At the time of trial this farm was encumbered in the amount of $5,600. The trial court found the value of this farm to be $22,000 which, from our view of the record is the reasonable market value of this farm.

The plaintiff testified that he had a tractor worth from $700 to $800, encumbered with a mortgage of $1,000, and a hay baler worth $1,500 and a 1950 Buick special which he valued at $1,000, which were encumbered with a mortgage of $1,910. He also had an old drill valued at $50 and a lister valued at $60 to $70. The defendant had the use of a 1952 Pontiac sedan. This car was purchased by the twin sisters of the defendant with a trade-in of a 1941 Pontiac valued at $250 which the

plaintiff had purchased and placed in the defendant's name.

For 2 years prior to the time of trial the plaintiff had contributed $100 a month for the support of the children. The defendant's net earnings for 1952 amounted to $1,952.06. From these amounts she paid $325 for the care of her youngest child, Harvey, while she was working, and the living expenses which she enumerated. Also included were car insurance and expense, dental bills, doctor bills, glasses and eye examinations, the childrens' allowances, clothing, music lessons, life insurance, and rent on a frozen-food locker, which for the year 1952 amounted to $3,324.35.

The trial court found the net value of the property owned by the plaintiff to be $18,400.

That the evidence was sufficient to grant the defendant a divorce on her cross-petition is conceded. There is no cross-appeal by the plaintiff.

From a review of the record we conclude these parties are both capable, intelligent, and in good health, and have in the past been able to earn good wages. The disposition made by the trial court as to the permanent alimony payable to the defendant and the amount allowed by the trial court for child support is affirmed.

In determining provision to be made in a divorce case for support of an infant child or children of the parties, their status and situation and all the attendant circumstances should be considered, and an amount fixed in accordance with the best judgment of the court. See, Ristow v. Ristow, *supra;* Christoffersen v. Christoffersen, *supra.*

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

change or it shall be to the best interests of the child or children. See Ristow v. Ristow, *supra.*

These rules were recognized by the court as is indicated by the decree in this case. The evidence discloses that the plaintiff's farm is located in a respectable neighborhood with good environment; that the grandparents and relatives live in the immediate vicinity; and that the plaintiff is a leader in 4-H work, is a hard-working, industrious farmer, and has a deep-rooted love for his minor children. We see no reason why the judgment of the trial court in awarding the custody of the children as set forth in the decree, with the reservation made therein, should be disturbed.

For the reasons given in this opinion, the judgment of the trial court is affirmed.

AFFIRMED.

SECURITIES ACCEPTANCE CORPORATION, A CORPORATION, APPELLEE, V. HARRY BLAKE, DOING BUSINESS AS BLAKE'S USED CAR EXCHANGE, APPELLANT.

62 N. W. 2d 132

Filed January 8, 1954. No. 33430.

1. **Trial.** A motion to instruct a verdict admits the truth of all material and relevant evidence, and the party against whom the motion was made is entitled to have it considered in the light most favorable to him and to have the benefit of all inferences reasonably deducible therefrom in testing the correctness of the action of the court in granting the motion.
2. **Bills and Notes.** The endorsement of a promissory note by the use of the words, for value received pay to the order of a named endorsee, demand, presentment for payment, protest, notice of protest and nonpayment waived, payment guaranteed, obligates the endorser to pay the amount of the note to the holder or any subsequent endorser who may be compelled to pay it.
3. **Contracts.** When a written contract has been unconditionally delivered in the sense that it is intended to take effect as a legal obligation, a contemporaneous oral agreement, providing

that the contract is not to be performed if a certain condition or contingency occurs, cannot be shown, as such testimony would have the effect of adding to, varying, or contradicting the express terms contained in the writing.

4. ———. In the absence of fraud, mistake, or ambiguity a written agreement is not only the best evidence but the only competent evidence as to what was the contract of the parties.
5. **Fraud.** It is a general rule that fraud must relate to a present or preexisting fact, and cannot ordinarily be predicated on an unfulfilled promise or a statement as to a future event.

APPEAL from the district court for Keith County: JOHN H. KUNS, JUDGE. *Affirmed.*

Firmin Q. Feltz, for appellant.

Maupin & Dent, for appellee.

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

BOSLAUGH, J.

This is an appeal from the decision of the district court that as a matter of law appellee was entitled to have judgment against appellant for the amount due on a promissory note in which he was named as payee, and which was by him endorsed with recourse and sold and delivered to appellee. The jury was, on motion of appellee, discharged and a judgment was rendered in its favor and against appellant.

The claim of appellee was that on or about July 14, 1949, Russell Johnson for a consideration executed and delivered to appellant a promissory note for $1,180.44 payable in monthly installments of $65.58 beginning August 20, 1949; that appellant endorsed the note with recourse, guaranteed its payment, and for a consideration sold and delivered it and the security for its payment to appellee; that only three monthly installments had been paid; and that appellee was entitled to judgment for the unpaid balance of the note with interest as therein provided.

Appellant admits that he had taken and owned the

Johnson note and the mortgage securing its payment; that he endorsed the note with recourse and guaranteed its payment; that on July 14, 1949, he sold and delivered the note and mortgage for a consideration to appellee; that he received and has since retained the consideration paid him on that account; that the maker of the note paid only three monthly installments on the indebtedness; and that all installments that matured commencing with November 20, 1949, were unpaid. Appellant claims, and over objection was permitted to offer evidence to establish, that Johnson, an itinerant gypsy carnival worker with the Bohn Shows then exhibiting in Ogallala, had been negotiating with appellant upon a time payment plan for the purchase of a used 1947 trailer house for a price of $1,750; that appellant had previously sold notes to appellee; that appellant refused the offer of Johnson until he had contacted and talked with appellee; that appellant discussed the matter with the agent and manager of the office of appellee at North Platte; that he said appellee would purchase a note and mortgage of Johnson if appellant made a deal with him but appellant would have to endorse the note with recourse; that appellee would, in the event that Johnson defaulted in his payments as required by the note, return the trailer house to the used car lot of appellant in Ogallala before he would be required to pay appellee the note; that thereafter appellant sold the trailer house to Johnson, received $852.28 of the purchase price, took the note involved in this case for the balance of the purchase price, the finance charges, and cost of insurance, procured a chattel mortgage securing the note, endorsed it, and sent it and the security for its payment to appellee and received from it a remittance for the amount due appellant as the net proceeds from the purchase of the note; that there has been no communication from Johnson since he made the October 1949 payment on the note, and search for him has been without result; that the trailer house has not been returned to the used car lot

of appellant; and that the representation in this regard of appellee "was false, and the plaintiff knew it was false, or made it without knowledge as a positive statement of a known fact."

The note, the written endorsement, and the guarantee of payment of it made and signed by appellant were received in evidence. The testimony offered by appellant concerning the conversation between him and the agent and manager of appellee in North Platte is not contradicted. The manner of considering the evidence of the party against whom a verdict has been directed or the jury has been discharged and a judgment rendered by the trial court in determining the correctness or error of the action of the trial court in that regard does not require discussion. Armer v. Omaha & C. B. St. Ry. Co., 151 Neb. 431, 37 N. W. 2d 607; Olson v. County of Wayne, *ante,* p. 213, 59 N. W. 2d 400.

The time of the conversation appellant says he had with the agent of appellee was before July 14, 1949, if the language "the other day" in the letter written by appellant to appellee of July 14, 1949, is to be accepted. In any event it is established by the record that any conversation between these parties was before the transaction for the sale of the trailer house by appellant to Johnson, and before the note or any of the papers incident to the transaction were executed.

The note with the endorsement and guarantee of payment was sent to appellee for unconditional transfer and delivery thereof to it and the proceeds of the sale of the note were promptly remitted to, accepted, and retained by appellant. He did nothing to interpose a condition precedent to the taking effect of his endorsement and guarantee or to modify or restrict the obligation thereby created. In fact he could not have effected the sale of the note if he had because he had been advised that appellee would not accept the note unless it was endorsed by appellant with recourse. The endorsement of the note and its delivery for a consideration by appel-

lant to appellee bound the former to pay the amount of the note to the holder of it. § 62-166, R. R. S. 1943; Baldwin-Heckes Co. v. Kammerlohr, 123 Neb. 317, 242 N. W. 661.

The endorsement was in writing and it was the only competent evidence of the obligation of appellant to appellee. It has long been the law of this state that if persons to a transaction have put their engagement in writing in such terms as import a legal obligation without uncertainty of the object or extent of the engagement, it is conclusively presumed that the entire engagement of the parties and the extent and manner of their undertaking have been reduced to writing, and any parol agreement is merged in the written contract and testimony of prior or contemporaneous conversations is incompetent. In the absence of fraud, mistake, or ambiguity a written agreement is not only the best evidence but the only competent evidence as to what was the actual contract of the parties. If it is claimed that the execution of a written contract has been induced by prior or contemporaneous oral conversation or agreement parol evidence is not admissible to add to or contradict the terms of the written contract. In Security Savings Bank v. Rhodes, 107 Neb. 223, 185 N. W. 421, 20 A. L. R. 412, it is said: "When a written contract has been unconditionally delivered in the sense that it is intended to take effect as a legal obligation, a contemporaneous oral agreement, providing that the contract is not to be performed if a certain condition or contingency occurs, cannot be shown, as such testimony would have the effect of adding to, varying or contradicting the express terms contained in the writing." See, also, State ex rel. Davis v. Banking House of A. Castetter, 118 Neb. 231, 224 N. W. 21; Bartels v. Wade, 130 Neb. 836, 266 N. W. 712; Weidenfeld v. Olson, 132 Neb. 303, 271 N. W. 806; Lefferdink v. Schmutte, 149 Neb. 695, 32 N. W. 2d 194; Hoerger v. City State Bank, 151 Neb. 321, 37 N. W. 2d 393; Perry v. Gross, 155 Neb. 662, 53 N. W. 2d 73;

Ford v. Luria Steel & Trading Corp., 192 F. 2d 880; Restatement, Contracts, § 237, p. 331.

The endorsement of the note is a complete writing and expresses the whole arrangement between the parties. The testimony admitted of an alleged prior or contemporaneous oral agreement was inconsistent with, contradicted, and varied the terms and obligations of the endorsement of the note. It attempted to make the liability of appellant depend upon a condition subsequent. The testimony was incompetent and should have been rejected. The record in this case does not justify the application of any exception to the parol evidence rule as the appellant insists should be done. Appellant argues that failure to give effect to the alleged oral arrangement that no liability would be enforced against him until appellee had recaptured and returned the trailer house to appellant at his place in Ogallala would be a fraud upon him. This argument is not novel. It has been advanced since the existence of the parol evidence rule. It has been repudiated by this court. Security Savings Bank v. Rhodes, *supra.*

Appellant insists that the statement he attributes to the agent of appellee, made before the appellant had sold the trailer to Johnson, was a representation of a fact in the future and not a mere promise, and that such a representation which has been acted upon and proves to be false entitles the injured party to the remedies existing for fraudulent representation of an existing fact. The statement as appellant relates it was that if the trailer was sold to Johnson and he disappeared "* * * we will find him and put that trailer and pickup back on your lot." It is generally considered that fraud must relate to a present or preexisting fact and may not ordinarily be predicated on an unfulfilled promise or a statement as to a future event. Beltner v. Carlson, 153 Neb. 797, 46 N. W. 2d 153. The reliance claimed by appellant in this regard was upon a mere promise.

There is no evidence that if it was made there was a present intention not to perform it.

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

AFFIRMED.

MARTIN LUND, APPELLANT, V. HARVEY HOLBROOK, SR., ET AL., APPELLEES.

62 N. W. 2d 112

Filed January 8, 1954. No. 33441.

1. **Appeal and Error: Parties.** An order granting a motion to bring in an additional party in a cause is not a final or an appealable order.
2. **Appeal and Error.** An order is not final when the substantial rights of the parties involved in the action remain undetermined and when the cause is retained for further action. In such a case, the order is interlocutory and not appealable.
3. **Appeal and Error: Evidence.** An order for the production of books and papers is regarded as a mere interlocutory order and for that reason not an appealable order.

APPEAL from the district court for Antelope County: LYLE E. JACKSON, JUDGE. *Appeal dismissed.*

Pilcher & Haney, Keith Howard, and *Elmer C. Rakow,* for appellant.

Deutsch & Jewell, for appellees.

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

MESSMORE, J.

This is an action for damages arising out of a collision between a truck owned by the plaintiff and a car owned by the defendant Harvey Holbrook, Sr., driven by Harvey Holbrook, Jr. Trial was had, resulting in a verdict in favor of the plaintiff. The defendants appealed. This court reversed the judgment of the trial court and re-

manded the cause for a new trial. Our opinion will be found in 153 Neb. 706, 46 N. W. 2d 130. The trial judge, as provided for in the mandate, ordered that the judgment previously entered in the district court for Antelope County in this cause be vacated and set aside and a new trial in this action be had.

Thereafter defendants filed an application in the district court to require the plaintiff to make the Pennsylvania Fire Insurance Company a party defendant to this cause, and that it be ordered to produce its files and records pertaining to the accident; that the attorneys of record for the plaintiff be ordered and directed to produce records concerning the admissions and declarations and proof of loss in respect to damage sustained by him in the collision; and that upon the failure of the plaintiff and his attorneys of record and the Pennsylvania Fire Insurance Company to produce the evidence requested, as aforesaid, that the cause be dismissed except with reference to the cross-petition, and such relief as the premises merit.

Upon the hearing of the above application and the request for admissions and written interrogatories made and propounded by the defendants to the plaintiff and the response thereto, the trial court made certain findings with reference to a settlement made by the Pennsylvania Fire Insurance Company with which the plaintiff carried a policy of insurance. The trial court ordered the plaintiff to file an amended petition within 30 days from the date the order was entered making the Pennsylvania Fire Insurance Company a party defendant in this cause; that process be issued as provided for by law; and that when the Pennsylvania Fire Insurance Company had been made an additional party defendant to the above cause, it be required to produce its records and files pertaining to the settlement of the collision with the plaintiff, and more particularly its proof of loss and other statements and matters pertaining thereto that might be necessary with respect to the value of the

plaintiff's property and the damage sustained by him.

The plaintiff filed a motion to vacate the above order and the plaintiff be not required to make the Pennsylvania Fire Insurance Company a party to this action, or, in the alternative, that the trial court grant the plaintiff a new trial. Each of the above motions were overruled.

At the outset of this appeal we are met with a motion on the part of the defendants to dismiss this appeal, primarily for the reason that an order of the district court directing an additional party to be brought into this cause is not an appealable order.

The answer to this assignment of error depends upon whether or not the order requiring the plaintiff to make the Pennsylvania Fire Insurance Company a party defendant in this cause is an appealable order within the meaning of section 25-1902, R. R. S. 1943, which provides: "An order affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment, and an order affecting a substantial right made in a special proceeding, or upon a summary application in an action after judgment, is a 'final order' which may be vacated, modified or reversed, as provided in this chapter."

In the absence of a statute which, by its terms or as construed by the courts, permits an appeal from an interlocutory order of the kind herein discussed, it is generally held that an order requiring, or permitting, or refusing to permit, the joinder of additional parties is not appealable, since it is interlocutory and not final in nature. See, Annotation, 16 A. L. R. 2d 1028; Kaplan v. City of Omaha, 100 Neb. 567, 160 N. W. 960; Hall v. Vanier, 7 Neb. 397. See, also, Levstek v. National Surety Corp., 203 Minn. 324, 281 N. W. 260; Cook v. City of Menasha, 95 Wis. 215, 70 N. W. 289; Fisher v. Milwaukee Electric Ry. & Light Co., 173 Wis. 57, 180 N. W. 269.

In Chapman v. Dorsey, 230 Minn. 279, 41 N. W. 2d 438, 16 A. L. R. 2d 1015, it is said: "The rule of non-

appealability applies to orders which deny or grant motions for the vacation of an order either denying or granting the joinder of additional parties to an action."

We believe it is obvious that the overruling of the plaintiff's motions in question did not determine the action, nor did such ruling prevent a judgment or affect a substantial right.

The law, as we understand it, is that an order is final for the purpose of an appeal when it determines the rights of the parties; and no further questions can arise before the court rendering it except such as are necessary to be determined in carrying it into effect. See, Clarke v. Nebraska Nat. Bank, 49 Neb. 800, 69 N. W. 104; Anson v. Kruse, 147 Neb. 989, 25 N. W. 2d 896.

An order is not final when the substantial rights of the parties involved in the action remain undetermined and when the cause is retained for further action. In such a case, the order is interlocutory. See, Krepcik v. Interstate Transit Lines, 153 Neb. 98, 43 N. W. 2d 609; Miller v. Schlereth, 151 Neb. 33, 36 N. W. 2d 497.

An order for the production of books and papers is regarded as a mere interlocutory order, and for that reason not a subject of separate appeal. See 28 L. R. A. N. S. 516, note thereunder and cases cited.

For the reasons given herein, the motion of the defendants to dismiss this appeal is sustained, and the appeal is hereby dismissed.

APPEAL DISMISSED.

STEPHEN M. GASPER, APPELLANT, V. JULIUS STANLEY MAZUR ET AL., APPELLEES.
62 N. W. 2d 117

Filed January 8, 1954. No. 33443.

1. **Mortgages: Pleading.** A petition for the foreclosure of a real estate mortgage is required to state whether any proceedings have been had for the recovery of the debt secured thereby.

2. ———: ———. The absence of the required allegation in a petition prevents it from stating a cause of action and is fatal to a judgment rendered because of the petition if the defect is taken advantage of by a party prejudiced thereby by an appeal from the judgment.
3. **Pleading.** The sufficiency of a petition to state a cause of action is not the test of jurisdiction of a court or of the validity of a judgment rendered because of the petition.
4. **Courts: Judgments.** If a court has jurisdiction of the parties and the subject matter of the action, a judgment rendered is not void even though the court was in error in holding that a cause of action was properly stated.
5. **Courts: Pleading.** If the allegations of a petition are sufficient to inform the defendant the relief sought by the plaintiff, the court having power to grant it in a proper action, jurisdiction exists.
6. **Judgments.** A prerequisite to the vacation of a judgment for irregularity in obtaining it is that the court find and adjudge that there is a valid defense to the action in which the judgment was rendered.
7. **Mortgages.** The exercise of an option given a holder of a mortgage to accelerate the maturity of the indebtedness secured and to have foreclosure of the mortgage in the event of default of the mortgagor in the performance of an obligation required of him is absolute, if a default exists, and the effect thereof cannot be defeated by the mortgagor without the concurrence of the holder of the mortgage.
8. **Fraud: Judgments.** Fraud as a reason for vacation of a judgment after the term at which it was rendered may only be taken advantage of by an action as provided by section 25-2002, R. R. S. 1943.

APPEAL from the district court for Douglas County: JAMES M. PATTON, JUDGE. *Reversed and remanded with directions.*

August Ross, for appellant.

George Evens, for appellees.

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

BOSLAUGH, J.

This appeal contests the validity of an order of the

district court setting aside a decree of foreclosure of a real estate mortgage and all proceedings and acts subsequent to and dependent upon it.

The basis of the action of the trial court was a pleading of appellees after adjournment of the term of court at which the decree was rendered and entered, referred to and treated as a motion, by which it was claimed there was an irregularity in obtaining the decree of foreclosure, and that appellant had practiced fraud upon the court at the time of and in procuring the entry of the decree.

The district court had acquired and had jurisdiction of the subject matter of the action and over the person of each of the appellees at the time of the rendition of the decree of foreclosure. There is no claim of defect in the jurisdiction of the court. The irregularity relied upon by appellees, as stated by them, "consisted of the failure of the plaintiff herein (appellant) to allege (in his petition) as provided by law that no action or proceeding at law had been had to recover the debt or any part thereof." A petition for the foreclosure of a real estate mortgage is required to state "whether any proceedings have been had at law for the recovery of the debt secured thereby." § 25-2142, R. R. S. 1943. The absence of the required allegation in such a petition prevents it from stating a cause of action and is fatal to a decree of foreclosure rendered on such a petition if the defect is taken advantage of by a party prejudiced thereby by timely direct attack on the pleading. Jones v. Vennerberg, 133 Neb. 143, 274 N. W. 494. The petition of appellant in this case did not state "whether any proceedings have been had at law for the recovery of the debt secured thereby." It was in other respects sufficient. The appellees did not challenge the sufficiency of the petition before entry of the decree. They were served with process of the character and in the manner provided by law. They made no appearance in the case until after the confirmation of the sale of the property

involved by authority of the decree of foreclosure and the conveyance of the property to the purchaser on August 17, 1951, by deed of the sheriff.

The first attempt of appellees to secure a vacation of the decree of foreclosure rendered and entered on June 11, 1951, was futile. Gasper v. Mazur, 155 Neb. 856, 54 N. W. 2d 66. This attack on the decree of foreclosure and the proceedings and acts subsequent to it was originated by a pleading filed in the case on January 23, 1953. It sought the exercise of the statutory right given the district court to vacate its judgments or orders after the term at which they were made. § 25-2001, R. R. S. 1943. This eventuated in this appeal. The sufficiency of the petition to state a cause of action is not the test of jurisdiction of the court or the validity of a judgment rendered because of the petition. In Wistrom v. Forsling, 144 Neb. 638, 14 N. W. 2d 217, this court said: "Where a court has jurisdiction of the parties and the subject matter of the action, a judgment rendered is not void and subject to collateral attack, even though the court was in error in holding that a cause of action was properly stated. * * * There is no connection between jurisdiction and the sufficiency of the allegations of a petition to state a cause of action. * * * Where the allegations of a petition are sufficient to inform the defendant what relief the plaintiff demands, the court having the power to grant it in a proper action, jurisdiction exists."

The district court found and held that the petition did state a cause of action, and it respected and enforced the cause of action by the decree of foreclosure. That was a judicial question the trial court had authority and jurisdiction to consider and decide. It had power to determine it either way and in conformity with its conclusion to pronounce a judgment that was conclusive on the litigants if it was not reversed or changed by direct proceeding for that purpose. Appellees may not in this proceeding have any relief because the petition omitted a required allegation. The sufficiency of the petition

was adjudicated by the district court at the time of and by the rendition of the decree. It is said in Brandeen v. Lau, 113 Neb. 34, 201 N. W. 665: " 'The sufficiency of the petition is not a test of jurisdiction, as the court may commit an error in holding it sufficient; * * *.' "

A prerequisite to the vacation of a judgment by resort to the statutory method relied upon by appellees is that "it is adjudged that there is a valid defense to the action in which the judgment is rendered." § 25-2005, R. R. S. 1943. It is true, as appellees assert, they were not required to tender an answer stating a defense to the action in which the decree of foreclosure was rendered with their motion to vacate the decree. Fisk v. Thorp, 60 Neb. 713, 84 N. W. 79. However appellees were required to show by proof that they were prejudiced by the decree and it was mandatory that the court should find from the evidence and adjudicate that a valid defense existed before it could, in any event, vacate the decree. In Fisk v. Thorp, *supra*, this court said: "It is not required in such instances that there shall be tendered an answer, but only that the court shall find from the evidence that a valid defense exists. This may be found from evidence offered in support of the motion filed asking the vacation of the judgment." This case was approved in Godfrey v. Cunningham, 77 Neb. 462, 109 N. W. 765, and it is therein stated: "As to whether or not the defendant was prejudiced (by the judgment sought to be vacated) is to be determined from the evidence * * *." See, also, Western Assurance Co. v. Klein, 48 Neb. 904, 67 N. W. 873; Willms v. Plambeck, 76 Neb. 195, 107 N. W. 248. The appellees did not offer evidence tending to show a defense to the claim of appellant. Their pleading asking vacation of the decree admits they were, at the time of the commencement of the case, in default of performance of the obligations of the note and mortgage given by them to appellant. Appellant asserted by his petition the right of foreclosure of the mortgage given him by appellees because it assured

to him this right, at his option, if any part of the indebtedness secured thereby was not paid when it became due; that seven installments of the indebtedness had matured and were unpaid when this action was commenced; and that the institution of an action to enforce the mortgage was the only notice of the exercise of the option exacted by it. The exercise of the option by appellant, when a default of appellees existed, was absolute and the effect thereof could not be defeated by any act of appellees without the concurrence of appellant. The efforts of appellees after the foreclosure was completed and the property had been conveyed to the purchaser to extinguish by tender or payment of the indebtedness owing to appellant by appellees at the time the case was commenced with interest and costs were of no legal significance or effect. Hockett v. Burns, 90 Neb. 1, 132 N. W. 718; Crawford v. Houser, 115 Neb. 62, 211 N. W. 165; Matthews v. Guenther, 120 Neb. 742, 235 N. W. 98; Annotation, 31 A. L. R. 731. The trial court did not adjudge that there was a valid defense to the action in which the decree was rendered. This is an additional reason why the order assailed by this appeal cannot be sustained.

The claim of appellees that there was fraud practiced by appellant in obtaining the decree of foreclosure is without merit. This ground for vacating a judgment after the term at which it was entered may not be presented by motion but can only be availed of by an action begun and prosecuted by petition and summons. § 25-2002, R. R. S. 1943. This charge is unsupported by allegation of wrongful act or omission by appellant that in any manner influenced or affected the entry of the decree.

The judgment of the district court rendered and entered in this case on May 26, 1953, vacating and setting aside all proceedings in this case subsequent to the filing of the petition of appellant, the plaintiff in the district court, should be and it is reversed.

The district court for Douglas County should be and it is directed to reinstate by proper adjudication all of the proceedings vacated and set aside by its said judgment of May 26, 1953, so that they will appear and be in force and effect in the same manner and with like effect as though the said judgment of May 26, 1953, had not been rendered and entered.

REVERSED AND REMANDED WITH DIRECTIONS.

BETTY BERG, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.
61 N. W. 2d 837

Filed January 8, 1954. No. 33448.

1. **Forgery.** In a prosecution for uttering a forged instrument knowing it to be forged, a conviction cannot be sustained without proof of the forgery.
2. ———. To sustain a conviction for forgery it is not sufficient to show that the signature is not that of the party whose name is used, but it must also affirmatively be shown that the signing was made without his authority.

ERROR to the district court for Hall County: ERNEST G. KROGER, JUDGE. *Reversed and remanded with directions.*

John F. McCarthy, 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.

SIMMONS, C. J.

By information it was charged that defendant had in her possession a forged bank check for the payment of money; that she knew that it was a forged check; and that she uttered it as true and genuine with intent to damage and defraud. She plead not guilty, was tried to a jury, and found guilty. Motion for a new trial was filed and overruled. Sentence was pronounced. She

brings the matter here by petition in error. We reverse the judgment of the trial court and remand the cause with directions to dismiss.

The date of the check was March 27, 1953. The complaint before the justice of the peace was filed April 6, 1953. The preliminary hearing was held April 9, 1953. Information was filed April 13, 1953, and trial had April 16, 1953.

The State offered the evidence of a merchant in Grand Island that the defendant presented the check to him; that when presented it bore only the name of John Finck as drawer; that he filled in the name of the payee as "cash" for the amount of $100, and the date; that he required the defendant to endorse the check; and that he delivered merchandise to the defendant and cash for the difference.

Thereafter he compared the signature with the signature of John Finck on two other checks which he had, concluded that "something that didn't look right to me," and deposited the check.

The State next called the cashier of the bank on which the check was drawn. He testified that the check was received from a correspondent bank in Grand Island; that when it was received at the bank several of the officers and employees checked the signature with the signature card of John Finck; that a conference was had with John Finck and his son; and that as a result John Finck signed a "stop-payment" request for the reason "Signature is questioned"; and that the check was returned unpaid to the correspondent bank. He further testified that in his opinion the signature was not that of John Finck. This witness was asked if John Finck ever authorized anybody to sign a check for him. He answered no—"Not to my knowledge."

The State then offered certain signatures of John Finck and called an expert witness who testified that, in his opinion, the signature on the check here involved was a forgery.

The State rested. Defendant moved for a dismissal on the ground that the State had failed to prove the crime charged. The trial court overruled the motion. This is assigned as an error here.

The defendant then called John Finck as her witness. He testified that he had an account in the bank on which the check was drawn; that he had given the defendant three checks signed by him with the amount not written in; and that the check here involved was one of those checks.

On cross-examination Mr. Finck was asked about statements he had made to others about this check and the signature. He testified that he had told the banker, his son, a lawyer not involved in the trial, and the prosecuting attorney that he thought the signature was not his; and that he had dictated such a statement to a reporter, but at those times he did not have his glasses, and "when I used my glasses I knowed it was my signature." He further testified that he had given the defendant the privilege of signing his name to a check but that this check was not one signed by her. The defendant then moved for a dismissal because of the failure of the State to prove a case based on Mr. Finck's testimony that it was his signature on the check.

The defendant then testified that Mr. Finck had signed the check here involved and two others in her presence; that this one was given as a loan; and that she gave Mr. Finck a note for it. Defendant's landlady testified that Mr. Finck had signed and delivered a check to her for defendant's rent about March 27, 1953.

The first question presented is whether or not the State introduced evidence sufficient to take this case to a jury and sustain the verdict of defendant's guilt.

The rule is: In a prosecution for uttering a forged instrument knowing it to be forged, a conviction cannot be sustained without proof of the forgery. Majors v. State, 109 Neb. 316, 190 N. W. 1020.

The State's burden here was, in part, to prove that

the signature on the disputed check was a forgery. The State offered circumstantial evidence that the signature here was not that of John Finck. See Wakeley v. State, 118 Neb. 346, 225 N. W. 42. Assuming but not deciding that the evidence was sufficient, if believed as to that question, the State then had the further burden of proving that the signature of Mr. Finck was made without his authority.

The rule is that to sustain a conviction for forgery it is not sufficient to show that the signature is not that of the party whose name is used, but it must also affirmatively be shown that the signing was made without his authority. Taylor v. State, 114 Neb. 257, 207 N. W. 207; Lunsford v. State, 124 Neb. 529, 247 N. W. 37; Sutherlin v. State, 136 Neb. 809, 287 N. W. 614.

The only evidence in this record that we find as to lack of authority is that of the cashier of the bank who testified that so far as his knowledge went Mr. Finck had never authorized anyone to sign checks for him. Obviously the knowledge of the cashier of the bank does not prove lack of authority by Mr. Finck. See People v. Maioli, 135 Cal. App. 205, 26 P. 2d 871, for a case factually largely comparable to the instant case. It relies in part upon the decision in People v. Lundin, 117 Cal. 124, 48 P. 1024, a case which we relied upon in Taylor v. State, *supra*. It states in essence our rule with reference to the necessity for proof of a signing without authority.

The trial court should have sustained defendant's motion to dismiss at the close of the State's evidence.

This conclusion makes unnecessary a statement of the evidence on cross-examination of the defendant as to previous offenses and a ruling thereon. Likewise, other assigned errors need not be determined.

The judgment of the district court is reversed and the cause remanded with directions to dismiss.

REVERSED AND REMANDED WITH DIRECTIONS.

E. K. BUCK RETAIL STORES, A CORPORATION, ET AL., APPELLEES, V. WALTER E. HARKERT ET AL., APPELLANTS.

62 N. W. 2d 288

Filed January 15, 1954. No. 33356.

1. **Constitutional Law: Corporations.** The purpose of Article XII, section 5, of the Constitution, is to give stockholders the privilege of cumulating their votes in the election of directors or managers of incorporated companies. The words "shall not be elected in any other manner" make it mandatory upon the corporation to grant the privilege.
2. ———: ———. Article XII, section 5, of the Constitution, does not purport to prohibit or restrict the right of stockholders to contract among themselves.
3. **Corporations.** A stockholder owning a majority of the stock of a corporation may lawfully contract with another stockholder to vote his stock for certain persons as directors in order to secure additional funds for the corporation when such agreement is reasonable, intended to be for the benefit of the corporation, and does no injury other than the contemplated detriment to the contracting stockholders.
4. **Contracts.** The power of courts to invalidate contracts for being in contravention of public policy is a very delicate and undefined power which should be exercised only in cases free from doubt. It is not the province of courts to destroy the right to contract by enabling parties to escape their contractual obligations on the ground of public policy unless the preservation of the public welfare imperatively so demands.
5. **Corporations: Contracts.** A control agreement, in which it is provided that each of two contracting stockholders owning a majority of the stock will designate two members of a board of directors of four, is not void per se as being against public policy.
6. **Corporations: Estoppel.** One who has received the benefit of a provision in a stockholders control agreement for a long period of time, which provision was for his sole benefit, is estopped to deny the validity of the provision as a basis for voiding the whole agreement.
7. **Corporations: Contracts.** A stockholders control agreement, which provides that it shall be operative during the period that the contracting stockholder providing new funds for the corporation shall be a stockholder in the corporation, is for a definite period and not void on the ground of public policy.
8. **Corporations: Actions.** A stockholder may not bring an action

in his own name to recover for wrongs done to the corporation or its property. The fact that it is based on a stockholders control agreement does not authorize a personal action unless the injury is his alone and not common to all stockholders.

APPEAL from the district court for Douglas County: JAMES M. PATTON, JUDGE. *Affirmed in part, and in part reversed and dismissed.*

Hotz & Hotz, Robert M. Kane, and *William F. Dalton,* for appellants.

Kennedy, Holland, DeLacy & Svoboda, for appellees.

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

CARTER, J.

This is a suit for a declaratory judgment brought by E. K. Buck Retail Stores, a corporation, and Earl K. Buck against Walter E. Harkert and Mercedes C. Harkert, and Harkert Houses, a corporation, to test the validity of a corporation control agreement entered into by the parties in their capacities as stockholders in Harkert Houses. The trial court disposed of the issues raised by holding two separate trials and entering two decrees. The first decree was entered on October 29, 1951, in which it was determined that the agreement was in all respects valid, the defendants Harkert were restrained from violating said agreement, the defendants Harkert were ordered to perform in accordance with the terms of the agreement, the prayer of the plaintiffs for a declaration that the corporate election of January 16, 1950, was invalid was denied, and all claims of the defendants, including those for damages, were denied. A second agreement between the parties bearing date of July 7, 1938, similar in nature, was also held valid. The court granted permission to plaintiffs to seek further relief in damages based on the judgment and decree, and retained jurisdiction of the case for this purpose. The second decree was entered on January 14, 1953, in which it

was determined that plaintiffs were entitled to judgment against the defendants Harkert in the amount of $33,612 and that defendants' motions for judgment notwithstanding the findings of the court should be overruled. On February 3, 1953, all motions for a new trial were severally overruled. This was a final order as to the decree of October 29, 1951, and that of January 14, 1953. The defendants Harkert have appealed from this order. In order to simplify the disposition of the issues we shall deal first with those involved in the first trial which resulted in the decree of October 29, 1951.

The record shows that Walter E. Harkert, hereafter referred to as Harkert, was on and before the latter part of 1937 the sole owner of a chain of restaurants or hamburger stands. His finances became impaired in the period prior thereto to the extent that he was compelled to seek financial aid from sources other than banking institutions. He engaged in a plan of selling the fixtures and equipment at a designated eating house or stand to the investor for cash and entering into an agreement to buy the fixtures and equipment back at the end of 5 years for a higher price, payment to be made in monthly installments over the 5-year period. Several of these sale and repurchase agreements had been entered into before Harkert became acquainted with Earl K. Buck, hereafter referred to as Buck. Harkert and Buck became acquainted, with the result that Buck entered into four purchase and resale agreements with Harkert prior to the incorporation of the Harkert restaurants. In the latter part of 1937 Harkert was desirous of improving his financial structure, and broached the subject to Buck. Buck advised Harkert to consult with Buck's lawyer with reference to the matter. The incorporation of the Harkert interests under the name of Harkert Houses resulted, undoubtedly with the expectation that Buck would be interested in advancing more money in the furtherance of his interests and those of the new corporation. An auditor calculated the net

worth of the business at this time to be $47,504.38. This figure was admittedly arrived at by not treating the payments on repurchase agreements, which became due more than 1 year thereafter, as a liability in his calculation of the net worth of Harkert. These deferred payments amounted to $41,042 and, if deducted as a liability, would have fixed Harkert's net worth at $6,462.38, exclusive of good will and the value of the business as a going concern. All of this Buck knew and no contention is made that he was misled thereby.

From this point on we shall refer to the E. K. Buck Retail Stores, Buck, and Devor, as Buck, their interests being identical so far as this litigation is concerned. The evidence shows that Harkert at this time was obligated on repurchase agreements and other forms of indebtedness in the sum of $44,750 to persons other than Buck. Harkert was indebted to Buck in the gross face amount of $55,650. An agreement was made whereby Buck would cancel this gross amount of $55,650 and pay $53,625 in cash into the business for which he was to receive as a consideration therefor 40 percent of the stock of Harkert Houses and equal representation on the board of directors of the corporation. Figuring the gross amount of the indebtedness of Harkert to Buck at its then present value, it appears that Buck actually invested a total of $90,725 in Harkert Houses. The evidence shows that Buck paid in the $53,625, $44,750 of which was used to pay the assumed obligations of Harkert by Harkert Houses, and $8,875 was paid to Harkert as a part of the stock transaction, all with the full knowledge of Buck.

As hereinbefore indicated, Buck and those for whom he acted were to receive 40 percent of the stock of the company and equal control on the board of directors of the Harkert Houses. The pertinent part of the contract so providing states: "That the number of the members of the Board of Directors of Harkert Houses be reduced from five, as it now is, to the number of four,

and that the said four members of the new Board shall consist of said Walter E. Harkert, Mercedes C. Harkert, his wife, Earl K. Buck and Rodney B. Devor, and that the number of members of said Board of Directors shall be maintained at four in number, of which at all times two thereof shall be such persons as shall be nominated or designated by the said Walter E. Harkert or his heirs, representatives or legatees, and the other two thereof shall be such persons as shall be nominated or designated by the said party of the second part. And it is further mutually agreed between the parties that at all stockholders' meetings of the said Harkert Houses held for the purpose of election of directors or director (in case of vacancy on the Board of Directors), that all of the said shares of stock of parties of the first part and also of party of the second part and also any additional shares of stock of the Harkert Houses which may be subsequently acquired by the said parties or either of them, shall be voted in such manner and for such person or persons as will keep and maintain the Board of Directors four in number, of which two thereof shall be such persons as shall be nominated or designated by said Walter E. Harkert or his heirs, representatives or legatees, and two thereof shall be such persons as shall be nominated or designated by the said party of the second part."

It is contended by the defendants that the foregoing portion of the agreement violates Article XII, section 5, of the Constitution, and section 21-135, R. S. 1943, and, in addition thereto, contravenes the public policy of the state and is void for that reason. It will be noted that the statute was enacted pursuant to the mentioned constitutional provision and that the two are similar insofar as their substance is concerned. They will therefore be considered together.

The pertinent part of Article XII, section 5, of the Constitution, is as follows: "The Legislature shall provide by law that in all elections for directors or managers

of incorporated companies every stockholder shall have the right to vote in person or proxy for the number of shares owned by him, for as many persons as there are directors or managers to be elected or to cumulate said shares and give one candidate as many votes as the number of directors multiplied by the number of his shares shall equal, or to distribute them upon the same principle among as many candidates as he shall think fit, and such directors or managers shall not be elected in any other manner; * * *."

The contract here involved was entered into on May 23, 1938, by Walter E. Harkert and Mercedes C. Harkert as parties of the first part and the E. K. Buck Retail Stores as the party of the second part. On the date of the agreement Harkert was the owner of 2,637 shares of stock in Harkert Houses and Mercedes C. Harkert was the owner of 300 shares. The E. K. Buck Retail Stores became the owner of 1,198 shares on the day the contract was made and Buck and Rodney P. Devor became the owners of one share each. Harkert retained 1,437 shares and Mercedes C. Harkert retained 300 shares. There were a number of shares of stock held by persons not signatory to the agreement after the completion of the stock transaction. The contract was between the parties as stockholders. They involved no action on the part of the corporation. So far as the record shows, the board of directors, officers, or stockholders as such had no knowledge of the transaction. The E. K. Buck Retail Stores was a corporation operating a chain of shoe stores and was not, consequently, a competitor of Harkert Houses in the restaurant business.

In considering the meaning of Article XII, section 5, of the Constitution, and section 21-135, R. S. 1943, it is proper to consider the evil and mischief attempted to be remedied, the objects sought to be accomplished, the scope of the remedy its terms apply, and give it such an interpretation as appears best calculated to effectuate the design of the constitutional and legislative provi-

sions. It is clear to us that the purpose of the constitutional provision and statute enacted pursuant thereto was to provide for cumulative voting in the election of directors or managers of incorporated companies in order to secure to minority stockholders a greater representation in the management of the corporation's business. In order to do this it was necessary that the law state the number of votes to which each stockholder was entitled and to insure against an involuntary loss of the right conferred. In the accomplishment of the latter, the Constitution provides that "such directors or managers shall not be elected in any other manner." The latter prohibition, as we view it, operates to prevent a corporation by its articles of incorporation, by-laws, or any act of its directors or stockholders from depriving a stockholder of the right to vote his stock in the manner specified in the Constitution and statute. But such provision does not purport to limit the right of the stockholder to contract with reference to his stock. It grants him a right or privilege which he may or may not exercise as he sees fit, but it is one of which the corporation or any agency thereof cannot deprive him. Neither the constitutional provision nor the statute purports to limit the right of the stockholder to contract with other stockholders with respect to such right. The nature of the right granted by the Constitution and statute appears to have been concisely stated in Tomlin v. The Farmers & Merchants Bank, 52 Mo. App. 430, wherein the court said: "The right is one guaranteed by the law, constitutional and statutory, it is personal to the stockholder, it can be exercised or not by such stockholder as he may himself elect. * * * It, therefore, cannot be taken from him by a resolution or by-law adopted by a majority of shareholders."

In State ex rel. Frank v. Swanger, 190 Mo. 561, 89 S. W. 872, 2 L. R. A. N. S. 121, the court in dealing with a similar provision said: "The object and purposes of this provision in our Constitution is well understood

and has been judicially expounded on several occasions. Its purpose was to introduce the principle of cumulative system of voting in elections of stockholders so as to secure to the minority of stockholders a voice in the management of the affairs of the company in proportion to the number of their shares, * * *. A construction has nowhere been given to section 6 of article 12, within our knowledge or research, so as to constitute it a prohibition or restriction on the right of stockholders to make their contracts which violate no rule of the common law and which affect no rights except their own."

The result necessarily hinges upon the meaning to be given to the words "and such directors or managers shall not be elected in any other manner." It will be noted that Article XII, section 5, of the Constitution, provides that every stockholder shall have the right to vote in person or proxy for directors or managers on a stock ownership basis for as many as there are directors to be elected, and he may cumulate his vote and distribute it among the candidates as he sees fit. Then follows the provision that directors shall be elected in no other manner.

We think the meaning of the constitutional provision is clear. Its purpose is to provide for cumulative voting in the accomplishment of which it was necessary to fix the voting power of the shares of stock. In many states cumulative voting is permissive,—it could be properly included in the articles of incorporation, or not, as the incorporators might determine. The clause "and such directors or managers shall not be elected in any other manner" was placed in Article XII, section 5, of the Constitution, to make it mandatory that every corporation within the purview of the constitutional provision should permit cumulative voting.

It is contended that the provision intended much more than that from its plain, unambiguous language, that it meant also that any agreement between stockholders,

even though accompanied by a valuable consideration, was voided by the provision that such directors shall not be elected in any other manner. We point out that the elections of directors after the agreement of May 23, 1938, were held in accordance with the method prescribed in Article XII, section 5, of the Constitution. For that matter, the elections held after the breach of the agreement likewise were held in the manner prescribed. It will be noted that each share of stock was given one vote, the right to cumulate was not denied and, for aught the record shows, the voting power of the stock was in no way reduced. It is asserted, however, that an agreement between stockholders as to how stock shall be voted at the election of directors ipso facto changes the manner of election prescribed by the Constitution. To so hold would have the effect of invalidating existing statutes relating to voting trusts and all other forms of voting combines by a majority of the stock to control the management of the corporation, which were recognized at common law. The Constitution so construed would be superior to any statute in conflict therewith. We do not think the framers of the Constitution had any such intention and, if they had, adequate language could easily have been found to have expressly so provided. It was clearly the purpose of Article XII, section 5, of the Constitution, to secure to minority stockholders a voice in the management of the affairs of the corporation in proportion to the number of their shares. We can find nothing in this section which purports to change the then existing rights of a stockholder to contract with another stockholder with reference to how he should vote his stock.

Elaborate briefs have been filed by the parties dealing with the issues in this case. To discuss all of the cases cited and the distinctions drawn by the parties would unduly extend this opinion. On the constitutional issue, however, the defendants rely mainly upon two cases upon which we will venture to comment. These

cases are People ex rel. Arkansas Valley Sugar Beet & Irrigated Land Co. v. Burke, 72 Colo. 486, 212 P. 837, 30 A. L. R. 1085, and Brooks v. State ex rel. Richards, 3 Boyce (Del.) 1, 79 A. 790.

In the Burke case it appears that the water storage company, desiring to build an irrigating and storage system of its own, entered into an agreement with the receiver of the old canal company for the joint use of a part of its existing canal. A new canal company was organized and the old canal company stockholders were to receive stock in the new company. For the purpose of giving representation to the storage company, in the problems involved in maintaining and operating that part of the canal jointly used, the contract for the joint use of the canal provided also that the stockholders of the new canal company would annually vote for and elect as two of its five directors two stockholders of their own number to be designated by the storage company. The two corporations were rival and competitive companies whose rights and interests were antagonistic and adverse to the rights and interests of their own corporation. The right of the storage company was not contingent on its being a stockholder. It appears plain to us that the receiver was acting for the corporation and all of the stockholders thereof. If this be true, the provision for the election of the two stockholders nominated by the storage company to be directors constituted a corporate limitation on the power of stockholders to vote cumulatively or otherwise for all directors to be elected. Such a holding would, of course, be in line with our interpretation of Article XII, section 5, of the Nebraska Constitution,—the constitutional provision of the Colorado Constitution being identical with ours for all practical purposes. In the decision, however, the Colorado court went further and held that the words "And such directors, trustees or managers shall not be elected in any other way" meant more than the establishment of a cumulative method of voting. The court said: "The

language is plain and unambiguous. It is not susceptible of construction. It interprets itself. It is an absolute, unequivocal command that the directors shall not be elected in any other way than the way or ways which the section itself specifically provides. The sentence was not intended to establish cumulative voting. That object had been accomplished by previous provisions of the section. The inhibition is no more applicable or appropriate to cumulative voting than to voting by a stockholder of all his shares for as many directors as are to be elected. That is, two methods of voting—cumulative and non-cumulative—are provided, and the nominating and electing by either method is the same." The court held the contract void on its face for the reasons set out in the opinion at considerable length. The court did not say, as the defendants here contend, that all agreements between stockholders relating to the voting of stock were void. It did say: "Such being our conclusion, it is unnecessary to determine whether all separations of voting power from beneficial ownership, all irrevocable powers of attorney for the voting of the stock, or all voting trust agreements, are invalid." We think that the Colorado court meant that the canal company violated the constitutional provision when it attempted to limit the right of its stockholders to elect its directors, by the cumulative method or otherwise, when it contracted with reference thereto with the storage company in the manner in which it did. But it was not a case where two stockholders contracted for a consideration with reference to the voting of their stock. If the holding of the Colorado court has the effect that the defendants claim for it, we have no hesitancy in saying that it is not sustained by the better reasoning.

In the Brooks case the Delaware court was called upon to determine the right of the owners of preferred shares of stock to vote at the election of directors. The constitutional provision was similar to Article XII, section 5, of the Nebraska Constitution. The articles of incor-

poration of the company involved purported to deprive the owners of preferred stock of the right to vote for directors. A statute enacted subsequent to the adoption of the constitutional provision authorized such a provision in the articles of incorporation. The court held that the holders of the preferred stock were entitled to vote their stock under the constitutional provision. It will be noted that the prohibition of the constitutional provision operated against the corporation providing restrictive methods of electing directors. We find nothing in the opinion touching upon the right of stockholders to contract with each other with reference to how they will vote their stock. We think the defendants claim too much for the Burke and Brooks cases.

It is next contended that the agreement of May 23, 1938, was void as being against public policy. It is claimed that the public policy of this state is derived from Article XII, section 5, of the Constitution, and the implementing statute to which we have referred. Our discussion of the validity of the agreement as the constitutional provision relates to it tends to dissolve this issue. If, as we have said, control agreements between stockholders are not ipso facto void because of the constitutional provision, certainly no public policy can be gleaned therefrom which would void the agreement. No other source of public policy is asserted other than the constitutional provision and the implementing statute. We desire to make it clear, however, that in holding that the constitutional provision does not of itself void stock control agreements between stockholders, it does not mean that all such agreements are valid. The validity of the contract under the law, after determining the irrelevancy of the constitutional provision, will be subsequently dealt with herein.

Under the statutory law of this state, a corporation is to be managed by a board of directors elected by the stockholders. § 21-111, R. S. 1943. The contract here involved does not violate that provision. The stock-

holders elect the directors by the terms of the contract, and the power of the directors to manage Harkert Houses is not infringed. "It is not in violation of any rule or principle of law nor contrary to public policy for stockholders who own a majority of the stock of a corporation to cause its affairs to be managed in such way as they may think best calculated to further the ends of the corporation, and it is not against public policy or unlawful per se for stockholders to agree or combine for the election of directors or other officers, so as to secure or retain control of the corporation, at least where the object is to carry out a particular policy with a view to promote the best interests of all of the stockholders, and the agreement is fair to all the stockholders alike, and to the corporation. It is 'the general inherent right, resulting from the ownership of stock in a corporation, to exercise the elective power such ownership confers, and to exercise it wisely or unwisely, alone, or pursuant to an agreement with other stockholders.' * * * Accordingly, it has been held that stockholders who own a majority of the stock of a corporation may elect themselves directors or appoint themselves its agents, or form and carry into effect policies of management as freely as if the business were their own, and so long as they act honestly, and do not devote the corporate assets or business to their own private gain or to the prejudice of other stockholders, no one can question their acts, which are purely intra vires. * * * If a control and voting agreement among stockholders aims at security of control without fraud on the corporation or others and does not sever stock ownership from stock control, it is not illegal. * * * In like manner a contract by the owners of more than one-half of the shares of stock of a corporation to elect the directors of the corporation so as to secure the management of its property, to ballot among themselves for directors and officers if they could not agree, to cast their vote as a unit as the majority should decide, so as to control the election, and

not to buy or sell stock except for their joint benefit, is not dishonest, violative of the rights of others, or in contravention of public policy, so long as no fraud is committed or wrong done to other stockholders. * * * Hostility towards such agreements and combinations seems to be lessening, or perhaps is becoming more discriminating between good and bad ends. Such agreements are distinct from voting trusts, and are not controlled by the same principles. The stockholders necessarily combine in the majority which passes the vote, whether they do so by previous agreement or not; and doing it by previous agreement is not of itself invalid. According to the weight of authority, the validity and legality of such combinations and agreements depend rather upon the objects thereby sought to be attained and the acts which are done under them, and the other circumstances, and an agreement may be a valid control agreement but invalid because of some other cause or effect. * * * The consideration for a voting agreement may consist in the purchase of stock on the faith of the promise of others to enter into the agreement." 5 Fletcher, Cyclopedia Corporations, § 2064, p. 249. This, we think, states the general law dealing with the subject of stockholders control agreements.

The evidence discloses that prior to the agreement of May 23, 1938, the defendants Harkert were financially involved to the extent that financial assistance was desired, if not necessary. Harkert had sold all of his restaurants for cash and taken back repurchase agreements calling for large monthly payments over a 5-year period. There were other obligations that had to be met. He approached Buck for the purpose of interesting him in providing fresh money for the business. Buck demanded that Harkert's business be incorporated as one condition precedent to financial aid by him. The business was incorporated and the issuance of 4,000 shares of stock at the par value of $100 per share authorized. Buck offered to cancel Harkert's obligations to him and pay $53,625

into the business in consideration of the transfer of 50 percent of the stock to him. Harkert was unwilling to sell 50 percent of the stock on this basis and offered Buck 40 percent of the stock and 50 percent of the control of the business. This arrangement was agreed upon. We point out that the written agreement provided that the board of directors was to be reduced from five to four in number and maintained at that number. This portion of the contract in itself prevented Harkert from electing more than two directors if Buck exercised the right to cumulate his vote. But the agreement went further and provided that each should vote for the two nominees of the other for directors so long as Buck was a stockholder. The evidence is clear that Buck cancelled the indebtedness of Harkert Houses to him and paid the $53,625 in cash on the strength of the control agreement. Without it he would not have agreed to the terms offered. We point out, also, that the agreement in no manner attempted to control the action of directors after they were elected. The claim that the agreement sterilized the board of directors is based on the assumption that the directors nominated by Buck would always vote together. This is probably a practical result, although not one dictated by the agreement. Our statute requires a corporation to have a board of directors of three or more. § 21-111, R. S. 1943. In other words, a board containing an even number of directors is authorized by statute. It would not be unusual for such a board to split evenly on some matters pertaining to corporate policy and thereby create a situation similar to the one before us. Such a situation, in itself, cannot be said to be illegal. The question before us is whether the contract makes it unlawful because of its terms.

It is the contention of the defendants that although a stockholder may vote as he pleases, public policy forbids the enforcement of a contract by which a stockholder undertakes to bargain away his right to vote for directors according to his best judgment, and in the

interest of the corporation. They contend that he has no right to disable himself by contract from performing this duty. Defendants cite the following cases in support of this proposition: Haldeman v. Haldeman, 176 Ky. 635, 197 S. W. 376; Jackson v. Hooper, 76 N. J. Eq. 592, 75 A. 568, 27 L. R. A. N. S. 658; Nickolopoulos v. Sarantis, 102 N. J. Eq. 585, 141 A. 792; Manson v. Curtis, 223 N. Y. 313, 119 N. E. 559, Ann. Cas. 1918E 247; Benintendi v. Kenton Hotel, Inc., 294 N. Y. 112, 60 N. E. 2d 829, 159 A. L. R. 280; Seitz v. Michel, 148 Minn. 80, 181 N. W. 102, 12 A. L. R. 1060; and Smith v. California Thorn Cordage, Inc., 129 Cal. App. 93, 18 P. 2d 393.

The plaintiffs assert that no public policy is violated in the making of an agreement between a majority and a minority stockholder to cause the voting rights in the corporation to be equal when it is beneficial to the corporation for the purpose of bringing fresh money into the business and injures no one except the majority stockholder in voluntarily giving up a part of his voting rights. The following cases are cited in support of this statement: Trefethen v. Amazeen, 93 N. H. 110, 36 A. 2d 266; Ringling Bros.-Barnum & Bailey Com. Shows v. Ringling, 29 Del. Ch. 610, 53 A. 2d 441; Thompson v. The J. D. Thompson Carnation Co., 279 Ill. 54, 116 N. E. 648, Ann. Cas. 1917E 591; Bator v. United Sausage Co., 138 Conn. 18, 81 A. 2d 442; Hart v. Bell, 222 Minn. 69, 23 N. W. 2d 375; Wabash Ry. Co. v. American Refrigerator Transit Co., 7 F. 2d 335 (Certiorari Denied 270 U. S. 643, 46 S. Ct. 208, 70 L. Ed. 776); and Hocking Valley Ry. Co. v. Toledo Terminal R. R. Co., 99 Ohio St. 35, 122 N. E. 35.

An individual discussion of each case cited by the parties is not practical. There are certain fundamentals pertaining to corporate control running through all the cases cited upon which there can be little or no dispute. Among them are the following: A corporation is a creature of the Legislature, and statutes and applicable law prevail over private agreements between stock-

holders. The property of a corporation belongs to the stockholders, but the possession and management thereof is in the hands of the directors. An agreement purporting to control the actions of directors after they are elected, in handling the ordinary business of the corporation, is ordinarily void. A partnership may not disguise itself as a corporation and any agreement purporting to do so is, generally speaking, void. The law imposes the business management of the corporation on its directors, who represent all the stockholders and creditors, and they cannot enter into agreements among themselves or with stockholders by which they purport to abdicate their independent judgment. Stockholders are powerless in this state to alter or reduce the voting power of any share of stock. As a general rule, stockholders cannot act in relation to the ordinary business of the corporation, nor control the judgment of directors in the performance of their duties. A board of directors acts through its majority and an agreement providing otherwise violates the intendments of the statutes. The separation of voting rights from stock ownership is frowned upon and will be sustained only when authorized by law, or when it is free from fraud of any kind. Many of the cases cited by the defendants involve one or more violations of the foregoing and do not decide the issue under discussion. It must be conceded, however, that the position of defendants does have support in the authorities cited by them.

But we think the correct rule is that stockholders control agreements are valid where it is for the benefit of the corporation, where it works no fraud upon creditors or other stockholders, and where it violates no statute or recognized public policy. "The propriety of the object validates the means and must affirmatively appear." Cone v. Russell & Mason, 48 N. J. Eq. 208, 21 A. 847.

It is not here established that the contract worked a fraud upon the corporation, creditors, stockholders, or any other person. Consequently, the following cases

sustain the validity of the contract on the point under discussion.

Trefethen v. Amazeen, *supra,* is a case in which the agreement between stockholders was for the purpose of securing additional working capital for the corporation and provided that the majority stockholder would waive his right to vote certain shares so long as either of the other two contracting stockholders would own stock in the corporation, so that these two would be able to vote at least 50 percent of the voting stock. The case is very similar on its facts to the case at bar. The court in sustaining the agreement said: "The validity of a contract between stockholders is to be determined by the effects of its provisions. In Bowditch v. Company, 76 N. H. 351, this Court upheld a stockholders' agreement for a voting trust applying as a test the conclusions that there was no wrong to the corporation, no special benefit to the parties to the contract and no turning over of management to strangers. The Court did not leave out of consideration other stockholders individually and creditors. * * * If we apply the above suggested tests to this agreement, it is clear that it is valid. Holden received no special benefit; his only benefit was the general one of all stockholders derived from a corporation with greater working capital. There was no injury to corporation, stockholders or creditors from the addition of new funds. The only detriment was to the parties to the contract and such as they themselves contemplated in the making of it, namely, the paying out of money by two of the parties and the loss of voting rights agreed to by the third party. There was no transfer of control of corporate management, whether for good or ill, to outsiders. The contract merely called for less voting power on the part of an assenting stockholder and relatively greater voting power on the part of other stockholders for a definite period. The effect of this upon other interests no one can say. 'It is not in violation of any rule or principle of law nor contrary to public

policy for stockholders who own a majority of the stock of a corporation to cause its affairs to be managed in such a way as they may think best calculated to further the ends of the corporation, * * *. A stockholders' agreement reasonably intended to be beneficial to a corporation and injurious to no one save for the contemplated detriment to the contracting parties is valid. Violation of the present agreement by the defendant trustee would cause irreparable injury to the plaintiff and he is without adequate remedy at law.' "

In Ringling Bros.-Barnum & Bailey Com. Shows v. Ringling, *supra,* the court had before it the question of the validity of an agreement between two stockholders to vote together for a certain slate of directors. For 3 years the two stockholders voted together and elected five of seven directors. The third stockholder by cumulating his vote elected the other two. The two contracting stockholders, Edith Ringling and Aubrey Ringling Haley, each owned 315 shares of stock and the third stockholder, John Ringling North, owned 370 shares. At the 1946 annual stockholders meeting Mrs. Haley voted contrary to the agreement and maintained that the agreement was invalid, or at least revocable. Her contention was based on the proposition that there can be no agreement, or any device whatsoever, by which the voting power of stock of a Delaware corporation may be irrevocably separated from the ownership of the stock except by an agreement which complied with section 18 of the Corporation Law (voting trust statute), and except by a proxy coupled with an interest. It was conceded that the voting trust statute was without application. In holding the agreement valid the court said: "But the statute does not purport to deal with agreements whereby shareholders attempt to bind each other as to how they shall vote their shares. Various forms of such pooling agreements, as they are sometimes called, have been held valid and have been distinguished from voting trusts. * * * We think the particular agreement before

us does not violate Section 18 or constitute an attempted evasion of its requirements, and is not illegal for any other reason. Generally speaking, a shareholder may exercise wide liberality of judgment in the matter of voting, and it is not objectionable that his motives may be for personal profit, or determined by whims or caprice, so long as he violates no duty owed his fellow shareholders. * * * The ownership of voting stock imposes no legal duty to vote at all. A group of shareholders may, without impropriety, vote their respective shares so as to obtain advantages of concerted action. They may lawfully contract with each other to vote in the future in such way as they, or a majority of their group, from time to time determine. * * * Reasonable provisions for cases of failure of the group to reach a determination because of an even division in their ranks seem unobjectionable. The provision here for submission to the arbitrator is plainly designed as a deadlock-breaking measure, and the arbitrator's decision cannot be enforced unless at least one of the parties (entitled to cast one-half of their combined votes) is willing that it be enforced. We find the provision reasonable. It does not appear that the agreement enables the parties to take any unlawful advantage of the outside shareholder, or of any other person. It offends no rule of law or public policy of this state of which we are aware."

In Thompson v. The J. D. Thompson Carnation Co., *supra,* an agreement was entered into between stockholders to vote their stock for each for directors and for no other person. The Illinois court in upholding the agreement said: "It does not divest or attempt to divest J. M. Thompson of his control or ownership of his stock, or his right to vote the same, except that by the first clause it is provided that the parties to the same shall vote their stock for each other for directors and for no other person or persons. Contracts of this character, by which the owners of a majority of the stock in a corporation agree to vote for certain persons for di-

rectors so as to secure to themselves the control and management of the corporation, are not illegal or void so long as no fraud is committed on the corporation or wrong done to the other stockholders. * * * We held in the case cited that the owners of stock might lawfully contract with each other not to buy or sell stock except for their joint benefit, and that such contracts are not dishonest, violative of the rights of others or in contravention of the public policy of this State. So far as the evidence shows, no fraud was practiced or intended to be practiced by the contract in question, and in our opinion, in so far as its validity is assailed on these grounds, it must be sustained as a valid exercise of the right of contract."

In Hart v. Bell, *supra,* the court said: "Romig and C. W. Hart requested Bell to lend additional money to Sports Afield, but he flatly refused unless he were permitted to acquire enough common stock to give him absolute and permanent control. * * * The trial court by its findings, which are all reasonably sustained by the evidence, determined all these issues in favor of defendants, and specifically found that Bell had, in all his corporate activities and transactions, acted in good faith and to the best advantage and interest of Sports Afield and its stockholders. * * * It is not the province of courts to emasculate the liberty of contract by enabling parties to escape their contractual obligations on the pretext of public policy unless the preservation of the public welfare imperatively so demands. * * * 'the power of courts to declare a contract void for being in contravention of sound public policy is a very delicate and undefined power, and, like the power to declare a statute unconstitutional, should be exercised only in cases free from doubt.' Cole v. Brown-Hurley Hardware Co., 139 Iowa 487, 491, 117 N. W. 746, 748, 18 L. R. A. (N. S.) 1161, 16 Ann. Cas. 846. Quoted with approval in Hollister v. Ulvi, 199 Minn. 269, 280, 271 N. W. 493, 498-499. * * * The practical conduct of a modern business corporation

compels a frank recognition that 'an agreement by a number of stockholders to combine their votes in order to effectuate a particular policy is not of itself unlawful in the absence of evidence of an intent to defraud the other stockholders or to secure a private benefit at the expense of the corporation or the other stockholders.' 66 U. S. L. Rev. (1932) pp. 562, 566. Illegality per se is no longer the inevitable consequence of every agreement by a majority of the stockholders without regard to its purpose or effect."

The case of Manson v. Curtis, *supra,* cited by the defendants, is a leading case on the subject before us. In that case the agreement between stockholders was held to be void because it operated to force an abdication by the directors of the control of the business affairs of the corporation. But it does not hold that stock control agreements are void per se as is evidenced by the following from the opinion of the court in that case: "It is not illegal or against public policy for two or more stockholders owning the majority of the shares of stock to unite upon a course of corporate policy or action, or upon the officers whom they will elect. An ordinary agreement, among a minority in number, but a majority in shares, for the purpose of obtaining control of the corporation by the election of particular persons as directors is not illegal. Shareholders have the right to combine their interests and voting powers to secure such control of the corporation and the adoption of and adhesion by it to a specific policy and course of business. Agreements upon a sufficient consideration between them, of such intendment and effect, are valid and binding, if they do not contravene any express charter or statutory provision or contemplate any fraud, oppression or wrong against other stockholders or other illegal object."

In a similar case the court said in In re Feinson's Estate, 196 Misc. 590, 92 N. Y. S. 2d 87: "It is now well established that stockholders of a corporation may

validly agree to elect specified persons as directors. Clark v. Dodge, 269 N. Y. 410, 199 N. E. 641; Kassel v. Empire Tinware Co., 178 App. Div. 176, 164 N. Y. S. 1033; Matter of Block's Will, 186 Misc. 945, 949, 60 N. Y. S. 2d 639, 642. Moreover, the complete owners of a corporation may, by agreement among themselves, control the exercise of power and discretion by the directors of the corporation, provided that the interests of creditors of the corporation are not prejudiced and the public policy of the State is not offended. * * * Even though a contract might impinge somewhat upon the provisions of section 27, General Corporation Law, there is no reason for holding it illegal if the enforcement of it 'damages nobody—not even, in any perceptible degree, the public.' Clark v. Dodge, supra, 269 N. Y. page 415, 199 N. E. page 642."

We conclude that stockholders control agreements are not invalid per se. If they are based on a sufficient consideration between the contracting stockholders they are valid and binding if they do not contravene any express constitutional or statutory provision or contemplate any fraud, oppression, or wrong against creditors or other stockholders, or other illegal object. Where such a situation appears it is not illegal or against public policy for two or more stockholders owning the majority of the shares of stock to unite upon a course of corporate policy, or upon the officers, including directors, whom they will elect.

The defendants contend, however, that even if the stock control agreements are generally valid under circumstances here shown, the one at bar is invalid for the reason that the agreement which provides that two of a total of four directors shall be nominated by the owners of 40 percent of the stock and elected by the contracting stockholders so long as the contracting party (Buck) shall be a stockholder, is void as being against public policy. While the cases heretofore cited indicate that such a provision in the agreement does not

invalidate the contract under the circumstances, additional cases are cited on this specific point. That there is a division of authority on this point cannot be questioned. We point out once more that the agreement does not place Buck, the owner of 40 percent of the stock, in control of the corporation. It does give him a veto power over questions of corporate policy. It is plain that Buck would not have cancelled the gross indebtedness of $55,650 and paid in the $53,625 in fresh money without the stock control agreement being made. It must be assumed that the purpose of the agreement was to prevent the corporation from getting into financial distress by a continuance of the corporate policy which brought about the necessity for its reorganization at the time Buck became a stockholder. It appears plain that Buck was insistent upon the corporation not spreading itself too thin in the enlargement of its business. The difficulties of Harkert and Buck arose after 11 years of successful operations on the very policy which Buck sought to have maintained when he brought the gross amount of $109,275 into the business by the purchase of 40 percent of the stock. Defendants rely upon Morel v. Hoge, 130 Ga. 625, 61 S. E. 487, 16 L. R. A. N. S. 1136; Odman v. Oleson, 319 Mass. 24, 64 N. E. 2d 439; Luthy v. Ream, 270 Ill. 170, 110 N. E. 373, Ann. Cas. 1917B 368; and cases of similar import to support their position. We think the more reasonable and more modern rule is to the contrary.

Stockholders control agreements which purport to supersede the powers of the directors of a corporation in handling its ordinary business affairs are held ordinarily to be in violation of statutes placing the power of management in the directors. The creation of a dummy board of directors, or, in the language of some of the cases, a sterilized board of directors, by a stockholders control agreement, is usually held to be void. But the mere fact that a board of directors of four members is created with the understanding that each shall nominate

two, is not of itself unlawful. The validity of such a contract is determined by the nature of the restrictions placed upon the board in carrying out their duty to exercise their best judgment in managing the affairs of the corporation. Where the control agreement leaves the directors free to act after being selected, we fail to see where there is a violation of any law or established rule of public policy. The mere fact that a board is created which may split evenly on a matter of corporate policy is not a basis for voiding the contract. In the instant case the directors were free to manage the ordinary business affairs of the corporation without contractual restraint. It is not a dummy or sterilized board within the ordinary meaning of those terms. The following from Clark v. Dodge, 269 N. Y. 410, 199 N. E. 641, seems to state the applicable rule: "Except for the broad dicta in the McQuade opinion, we think there can be no doubt that the agreement here in question was legal and that the complaint states a cause of action. There was no attempt to sterilize the board of directors, as in the Manson and McQuade cases. The only restrictions on Dodge were (a) that as a stockholder he should vote for Clark as a director—a perfectly legal contract; (b) that as director he should continue Clark as general manager, so long as he proved faithful, efficient and competent—an agreement which could harm nobody; (c) that Clark should always receive as salary or dividends one-fourth of the 'net income.' For the purposes of this motion, it is only just to construe that phrase as meaning whatever was left for distribution after the directors had in good faith set aside whatever they deemed wise; (d) that no salaries to other officers should be paid, unreasonable in amount or incommensurate with services rendered—a beneficial and not a harmful agreement. If there was any invasion of the powers of the directorate under that agreement, it is so slight as to be negligible; and certainly there is no damage suffered by or threatened to anybody. The broad statements in

the McQuade opinion, applicable to the facts there, should be confined to those facts."

Defendants next assert that the control agreement is void because of the provision that Harkert be retained as president for an indefinite period at a fixed salary. On this question the authorities again appear to be in conflict, depending in most cases on the nature of the agreement. But we do not feel that we are called upon to decide it in this case. The defendant Harkert for some 11 years participated in carrying out this part of the agreement by accepting the benefits it gave him. It was a provision for the benefit of Harkert and not of Buck. After reaping the benefits for 11 years he now seeks to invalidate the agreement because of the alleged invalidity of a provision made for his benefit. This he cannot do. It hardly requires a citation of authority to hold that one who has received the benefit of the provision for a period of 11 years may not now question the validity of the provision as a basis for invalidating the control agreement to which he is a voluntary party. He is estopped from questioning its validity. Under such circumstances there is no merit to the defendants' contention on this point.

It is also contended that the control agreement is void because it was to remain in effect so long as Buck retained any stock in the corporation. We think not. The purpose of the agreement was to give Buck such protection against mismanagement as to induce him to bring needed money into the corporation. It is reasonable that such protection should be afforded so long as he is a stockholder. It is not a contract which binds the parties in perpetuity, as defendants allege. It is definite as to the term of its existence. The rule was correctly applied in Trefethen v. Amazeen, *supra*, wherein the court said: "Briefly, the present stockholders' agreement was for the purpose of securing additional working capital for the corporation and provided that Mr. Holden would waive his right to vote certain shares so long as either

of the other two contracting stockholders should own stock in the company, so that these two would be able to vote at least 50% of the voting stock. * * * The contract merely called for less voting power on the part of an assenting stockholder and relatively greater voting power on the part of other stockholders for a definite period."

It is urged that the sale and repurchase agreements made by Harkert and Buck prior to 1938 were usurious. We do not deem it necessary to determine that question because of the nature of the consideration recited in the stockholders control agreement. The agreement in part provided: "That, whereas, said party of the second part has this day purchased from Harkert Houses, a corporation of Douglas County, Nebraska, and Walter E. Harkert, President of said corporation, 1200 shares of stock of said Harkert Houses of the par value of $120,000 as evidenced by Certificate No. 39 for 1198 shares issued to the party of the second part and one share issued to Earl K. Buck, President of party of the second part, and one share issued to Rodney B. Devor, Treasurer of party of the second part, and has paid therefor the sum of $53,625 in cash and has canceled and satisfied notes of said Harkert Houses, maker, and of said Walter E. Harkert, maker, which have heretofore been assumed by the said Harkert Houses, in the total gross face sum of $55,650; * * *." No attempt was made to calculate the net amount due Buck from Harkert Houses in the contract, nor to fix the actual value of the stock sold to Buck. The stated consideration was that Buck would pay $53,-625 in cash and cancel the indebtedness of Harkert Houses to him in the "total gross face sum of $55,650." Whatsoever the net amount of the total gross face sum of $55,650 may have been, played no part in the transaction. As a matter of law, the consideration fixed by the agreement is controlling and the net amount due is immaterial to the issue. Defendants are in no position

to assert that the "deals" made prior to the incorporation of Harkert Houses were usurious.

We conclude that the stockholders control agreements were valid under the circumstances here shown and that the declaratory judgment entered on October 29, 1951, was correct in so holding.

In its decree of October 29, 1951, the trial court, after holding that there was a breach of a valid contract on the part of the defendants, authorized the plaintiffs to institute ancillary proceedings to recover such damages, if any, resulting from the breach of contract. Jurisdiction to entertain such further application and to render complete relief in damages was therein specifically retained.

Plaintiffs thereafter filed a supplemental petition setting forth the damages they are alleged to have sustained. The nature of such damages are summarized in plaintiffs' brief and for the purposes of the question to be considered, they will be accepted. It is claimed that the following items would not have been expended if the stockholders control agreement had not been breached by Harkert and his associates and, plaintiffs being the owners of 40 percent of the stock of the corporation are entitled to a personal judgment for 40 percent of the losses sustained. The items of damage, briefly stated, are: Attorney fees paid by the corporation in this litigation, $4,000; accountant fees paid by the corporation in this suit, $930.25; excessive expenditures at the Athletic Club location, $18,085.32; excessive salary paid to Fitzgerald, Schwentker, and Clara Harkert, $5,264.52; proceeds of corporate bonds used in purchase of Farnam Street building, $25,000; proceeds of corporate bonds used in establishment of the restaurant in Lincoln, $37,000; expenditure of corporate earnings in paying off the mortgage on the Farnam Street building, $25,000; expenditure of corporate funds on Lincoln restaurant over and above that derived from the sale of bonds, $15,639.60; and rent paid on location leased and

not used by the corporation, from June to December 1951, $2,100. The total of these items is $133,019.69, 40 percent of which is $53,207.87 for which plaintiffs sought judgment. In addition to the foregoing, defendants are charged with waste and mismanagement of the corporate business, thereby causing the net profit for the first 6 months in 1951 to be only $25,009 as against $41,766.04 and $47,519.73 for the same periods in 1950 and 1949, respectively. The defendant Walter E. Harkert is charged with using funds of the corporation in the amount of $2,185 for the purchase of an automobile for his own use and in making loans of corporate funds to his friends and relatives in the amount of $2,890 which have been outstanding and unpaid for 2 years. Plaintiffs allege that they have been damaged by the breach of the stockholders control agreement on the part of the defendants in an amount not less than $100,000. A trial was had on the issues thus presented which resulted in the decree of January 14, 1953, awarding plaintiffs a judgment against the defendants Harkert in the amount of $33,612.

The defendants assert that plaintiffs had no personal cause of action against the defendants Harkert and that the damages alleged, if proved, run in favor of the corporation. In other words, the contention of the defendants is that any action to recover the damages alleged must be brought in the name of the corporation, either by the corporation itself or, upon its refusal or failure to do so, by a stockholder in a representative action. The plaintiffs contend that the action is personal to them because of the stockholders control agreement which was entered into between E. K. Buck Retail Stores and the defendants Harkert, personally, as stockholders.

The general rule is stated in Ruplinger v. Ruplinger, 154 Neb. 394, 48 N. W. 2d 73, as follows: "A stockholder may not bring an action in his own name to recover for wrongs done to the corporation or its property. Such

a cause of action is in the corporation and not the stockholders. The right of a stockholder to sue is derivative in its nature and can be brought only in a representative capacity for the corporation."

We point out that every item of damage claimed, if the defendants are liable therefor, is a wrong committed against the corporation or its property. The damages alleged either deplete corporate funds, convert property of the corporation into unauthorized investments, or tend, because of inept management, to reduce the value of the stock of all stockholders. Such damages ordinarily fall within the general rule and create a cause of action on the part of the corporation or a representative suit by a stockholder. It is the contention of the plaintiffs that the stockholders control agreement calls for a different result in the present cause that raises the precise question to be decided.

In Smith v. Bramwell, 146 Ore. 611, 31 P. 2d 647, the court after recognizing the general rule stated: "Appellant recognizes the rule as above stated, but asserts that it has no application to the particular facts involved in this case. Plaintiff contends that his action is based upon a violation of the voting trust agreement and that, by virtue of such contractual relationship, he may maintain the action in his own behalf even though there was a direct damage to the corporation. * * * We cannot agree that the instant action is predicated upon a breach of the voting trust agreement. Some of the defendants were not parties to this trust agreement. When confronted at the commencement of the trial by the objection to the introduction of any testimony for the reason that the complaint failed to allege a cause of action, the plaintiff undertook to bring himself within the exception to the general rule, relative to actions by stockholders against officers of a corporation, by showing a contractual relationship under the voting trust agreement. But, as we have endeavored to show, a breach of this voting agreement did not con-

fer upon the plaintiff a right to an individual and direct action, as distinguished from a derivative one, as any loss sustained by plaintiff by reason of the breach was, under the facts alleged, common to all stockholders."

In Green v. Victor Talking Machine Co., 24 F. 2d 378, 59 A. L. R. 1091, the court said: "Nor does the allegation of a contractual duty to plaintiff's testator aid her. If it be assumed that the allegations of the complaint are sufficient to charge a contractual duty owing by defendant to the Pearsall Company, despite the indefiniteness of the terms of such a contract, and despite the fact that it was made with a shareholder, not with the corporation, nevertheless a breach of that duty would give a right of action to the corporation, not to its shareholders."

To like effect is Wells v. Dane, 101 Maine 67, 63 A. 324, which states: "The plaintiff was not the corporation notwithstanding he owned and controlled a majority of its stock. He did not own or control its property or make or cancel its contracts with the defendant Dane. * * * He was injured the same as every other shareholder because of and through the injury to the corporation property and rights. There was no special injury to the plaintiff different from that to all other shareholders, nor were his individual rights injured outside of the injury suffered by the collective entity the corporation. 'A shareholder cannot sue individually for damages caused by wrongful acts impairing the value of his shares through an invasion of the corporate or collective rights.' Morawetz Pri. Corp. section 236 a. In such cases, if the regular officers of the corporation are unable or unwilling to take the necessary steps to protect the corporate property and interests, a shareholder may proceed in equity on behalf of himself and other stockholders and the company. At law, however, the corporation itself representing all those rights can alone recover for such injury. Any other rule would admit of as many suits against the wrongdoer as there were

stockholders in the corporation. * * * There may be cases of injuries to the individual rights of the shareholder where he and not the corporation must seek redress, such for instance as the levying of an unlawful tax on shares held by the individual stockholder, mutilation or destruction of his certificate, or circulating false and scandalous reports or issuing spurious certificates thus creating uncertainty as to the title or validity of existing shares. In all such cases, however, the wrongful act affects the shares directly. They are readily distinguished from the case at bar where the plaintiff claims his shares were depreciated by wrongful acts making possible the issue of 600 shares of stock without payment therefor. Such a wrong being primarily against the corporation, the redress for it must be sought by the corporation."

Other cases to the same effect are: Commonwealth of Massachusetts v. Davis, 140 Tex. 398, 168 S. W. 2d 216; Coronado Development Corp. v. Millikin, 175 Misc. 1, 22 N. Y. S. 2d 670; and Liken v. Shaffer, 64 F. Supp. 432.

The plaintiffs rely upon the case of Ritchie v. McMullen, 79 F. 522, wherein the court said: "But we are of opinion that this principle has no application where the wrongful acts are not only wrongs against the corporation, but are also violations by the wrongdoer of a duty arising from contract or otherwise, and owing directly by him to the stockholders." Other cases cited are: In re Auditore, 249 N. Y. 335, 164 N. E. 242, 62 A. L. R. 551; R. G. Dun & Co. v. Shipp, 127 Tex. 80, 91 S. W. 2d 330; Meyerson v. Franklin Knitting Mills, 172 N. Y. S. 773; and Keating v. Hammerstein, 209 N. Y. S. 769.

It is true that the line drawn by the cases determining when a stockholder may or may not sue in person is not too well defined. At least the reasoning contained in them does not uniformly point to the same result. The better rule seems to be that a stockholder may sue personally, as distinguished by suit in a representative

capacity, when he has sustained a loss separate and distinct from that of other stockholders. The entry of the parties into the stockholders control agreement did not operate to confer upon plaintiffs the right to an individual direct action that did not exist before. We point out that the control agreement is upheld on the theory that it was for the benefit of the corporation and all stockholders alike. If it had operated to bestow special privileges upon one or both of the stockholders at the expense of stockholders not a party to the agreement, the validity of the agreement would appear doubtful. Plaintiffs assert no cause of action peculiarly their own as distinguished from other stockholders. The control agreement purports only to establish a business policy for the corporation, the continuance of which is assured by the contractual right of Buck to nominate two of the directors. The plaintiffs, therefore, find themselves in a situation where they must choose between two courses of action,—sustain the control agreement and seek their remedy for damages by a representative suit or, on the other hand, assert special rights appurtenant to their shares of stock and have no cause of action at all for damages resulting to all stockholders. Plaintiffs clearly chose the wrong remedy under the facts presented.

To hold that plaintiffs could sue personally in the present case would authorize a suit by each stockholder and result in a multiplicity of suits. The damages alleged are to the corporation which is owned by all the stockholders. It follows that a right of a stockholder to sue under the facts pleaded is derivative only. The recovery, if any, would be in favor of the corporation and, indirectly to all stockholders. The supplemental petition sets forth the damages alleged to be due to the breach of the control agreement by the defendants. Plaintiffs pray that 40 percent thereof, based on their ownership of 40 percent of the stock of the corporation, indicating that plaintiffs recognize that the damages resulted to all stockholders, shall be awarded to them

personally. In other words, for a direct injury to the stock of a stockholder, not common to all stockholders as such, plaintiffs may pursue a personal action. The plaintiffs do not come within this rule in the case at bar. When the injury is to the collective rights of stockholders and the corporate property has been augmented by restitution, the plaintiffs, who have suffered as one of these, will be fully indemnified. If a stockholder is permitted to bring an action personally to recover his proportionate share of the damages suffered by the corporation, a subsequent recovery by or for the corporation would be equivalent to a double recovery by him. To permit such an action by the stockholder individually could possibly injure the rights of creditors and taxing authorities. The reasoning of the cases that a stockholder cannot sue personally for damages where only his derivative or corporate rights have been infringed, appears unassailable. We hold, for the reasons stated, that plaintiffs have neither alleged nor proved any right to damages for which they could sue personally in their capacity as stockholders. The judgment in the amount of $33,612, bearing date of January 14, 1953, is therefore reversed and the pleading designated as an ancillary and supplemental petition is dismissed.

For the reasons herein stated, the decree of October 29, 1951, is affirmed, and the decree of January 14, 1953, is reversed and the pleading designated an ancillary and supplemental petition is dismissed.

AFFIRMED IN PART, AND IN PART REVERSED AND DISMISSED.

IN RE INQUIRY OF ANTHONY MANTELL. LAWRENCE C. KRELL, APPELLEE, V. ANTHONY MANTELL, APPELLANT.
62 N. W. 2d 308

Filed January 15, 1954. No. 33370.

1. **Appeal and Error: Courts.** A review of a finding and adjudica-

tion of delinquency and commitment to the State Industrial School under the Juvenile Court Act may be had in this court by appeal.

2. **Evidence: Courts.** In a hearing before the juvenile court the customary rules of evidence must be adhered to and a finding of fact may not rest upon hearsay.

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

Warren C. Schrempp and *David S. Lathrop*, for appellant.

Eugene F. Fitzgerald and *Robert C. McGowan*, for appellee.

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

YEAGER, J.

The action out of which the proceeding for review here grew was one wherein Lawrence C. Krell filed a petition in the district court for Douglas County, Nebraska, juvenile division, charging that Anthony Mantell, a minor under the age of 18 years, was a delinquent, had been associating with vicious and immoral people, and that he had been guilty of immoral conduct.

In due form of law Mantell was brought before the court and a hearing was had at the conclusion of which the court found that the charges of delinquency against him were true; that he was a fit subject for commitment to the Boys' Training School at Kearney, Nebraska, and the care and custody of the Board of Control of the State of Nebraska; and accordingly committed him until he should arrive at the age of 21 years unless he was sooner paroled or otherwise disposed of according to law.

Mantell has brought this finding and judgment to this court for review by appeal. In the brief on appeal Lawrence C. Krell is designated as complainant and Anthony Mantell as defendant. These designations will

be used for the further purposes of this opinion.

On the lodgment of the case here the complainant filed a motion for dismissal on the ground that this court is without jurisdiction to review the action of the district court on appeal. He contends this court has jurisdiction to review in a case such as this only on writ of error.

This question requires first consideration herein and upon the determination depends the question of whether or not the errors assigned by the defendant require consideration.

In support of his contention complainant relies on section 83-471, R. R. S. 1943, as follows: "The proceedings before any county court or a justice of the peace may be reviewed on writ of error by the district court in the manner provided by law for reviewing criminal cases. Proceedings before any district court or judge thereof may be reviewed by the Supreme Court in the manner provided by law for reviewing criminal cases." This is a provision of what is commonly referred to as the State Industrial School Act.

The defendant has not briefed this question but we do not assume from this that the point is conceded. In this light it has been necessary to examine this provision together with its history and other related statutory provisions.

In 1879, by act of the Legislature, The Nebraska State Reform School for Juvenile Offenders came into existence. Laws 1879, p. 413. The act contained provisions relating to the commitment of children under the age of 16 years to the Reform School and the care of such children. It also contained procedural provisions which imposed duties upon courts in the treatment of such children. Nothing further need be said in this regard except that the act did not contain any provision relating to review of action in a legal proceeding.

This act was amended by chapter 74, Laws 1887. Section 10 of the act as amended contained the following:

"The proceedings before any judge or the county court may be reviewed on writ of error by the district court, and proceedings before any district court or judge thereof may be reviewed by the supreme court in the manner provided by law for reviewing criminal cases in these courts." This language was carried into section 4180, Comp. St. 1899.

By chapter 51, Laws 1901, the name of the institution was changed to "State Industrial School." In the amended act the provision for appeal was carried forward without change. This same language was carried into the revision of 1913. § 7378, Rev. St. 1913. Likewise it was carried into the compilation of 1922. § 7037, Comp. St. 1922. Also it was carried into the compilation of 1929. § 83-1108, Comp. St. 1929.

The provision has never been repealed and it has never been specifically amended. It however has been revised and its substance came into the revision of 1943 as it now appears as section 83-471, R. R. S. 1943.

It becomes clear that the review procedure in case of commitment of minors to the State Industrial School provided by the Industrial School Act has remained in all substantial respects the same since 1887.

Prior to 1887 it was clearly contemplated that a minor could not be committed except on conviction of a criminal offense. In 1887 power was granted for commitment not only on the basis of the conviction of a criminal offense but also in the case of a finding that a child was growing up in mendicancy and vagrancy, or was incorrigible. Laws 1887, c. 74, § 5, p. 592.

The provisions of the act of 1887 in this respect remained substantially the same until 1943. By the revision of 1943 the substance of the section was set forth in two sections. The first (section 83-465, R. R. S. 1943) provides for commitment for conviction of a crime, except murder or manslaughter, in a court of record. The second (section 83-466, R. R. S. 1943) provides for commitment where it is found that a child is growing up

in mendicancy or crime because of want of parental care or other cause.

There can be no doubt that in each instance where there has been a conviction in the district court of crime within the meaning of section 83-465, R. R. S. 1943, or a finding that a child is growing up in mendicancy or crime within the meaning of section 83-466, R. R. S. 1943, and a commitment, and review is sought in this court, proceeding for review is provided by section 83-471, R. R. S. 1943, that is in the manner provided by law for reviewing criminal cases. The method for review of all criminal cases by the Supreme Court is upon writ of error. § 29-2306, R. S. Supp., 1951.

In the year 1905 the Legislature enacted what is commonly referred to as the Juvenile Court Act. Laws 1905, c. 59, p. 305. This was an entirely new body of law, the primary design of which was to set up administrative and judicial procedure for the care, control, protection, and correction of children who because of neglect or other circumstances, or individual propensities, needed attention. The act designated classifications or categories with general definitions within the general purview. One of the classifications was designated as "delinquent child." This is the classification which is of concern here.

The act made provision for the filing of complaint charging delinquency and it made provision, among other provisions, for, in case of finding of delinquency by the juvenile court, commitment in what is now the State Industrial School.

It was agreeable to this act in its present form, Chapter 43, article 2, R. R. S. 1943, that the defendant herein was complained against and after hearing committed to the State Industrial School.

The Juvenile Court Act contains no provision for review of a hearing had in the district court.

By the terms of section 25-1912, R. R. S. 1943, which is a provision of the Code of Civil Procedure, it is pro-

vided that the proceeding for review of judgments, decrees, or final orders of the district court shall be by appeal, except in case of judgments and sentences upon convictions for felonies and misdemeanors under the criminal code.

The proceeding here is not one under the criminal code and the complaint against the defendant is not a charge of felony or misdemeanor. It is a charge of delinquency under the Juvenile Court Act. Whether or not it is in the true sense a civil action we do not need to decide. It was clearly the intention of the Legislature to permit review on appeal in all cases not specifically excepted. Actions such as this are not excepted.

The intention of the Legislature in this respect being clear we hold that this action has come here properly by appeal. See Laurie v. State, 108 Neb. 239, 188 N. W. 110.

In the light of this conclusion it becomes necessary to examine the assignments of error urged as grounds of reversal.

The first assignment is that the court erred in admitting the unsworn hearsay testimony of the witnesses for the complainant over the objection of the defendant.

The assignment correctly reflects factually that which occurred at the hearing on which the defendant was committed as is disclosed by the bill of exceptions.

The case came on for hearing and at its commencement the following transpired: "MR. KRELL: This is a delinquency petition concerning Anthony Mantell, who is fifteen years old. MR. SCHREMPP: Excuse me - Is there an arraignment here?" Mr. Schrempp was then and is now attorney for the defendant. "THE COURT: No. Just sit down and listen. MR. SCHREMPP: Let the record show Warren C. Schrempp has been employed by the defendant and his parents to represent him in this hearing. THE COURT: Do you have a formal complaint? MR. KRELL: The petition says Anthony Mantell is delinquent, he has been associating with vicious

and immoral people and has been guilty of immoral conduct." Then after an interchange of no importance here the following appears: "THE COURT: All right, proceed." Mr. Krell then proceeded to give a statement but was interrupted by objection of Mr. Schrempp, attorney for defendant, as follows: "MR. SCHREMPP: At this time, Your Honor, we object to any unsworn testimony before the Court in this matter. THE COURT: Overruled. Go on. * * * MR. SCHREMPP: May we have a continuing objection so we can keep the record straight? First we object to the petition, that it is not sworn testimony. THE COURT: You may have it shown that what is being said is what our Juvenile Court Records show, and what is being related is not evidence at the present time under oath. MR. SCHREMPP: Then my objection to the statement of Mr. Krell at this time is based upon these grounds: First, that it is unsworn and consequently it is a relation of what is classified as hearsay testimony and in the nature of an admission against interest of any parties in this lawsuit. THE COURT: Your objection will go to all the matters which will now be related, and the same ruling will obtain."

Mr. Krell then proceeded to make a detailed statement with regard to the defendant not under oath all of which was clearly and admittedly hearsay. Others were allowed to make statements not under oath and which likewise were hearsay.

No witness was sworn and nothing except hearsay information was adduced at the hearing. It was at the conclusion of the hearing thus described that the order of commitment was rendered.

The claim of error embraced in this assignment or even of any assignment is not met by the brief of the county attorney who represents the complainant so we can only by conjecture arrive at a conclusion as to the basis upon which the court regarded the hearing conducted as one conforming to proper and legal processes.

The basis, if it may be regarded as a basis, of the court's conclusion is language appearing in section 43-206, R. R. S. 1943, as follows: "* * * on the return of the summons or other process, or as soon thereafter as may be, the court shall proceed to hear and dispose of the case in a summary manner."

A child on being found to be a delinquent may be deprived of his liberty. § 43-210, R. R. S. 1943. The effect of the adjudication in this case was to deprive the defendant of his liberty.

Can it be that the Legislature by the quoted statement appearing in section 43-206, R. R. S. 1943, intended to destroy the traditional and constitutional safeguards of a trial? Can it be that it intended that trials should be had without the benefit of testimony of witnesses given under the sanction of oath or affirmation? Can it be said that the Legislature intended that the liberty of a child had less sanctity than that of an adult? Even if it did so intend, could that intention be sustained? We think not.

This matter has not been previously considered here but it has been by other courts. The courts of New York and California have spoken in a manner which meets approval here.

In People v. Lewis, 260 N. Y. 171, 183 N. E. 353, 86 A. L. R. 1001, it was said: "In the administration of Children's Court there is evidence of a tendency to confuse the procedure usual in mere dependency cases with that necessary in delinquency cases involving an issue of fact. To serve the social purpose for which the Children's Court was created, provision is made in the statute for wide investigation before, during and after the hearing. But that investigation is clinical in its nature. Its results are not to be used as legal evidence where there is an issue of fact to be tried. When it is said that even in cases of lawbreaking delinquency constitutional safeguards and the technical procedure of the criminal law may be disregarded, there is no implication that a

purely socialized trial of a specific issue may properly or legally be had. The contrary is true. There must be a reasonably definite charge. The customary rules of evidence shown by long experience as essential to getting at the truth with reasonable certainty in civil trials must be adhered to. The finding of fact must rest on the preponderance of evidence adduced under those rules. Hearsay, opinion, gossip, bias, prejudice, trends of hostile neighborhood feeling, the hopes and fears of social workers, are all sources of error and have no more place in Children's Court than in any other court."

In In re Matter of Hill, 78 Cal. App. 23, 247 P. 591, it was said: "The relations of parent and child should not be severed or disturbed unless the facts justify it, and the interests of all parties concerned require that these facts be shown by evidence whose verity has been carefully and legally tested. And so, while the exact truth should be searched out and all mere technicalities of procedure as distinguished from the rules which protect substantial rights should be disregarded, the regular processes of the law provided to produce evidence, and the ordinary rules established to aid courts in testing and weighing it, are not scrapped because the proceeding is a summary one.

"In the instant case the process of the law was available to bring witnesses into court, and it should have been used for that purpose. If persons secretly informed the judge that the parents' home was not a fit place for this child, and if their information was reliable and of any value, these persons must have known facts which would warrant that conclusion. It was their duty to come forward and in a manly or womanly fashion give their testimony, so that this helpless infant might be withdrawn from danger and cruelty. But details whispered privately to a judge in chambers cannot be basis of a final order. The more serious the accusation the greater the need that it be carefully tested, and to

that end that no one interested be denied the right of cross-examination."

It must be said that the defendant was not accorded a legal hearing in the juvenile court.

This conclusion renders unnecessary consideration of the other assignments of error contained in the brief of defendant.

The judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

VIOLA MAE ANDRESEN, APPELLEE, V. FORREST B. BURBANK ET AL., APPELLANTS.
62 N. W. 2d 135

Filed January 15, 1954. No. 33397.

Municipal Corporations. A lot owner is not required to repair an adjacent sidewalk until he has been notified by the city to do so, and in absence of such notice he is not liable to pedestrians for damages for personal injuries.

APPEAL from the district court for Douglas County: JAMES M. FITZGERALD, JUDGE. *Reversed and remanded with directions.*

Brown, Crossman, West, Barton & Quinlan, for appellants.

Tesar & Tesar, for appellee.

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

SIMMONS, C. J.

This is an action for damages based upon the alleged negligence of the defendants. It involves a fall on a sidewalk abutting property owned by the defendants in the city of Omaha. Issues were made and trial had. Plaintiff recovered a judgment. Defendants appeal. We

reverse the judgment of the trial court and remand the cause with directions to dismiss.

The first assignment of error is that the trial court erred in overruling defendants' motion for a directed verdict made at the close of all the evidence.

The evidence is sufficient to establish that the sidewalk at the place involved had deteriorated on its surface, so that it was uneven, cracked, and had loose pieces of stone on its surface. This was a condition of long standing. Plaintiff, walking along there at night, fell when her foot touched and rested upon a loose stone. She suffered personal injuries.

By pleadings and evidence it is established that defendants had not been notified by the city of Omaha to make repairs to the sidewalk. One ground urged by the defendants to sustain the motion is nonliability under these circumstances.

Defendants rely upon sections 14-320, 14-322, and 14-323, R. S. 1943. These sections substantially in their present form were construed by us in McAuliffe v. Noyce, 86 Neb. 665, 126 N. W. 82. We there held: The fee of the street is in the city, and the sidewalk is part of the street. It is the duty of the city to keep its sidewalks in repair and in a safe condition for public use. A lot owner is not required to repair an adjacent sidewalk until he has been notified by the city to do so, and in absence of such notice he is not liable to pedestrians for damages for personal injuries.

Defendants further rely on our holding in Hanley v. Fireproof Building Co., 107 Neb. 544, 186 N. W. 534, 24 A. L. R. 382, that under the common law no duty developed upon an abutting owner to keep the sidewalks adjacent to his property in a safe condition. Defendants say that these and other of our decisions of similar import establish that they are not liable.

Plaintiff does not challenge the correctness of these holdings but rather argues that there is an exception to the nonliability rule which makes the abutting owner

liable for injuries caused by defective sidewalks when the condition is the result of participation by the abutting owner in the creation of such defect by a use thereof for which the sidewalk was not designed, either by authorizing it or by making the act or acts creating such defect his own. Prange v. McLaughlin, 115 N. J. Law 116, 178 A. 782.

Plaintiff would have us declare a nonstatutory liability rule and in effect limit our statute and decisions to cases of ordinary sidewalks in disrepair caused by ordinary use. Plaintiff relies on City of Omaha v. Philadelphia Mortgage & Trust Co., 88 Neb. 519, 129 N. W. 996. That decision turned upon an implied agreement between the owner and the city to maintain the sidewalk involved in a proper and safe condition. That is not the situation here.

Plaintiff relies on decisions from other states easily distinguishable because not based on statutes such as ours nor based on nonliability decisions such as ours. We discuss one of the decisions of other states, which factwise comes more nearly to the instant case than the others. It is Prange v. McLaughlin, *supra*. As we read the subsequent cases of that court it has not sustained either the rule or the broad application which is made there.

Citing the Prange case in Schwartz v. Howard Savings Inst., 117 N. J. Law 180, 187 A. 171, the court stated its rule in this way: "An owner is responsible for defects in the sidewalk caused by his affirmative wrongdoing or negligent use of such sidewalk for other than its intended purpose."

In Lindemann v. F. W. Woolworth Co., 123 N. J. Law 208, 8 A. 2d 321, the court held that liability existed where damage is caused by the wrongful act of the owner or occupant.

In Lindner v. Michel, 125 N. J. Law 409, 16 A. 2d 340, unintended use was urged in a case somewhat similar to the facts here. The court cited the Prange case as to

"knowledge and for the benefit of the owner, thus amounting to participation" in the creation of a nuisance and denied recovery because of the absence of testimony that the owner caused the condition complained of or that the improper use was for his benefit.

The evidence is that in the rear of defendants' building, and adjoining the area of the walk in disrepair, is a door several feet above the level of the sidewalk, and without stairs leading to the walk. This was used as a loading opening for tenants in defendants' building. There is also a coal chute, lower down, but in the side of the building, which was used to place coal in defendants' building, which coal was used by defendants to heat the building. Then there is an opening with three steps leading to a platform. This appears to have been used by tenants to get access to the building and as a loading platform for garbage and refuse.

There is evidence of four types of trucks that used this walk where the deteriorated condition exists. Coal trucks backed upon it to unload coal in defendants' building. Merchandise trucks backed in there to load and unload wares in the door above described. Garbage and refuse trucks backed in there to load those items. Plaintiff makes no showing as to who owned, operated, or controlled these trucks. Defendants' testimony is definite that they did not. Laundry trucks of a business adjoining this property parked there at times. There is no contention that the laundry trucks had any connection with defendants' building or tenants. There is no showing as to which, if any, of these trucks caused the damage to the sidewalk. The evidence is only that the sidewalk was in a deteriorated condition.

We refer here to Overman v. Trust Co. of New Jersey, 126 N. J. Law 86, 18 A. 2d 615 (a case citing the Prange decision), where there was no proof that the vehicles using the sidewalk caused the damage, the court said that assuming that a jury would be justified in that inference the plaintiff nevertheless was required to sup-

ply proof that the defendant knowingly permitted an improper use for his benefit and that the use and benefit were tantamount to a participation in the creation of a nuisance. Such evidence is lacking here. There is no contention that the laundry trucks were for the use and benefit of defendants. The fact that third parties used this sidewalk in making deliveries and picking up merchandise and garbage does not sustain a finding that the use was for the benefit of the owners of the building. Normally parties receiving and delivering merchandise are concerned with the fact of receipt and delivery. The method of delivery is normally the concern of those handling the items in the absence of specific direction or necessity. There is no evidence either of direction or necessity. For aught that appears here coal could have been delivered to the premises, merchandise could have been delivered and picked up, and garbage and refuse could have been picked up from the street. Proximity to the building was obviously desired for the benefit of and for the labor economy of those operating the trucks. At least there is no showing that it was for the benefit of the defendants.

Plaintiff assumes, without evidence, that this sidewalk was designed for ordinary pedestrian use. However, it was constructed in front of three openings, two of which were designed as loading platforms or places of reception of commodities. The only evidence is that the walk deteriorated by continued use and was insufficient for the uses to which it was put; but that, without more, does not support an inference that it was not designed for the uses to which it was put. It is to be remembered that by section 14-320, R. S. 1943, as construed in McAuliffe v. Noyce, *supra,* the material and manner of construction and repair are for determination of the city.

Plaintiff's evidence does not bring her case within the rule which she urges we adopt. It is unnecessary to explore further the application of the proposed rule.

Specifically we do not determine that the rule urged by plaintiff is applicable in this state.

It necessarily follows that the trial court erred in overruling defendants' motion for an instructed verdict.

The judgment of the trial court is reversed and the cause remanded with directions to dismiss.

REVERSED AND REMANDED WITH DIRECTIONS.

IN RE ADOPTION OF DORIS ANN HIATT, MINOR. SALLY L. HIATT, APPELLANT, V. MANUEL S. MENENDEZ ET AL., APPELLEES.

62 N. W. 2d 123

Filed January 15, 1954. No. 33402.

1. **Judgments: Fraud.** In an action to set aside a judgment on the ground of fraud, the burden is on the party charging it to clearly establish the fraud.
2. **Adoption: Pleading.** The failure of a petitioner to sign a petition or a verification of a petition for adoption as required by statute is an irregularity but it is not jurisdictional.
3. **Adoption: Judgments.** Two years after the entry of a decree of adoption has been rendered it is conclusively presumed as against defects appearing on the face of the record that all proceedings in connection with the adoption were in all respects valid.

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

Edith Beckman and *Ralph R. Bremers*, for appellant.

Gross, Welch, Vinardi & Kauffman and *John F. MacKenzie*, for appellees.

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

YEAGER, J.

On August 18, 1949, Manuel S. Menendez and Sylbia Mae Menendez filed in the county court of Douglas

County, Nebraska, a petition for the adoption of Doris Ann Hiatt. Doris Ann Hiatt was then of the age of 3 years and the daughter of Herschel Hiatt and Sally L. Hiatt. Herschel Hiatt was deceased at the time of the filing of the petition.

At the same time that the petition was filed a consent to adoption by Sally L. Hiatt was filed. In due course, on September 17, 1949, a decree of adoption was duly rendered awarding adoption to Manuel S. Menendez and Sylbia Mae Menendez of Doris Ann Hiatt.

On May 20, 1950, Sally L. Hiatt filed a petition in the county court in which she asked the court to set aside the decree of adoption and to restore to her the care and custody of Doris Ann. The substantial ground alleged for revocation of the decree was that the decree was obtained by fraud as follows: That she did not knowingly or intentionally sign a consent to adoption, but on the contrary thought when she signed the purported consent she was signing a consent to guardianship; that Doris Ann had lived with her up to the time of the filing of the petition for adoption and had not lived with Manuel S. Menendez and Sylbia Mae Menendez for 6 months next preceding the rendition of the decree of adoption; and that at the time of the decree Manuel S. Menendez and Sylbia Mae Menendez were not a married couple.

The statute requires as one of the conditions necessary to the rendition of a decree of adoption that it shall appear that the child has resided with the adoptive parents for at least 6 months preceding the rendition of the decree. § 43-109, R. R. S. 1943.

Issue was joined and a trial had, at the conclusion of which the county court found against Sally L. Hiatt and entered judgment dismissing her petition. An appeal was taken to the district court where a trial was had. The adjudication in the district court sustained the judgment of the county court. Motion for new trial was filed and in due course overruled. From the order over-

ruling the motion for new trial and the judgment Sally L. Hiatt has appealed.

For the further purposes of this opinion Sally L. Hiatt will be referred to as appellant and Manuel S. Menendez and Sylbia Mae Menendez will be referred to as appellees except where the use of a name is required for identification.

In an action to set aside a judgment on the ground that it was obtained by fraud, the burden is on the party charging it to clearly establish the fraud. Kielian v. Kent & Burke Co., 131 Neb. 308, 268 N. W. 79; Pinches v. Village of Dickens, 131 Neb. 573, 268 N. W. 645; County of Lincoln v. Provident Loan & Investment Co., 147 Neb. 169, 22 N. W. 2d 609.

The question of whether or not fraud was practiced upon appellant in obtaining her signature to the consent to adoption must be resolved against her. Three witnesses including an attorney then representing her all gave testimony as to the incidents attendant upon the signing and as to the signing, all of which indicated that she knew what she was signing. The attorney signed it as witness and in his capacity as a notary public took her acknowledgment.

As against this she admitted that the signature was hers but that she was asked by the attorney to and did sign her name upon a blank piece of paper. This of course could not have been true since the consent was on a printed form supplied by the county court. There was other evidence of circumstances calculated to corroborate the contention of appellees and to discredit that of the appellant which we do not deem necessary to be set out here. The appellant failed to sustain the burden of proof in this respect.

The charge that the appellees were not a married couple at the time of rendition of the decree of adoption is wholly without support in the evidence. Without contradiction the record discloses that they were married in 1947.

On the question of whether or not fraud had been practiced upon the court by representations that Doris Ann had lived with appellees for 6 months next preceding the rendition of the decree the record preponderantly shows that the appellees started caring for Doris Ann intermittently in 1947. They started caring for her on a full-time basis probably in June 1948. Then they had her regularly thereafter through 1948 except for 3 weeks and all of 1949 up to the date in 1949 when the decree of adoption was rendered.

The evidence was in dispute but as stated we think it preponderated in favor of appellees in this respect.

The district court correctly held that the appellant failed to sustain her charge that the decree of adoption had been procured by fraud.

The appellant presents a question by assignment of error here which was not presented by pleading either in the county court or the district court. The effect of the assignment is to say that the county court was without jurisdiction to decree adoption for the reason that the petition was on its face insufficient to confer jurisdiction and that therefore the decree is void.

Section 43-101, R. R. S. 1943, provides that no person having a husband or wife may adopt a child unless the husband or wife joins in a petition for adoption.

Section 43-102, R. R. S. 1943, provides that any person or persons desiring to adopt a child shall file a petition for adoption signed and sworn to by the persons desiring to adopt.

The petition in this case was made on behalf of both appellees but it was not signed by either of them personally. It was signed for them by their attorney. It was sworn to alone by Manuel S. Menendez.

The decree recites that both the appellees were in court and that the allegations of the petition were true. One of the allegations of the petition is that: "Petitioners further state that * * * they now desire to adopt the said child, * * *."

There can be no question but that there is an irregularity and a failure of compliance with the statutory requisites of a proper petition for adoption. However the irregularity may not be regarded as one which defeats the jurisdiction of the court. It is well settled that the want of a verification to a petition is not jurisdictional. Johnson v. Jones, 2 Neb. 126; Dorrington v. Meyer, 8 Neb. 211; Northup v. Bathrick, 80 Neb. 36, 113 N. W. 808.

The rule of law applicable in the case of failure to verify a petition is applicable to failure to sign a petition where it appears that there has been full acceptance of the petition with knowledge of its contents by the named petitioner. In re Estate of Graff, 86 Neb. 535, 125 N. W. 1091.

Here the decree of adoption recites that both appellees were present at the adoption hearing as petitioners. This clearly supports a presumption that these parties with full knowledge accepted the petition as their own.

We conclude that the irregularity complained of and found to exist did not have the effect of rendering the decree void because of want of jurisdiction of the court to enter it.

The provisions of the statute do contemplate that decrees of adoption may be attacked for irregularity in the proceedings. The provision providing for the attack is stated negatively but nevertheless it purports to grant the right. The provision is, as applied to the facts of this case, that: "When any county court in the State of Nebraska shall * * * hereafter enter of record such a decree of adoption, it shall * * * be conclusively presumed that said adoption and all instruments and proceedings in connection therewith are valid in all respects notwithstanding some defect or defects may appear on the face of the record, * * * unless an action is brought within two years from the entry of such decree of adoption attacking its validity." § 43-116, R. R. S. 1943.

The decree of adoption here was entered September 17, 1949. The attention of the district court was never

called to the irregularity formally by pleading or otherwise. Attention was formally called to it first by assignment of error in the brief filed in this court. The brief was filed August 13, 1953, which was more than 3 years after the rendition of the decree of adoption.

Certainly the appellant was barred by the statute from taking advantage of the irregularity which appeared on the face of the record in the adoption proceeding.

The decree of the district court is affirmed.

AFFIRMED.

JOHN L. KOUTSKY ET AL., APPELLANTS, V. DAVID H. BOWMAN ET AL., APPELLEES.
62 N. W. 2d 114

Filed January 15, 1954. No. 33403.

1. **Evidence: Trial.** Circumstantial evidence can be sufficient to sustain a verdict depending solely thereon for support if the circumstances proved by the evidence are of such a nature and so related to each other that the conclusion reached is the only one that can fairly and reasonably be drawn therefrom.
2. **Trial.** The plaintiff, as against a motion for a directed verdict, 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.

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

Pilcher & Haney, for appellants.

Kennedy, Holland, DeLacy & Svoboda, L. J. Tierney, Swarr, May, Royce, Smith & Story, and *Mecham, Stoehr, Moore, Mecham & Hills,* for appellees.

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

SIMMONS, C. J.

This is an action for damages allegedly caused to

plaintiffs' brick building by dirt put against the building, causing the side to be pushed in and the building materially injured.

The plaintiffs owned the building and the lot on which it stands. Immediately adjoining plaintiffs' building to the south is a vacant lot owned by the defendant Bowman. Plaintiffs alleged that defendant McDonald, with the permission of defendant Bowman, dumped dirt on the vacant lot and up and against their building. Issues based on negligence were made and trial had. At the close of plaintiffs' evidence the trial court sustained separate motions of each of the defendants to dismiss. The dismissals were based on a "want of evidence" in each instance.

Plaintiffs appeal. We reverse the judgment and remand the cause.

We determine the contentions advanced by the defendants to sustain the action of the trial court.

Defendant McDonald urges that there is no evidence that he dumped any dirt against the plaintiffs' building. We summarize plaintiffs' evidence as to that question.

The properties here involved are located on the west side of 16th Street in Omaha. The first floor of plaintiffs' building and the surface of the lot are below the level of 16th Street. Sometime in 1948 a Mr. Miller dumped dirt on portions of the lot, but leaving an area unfilled to the south of plaintiffs' building 8 feet wide at the bottom, 16 feet away from the building at the top, and running lengthwise with the building. No damage resulted to the plaintiffs from that operation.

Following the permission given to put dirt on "the lot," to which reference is later made, McDonald "went to filing it up," and he dumped about 3,000 cubic yards of dirt on the vacant lot. The dumping was accomplished by trucks backing into the lot and to a place of unloading. They dumped to the west toward the alley, then to the south, and then to the north. Warning was given by plaintiffs not to dump toward plaintiffs' build-

ing. It was heeded when given. However, in the last 2 days of the operation dirt in quantity was dumped by someone against the plaintiffs' building.

There is no direct evidence by anyone that they saw dirt dumped against the building by McDonald or anyone else. However, the rule is: "Circumstantial evidence can be sufficient to sustain a verdict depending solely thereon for support if the circumstances proved by the evidence are of such a nature and so related to each other that the conclusion reached is the only one that can fairly and reasonably be drawn therefrom." Scarborough v. Aeroservice, Inc., 155 Neb. 749, 53 N. W. 2d 902.

McDonald had an exclusive contract to excavate property at 17th and Leavenworth Streets in Omaha. He owned and operated a number of trucks which bore his own firm name. He used them in this operation together with a number of rented trucks, not otherwise identified, but under his supervision and control. The evidence is that for the 2-week period a continuous procession of trucks were dumping dirt on the Bowman lot. It was the same group of trucks during the 2-week period. Some bore McDonald's firm name and some did not. These trucks came from the north. No other trucks than those above referred to were seen coming to the lot and emptying dirt. All were a part of the "procession." The evidence is also that there was a trail of clay on the pavement from the Bowman lot to the excavation at 17th and Leavenworth Streets. The same group of trucks were observed at the 17th and Leavenworth site, removing dirt and going down Leavenworth and South 16th Streets to the Bowman lot. The trucks all quit coming at the same time after the dirt had been dumped against plaintiffs' building. There has been no dumping since.

The plaintiffs, as against a motion for a directed verdict, are entitled to have every controverted fact resolved in their favor and to have the benefit of every inference

that can reasonably be deduced from the evidence. Davis v. Spindler, 156 Neb. 276, 56 N. W. 2d 107.

Tested by the above rules we think that a jury could properly find that the dirt against plaintiffs' building was placed there by defendant McDonald. It follows that the sustaining of the motion for a directed verdict, for want of evidence as to McDonald's dumping of the dirt that caused the damage, was error.

Defendant Bowman advances the contention that liability is not shown based on the premise that the permission to dump given to McDonald was limited to dumping no closer to plaintiffs' building than the previous dumping, which was 8 feet from the building. The evidence as to that question is given by the general superintendent of McDonald's operations. He testified that he asked permission to dump dirt on "the lot" after asking about the right "to fill it with dirt"; was told "we want to get that lot filled up"; and that he was given authority to "fill it up." He further testified that he was told to "go as far west as the alley"; "to the property line" to the south; "He didn't say we could go north at all"; and "He didn't say we could go any further north."

Defendant Bowman argues that the last two quoted statements limited McDonald's authority to dump dirt on the lot. The authority to "fill it up" obviously relates to the entire lot owned by Bowman. McDonald was given that authority. He was then permitted to go to the west to the alley and to the south to the property line. These were the bounds of the permit given in those two directions. They are obvious restrictions limited to the lot boundaries. The boundary to the north of Bowman's lot was in part at defendant's building. Nothing was said as to that. The permission given to "fill it (the lot) up" was not limited as defendant contends. The sustaining of the motion to dismiss cannot be sustained on the basis of the want of evidence which the defendant suggests.

The judgment of the trial court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

SECURITY INSURANCE COMPANY, APPELLANT, V. OMAHA COCA-COLA BOTTLING COMPANY, APPELLEE.

62 N. W. 2d 127

Filed January 15, 1954. No. 33404.

1. **Negligence.** The doctrine of res ipsa loquitur means that the facts of the occurrence warrant the inference of negligence, not that they compel it. The doctrine is a rule of evidence and not a rule of substantive law. It is a qualification of the general rule that negligence is not to be presumed but must always be affirmatively proved. It merely takes the place of evidence as affecting the burden of proceeding with the case.
2. ———. When facts are adduced to which the doctrine of res ipsa loquitur has application an inference of negligence arises, that is, the thing speaks for itself. It then presents a question for the jury as to liability.
3. ———. The applicability of the doctrine of res ipsa loquitur always depends upon the particular facts and circumstances of each case.
4. ———. It is a doctrine of limited and restricted scope and should ordinarily be applied sparingly.
5. **Fires: Negligence.** As a general rule, the mere occurrence of a fire, with resultant damage, does not raise a presumption of negligence.
6. ———: ———. However, the circumstances under which a fire occurs may sometimes be such as to justify the application of the doctrine of res ipsa loquitur and impose upon the defendant the burden of proving his freedom from fault.

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

Pilcher & Haney, for appellant.

Kennedy, Holland, DeLacy & Svoboda, for appellee.

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

WENKE, J.

Security Insurance Company, an insurance company, brought this action in the district court for Douglas County against the Omaha Coca-Cola Bottling Company, a corporation. The purpose of the action is to recover from the defendant the sum of $2,950.30 which plaintiff was forced to pay on behalf of the Woodmen of the World Life Insurance Society and Omaha Welding Company, Inc., two of its insureds. The basis of the action is negligence. At the conclusion of plaintiff's case the trial court sustained defendant's motion for a directed verdict and dismissed the action. Its motion for new trial having been overruled, the plaintiff perfected this appeal.

In view of the manner in which the action was disposed of by the trial court we shall apply to the evidence adduced, insofar as material to the questions raised, the following principle: "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." Bishop v. Schofield, 156 Neb. 830, 58 N. W. 2d 207.

And, when so considered, we shall view the result in light of the following principle: "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." Bishop v. Schofield, *supra.*

These basic facts are not in dispute: The Woodmen of the World Life Insurance Society owned a two-story building in Omaha, Nebraska, located at 1513-23 Marcy Street. It had leased this building to the Omaha Welding Company, Inc., who was occupying it as lessee. Appellant had a policy of insurance with the owner and

lessee covering the building against loss or damage from fire. On Sunday, May 8, 1949, the interior of the building was materially damaged by smoke and appellant, pursuant to the provisions of the foregoing policy, paid $2,950.30 for cleaning and redecorating. It thereupon, in consideration of the sum paid, took a subrogation receipt from the insureds. This receipt assigned to it any rights they, the insureds, might have against any person or corporation liable for the loss. Appellant then brought this action as such subrogee on the ground that appellee's negligence was the cause of the fire.

Appellant did not allege any specific acts of negligence on the part of the appellee but only that through its employees it carelessly and negligently permitted its pop vending machine, which had been placed in this building pursuant to an oral agreement with the lessee, to catch fire, causing the entire building to become filled with heavy smoke and causing the interior of the building to become covered with sticky, gummy deposits, making necessary the cleaning and decorating. It is appellant's thought that the doctrine of res ipsa loquitur has application to the situation presented by the evidence it adduced and that, because of the doctrine having application, the evidence adduced presented a question for the jury.

The doctrine of res ipsa loquitur means that the facts of the occurrence warrant the inference of negligence, not that they compel it. The doctrine is a rule of evidence and not a rule of substantive law. It is a qualification of the general rule that negligence is not to be presumed but must always be affirmatively proved. It merely takes the place of evidence as affecting the burden of proceeding with the case. When facts are adduced to which it has application an inference of negligence arises, that is, the thing speaks for itself. When facts are adduced to which it has application it then presents a question for the jury as to liability. The applicability of the doctrine always depends upon the

particular facts and circumstances of each case. See, 38 Am. Jur., Negligence, § 298, p. 994; Highland Golf Club v. Sinclair Refining Co., 59 F. Supp. 911.

The evidence adduced shows that prior to May 8, 1949, appellee, a corporation engaged in the business of manufacturing and dispensing beverages, entered into an oral agreement with the lessee of this building whereby, for a consideration of five-sixths of a cent for each bottle of pop sold, it would be permitted to place one of its pop vending machines in this building. Under and pursuant to this arrangement it did so and, on May 8, 1949, had such a machine in the lunchroom located therein. The lunchroom was on the first floor of the building. It was in a room 9 by 14 feet in size which had a cement floor. The walls were of a noncombustible material except there was a narrow strip of wainscoting which extended around the room. This strip was located about 4 feet from the floor.

This room, in addition to appellee's pop vending machine which was located against the east wall thereof at a point about 34 inches south of the door leading into it, contained quite a number of wooden cases filled with bottles of pop, a Seven-Up vending machine, and two wooden tables with benches. The cases of pop were stacked against the east wall just south of the Coca-Cola vending machine. The Seven-Up machine was in the southeast corner of the room and a couple of feet south of the cases of pop. The wooden tables and benches were about in the center of the room. Along the west wall was a sink with a cupboard underneath, a table on which was a coffee urn and electric plate, and a wastebasket. This room was used by employees of the lessee as a place in which to eat their lunch.

Appellee's vending machine was of a water cooling type. It was about 37 inches long, 25 inches wide, and 3 feet high. Its exterior was of metal and would open sufficiently at the top, when a nickel was deposited, to enable the customer to obtain the merchandise he had

purchased. The cooling unit was operated by means of an electrically driven motor and compressor, which were located immediately underneath the upper compartment or cooler. Power to operate it was obtained by plugging a cord into a double socket located in the east wall. Both this and the Seven-Up machines were plugged into this socket. The machine was entirely enclosed by metal. The lower part was ventilated from the front by a slotted strip and access thereto could be had by lifting this strip. This was apparently for convenience in servicing the motor and compressor. The top could also be unlocked and additional supplies of pop added. The lessee had a key for this purpose which permitted it to have a supply of cold pop available at all times. However, appellee owned and agreed to keep the machine in working order.

One of lessee's janitors, after thoroughly cleaning up the lunchroom, left the building about 5 a. m. on Sunday, May 8, 1949. Lessee did not operate on Sundays and apparently no one entered the building on this Sunday until shortly after 10 p. m. when another janitor reported for duty. He found the building filled with smoke and the damage, already referred to, resulting therefrom. He thoroughly examined the building and found no fire but did find that the Coca-Cola vending machine and the wooden pop cases adjacent thereto had been completely burned, leaving only the metal shell of the machine, the metal strips from the cases, and the melted and twisted glass from the bottles contained therein. On the floor surrounding this debris was a sodden mass which apparently came from the sugar in the pop. Nothing else in the lunchroom had burned. The only other evidence of the fire was a brown-scorched spot on the white finish of the Seven-Up machine, a scorched place immediately above the Coca-Cola machine on the wooden wainscoting, and the scorched wall back of the machine and pop cases.

There is some evidence that for several days immedi-

ately preceding the fire the machine, when operating, had been noisy; that on at least two occasions lessee had notified appellee of that fact; and that appellee had failed to take any action in regard thereto. There is no evidence from which it could be found that this noise was in any way connected with or a cause of the fire. This evidence, in the first place, was irrelevant and the objection thereto by appellee should have been sustained. See, Mischnick v. Iowa-Nebraska Light & Power Co., 125 Neb. 598, 251 N. W. 258; 65 C. J. S., Negligence, § 220(6), p. 1002.

As stated in Mischnick v. Iowa-Nebraska Light & Power Co., *supra:* "The doctrine of res ipsa loquitur proceeds on the theory that, under special circumstances which invoke its operation, the plaintiff is unable to specify the particular act of negligence which caused the injury, but if the petition alleges particular acts of negligence, then the plaintiff, in order to recover, must establish the specific negligence alleged, and the doctrine of res ipsa loquitur cannot be applied. 45 C. J. 1225; Marshall Window Glass Co. v. Cameron Oil & Gas Co., 63 W. Va. 202; Knies v. Lang, 116 Neb. 387."

However, we think if the doctrine has application here the following would apply: "* * * plaintiff is not deprived of the benefit of the doctrine from the mere introduction of evidence which does not clearly establish the facts or leaves the matter doubtful, for, if the case is a proper one for the application of the doctrine and if, under the rules discussed infra s. 220 (11), the pleading is such that it may be invoked, an unsuccessful attempt on the part of plaintiff to show the specific negligent act which caused his injury does not weaken or displace the presumption of negligence on the part of the defendant arising from the facts of the case by virtue of the rule of res ipsa loquitur." 65 C. J. S., Negligence, § 220(6), p. 1004.

Such would naturally be true because if the doctrine applied and appellee would attempt to show, in making

a defense, that it had caused the machine to be properly serviced then such evidence would have been proper on rebuttal.

Although, as a general rule, the mere occurrence of a fire, with resultant damage, does not raise a presumption of negligence, however, the circumstances under which a fire occurs may sometimes be such as to justify the application of the doctrine res ipsa loquitur and impose upon the defendant the burden of proving his freedom from fault. See, 22 Am. Jur., Fires, § 76, p. 643; 65 C. J. S., Negligence, § 220(12), p. 1038; Highland Golf Club v. Sinclair Refining Co., *supra.*

We have, on several occasions, done so. In the cases of Burlington & M. R. R. Co. v. Westover, 4 Neb. 268, and Rogers v. Kansas City & O. R. R. Co., 52 Neb. 86, 71 N. W. 977, we applied the doctrine where the fire was started by sparks from a steam locomotive, and, also, in Friederich v Klise, 95 Neb. 244, 145 N. W. 353, where the fire was started by sparks from a steam engine used in threshing. However, in the latter case the opinion would indicate there was evidence of a defective condition in the spark arrester on the smokestack.

The doctrine of res ipsa loquitur is of limited and restricted scope and should ordinarily be applied sparingly. We do not think it has application to the situation here presented. It seems significant that no case is cited, nor did we find one, wherein the doctrine was sought to be applied to a like situation, let alone held applicable thereto.

In view of what we have said we do not find it necessary to discuss the contention that the evidence adduced is not sufficient to support a finding that the fire started in the machine. Likewise, we will not discuss the extent to which one sought to be held must have the management and control of the instrument causing the damage and to which the doctrine is sought to be applied.

Having come to the conclusion that the trial court was correct in sustaining appellee's motion for a directed

verdict, we affirm its action in doing so and in dismissing the action.

AFFIRMED.

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Actions.

Even though based on a stockholders control agreement, a stockholder cannot bring an action in his own name for wrongs done to the corporation unless the injury is to him alone and not common to all stockholders. *E. K. Buck Retail Stores v. Harkert* 867

Adoption.

1. When a dependent child has been disposed of by placement the person, association, institution, or probation officer with whom placed may with assent of the juvenile court consent to adoption in an adoption proceeding. *Krell v. Jenkins* 554
2. A decree of adoption of a child adjudged to be dependent by the juvenile court may be granted in an adoption proceeding in the county court on consent of a person, association, institution, or probation officer to whom or which the custody of the child has been committed, provided assent to such consent has been given by the juvenile court. *Krell v. Jenkins* 554
3. The action of the juvenile court for the determination of whether or not a minor is a dependent child is not an adoption proceeding. *Krell v. Jenkins* 554
4. One of the functions of the county court in an adoption proceeding is the determination of what is for the best interests of the child. *Krell v. Jenkins* 554
5. The failure of a petitioner to sign or verify a petition for adoption is an irregularity but it is not jurisdictional. *Hiatt v. Menendez* 914
6. After two years have elapsed since the entry of a decree of adoption, it is conclusively presumed as against defects appearing on the face of the record that all proceedings in connection with the adoption were in all respects valid. *Hiatt v. Menendez* 914

Adverse Possession.

1. Where a claimant has shown open, visible, continuous, and unmolested use of land for a period of time sufficient to acquire an easement by adverse user, such use will be presumed to be under claim of right. *Butts v. Hale* 334

2. The presumption of use under claim of right which flows from open, visible, continuous, and unmolested use of land for a time sufficient to acquire an easement by adverse use prevails unless it is overcome by a preponderance of evidence. *Butts v. Hale* 334
3. A right by adverse user over adjacent lands, having been established, passes in succession to subsequent grantees. *Butts v. Hale* 334

Appeal and Error.
1. The proof in a trial of a jury case must be confined to legal evidence tending to prove or disprove an issue made by the pleadings. The admission of improper evidence is prejudicial error if it may have influenced the verdict. *Borden v. General Insurance Co.* 98
2. Erroneous reception of evidence must be considered prejudicial error unless it appears that it did not unfavorably affect the result of the trial. *Borden v. General Insurance Co.* 98
3. The finding of the trial court as to qualifications of a juror will not be set aside unless error is manifest or unless there has been a clear abuse of discretion. *Losieau v. State* 115
4. The finding of the trial court that a great emergency existed which permitted the calling of talesmen will not be treated as error in the absence of a showing that the finding was manifestly erroneous or that there was a clear abuse of discretion. *Losieau v. State* 115
5. Where the defendant objects thereto and his objection is overruled, prejudicial error will be presumed if the method provided by statute for securing jurors is disregarded. *Losieau v. State* 115
6. The right of appeal is statutory. Unless a statute provides for an appeal from the decision of a quasi-judicial tribunal, such right does not exist. *Jungman v. Coolidge* 122
7. Where no method of review by appeal or otherwise is provided, proceedings in error afford the remedy to determine and correct errors of a quasi-judicial tribunal. *Jungman v. Coolidge* 122
8. The rule requiring an offer to prove the facts sought to be elicited applies to the proponent of the witness but not to cross-examination. *Rice v. American Protective Health & Accident Co.* 256
9. The giving of erroneous instructions is not cause for

reversal if the instructions are more favorable to the complaining party than he is entitled to under the law. *Shiers v. Cowgill* 265
10. A divorce suit is tried de novo on appeal to the Supreme Court. *Mason v. Mason* 279
Wakefield v. Wakefield 611
Hoffmeyer v. Hoffmeyer 842
11. An opinion of the Supreme Court, when made a part of the mandate, should be examined in conjunction with the mandate to determine the nature and terms of the judgment to be entered, or the action to be taken thereon. *Master Laboratories, Inc. v. Chesnut* 317
12. A reversal of a judgment and the remand of a cause for further proceedings not inconsistent with the opinion, without specific direction to the trial court as to what it shall do, is a general remand and the parties stand in the same position as if the case had never been tried. *Master Laboratories, Inc. v. Chesnut* 317
13. Where on a retrial the facts are the same as those adduced at the former trial, the former findings are binding on the parties, the trial court, and the Supreme Court as the law of the case. It is only where the findings on a retrial are made on facts relating to the issues which are materially and substantially different that the law of the case does not apply. *Master Laboratories, Inc. v. Chesnut* 317
14. Where all new evidence adduced at the retrial of a case is incompetent, the rule as to the law of the case applies. *Master Laboratories, Inc. v. Chesnut* 317
15. An appeal in a workmen's compensation case will be considered by the Supreme Court de novo upon the record, subject to the rule with respect to superior opportunity of the trial court to see the witnesses and hear their testimony. *Dietz v. State* 324
16. Errors in instructions not prejudicial to the complaining party do not require a reversal of a judgment otherwise correct. *Becker v. Hasebroock* 353
17. The ruling of the trial court in regard to the scope of cross-examination will be sustained in the absence of an abuse of discretion. *Griffith v. State* 448
18. If a witness is permitted to be cross-examined as to matters not brought out on his direct examination, the judgment in the case will not be reversed if it appears that no prejudice could have resulted therefrom. *Griffith v. State* 448
19. The fact alone that a litigant is subjected to incon-

venience, annoyance, or expense by an order of the court does not give him a right to appeal from it if he is not thereby barred from asserting or defending his claim of personal or property rights in court. *Rehn v. Bingaman* 467

20. Rule for trial de novo of actions in equity is stated. *Keim v. Downing* 481
Gallagher v. Vogel 670
Kerns v. Kerns 786

21. The Supreme Court may in an equity case give proper consideration to the fact that the trial court inspected the premises and the physical matters involved and that its examination thereof constituted evidence because the relevant facts observed necessarily affected the mind of the court and tended to influence belief or unbelief on the matters at issue in the case. *Keim v. Downing* 481

22. On appeal, in testing the sufficiency of the 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. *Dorn v. Sturges* 491

23. Instructions must be considered and construed together. If they are not sufficiently specific in some respects, it is the duty of counsel to offer requests for instructions that will supply the omission, and, unless this is done, the judgment will not ordinarily be reversed for such defects. *Dorn v. Sturges* 491

24. The proof in a trial of a jury case must be confined to legal evidence which tends to prove or disprove an issue in the case. The admission of improper evidence is prejudicial error if it may have influenced the verdict. *State v. County of Cheyenne* 533

25. If it does not appear from the record that evidence wrongfully admitted in the trial of a jury case was harmless, its reception must be considered prejudicial error. *State v. County of Cheyenne* 533

26. In the absence of a bill of exceptions, a question will not be considered, a determination of which requires an examination of evidence produced at the trial. *National Fire Ins. Co. v. Evertson* 540
Palmer v. Capitol Life Ins. Co. 760

27. In the absence of a bill of exceptions on appeal to the Supreme Court, it will be presumed that the determination on the issues of fact presented by the

pleadings was established by evidence and that such issues were correctly decided by the district court. *National Fire Ins. Co. v. Evertson* 540
Caldwell v. Savage 603
Palmer v. Capitol Life Ins. Co. 760

28. To review errors in ruling on evidence in an equity case appealed to the Supreme Court, a motion for a new trial must be filed assigning as error the admission or rejection of the evidence. *Rush v. Heinisch* 545

29. On an appeal from an order of the State Railway Commission while acting within its jurisdiction, the matter for decision is whether or not the order is unreasonable or arbitrary. *Chicago & N. W. Ry. Co. v. City of Norfolk* 594
Nebraska State Railway Commission v. Service Oil Co. 712

30. In order that a stipulation of facts may be considered on appeal, such stipulation must be identified and introduced in evidence on the trial of the case and preserved in a bill of exceptions. *Caldwell v. Savage* 603

31. The mode of trial in the lower court may affect the scope of the review both by reason of statutory provisions and because consent to a particular mode of trial may operate as a waiver of the right to have certain questions reviewed. *Peterson v. State* 618

32. In either civil or criminal actions, tried to the court without a jury, the erroneous admission of evidence is immaterial on appeal where the judgment below is sustained by sufficient competent evidence. *Peterson v. State* 618

33. Instructions are to be considered together. 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. *Callies v. State* 640

34. Objection that no attempt was made by the condemner to agree with the condemnee as to the amount of damages may be raised on appeal to the district court. *Higgins v. Loup River Public Power Dist.* 652

35. The Supreme Court has authority to reduce a sentence imposed by the district court for the commission of a crime but it will not often do so if the crime involves violence and moral turpitude. *Sall v. State* 688

36. If the punishment of an offense is left to the discretion of the trial court to be exercised within prescribed limits, a sentence within those limits will not

be disturbed in the absence of an abuse of such discretion. *Sall v. State* 688

37. It is the duty of the trial court, without request, to instruct the jury on each issue presented by the pleadings and supported by evidence. A litigant is entitled to have the jury instructed as to his theory of the case as shown by pleadings and evidence, and a failure to do so is prejudicial. *Harsche v. Czyz* 699

38. An instruction which conflicts with the propositions of law properly and correctly stated in another instruction on a vital issue of fact and tends to mislead or confuse the jury in deliberating on conflicting evidence is erroneous and prejudicial. *Harsche v. Czyz* 699

39. 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 and that they were correctly decided. In such situations the only issue that will be considered on appeal to the Supreme Court is sufficiency of the pleadings to support the judgment. *Gomez v. State ex rel. Larez* 738

40. Where a court does not have jurisdiction over the subject matter of an action, that question may be raised at any stage of the proceedings, even on appeal, or in a collateral action. *Gomez v. State ex rel. Larez* 738

41. Where the record contains competent evidence from which the jury may have reasonably arrived at its verdict, the judgment thereon will not be reversed for want of evidence to sustain it. *Rossmiller v. Becker* 756

42. Any assignment of error that requires an examination of evidence cannot prevail on appeal in the absence of a bill of exceptions. *Palmer v. Capitol Life Ins. Co.* 760

43. In an instruction stating the issues, the court should make a clear and concise statement thereof and not substantially copy the pleadings. Where prejudice results from the latter course, it is ground for reversal. *Snyder v. Farmers Irr. Dist.* 771

44. It is not the province of the Supreme Court in reviewing the record in an action at law to resolve conflicts in or weigh the evidence. *Snyder v. Farmers Irr. Dist.* 771

45. It is presumed in a law action that controverted facts were decided by the jury in favor of the successful party, and its finding based on conflicting evi-

dence will not be disturbed unless clearly wrong. *Snyder v. Farmers Irr. Dist.* 771

46. The procedure on appeal for review of an order granting a new trial is stated. *Pongruber v. Patrick* 799

47. Alleged errors asserted as basis for granting of new trial will be considered and determined by the Supreme Court so far as necessary, subject to the right to consider plain errors not assigned. *Pongruber v. Patrick* 799

48. Where an inspection of premises is made by the trial court in relation to issues involved, such inspection becomes a matter of evidence to be considered by the Supreme Court on appeal. *Petersen v. Thurston* 833

49. An order granting a motion to bring in an additional party in a cause is not a final or an appealable order. *Lund v. Holbrook* 854

50. When the substantial rights of the parties involved in an action remain undetermined and the cause is retained for further action, an order is not final but is interlocutory and not appealable. *Lund v. Holbrook* 854

51. An order for the production of books and papers is a mere interlocutory order and is not appealable. *Lund v. Holbrook* 854

52. A review of an adjudication of delinquency and commitment to the State Industrial School under the Juvenile Court Act may be had in the Supreme Court by appeal. *Krell v. Mantell* 900

Appearances.

1. An appearance is special when its sole purpose is to question the jurisdiction of the court. It is general if the party appearing invokes the power of the court on any question other than that of jurisdiction. *Ivaldy v. Ivaldy* 204

2. Rules governing manner of raising objection to jurisdiction of the court over the person of the defendant restated. *Ivaldy v. Ivaldy* 204

3. When a party has filed a special appearance challenging the jurisdiction of the court over his person but, before the court rules thereon, makes a general appearance he thereby waives his special appearance. *Ivaldy v. Ivaldy* 204

4. A general appearance does not relate back so as to validate the void proceedings. Its only effect is to

confer jurisdiction over the person of defendant from its date. *Ivaldy v. Ivaldy* 204

Attorney and Client.

1. Unless it is authorized by statute or a uniform course of procedure, a litigant is not entitled to the allowance of an attorney fee. *Borden v. General Insurance Co.* 98
2. An attorney fee in favor of the plaintiff upon recovery on a fire insurance policy concerning only personal property is unauthorized. *Borden v. General Insurance Co.* 98
3. Attorney's fees are allowed only in cases provided for by statute, or where the uniform course of procedure has been to allow such recovery. Where there is no legal basis for an action, an allowance of attorney's fees is not authorized. *McGuire v. McGuire* 226
4. In a disbarment proceeding the presumption of innocence applies, and the charge made against the lawyer must be established by a clear preponderance of the evidence. *State ex rel. Nebraska State Bar Assn. v. Pinkett* 509

Automobiles.

1. 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. *Paxton v. Nichols* 152
2. If the evidence is undisputed, or such that minds of men could not reasonably arrive at any other conclusion, the question of whether or not a person riding in a motor vehicle is a guest 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. *Paxton v. Nichols* 152
3. Rules stated for determining liability of automobile host to a guest proximately caused by a defective condition of the automobile. *Paxton v. Nichols* 152
4. Violations of statutes as to speed and as to stop signs are evidence of negligence. *Cunning v. Knott* 170
5. Evidence as to drinking intoxicants within a reasonable time prior to an accident is a circumstance to be considered in determining whether or not a driver of an automobile is guilty of gross negligence. *Cunning v. Knott* 170

6. When evidence in a guest case is resolved most favorably toward the existence of gross negligence, the question whether such facts will sustain a finding of the existence of gross negligence is a question of law. *Cunning v. Knott* 170
7. The burden of proof is upon a guest, riding in an automobile by invitation, to prove by a preponderance of the evidence that such owner or operator was guilty of gross negligence. The fact that the operator of the automobile may have been guilty of ordinary negligence is insufficient to warrant a recovery. *Cunning v. Knott* 170
8. Excessive speed of an automobile does not necessarily establish gross negligence, although it is a factor to be considered. *Cunning v. Knott* 170
9. It is not necessary in all cases that the operator of an automobile be aware of impending danger in order to hold him guilty of gross negligence, but that is a circumstance which should be considered. *Cunning v. Knott* 170
10. When the undisputed physical facts demonstrate that defendant was not negligent in the operation of his automobile at the time of a collision, the evidence is not sufficient to support a verdict for plaintiff. *Shiers v. Cowgill* 265
11. Where the negligence of the driver of an automobile in which plaintiff is riding as a passenger is the sole proximate cause of a collision in which plaintiff is injured, plaintiff cannot recover from a third person for such injury. *Shiers v. Cowgill* 265
12. As a general rule it is negligence as a matter of law for a motorist to drive an automobile so fast on a highway at night that he cannot stop in time to avoid a collision with an object within the area illuminated by his lights. *Haight v. Nelson* 341
13. A driver of an automobile is legally obligated to keep such a lookout that he can see what is plainly visible before him and he cannot relieve himself of that duty. In conjunction therewith, he must so drive his automobile that when he sees the object he can stop his automobile in time to avoid it. *Haight v. Nelson* 341
14. The presence of smoke, snow, fog, mist, blinding headlights, or other similar elements which materially impair or wholly destroy visibility are not to be deemed intervening causes but rather as conditions which impose upon the drivers of automobiles the

duty to exercise a degree of care commensurate with surrounding circumstances. *Haight v. Nelson* 341

15. Exceptions to general rule requiring motorist to stop within range of his vision stated. *Haight v. Nelson* 341
Andelt v. County of Seward 527

16. Ordinarily where it appears from the evidence of a witness that, although he saw an automobile in movement immediately before the accident, but he had no reasonable length of time, movement in distance, or other means to use as a basis upon which to formulate an opinion as to the speed thereof, he should not be allowed to testify in regard thereto. *Haight v. Nelson* 341

17. Statute prohibiting parking on highway does not apply to any automobile which is disabled in such manner and to such extent that it is impossible to avoid stopping and temporarily leaving such vehicle in such position. *Haight v. Nelson* 341

18. To establish a violation of statute with respect to driving an automobile in daytime without lights, there must be evidence to sustain a finding that there was not sufficient light to render persons or vehicles clearly discernible upon the highway at a distance of 500 feet ahead. *Becker v. Hasebroock* 353

19. An automobile driver may not violate the rules of the road and then invoke the doctrine of sudden emergency to relieve himself from liability to another who is injured as a result of his violation of such rules. *Becker v. Hasebroock* 353

20. A driver of a motor vehicle about to enter a highway protected by stop signs must stop as directed, look in both directions, and permit all vehicles to pass which are at such a distance and traveling at such a speed that it would be imprudent to proceed into the intersection. *Dorn v. Sturges* 491

21. In an action for damages to an automobile, where the automobile cannot be placed in substantially as good condition as it was before the injury, the measure of damages is the difference between its reasonable market value immediately before and immediately after the accident. *Dorn v. Sturges* 491

22. The duty to sound a signal warning of the approach of a motor vehicle depends largely on the circumstances of the particular case. *Dorn v. Sturges* 491

23. Where a driver of an automobile is suddenly confronted with an emergency requiring instant decision, he is not necessarily guilty of negligence in pursuing

a course which mature reflection or deliberate judgment might prove to be wrong. *Andelt v. County of Seward* 527

24. Generally guests who enter an automobile must take such vehicle as they find it and as it pleases the owner, in the exercise of his right of dominion over his property, to maintain it. *Cronin v. Swett* 662

25. Rule stated with respect to liability of owner to guest on account of defective or dangerous condition of automobile. *Cronin v. Swett* 662

26. A motor vehicle having started to cross an intersecting street in accordance with a signal light is ordinarily entitled to complete the crossing notwithstanding a change in lights. *Laurinat v. Giery* 681

27. A person entering a street intersection with a traffic light in his favor is under an obligation to use due care and to yield the right-of-way to vehicles already in the intersection. His right-of-way is subject to the rights of those already in the intersection. *Laurinat v. Giery* 681

28. A motorist is not obligated to stop his motor vehicle or turn aside because a person gets so close to it that it is possible for him to walk into it. *Laurinat v. Giery* 681

29. There is no presumption or inference as to the negligence of a driver of an automobile arising from the mere fact of collision between vehicles. *Pongruber v. Patrick* 799

30. A driver of an automobile should have his car under such reasonable control as will enable him to avoid collision with other vehicles, assuming that the drivers thereof will exercise due care. *Pongruber v. Patrick* 799

31. Reasonable control of motor vehicles is such as will enable the operators thereof to avoid collision with other vehicles operated without negligence and with pedestrians using due care. *Pongruber v. Patrick* 799

Banks and Banking.

1. One of two joint owners of money, deposited in a joint account payable to either or the survivor, cannot divest the survivorship right in the jointly owned account by withdrawing the money and depositing it in his individual account without the knowledge and consent of the other. *Crowell v. Milligan* 127

2. Where one joint tenant makes withdrawals from a joint bank account during the life of both tenants,

the joint tenancy is not destroyed, the proceeds retain the joint tenancy character wherever they can be traced unless the character is changed by agreement of the parties, and the deprived tenant can exercise his right of survivorship as to the entire fund which has retained the joint tenancy character. *Crowell v. Milligan* 127

Bills and Notes.

Where the endorsement of a promissory note waives demand, protest, and notice of nonpayment, and payment is guaranteed, the endorser is obligated to pay the note to any subsequent endorser. *Securities Acceptance Corp. v. Blake* 848

Burglary.

When two persons are apprehended in the commission of a burglary, evidence of possession of burglarious tools by one is proper evidence against the other. *Phillips v. State* 419

Carriers.

1. As a condition precedent to the issuance of a certicate of convenience and necessity to a motor carrier, the Nebraska State Railway Commission must find that the service is or will be required by present or future public convenience and necessity. *Edgar v. Wheeler Transport Service, Inc.* 1
2. An applicant for a certificate of convenience and necessity must show that the operation under the certificate is and will be required by the present or future public convenience and necessity. *Edgar v. Wheeler Transport Service, Inc.* 1

Cemeteries.

1. Where a cemetery association is shown by appropriate records to have been organized under the Cemetery Association Act, a presumption of its continued existence arises. *Tetschner v. Cram* 734
2. A cemetery association organized under the Cemetery Association Act is authorized to create a perpetual care fund and to receive property as trustee for the purpose of providing for the care of burial lots, graves, and the like. *Tetschner v. Cram* 734
3. A bequest to an existing cemetery association, directing that it be used for the purpose of maintaining its cemetery in proper condition and requesting that

the graves of the testator's family and relatives have preference and be properly cared for, constitutes a valid bequest in trust for the purposes indicated. *Tetschner v. Cram* 734

Children Born out of Wedlock.

1. A "child born out of wedlock" is one whose parents were not married to each other at the time of the birth of the child. *Gomez v. State ex rel. Larez* 738
2. The mother of a "child born out of wedlock" may be at the time of conception and birth of the child a married woman. *Gomez v. State ex rel. Larez* 738
3. The mother of a "child born out of wedlock" is a proper party to make complaint under the statute. *Gomez v. State ex rel. Larez* 738
4. In a proceeding by the mother of a child born out of wedlock, the necessary allegations of the complaint are that plaintiff is a resident of the state where the complaint was filed, that on a day certain she was delivered of a child born out of wedlock, and that the accused is its father. *Rossmiller v. Becker* 756

Constitutional Law.

1. Courts will not declare a statute unconstitutional at the suit of one who is not injuriously affected thereby. *Hanson v. City of Omaha* 403
2. Statutes providing for the levy of an ad valorem personal property tax on flight equipment used in interstate commerce, when such flight equipment is wholly and continuously outside of the state of the owner's domicile during the tax year, is not violative of the Commerce Clause of the Constitution of the United States when such tax bears a fair and reasonable relation to the use of the property in the taxing state. *Mid-Continent Airlines v. State Board of Equalization & Assessment* 425
3. Statutes providing for taxation of flight equipment of aircraft did not violate state or federal Constitutions. *Mid-Continent Airlines v. State Board of Equalization & Assessment* 425
4. The Legislature may not delegate to private individuals either legislative or judicial functions. *Nickel v. School Board of Axtell* 813
5. The fixing of boundaries of a political subdivision of a state into counties or districts for public purposes is a legislative function. *Nickel v. School Board of Axtell* 813

6. The Legislature may authorize the organization of districts for public purposes by other governmental bodies, and the proceeding may be proposed or initiated by private individuals. *Nickel v. School Board of Axtell* 813
7. Where a district is authorized to be initiated by private individuals, there must be some provision for determining whether the particular district is for the public health, convenience, or welfare, and a means by which an aggrieved property owner, whose property is injuriously affected, may have his rights judicially determined. *Nickel v. School Board of Axtell* 813
8. In those instances in which the Legislature may delegate authority, it may place upon the authority so granted such restrictions and limitations as it chooses. It may also prescribe the manner and circumstances of the exercise of such power. *Nickel v. School Board of Axtell* 813
9. Where financial burdens are necessarily imposed on property owners by an exercise of judicial power pursuant to specific terms of a statute, due process of law requires notice and an opportunity to be heard. *Nickel v. School Board of Axtell* 813
10. Questions of public policy, convenience, and welfare, as related to the creation of municipal corporations, or any change in the boundaries thereof, are in the first instance of purely legislative cognizance. When delegated to any public body having legislative power, any action in regard thereto does not come within the due process clause of either the state or federal Constitutions. *Nickel v. School Board of Axtell* 813
11. When the public body to which authority is delegated to create a school district or to change the boundaries thereof must find certain facts to exist upon which the Legislature has said depends its authority to declare such district or any change therein to exist, then the questions presented are of a quasi-judicial character. In such cases a hearing must be had to determine if such facts exist and proper notice thereof must be provided for and given to all parties interested therein. *Nickel v. School Board of Axtell* 813
12. It is mandatory under the Constitution that stockholders of a corporation be given the privilege of cumulative voting in the election of directors. *E. K. Buck Retail Stores v. Harkert* 867

13. The constitutional provision conferring the right of cumulative voting does not prohibit or restrict stockholders from contracting between themselves. *E. K. Buck Retail Stores v. Harkert* 867

Contempt.

A refusal to answer such improper questions as would constitute abuse of process is not a contempt and may not be punished. A witness is entitled to his privileges and immunities as well when a deposition is taken as when examined in open court. *Rice v. State* 579

Continuances.

An application for a continuance is addressed to the sound discretion of the trial court and its ruling thereon will not be disturbed unless it appears that the rights of the defendant were prejudiced thereby. *Phillips v. State* 419

Contracts.

1. A cost-plus contract is one where the total cost to the contractor represents the whole payment to be made to him plus a stated percentage of profit. *Grothe v. Erickson* 248
2. In a cost-plus contract the performing party's profit is limited to the amount specified. *Grothe v. Erickson* 248
3. To permit parol evidence to explain a contract as ambiguous, there must be a real uncertainty as to which of two or more possible meanings represent the true intention of the parties after pertinent rules of interpretation have been applied. *Master Laboratories, Inc. v. Chesnut* 317
4. When a written agreement shows a complete legal obligation, without uncertainty or ambiguity as to the object and extent of the engagement, it is conclusively presumed that the whole agreement of the parties was included therein. Omission of a point which might have been embodied therein will not open the door to the admission of parol evidence. *Master Laboratories, Inc. v. Chesnut* 317
5. Contracts must receive a reasonable construction, so as to give effect to the intention of the parties thereto and carry out, rather than defeat, the purpose for which they were executed. *Gallagher v. Vogel* 670
6. Language used in a contract prepared by one of the parties thereto, which is susceptible to more than one

construction, should receive such a construction as the party preparing the same at the time supposed the other party would give to it, or such a construction as the other party would be fairly justified in giving to it. *Gallagher v. Vogel* 670

7. The intention of the parties governs the meaning of words employed. A prospective rather than a retrospective meaning is favored, and the context determines whether a word is used in its broad or restricted sense. *Gallagher v. Vogel* 670

8. Partial restraints in the exercise of any business are not unreasonable when they are ancillary to a valid contract affecting the business of the party in whose favor they are imposed, if made in good faith and apparently necessary to afford reasonable protection to such party. *Gallagher v. Vogel* 670

9. When a written contract has been unconditionally delivered in the sense that it is intended to take effect as a legal obligation, a contemporaneous oral agreement, providing that the contract is not to be performed if a certain condition or contingency occurs, cannot be shown. *Securities Acceptance Corp. v. Blake* 848

10. In the absence of fraud, mistake, or ambiguity, a written agreement is the best and the only competent evidence as to what was the contract of the parties. *Securities Acceptance Corp. v. Blake* 848

11. Courts may invalidate contracts as being in contravention of public policy only in cases free from doubt. Courts should not destroy the right to contract by enabling parties to escape their contractual obligations on the ground of public policy unless the preservation of the public welfare imperatively so demands. *E. K. Buck Retail Stores v. Harkert* 867

12. A stockholders control agreement, providing that each of two contracting stockholders will designate two members of a board of directors of four, is not void per se as being against public policy. *E. K. Buck Retail Stores v. Harkert* 867

13. A stockholders control agreement, operative during the period that the contracting stockholder providing new funds for the corporation shall be a stockholder in the corporation, is for a definite period and is not void on the ground of public policy. *E. K. Buck Retail Stores v. Harkert* 867

Corporations.

1. "Organize," or "organization," as used in reference to corporations, means the election of officers, providing for the subscription and payment of the capital stock, the adoption of by-laws, and such other steps as are necessary to endow the legal entity with the capacity to transact the legitimate business for which it was created. *Omaha Nat. Bank v. Jensen* 22
2. The place of its origin determines whether a corporation is foreign or domestic, without reference to the residence of its stockholders or incorporators, or the place where its business is transacted. *Omaha Nat. Bank v. Jensen* 22
3. A domesticated foreign corporation, although becoming a body corporate in the state of domestication, nevertheless remains a foreign corporation as distinguished from a corporation organized under the laws of the state of domestication. *Omaha Nat. Bank v. Jensen* 22
4. Applicable statute for the valuation for taxation of the shares of stock of a foreign corporation, domesticated in this state, is determined. *Omaha Nat. Bank v. Jensen* 22
5. It is mandatory under the Constitution that stockholders of a corporation be given the privilege of cumulative voting in the election of directors. *E. K. Buck Retail Stores v. Harkert* 867
6. The constitutional provision conferring the right of cumulative voting does not prohibit or restrict stockholders from contracting between themselves. *E. K. Buck Retail Stores v. Harkert* 867
7. A majority stockholder may lawfully contract to vote his stock for certain persons as directors in order to secure additional funds for the corporation when such agreement is reasonable, intended to be for the benefit of the corporation, and does no injury other than the contemplated detriment to the contracting stockholders. *E. K. Buck Retail Stores v. Harkert* 867
8. A control agreement, providing that each of two contracting stockholders will designate two members of a board of directors of four, is not void per se as being against public policy. *E. K. Buck Retail Stores v. Harkert* 867
9. Estoppel to deny the validity of a stockholders control agreement arises from the acceptance of the

benefit of a provision thereof for a long period of time. *E. K. Buck Retail Stores v. Harkert* 867

10. A stockholders control agreement, operative during the period that the contracting stockholder providing new funds for the corporation shall be a stockholder in the corporation, is for a definite period and is not void on the ground of public policy. *E. K. Buck Retail Stores v. Harkert* 867

11. Even though based on a stockholders control agreement, a stockholder cannot bring an action in his own name for wrongs done to the corporation unless the injury is to him alone and not common to all stockholders. *E. K. Buck Retail Stores v. Harkert* 867

Counties.

1. A right of action against a county for the recovery of damages resulting from a defective highway or bridge was unknown to the common law. *Olson v. County of Wayne* 213

2. In this state, the source of liability of a county for damages from a defective highway or bridge is statutory. *Olson v. County of Wayne* 213

3. A county is obligated to use reasonable and ordinary care in the construction, maintenance, and repair of its highways and bridges so that they will be reasonably safe for a traveler using them while he is in the exercise of reasonable and ordinary caution and prudence. *Olson v. County of Wayne* 213

4. The duty of a county to maintain its highways and bridges will not be extended beyond the words and fair implication of the statutory liability. *Olson v. County of Wayne* 213

5. A county is not an insurer of the safety of the roads and bridges maintained by it for the use of the public. *Olson v. County of Wayne* 213

6. The word insufficiency as used in statute requiring county to keep road or bridge in repair means inadequate to the need, use, or purpose of the highway. *Olson v. County of Wayne* 213

7. The word repair as used in the road laws means to restore to a sound or good condition after decay, injury, dilapidation, or partial destruction. *Olson v. County of Wayne* 213

8. In an action to recover damages from a county by virtue of a defective highway or bridge, the burden is on the plaintiff to establish that negligence of the county was the proximate cause of the injury or that

it was a cause that proximately contributed to it. *Olson v. County of Wayne* 213

9. Negligence may not be predicated upon the crookedness of a county highway or the location of a bridge constructed in accordance with the general plans of the highway and adopted as a part of it. *Olson v. County of Wayne* 213

10. A county is not obligated to erect and maintain safety warning signs along its highways apprising the public of conditions such as curves, turns, location of bridges, and similar situations that may be hazardous, unless the duty to exercise reasonable and ordinary care in the maintenance of its highways requires it to do so at a particular location. *Olson v. County of Wayne* 213

Courts.

1. The jurisdiction of the county court to permit the filing of a belated claim against the estate of a deceased person depends upon good cause shown, and in the absence thereof there is no judicial discretion for the granting of such permission. *Lesoing v. Dirks* 183

2. Where a court does not have jurisdiction over the subject matter of an action that question may be raised at any stage of the proceedings, even on appeal, or in a collateral action. *Gomez v. State ex rel. Larez* 738

3. Courts of general jurisdiction have the inherent power to do all things necessary for the proper administration of justice and equity within the scope of their jurisdiction. *Hoffmeyer v. Hoffmeyer* 842

4. If a court has jurisdiction of the parties and the subject matter of the action, a judgment rendered is not void even though the court was in error in holding that a cause of action was properly stated. *Gasper v. Mazur* 857

5. If the allegations of a petition are sufficient to inform the defendant the relief sought by the plaintiff and if the court has power to grant it in a proper action, jurisdiction exists. *Gasper v. Mazur* 857

6. A review of an adjudication of delinquency and commitment to the State Industrial School under the Juvenile Court Act may be had in the Supreme Court by appeal. *Krell v. Mantell* 900

7. In a hearing before the juvenile court the customary rules of evidence must be adhered to and a find-

ing of fact may not rest upon hearsay. *Krell v. Mantell* 900

Criminal Law.

1. The charge that one is an habitual criminal is not the charge of a distinct offense or crime, but is a direction of attention to facts which under the statute and the crime charged in the information are determinative of the penalty to be imposed. *Losieau v. State* 115
2. It is not error for the district court, in its discretion, before hearing on a count of an information charging that one is an habitual criminal, to allow an amendment to such count unless actual prejudice is shown. *Losieau v. State* 115
3. The test of whether a fact inquired of in cross-examination is collateral is, would the cross-examining party be entitled to prove it as a part of his case tending to establish his plea. *Griffith v. State* 448
4. If a witness is cross-examined on a matter collateral to the issue, he cannot as to his answer be subsequently contradicted by the party conducting the examination. *Griffith v. State* 448
5. The ruling of the trial court in regard to the scope of cross-examination will be sustained in the absence of an abuse of discretion. *Griffith v. State* 448
6. If a witness is permitted to be cross-examined as to matters not brought out on his direct examination, the judgment in the case will not be reversed if it appears that no prejudice could have resulted therefrom. *Griffith v. State* 448
7. In a criminal prosecution rebuttal testimony on behalf of the State may be given by witnesses whose names are not endorsed on the information. *Griffith v. State* 448
8. A defendant in a criminal case who becomes a witness subjects himself to the rules of law applicable to other witnesses. *Griffith v. State* 448
9. The credibility of witnesses and the weight of the evidence are for the jury to determine in a criminal case. The verdict of the jury may not be disturbed by the Supreme Court unless it is clearly wrong. *Griffith v. State* 448
   Sall v. State 688
10. Unless otherwise provided by statute, one charged with a misdemeanor has the right to demand a trial

by jury but may waive his right thereto. *Peterson v. State* 618

11. The procedure with regard to peremptory challenges is left to the sound discretion of the trial court. Its decision will not be disturbed unless it clearly appears that there has been an abuse of discretion prejudicial to defendant. *Sherrick v. State* 623
Callies v. State 640

12. Great latitude should be allowed in cross-examination of an accomplice who testifies for the State. He may be required to disclose all that he and his associates may have said or done in relation to the offense, and disclose whether he has in any manner been promised leniency or immunity for testifying. *Sherrick v. State* 623
Callies v. State 640

13. When the district court has by its instructions fully and correctly stated the law as it should be applied to the facts disclosed by the evidence in a criminal prosecution, it is not required to give further or additional instructions requested by defendant. *Sherrick v. State* 623

14. Any attempt by the trial court to collaterally encourage, invite, or induce a verdict of guilty in a criminal case is prejudicial error requiring reversal. *Sherrick v. State* 623

15. In a criminal case, a trial court is justified in directing a verdict of not guilty only (1) where there is a total failure of competent proof to support a material allegation in the information, or (2) where the testimony adduced is of so weak or doubtful a character that a conviction based thereon could not be sustained. *Sherrick v. State* 623
Callies v. State 640

16. Whoever aids, abets, or procures another to commit any offense may be prosecuted and punished as if he were the principal offender. *Callies v. State* 640

17. A common purpose among two or more persons to commit a crime need not be shown by positive evidence but may be inferred from the circumstances surrounding the act and from the defendant's conduct subsequent thereto. *Callies v. State* 640

18. Intent is seldom capable of direct proof. It is usually inferred from the proven surrounding circumstances. Participation in criminal intent may be inferred from presence, companionship, and conduct

before and after the offense is committed. *Callies v. State* 640

19. A district court within its district may hold a preliminary hearing. *Callies v. State* 640

20. Peremptory challenges are not to be exercised until the jurors have been passed for cause and 12 persons are in the jury box having the qualifications of jurors. *Callies v. State* 640

21. When a witness has been previously examined in open court and cannot be produced at the trial, the evidence given at the preliminary hearing for the same offense may be used at the trial, providing there is evidence of diligent search and inquiry as to the whereabouts of the witness and his unavailability to testify. *Callies v. State* 640

22. Direct evidence of intent to commit a crime is not required. It may be established by circumstances. *Sall v. State* 688

23. In criminal law, "malice" may denote that condition of the mind which is manifested by the intentional doing of a wrongful act without just cause or excuse. *Sall v. State* 688

24. An instruction in a criminal case is not required to contain the exact language of the statute, if words equivalent in meaning are used in defining the offense or the elements of the case that the State must establish to justify conviction of the accused. *Sall v. State* 688

25. It is a general rule that, on the trial of one accused of crime, proof of a distinct and independent offense of similar nature is inadmissible. In order for evidence of an independent offense to be admissible it must appear that it is within one of the recognized exceptions to the general rule. *Sall v. State* 688

26. Evidence of another crime, similar to that charged, is relevant and admissible if it tends to prove a particular criminal intent which is necessary to constitute the crime charged. *Sall v. State* 688

27. Whether a previous offense is too remote or whether it is sufficiently similar to the charge on trial is committed to the discretion of the trial court. *Sall v. State* 688

28. The Supreme Court has authority to reduce a sentence imposed by the district court for the commission of a crime but it will not often do so if the crime involves violence and moral turpitude. *Sall v. State* 688

29. If the punishment of an offense is left to the discretion of the trial court to be exercised within prescribed limits, a sentence within those limits will not be disturbed in the absence of an abuse of such discretion. *Sall v. State* 688

Crops.

1. The measure of damages for the destruction of a growing crop is the value thereof in the condition in which it exists at the time of its destruction. *Ricenbaw v. Kraus* 723
2. Damages based upon the value of unmatured crops cannot be recovered in case of either uncertainty or remoteness. The question of whether damages based on the result of an unmatured crop are speculative must be determined by whether there is sufficient data to determine with reasonable certainty the probable value it would have had if matured. *Ricenbaw v. Kraus* 723

Damages.

1. Nominal damages may be recovered where a cause of action for a legal wrong is established, but there is no proof of actual damages. *Stewart v. Spade Township* 93
2. The failure to allow nominal damages is reversible error where it affects a substantial right of plaintiff or prevents him from recovering costs. The rule, however, is otherwise where plaintiff is not thus injured. *Stewart v. Spade Township* 93
3. 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 if it is clear that the jury disregarded the evidence or rules of law. *Shiers v. Cowgill* 265
4. In an action for damages, where the law furnishes no legal rule for measuring them, the amount to be awarded rests largely in the sound discretion of the jury and courts are reluctant to interfere with a verdict so rendered. *Shiers v. Cowgill* 265
5. Funeral expenses cannot be recovered in the absence of proof that they represent the fair and reasonable value of the materials furnished and the services rendered. *Becker v. Hasebroock* 353

6. Where a verdict in a personal injury case is excessive and it appears to have been returned under the influence of passion and prejudice, it is the duty of the Supreme Court to set the verdict aside and grant a new trial. *Peacock v. J. L. Brandeis & Sons* 514

7. Where it is clear that a verdict is excessive but there is no method by which the court can rationally ascertain the extent of the excess, a remittitur cannot be properly required. *Peacock v. J. L. Brandeis & Sons* 514

8. An award of damages by a jury will not be disturbed on appeal if it is supported by evidence and bears a reasonable relationship to the elements of injury and damage proved. *Peacock v. J. L. Brandeis & Sons* 514

9. Recovery of damages for breach of an agreement not to re-enter business is not precluded by difficulty of making exact computation. *Gallagher v. Vogel* 670

10. In an action for breach of contract not to re-enter competitive business, plaintiff in order to recover substantial damages must furnish such data as will enable the court, with a reasonable degree of certainty and exactness, to estimate the actual damages. If he fails to do this he can recover only a nominal sum. *Gallagher v. Vogel* 670

11. A party injured by a breach of contract is entitled to recover all of his damages, including gains prevented as well as losses sustained, provided they are certain and such as might naturally be expected to follow the breach. *Gallagher v. Vogel* 670

12. The trial court should instruct the jury on the proper measure of damages, and failure to do so is error. *Harsche v. Czyz* 699

13. The measure of damages for the destruction of a growing crop is the value thereof in the condition in which it exists at the time of its destruction. *Ricenbaw v. Kraus* 723

14. Damages based upon the value of unmatured crops cannot be recovered in case of either uncertainty or remoteness. The question of whether damages based on the result of an unmatured crop are speculative must be determined by whether there is sufficient data to determine with reasonable certainty the probable value it would have had if matured. *Ricenbaw v. Kraus* 723

Deeds.

1. Where it is sought to establish by parol testimony that a deed absolute on its face is a mortgage, the evidence must be clear, convincing, and satisfactory. *Kerns v. Kerns* 786
2. Acts and declarations of a grantor in hostility to a deed, subsequent to the time of the delivery of the deed, are incompetent as against the grantee. *Kerns v. Kerns* 786
3. A deed, delivered to grantee in grantor's lifetime, is operative, though enjoyment of estate conveyed is postponed until grantor's death, as present estate or interest is transferred by such delivery. *Kerns v. Kerns* 786

Depositions.

1. In the absence of waiver or agreement in the taking of depositions, the notice required by statute is an essential prerequisite to the vesting of authority in a notary public to issue subpoenas, take the testimony, enforce the attendance of witnesses, or perform any function in connection with the taking of depositions. *Rice v. State* 579
2. A refusal to answer such improper questions as would constitute abuse of process is not a contempt and may not be punished. A witness is entitled to his privileges and immunities as well when a deposition is taken as when examined in open court. *Rice v. State* 579

Disbarment.

In a disbarment proceeding the presumption of innocence applies, and the charge made against the lawyer must be established by a clear preponderance of the evidence. *State ex rel. Nebraska State Bar Assn. v. Pinkett* 509

Divorce.

1. A decree of divorce may not be granted on the uncorroborated declarations, confessions, or admissions of the parties to the case. *Hines v. Hines* 20
   Wakefield v. Wakefield 611
2. In determining the sufficiency of the evidence in a divorce case the degree of corroboration required necessarily relates itself to the facts of the particular case. This does not eliminate the statutory

requirement of corroboration of the essential facts. *Hines v. Hines* 20

3. A decree awarding alimony and child support in an action for divorce does not become dormant by lapse of time. The defense of the statute of limitations is not available to defeat recovery of delinquent payments. *Nowka v. Nowka* 57

4. A conveyance of real estate by a husband to his wife with the intent to avoid payments under a decree of divorce obtained by a former wife is a fraudulent conveyance as to the former wife. *Nowka v. Nowka* 57

5. A conveyance of real estate by a husband to his wife where there are delinquent payments under a decree of divorce obtained by a former wife is presumptively fraudulent. The burden is on the transferee to establish the good faith of the transaction. *Nowka v. Nowka* 57

6. Elements of extreme cruelty stated. *Roberts v. Roberts* 163
Messer v. Messer 312
Wakefield v. Wakefield 611

7. A general rule as to the degree of corroboration required in a divorce action cannot be stated, as each case must be decided on its own facts and circumstances. *Roberts v. Roberts* 163
Wakefield v. Wakefield 611

8. By statute, either party to a divorce action may within 6 months of the date of entry of decree make application to have the decree set aside or modified. *Roberts v. Roberts* 163

9. If a motion to set aside or modify a decree of divorce is made pursuant to statute, the court may in the exercise of a sound discretion grant it and vacate or modify the decree. *Roberts v. Roberts* 163

10. The right to vacate or modify a decree of divorce within 6 months is not absolute but must be exercised within a sound judicial discretion. *Roberts v. Roberts* 163

11. To constitute a sound judicial discretion in vacating or modifying a decree of divorce it must be shown that (1) good reason therefor exists, and (2) such action would not produce an unconscionable result. *Roberts v. Roberts* 163

12. Where permanent alimony is not claimed and it is not made an issue in a divorce action, the court is

not warranted in allowing permanent alimony. *Roberts v. Roberts* 163
13. Special statutes relating to process in divorce actions are controlling. *Ivaldy v. Ivaldy* 204
14. Divorce statutes require, except when the defendant enters his voluntary appearance or service by publication is authorized, that the defendant be personally served with summons. *Ivaldy v. Ivaldy* 204
15. Where husband and wife are not living apart from each other, a wife may not successfully maintain a suit in equity against her husband for maintenance. *McGuire v. McGuire* 226
16. A divorce suit is tried de novo on appeal to the Supreme Court. *Mason v. Mason* 279
17. Upon the granting of an absolute divorce, the trial court may assign the property, both real and personal, acquired during the marriage by the joint efforts of the parties, between them as the demands of justice and equity may require. *Mason v. Mason* 279
Hoffmeyer v. Hoffmeyer 842
18. Divorce cases are tried de novo on appeal to the Supreme Court subject to the rule with respect to superior opportunity of the trial court to see the witnesses and hear their testimony. *Messer v. Messer* 312
Wakefield v. Wakefield 611
19. Rule for determination of alimony and division of property in divorce case stated. *Messer v. Messer* 312
Wakefield v. Wakefield 611
Hoffmeyer v. Hoffmeyer 842
20. Condonation is forgiveness for the past upon condition that the wrongs shall not be repeated. It is dependent upon future good conduct, and the repetition of the offense revives the wrong condoned. *Wakefield v. Wakefield* 611
21. Conduct which would not alone support a decree of divorce on the ground of extreme cruelty may be sufficient to avoid a condonation. *Wakefield v. Wakefield* 611
22. A party may condone the cruelty of the other, but one claiming condonation must establish it by clear and satisfactory proof. *Wakefield v. Wakefield* 611
23. In awarding the custody of minor children as between parents, the court looks to the best interests of such children. Children 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. *Wakefield v. Wakefield* 611

24. Custody of minor children awarded their mother in a divorce action will not be disturbed unless it is shown that the mother is an unfit person to have their custody, or that their best interests require such action. *Wakefield v. Wakefield* 611
25. Permanent alimony is founded upon the right of the wife to such support from her husband as she would be reasonably entitled to expect considering all the circumstances. Its amount rests upon the sound discretion of the court. *Hoffmeyer v. Hoffmeyer* 842
26. In determining the provision to be made in a divorce case for the support of infant children of the parties, their status, situation, and all the attendant circumstances should be considered. *Hoffmeyer v. Hoffmeyer* 842
27. If the circumstances of the parties shall change or if it shall be to the best interests of their children, the court may on its own motion revise or alter a decree of divorce so far as it concerns the care, custody, and maintenance of the children. *Hoffmeyer v. Hoffmeyer* 842

Drains.

1. Where a transcript of objections to the apportionment of benefits is filed within the statutory time, the district court acquires jurisdiction, even though the report of apportionment of benefits is not contained therein due to the mistake and act of the county clerk. *Prucka v. Eastern Sarpy Drainage Dist.* 284
2. The legality of the organization of a drainage district cannot be collaterally attacked for defects not jurisdictional. Jurisdictional defects may be shown at any time in any kind of action. *Prucka v. Eastern Sarpy Drainage Dist.* 284
3. The organization of a drainage district and the operation thereof after its establishment subserve public interests and not the private advantage to be gained by any property owner. *Prucka v. Eastern Sarpy Drainage Dist.* 284
4. Surface water is a common enemy. An owner of real estate may fight it as his judgment dictates, but he may not accumulate it in a drain, increase the flow, and discharge it on a servient estate or divert it in a different direction to the damage of a lower estate. *Keim v. Downing* 481
5. An oral arrangement for the construction and main-

tenance of a ditch and a graded road, serving as an embankment, in connection with drainage of land is valid and irrevocable if it has been accepted, executed, and used to advantage by the parties. *Keim v. Downing* 481

6. The proceeding for the establishment of a drainage district as a corporate body is purely statutory as distinguished from an action in court to adjudicate issues. *Petersen v. Thurston* 833

7. In a proceeding for the establishment of a drainage district as a corporate body, objectors may contest only on the ground that their land will not be benefited by drainage and should not be included. *Petersen v. Thurston* 833

8. In order that a drainage district may be organized under specified statutory proceedings, it must be made to appear that 160 acres or more in a contiguous body of swamp or overflowed lands will be reclaimed and protected from the effects of water by the drainage. *Petersen v. Thurston* 833

9. The feasibility and route of a drain is not a matter for consideration in the organization of a drainage district under specified statutory proceedings. *Petersen v. Thurston* 833

10. The fact that lands other than those included in the proposed drainage district might be benefited is not a bar to organization. *Petersen v. Thurston* 833

11. A "contiguous body of swamp or overflowed lands" includes adjoining lands in the same course of drainage and those bodies of land which though separated are so close together that each affects the other. *Petersen v. Thurston* 833

12. The inclusion of lands which will not be benefited in a proposed drainage district is not a bar to organization of the district, provided a contiguous body of 160 acres or more which will be benefited remains. *Petersen v. Thurston* 833

13. Where the owner seeks to have lands excluded from a drainage district on the ground that they will not be benefited, the burden is on him to satisfy the court of such contention. *Petersen v. Thurston* 833

Easements.

1. Where a claimant has shown open, visible, continuous, and unmolested use of land for a period of time sufficient to acquire an easement by adverse

user, such use will be presumed to be under claim of right. *Butts v. Hale* 334

2. The presumption of use under claim of right which flows from open, visible, continuous, and unmolested use of land for a time sufficient to acquire an easement by adverse use prevails unless it is overcome by a preponderance of evidence. *Butts v. Hale* 334
3. A parol grant of an easement or license like any other contract may rest in implication. *Keim v. Downing* 481
4. An existing easement to use an underground tile line obtained by implication or by prescription is not extinguished by a subsequent sale of the servient estate to a bona fide purchaser without notice. *Ricenbaw v. Kraus* 723
5. Every easement carries with it by implication the right of doing whatever is reasonably necessary for the full enjoyment of the easement itself. *Ricenbaw v. Kraus* 723
6. The dominant owner has the right of access to make repairs and may enter upon the servient estate for this purpose. He may not, however, inflict any unnecessary injury. *Ricenbaw v. Kraus* 723

Eminent Domain.

1. If the possibility of nonuser for the purposes for which the land is taken in eminent domain proceedings and a reverter to the state is so remote that it has no determinative value, it should not be considered in deciding the reasonable market value of the land taken. *State v. County of Cheyenne* 533
2. All damages immediate and prospective which result from the taking of property by the exercise of the power of eminent domain must be compensated in the original condemnation proceeding. *State v. County of Cheyenne* 533
3. The jury in deciding the reasonable market value of land is privileged to consider the purpose for which it is used, any use to which the land is adapted or for which it is available, the condition, situation, and surroundings of the land, and every fact and circumstance shown in evidence bearing upon its value. *State v. County of Cheyenne* 533
4. The right to exercise the power of eminent domain must be conferred by statute, either in express words or by necessary implication. Legislation conferring the power is to be strictly construed in favor of the

landowner. *Higgins v. Loup River Public Power Dist.* 652

5. Statutory provision requiring an attempt to agree with the owner before the institution of condemnation proceedings is mandatory. Condemnation proceedings instituted without first making a bona fide attempt to agree with the owner are subject to direct attack. *Higgins v. Loup River Public Power Dist.* 652
6. The attempt and failure to agree with owner must be alleged and proved, and this must appear on the face of the record. *Higgins v. Loup River Public Power Dist.* 652
7. An allegation of failure or inability to agree with the owner as to the purchase of the property, the value thereof, or the amount of damages, must be proved where such failure or inability is made a condition precedent by statute. *Higgins v. Loup River Public Power Dist.* 652
8. Condemnation proceedings commenced in a county court contemplate an informal hearing by the appraisers, a view of the lands, no record of testimony, and a report of damages assessed to be filed subject only to the right of appeal. *Higgins v. Loup River Public Power Dist.* 652
9. Objection that no attempt was made by condemner to agree with the condemnee as to the amount of damages may be raised on appeal to the district court. *Higgins v. Loup River Public Power Dist.* 652

Equity.

1. Based on the doctrine that equity will not render a decree which it is impractical to carry out, a decree for specific performance of a contract will not be granted if it would be nugatory and useless, or if it would be ineffectual or not beneficial to plaintiff. *Valentine Oil Co. v. Powers* 71
2. Where husband and wife are not living apart from each other, a wife may not successfully maintain a suit in equity against her husband for maintenance. *McGuire v. McGuire* 226

Escrows.

1. The grantor of an escrow agreement is entitled to its return when the grantee fails to perform the conditions thereof, or the contingency specified has not occurred. *Valentine Oil Co. v. Powers* 71

2. Upon performance of the condition of an escrow agreement, the grantee is entitled to delivery, which will be enforced by a decree of court. But a breach of the escrow agreement by the grantee may preclude him from bringing an action to enforce the terms thereof. *Valentine Oil Co. v. Powers* 71
3. There is no doctrine of substantial compliance governing performance of escrow agreements, and full performance only can discharge a condition precedent to valid delivery by the escrow holder. Ability to perform is not sufficient. *Valentine Oil Co. v. Powers* 71
4. While escrow conditions are ordinarily to be performed by the grantee, the necessity of action by a specified party may be obviated by his transfer of interest to another, or satified by the act of the depositor. *Valentine Oil Co. v. Powers* 71
5. The grantor loses control over an instrument placed in escrow, although he retains legal title until performance of the conditions; but, where the escrow is abandoned, it becomes ineffectual for any purpose. *Valentine Oil Co. v. Powers* 71
6. Where time is of the essence of an escrow agreement, the depositary has no authority to allow one of the parties to perform the conditions after the expiration of such time. *Valentine Oil Co. v. Powers* 71

Estates.

1. The term "special limitation" denotes that part of the language of a conveyance which causes the created interest automatically to expire upon the occurrence of a stated event. *Valentine Oil Co. v. Powers* 71
2. A possibility of reverter of real estate is not an estate or interest therein. *State v. County of Cheyenne* 533
3. A possibility of reverter has no value until the event upon which the determinable estate is limited has happened or until it can be determined that it will happen and when it will occur. *State v. County of Cheyenne* 533
4. If the possibility of nonuser for the purposes for which the land is taken in eminent domain proceedings and a reverter to the state is so remote that it has no determinative value, it should not be considered in deciding the reasonable market value of the land taken. *State v. County of Cheyenne* 533

Estoppel.

1. Public policy forbids the application of the doctrine of estoppel to the state growing out of the conduct and representations of its officers. *Omaha Nat. Bank v. Jensen* 22
2. In an action for rescission a party who has given a reason for his conduct and decision concerning a matter involved in controversy cannot, after litigation has begun, change his position and place or explain his conduct upon a different consideration. *Bennett v. Emerald Service, Inc.* 176
3. The doctrine of estoppel may be invoked against a municipal corporation where there have been positive acts by the municipal officers which may have induced the action of a party and where it would be inequitable to permit the corporation to stultify itself by retracting what its officers have done. *Nickel v. School Board of Axtell* 813
4. Estoppel to deny the validity of a stockholders control agreement arises from the acceptance of the benefit of a provision thereof for a long period of time. *E. K. Buck Retail Stores v. Harkert* 867

Evidence.

1. Courts take judicial notice of the contents of the journals of the Legislature. *Omaha Nat. Bank v. Jensen* 22
2. The owner of personal property is qualified to express an opinion of the value thereof solely because of his status as owner of it. *Borden v. General Insurance Co.* 98
3. A witness who is shown to be acquainted with property and its reasonable market value is qualified to testify to his opinion of such value. *Borden v. General Insurance Co.* 98
4. The qualification of a witness as to the value of personal property is committed to the sound discretion of the trial court and its ruling thereon will only be disturbed when clearly erroneous. *Borden v. General Insurance Co.* 98
5. The proof in a trial of a jury case must be confined to legal evidence tending to prove or disprove an issue made by the pleadings. The admission of improper evidence is prejudicial error if it may have influenced the verdict. *Borden v. General Insurance Co.* 98
6. Erroneous reception of evidence must be considered

prejudicial error unless it appears that it did not unfavorably affect the result of the trial. *Borden v. General Insurance Co.* 98

7. The rule requiring an offer to prove the facts sought to be elicited applies to the proponent of the witness but not to cross-examination. *Rice v. American Protective Health & Accident Co.* 256

8. The cross-examiner may inquire into all matters covered on direct examination as a matter of right, and a refusal to allow him to do so is error. *Rice v. American Protective Health & Accident Co.* 256

9. Physical facts may not be accepted as ground for refusal to submit a case to a jury as against the testimony of witnesses on a controverted question of fact unless such facts are demonstrable to a degree that reasonable minds cannot disagree as to their existence and unless the results flowing therefrom are demonstrable to a degree agreeable to the known and immutable laws of physics, mechanics, or mathematics. *Shiers v. Cowgill* 265

10. When there is a reasonable dispute as to what the physical facts show, the conclusions to be drawn therefrom are for the jury. The credibility of the witnesses and the weight to be given their testimony are solely for the consideration of the jury. *Shiers v. Cowgill* 265

11. To permit parol evidence to explain a contract as ambiguous, there must be a real uncertainty as to which of two or more possible meanings represent the true intention of the parties after pertinent rules of interpretation have been applied. *Master Laboratories, Inc. v. Chesnut* 317

12. When a written agreement shows a complete legal obligation, without uncertainty or ambiguity as to the object and extent of the engagement, it is conclusively presumed that the whole agreement of the parties was included therein. Omission of a point which might have been embodied therein will not open the door to the admission of parol evidence. *Master Laboratories, Inc. v. Chesnut* 317

13. The parol evidence rule is a rule of substantive law, which declares that certain kinds of facts are legally ineffective and forbids such facts to be proved at all. *Master Laboratories, Inc. v. Chesnut* 317

14. Funeral expenses cannot be recovered in the absence of proof that they represent the fair and rea-

sonable value of the materials furnished and the services rendered. *Becker v. Hasebroock* 353

15. The test of whether a fact inquired of in cross-examination is collateral is, would the cross-examing party be entitled to prove it as a part of his case tending to establish his plea. *Griffith v. State* 448

16. If a witness is cross-examined on a matter collateral to the issue, he cannot as to his answer be subsequently contradicted by the party conducting the examination. *Griffith v. State* 448

17. Extrajudicial statements of fact made by a party are available to the adverse party as admissions against interest or for impeachment. Such statements are, however, not conclusive but may be explained, rebutted, or contradicted. *Dorn v. Sturges* 491

18. Statements of an employee are admissible in evidence if they are spontaneous and so related to the accident as to be regarded as a part of it. *Peacock v. J. L. Brandeis & Sons* 514

19. When a statute authorizes a public official to make a certificate as to some matter pertaining to and part of his official duty and file or keep the same as a record belonging to his public office, such certificate is ordinarily competent evidence of the matters or facts recited therein. *Sherrick v. State* 623

20. Great latitude should be allowed in cross-examination of an accomplice who testifies for the State. He may be required to disclose all that he and his associates may have said or done in relation to the offense, and disclose whether he has in any manner been promised leniency or immunity for testifying. *Sherrick v. State* 623
Callies v. State 640

21. Certified copies of public records are evidence of those matters which are properly shown therein and may be explained by the custodian of the records when a proper foundation is laid for the admission of such testimony. *Callies v. State* 640

22. When a witness has been previously examined in open court and cannot be produced at the trial, the evidence given at the preliminary hearing for the same offense may be used at the trial, providing there is evidence of diligent search and inquiry as to the whereabouts of the witness and his unavailability to testify. *Callies v. State* 640

23. Direct evidence of intent to commit a crime is not

required. It may be established by circumstances. *Sall v. State* 688

24. It is a general rule that, on the trial of one accused of crime, proof of a distinct and independent offense of similar nature is inadmissible. In order for evidence of an independent offense to be admissible it must appear that it is within one of the recognized exceptions to the general rule. *Sall v. State* 688

25. Evidence of another crime, similar to that charged, is relevant and admissible if it tends to prove a particular criminal intent which is necessary to constitute the crime charged. *Sall v. State* 688

26. Whether a previous offense is too remote or whether it is sufficiently similar to the charge on trial is committed to the discretion of the trial court. *Sall v. State* 688

27. Hearsay testimony which is incompetent is not made admissible by reason of the death of the person who made the statement sought to be proved. *Kerns v. Kerns* 786

28. The question whether negative evidence is sufficient to take the case to the jury is to be decided according to all the circumstances of the case. No absolute rule can be laid down in regard thereto. *Pongruber v. Patrick* 799

29. An order for the production of books and papers is a mere interlocutory order and is not appealable. *Lund v. Holbrook* 854

30. In a hearing before the juvenile court the customary rules of evidence must be adhered to and a finding of fact may not rest upon hearsay. *Krell v. Mantell* 900

31. Circumstantial evidence is sufficient to sustain a verdict depending solely thereon for support if the circumstances proved by the evidence are of such a nature and so related to each other that the conclusion reached is the only one that can fairly and reasonably be drawn therefrom. *Koutsky v. Bowman* 919

Executors and Administrators.

1. The probate court may, for good cause shown, allow further time not exceeding 3 months after the expiration of the time previously allowed for the filing and determination of a claim against an estate. *Lesoing v. Dirks* 183

2. "Good cause," as employed in our statute of nonclaim, is not definitely defined therein, and the

proper interpretation and application thereof must depend upon the circumstances of each case. *Lesoing v. Dirks* 183

3. The jurisdiction of the county court to permit the filing of a belated claim against the estate of a deceased person depends upon good cause shown, and in the absence thereof there is no judicial discretion for the granting of such permission. *Lesoing v. Dirks* 183

4. A claimant against the estate of a deceased person is not entitled to have time extended beyond that duly fixed by the probate court so that he might present his claim, where such claimant has been guilty of inexcusable inattention, neglect, or lack of diligence. *Lesoing v. Dirks* 183

5. Good cause was not shown and applicant was not entitled to file a belated claim. *Lesoing v. Dirks* 183

Fires.

1. As a general rule, the mere occurrence of a fire, with resultant damage, does not raise a presumption of negligence. *Security Ins. Co. v. Omaha Coca-Cola Bottling Co.* 923

2. The circumstances under which a fire occurs may sometimes be such as to justify the application of the doctrine of res ipsa loquitur and impose upon the defendant the burden of proving his freedom from fault. *Security Ins. Co. v. Omaha Coca-Cola Bottling Co.* 923

Forgery.

1. In a prosecution for uttering a forged instrument, a conviction cannot be sustained without proof of the forgery. *Berg v. State* 863

2. To sustain a conviction for forgery it is not sufficient to show that the signature is false, but it must also affirmatively be shown that the signing was made without authority. *Berg v. State* 863

Fraud.

1. The general rule applicable to the measure of damages for fraud is that such an amount should be awarded to plaintiff as will compensate him for the loss occasioned by the fraud. *Harsche v. Czyz* 699

2. Fraud must relate to a present or preexisting fact, and cannot ordinarily be predicated on an unful-

filled promise or a statement as to a future event. *Securities Acceptance Corp. v. Blake* 848
3. Fraud as a reason for vacation of a judgment after the term at which it was rendered may only be taken advantage of by an action. *Gasper v. Mazur* 857
4. In an action to set aside a judgment on the ground of fraud, the burden is on the party charging it to clearly establish the fraud. *Hiatt v. Menendez* 914

Frauds, Statute of.
Burden and elements of proof stated where party seeks performance of an oral contract for the conveyance of land of a deceased person. *Rush v. Heinisch* 545

Fraudulent Conveyances.
1. A conveyance of real estate by a husband to his wife with the intent to avoid payments under a decree of divorce obtained by a former wife is a fraudulent conveyance as to the former wife. *Nowka v. Nowka* 57
2. A conveyance of real estate by a husband to his wife where there are delinquent payments under a decree of divorce obtained by a former wife is presumptively fraudulent. The burden is on the transferee to establish the good faith of the transaction. *Nowka v. Nowka* 57

Gifts.
1. The delivery may be symbolical or constructive if as nearly perfect and complete as the nature of the property and the attendant circumstances will permit. *Crowell v. Milligan* 127
2. Where the intention to make a gift is not clearly manifested, subsequent acts may aid in clarifying that intention. Where the intention is clear, inquiry must be confined to what occurred at the time of the transaction. *Crowell v. Milligan* 127
3. Where property is delivered by a donor to his agent with authority to deliver to a donee, and the donor dies before delivery to the donee, the attempted gift fails for want of delivery. *Crowell v. Milligan* 127

Guardian and Ward.
The Nonresident Guardianship Act permits a marshalling or collecting of the ward's assets, wherever located, without the necessity of having to commence and maintain independent guardianships in each

state or territory where assets of the ward may be located. *Howell v. Fletcher* 196

Highways.

1. A right of action against a county for the recovery of damages resulting from a defective highway or bridge was unknown to the common law. *Olson v. County of Wayne* 213
2. In this state, the source of liability of a county for damages from a defective highway or bridge is statutory. *Olson v. County of Wayne* 213
3. A county is obligated to use reasonable and ordinary care in the construction, maintenance, and repair of its highways and bridges so that they will be reasonably safe for a traveler using them while he is in the exercise of reasonable and ordinary caution and prudence. *Olson v. County of Wayne* .. 213
4. The duty of a county to maintain its highways and bridges will not be extended beyond the words and fair implications of the statutory liability. *Olson v. County of Wayne* 213
5. A county is not an insurer of the safety of the roads and bridges maintained by it for the use of the public. *Olson v. County of Wayne* 213
6. The word insufficiency as used in statute requiring county to keep road or bridge in repair means inadequate to the need, use, or purpose of the highway. *Olson v. County of Wayne* 213
7. The word repair as used in the road laws means to restore to a sound or good condition after decay, injury, dilapidation, or partial destruction. *Olson v. County of Wayne* 213
8. Evidence of use for 10 years or more by the public of a road through cultivated land, without substantial variance, with knowledge and acquiescence of the owner, raises a presumption of implied dedication and acceptance of such road as a highway. *Butts v. Hale* 334
9. Exceptions to general rule requiring motorist to stop within range of his vision stated. *Haight v. Nelson* 341
10. Statute prohibiting parking on highway does not apply to any automobile which is disabled in such manner and to such extent that it is impossible to avoid stopping and temporarily leaving such vehicle in such position. *Haight v. Nelson* 341
11. When one engaged in the lawful use of the highway

causes an obstruction to be placed upon it in such a manner as to be dangerous to traffic, he must use ordinary care to prevent injury to others where he knows that the obstruction is calculated to do injury to travelers upon the highway. *Shupe v. County of Antelope* 374

12. An obstruction includes anything which will interfere with the public's reasonable use of the highway easement. *Shupe v. County of Antelope* 374

13. A driver of a motor vehicle about to enter a highway protected by stop signs must stop as directed, look in both directions, and permit all vehicles to pass which are at such a distance and traveling at such a speed that it would be imprudent to proceed into the intersection. *Dorn v. Sturges* 491

Homesteads.

1. Any interest in real estate, either legal or equitable, that gives a present right of occupancy or posession, followed by exclusive occupancy, is sufficient to support a homestead right therein. *Mainelli v. Neuhaus* 392

2. Actual occupancy of lands or town lots, within the limits defined by statute, by a husband and wife at the time of the death of the fee-holding spouse will, in the absence of clear and satisfactory evidence to the contrary, be deemed a selection of the same from the separate property of the deceased spouse as the homestead of the husband and wife. *Mainelli v. Neuhaus* 392

3. A homestead, upon the death of the fee-holding spouse, vests instantly in the surviving spouse for life. *Mainelli v. Neuhaus* 392

4. When the holder of the legal title of the homestead dies, the law creates new estates, a life estate in his widow and an estate in remainder in his children and heirs. It is immaterial whether the widow and children continue to occupy the premises. Their estates do not depend upon the occupancy thereof after the death of the holder of the legal title, but vest in them absolutely on his death. *Mainelli v. Neuhaus* 392

Homicide.

1. In a prosecution for murder in the first degree the jury should determine the guilt or innocence of the accused and, if guilty, whether the penalty should be death or imprisonment for life. The decision should

not be influenced by or rest upon the fact of whether a pardon, parole, or other clemency is easy or difficult to secure. *Griffith v. State* 448

2. In a murder prosecution, an instruction by the court that the matter of eligibility for parole or other clemency is determined by the State Board of Pardons when it may see fit, and that the jury was not permitted to decide whether such power may or may not be exercised or to control the time or manner of such exercise, was not improper. *Griffith v. State* 448

3. The trial court may in the exercise of its discretion give or refuse to give an instruction on the effect of parole or other executive clemency. *Griffith v. State* 448

Indictments and Informations.

1. In its discretion the district court may before trial permit the amendment of a criminal information, provided the amendment does not change the nature or identity of the offense charged, and the information as amended does not charge a crime other than the one on which the accused had his preliminary examination. *Losieau v. State* 115

2. The charge that one is an habitual criminal is not the charge of a distinct offense or crime, but is a direction of attention to facts which under the statute and the crime charged in the information are determinative of the penalty to be imposed. *Losieau v. State* 115

3. A trial court may, in the exercise of its discretion, permit the names of additional witnesses to be endorsed upon an information before or after the trial has begun when there is no showing of prejudice to the rights of the defendant. *Phillips v. State* 419

4. In a criminal prosecution rebuttal testimony on behalf of the State may be given by witnesses whose names are not endorsed on the information. *Griffith v. State* 448

Infants.

1. A requisite of a complaint charging dependency of a minor is that it shall be filed by the county attorney or by a reputable person residing in the county with the consent of the county attorney. *Krell v. Jenkins* 554

2. "Dependent child" means a child under the age of

18 years who is destitute, homeless, or abandoned, or dependent upon the public for support, or has not proper parental care or guardianship. *Krell v. Jenkins* 554

3. In a case where dependency is found to exist the juvenile court may (1) place a child in an institution, (2) place it in the care of a reputable citizen, (3) place it in the care of some association, (4) place it in the custody of the Board of Control, (5) place it in care of a probation officer and allow it to remain in its own home, or (6) place it in some other suitable home, subject to the supervision of the probation officer. *Krell v. Jenkins* 554

4. When a dependent child has been disposed of by placement the person, association, institution, or probation officer with whom placed may with assent of the juvenile court consent to adoption in an adoption proceeding. *Krell v. Jenkins* 554

5. A decree of adoption of a child adjudged to be dependent by the juvenile court may be granted in an adoption proceeding in the county court on consent of a person, association, institution, or probation officer to whom or which the custody of the child has been committed, provided assent to such consent has been given by the juvenile court. *Krell v. Jenkins* 554

6. The juvenile court retains continuing jurisdiction of a dependent child after an adjudication of dependency. *Krell v. Jenkins* 554

7. The action of the juvenile court for the determination of whether or not a minor is a dependent child is not an adoption proceeding. *Krell v. Jenkins*.... 554

8. One of the functions of the county court in an adoption proceeding is the determination of what is for the best interests of the child. *Krell v. Jenkins* 554

Injunctions.

A party seeking an injunction must establish by competent evidence every controverted fact necessary to entitle him to relief. Injunction will not lie unless the right is clear, the damage is irreparable, and the remedy at law is inadequate to prevent a failure of justice. *Hanson v. City of Omaha* 403

Insurance.

1. Uncertainty in amount of payment under a policy of insurance is the chief characteristic distinguish-

ing an open from a valued policy. *Borden v. General Insurance Co.* 98

2. A provision of an insurance policy for indemnity to the extent of the actual cash value of the property not exceeding an amount therein stated is merely a limitation upon the amount of the recovery and is not a substantive measure of damages which the insured may invoke. *Borden v. General Insurance Co.* 98

3. A policy of insurance indemnifying against loss because of damages to or destruction of property designated therein not exceeding a specified amount is no evidence of the value of the property or the extent of the loss. *Borden v. General Insurance Co.* 98

4. An attorney fee in favor of the plaintiff upon recovery on a fire insurance policy concerning only personal property is unauthorized. *Borden v. General Insurance Co.* 98

5. In an application for health and accident insurance, false answers in application for health and accident insurance material to the risk that are willfully and knowingly made may defeat a recovery. *Rice v. American Protective Health & Accident Co.* 256

6. An instruction is prejudicially erroneous that defines confining illness within doors as illness rendering insured unable to do all of the substantial and material acts necessary to the prosecution of the insured's business or occupation in his customary and usual manner. *Rice v. American Protective Health & Accident Co.* 256

7. Under an insurance policy providing indemnity for confinement within doors, the insured is not required to remain constantly within doors, but there must be a substantial confinement within doors. *Rice v. American Protective Health & Accident Co.* 256

8. An unambiguous insurance policy must be enforced like any other contract according to the terms used. *Palmer v. Capitol Life Ins. Co.* 760

9. A provision in a group insurance policy, that irrespective of any other mode of termination the insurance upon the life of any person insured thereunder shall cease and determine upon termination of the employment of such person with the employer, is clear and unambiguous and must be enforced. *Palmer v. Capitol Life Ins. Co.* 760

10. A provision of a group insurance policy, which gives a former employee after termination of employment an option to continue insurance upon applica-

tion within 31 days and the payment of necessary premium without any examination as to insurability, does not extend the coverage of the policy to a former employee who died during that period without having made such application. *Palmer v. Capitol Life Ins. Co.* 760

Interest.

1. In order to recover interest, there must be a fixed and determinable amount which could have been tendered. The amount of the claim must be known or readily determinable. *National Fire Ins. Co. v. Evertson* 540
2. Interest on an unliquidated claim, the subject of reasonable controversy and incapable of being fixed by computation, may be recovered only from the date of the determination of the right of recovery and the ascertainment of the amount. *National Fire Ins. Co. v. Evertson* 540

Interpleader.

1. To maintain interpleader, the following elements must exist: (1) The same thing, debt, or duty must be claimed by both or all the parties against whom the relief is demanded; (2) all adverse titles or claims must be dependent, or be derived from a common source; (3) the person seeking relief must not have nor claim ay interest in the subject matter; and (4) he must have incurred no independent liability to either of the claimants, and he must stand perfectly indifferent and completely impartial between them in the position of an innocent stakeholder. *Strasser v. Commercial Nat. Bank* 570
2. The rules applying to the common-law bill of interpleader as distinguished from a bill in the nature of an interpleader apply to statutory interpleader in this state. *Strasser v. Commercial Nat. Bank* 570
3. A claimant to a fund held by a stakeholder is entitled to question the right of such stakeholder to interplead. *Strasser v. Commercial Nat. Bank* 570
4. A wrongdoer is not entitled to maintain an interpleader. One seeking such remedy has no right to it where his own act has caused the embarrassment of conflicting claims, the peril of double vexation, or precipitated the litigation from which he asks the court to extricate him. *Strasser v. Commercial Nat. Bank* 570

5. An order granting interpleader is interlocutory only as between the claimants, but as between the stakeholder and the claimants it is a final order in that it finally adjudicates the stakeholder's right to the remedy and, if allowed, discharges him from further liability. *Strasser v. Commercial Nat. Bank* 570

Joint Tenancy.

1. Under Uniform Property Act, an owner of property can convey to himself and another and thereby create a joint tenancy, tenancy in common, or tenancy in partnership. *Crowell v. Milligan* 127
2. If a right of survivorship is attached either to a joint tenancy or a tenancy in common, it will be carried out in accord with the intent expressed to the extent that it can be made effective. *Crowell v. Milligan* 127
3. One of two joint owners of money, deposited in a joint account payable to either or the survivor, cannot divest the survivorship right in the jointly owned account by withdrawing the money and depositing it in his individual account without the knowledge and consent of the other. *Crowell v. Milligan* 127
4. Where one joint tenant makes withdrawals from a joint bank account during the life of both tenants, the joint tenancy is not destroyed, the proceeds retain the joint tenancy character wherever they can be traced unless the character is changed by agreement of the parties, and the deprived tenant can exercise his right of survivorship as to the entire fund which has retained the joint tenancy character. *Crowell v. Milligan* 127

Judgments.

1. A judgment becomes a lien upon a judgment debtor's equitable interest in real estate with the commencement of a creditor's action to subject the equitable estate to the payment of the judgment. The lien continues while the cause is pending. *Nowka v. Nowka* 57
2. An action to foreclose a judgment lien may properly be entertained when it appears that the judgment creditor has no adequate remedy at law. *Nowka v. Nowka* 57
3. The costs and expenses of the foreclosure of a

judgment lien become a part of the amount to be recovered. *Nowka v. Nowka* 57

4. In the foreclosure of a judgment lien against the equitable interest of a judgment debtor in real estate the proceeds of sale should be first applied to the satisfaction of the judgment, costs, and expenses and the balance, if any, should be held subject to the further order of the court. *Nowka v. Nowka* 57

5. A judgment of a sister state which does not meet the requirements of due process as required by the Fourteenth Amendment to the Constitution of the United States has no validity in any state even as a matter of comity. *Howell v. Fletcher* 196

6. When 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. The party attacking the validity of the judgment has the burden of establishing its invalidity. *Howell v. Fletcher* 196

7. The legality of the organization of a drainage district cannot be collaterally attacked for defects not jurisdictional. Jurisdictional defects may be shown at any time in any kind of action. *Prucka v. Eastern Sarpy Drainage Dist.* 284

8. An order denying a motion for summary judgment determines only that the court making it was not then convinced by the record in the case that there was no genuine issue as to any material fact and that the party interposing the motion was entitled to a judgment as a matter of law. *Rehn v. Bingaman* 467

9. An order overruling a motion for a summary judgment is not a final order. *Rehn v. Bingaman* 467

10. 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. *Palmer v. Capitol Life Ins. Co.* 760

11. The court examines the evidence on motion for summary judgment, not to decide any issue of fact, but to discover if a real issue of fact exists. *Palmer v. Capitol Life Ins. Co.* 760

12. After the final adjournment of the term of court at which a judgment has been rendered, the court has no power or authority to vacate or modify the judgment except for the reasons stated and within

the time prescribed by statute for vacation of judgments at subsequent term. *Brown v. Lincoln* 840

13. If a court has jurisdiction of the parties and the subject matter of the action, a judgment rendered is not void even though the court was in error in holding that a cause of action was properly stated. *Gasper v. Mazur* 857

14. To vacate a judgment for irregularity in obtaining it the court must find and adjudge that there is a valid defense to the action in which the judgment was rendered. *Gasper v. Mazur* 857

15. Fraud as a reason for vacation of a judgment after the term at which it was rendered may only be taken advantage of by an action. *Gasper v. Mazur* 857

16. In an action to set aside a judgment on the ground of fraud, the burden is on the party charging it to clearly establish the fraud. *Hiatt v. Menendez* 914

17. After two years have elapsed since the entry of a decree of adoption, it is conclusively presumed as against defects appearing on the face of the record that all proceedings in connection with the adoption were in all respects valid. *Hiatt v. Menendez* 914

Judicial Sales.

1. The foreclosure and sale of lands passes to the purchaser every right or interest of the mortgagor including appurtenances and easements extending over adjacent lands. *Butts v. Hale* 334

2. A successful bidder at a judicial sale becomes a party to the proceedings, may appear and urge confirmation, and may appeal from an order setting the sale aside. *Knouse v. Knouse* 748

3. Where a substantially increased offer is made at a hearing in open court before confirmation of sale and both the highest bidder and the person making the offer are present with their attorneys, the trial court in the exercise of its judicial discretion may confirm the sale of the property to the person making the highest offer at the hearing. *Knouse v. Knouse* 748

Juries.

1. By statute, in the absence of a great emergency, when for any reason the panel of petit jurors shall not be full at the opening of court or at any time during the jury term the jury commissioner shall, when ordered, draw and summon in the same manner as the first drawing such number of jurors

as shall be ordered to fill the panel. *Losieau v. State* 115

2. By statute, in a great emergency the court may direct the jury commissioner to summon from the bystanders or the body of the county a sufficient number of persons having the qualifications of jurors to fill the panel. *Losieau v. State* 115

3. The finding of the trial court as to qualifications of a juror will not be set aside unless error is manifest or unless there has been a clear abuse of discretion. *Losieau v. State* 115

4. The finding of the trial court that a great emergency existed which permitted the calling of talesmen to try a cause will not be treated as error in the absence of a showing that the finding was manifestly erroneous or that there was a clear abuse of discretion. *Losieau v. State* 115

5. Where the defendant objects thereto and his objection is overruled, prejudicial error will be presumed if the method provided by statute for securing jurors is disregarded. *Losieau v. State* 115

6. To vitiate the verdict, an unauthorized inspection of the scene of an incident by a juror must be shown to have related to a matter in dispute and to have influenced the jury in arriving at a verdict. The ruling of the trial court thereon will not ordinarily be disturbed in the absence of a showing of an abuse of its discretion. *Phillips v. State* 419

7. Misconduct on the part of a juror in discussing the case with a disinterested person will not vitiate the verdict where the discussion appears to have been casual and harmless, unrelated to any material issue on which the evidence was in conflict, and not calculated to influence the jury in arriving at its verdict. *Phillips v. State* 419

8. Unless otherwise provided by statute, one charged with a misdemeanor has the right to demand a trial by jury but may waive his right thereto. *Peterson v. State* 618

9. The exercise of peremptory challenges may not be required until at least 12 jurors are in the jury box and passed for cause. *Sherrick v. State* 623

10. The procedure with regard to peremptory challenges is left to the sound discretion of the trial court. Its decision will not be disturbed unless it clearly appears that there has been an abuse of discretion prejudicial to defendant. *Sherrick v. State* 623

Callies v. State 640

11. Peremptory challenges are not to be exercised until the jurors have been passed for cause and 12 persons are in the jury box having the qualifications of jurors. *Callies v. State* 640

Landlord and Tenant.

A provision in a written lease that the lessees have an option to purchase the leased premises within 5 years from the date of the lease for a specified sum in cash is not ambiguous in the sense that parol evidence is admissible to explain the nature of the conveyance to be made if the option agreement is exercised. *Master Laboratories, Inc. v. Chesnut* 317

Licenses.

1. Mere use under a naked license, however long continued, cannot ripen into a prescriptive right. *Ricenbaw v. Krause* 723
2. A mere license, whether by deed or by parol, is revocable at pleasure. *Ricenbaw v. Kraus* 723
3. A license is not revocable where it has been executed or where, by reason of expenditures by the licensee on the strength of the license, it would otherwise be inequitable to permit the licensor to effect a revocation. *Ricenbaw v. Krause* 723

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5. The filing for record of a certificate of award of old age assistance benefits creates a lien upon any real estate owned by the recipient of such benefits for all amounts received subsequent to the effective date of the statute providing for such lien. *Arterburn v. Vandemoer* 68

Limitation of Actions.

A decree awarding alimony and child support in an action for divorce does not become dormant by lapse of time. The defense of the statute of limitations is not available to defeat recovery of delinquent payments. *Nowka v. Nowka* 57

Master and Servant.

Statements of an employee are admissible in evidence if they are spontaneous and so related to the accident as to be regarded as a part of it. *Peacock v. J. L. Brandeis & Sons* 514

Mines and Minerals.

1. The obligations between the assignor and assignee of an oil and gas lease are what the contract of assignment makes them in the light of the provisions of the lease assigned. *Valentine Oil Co. v. Powers* 71
2. The term "special limitation" denotes that part of the language of a conveyance which causes the created interest automatically to expire upon the occurrence of a stated event. *Valentine Oil Co. v. Powers* 71
3. An oil and gas lease, providing for termination upon failure to commence a well by a certain time or payment of stated rental, confers an optional right upon the lessee and should be strictly construed in favor of the lessor and against the lessee. *Valentine Oil Co. v. Powers* 71
4. Failure of the lessee or his assigns of an oil and gas lease containing a delay rental clause to tender or pay rentals within the specified time automatically terminates the lease without any affirmative action by the lessor, or any one else, for that purpose. *Valentine Oil Co. v. Powers* 71

Monopolies.

Partial restraints in the exercise of any business are not unreasonable when they are ancillary to a valid contract affecting the business of the party in whose favor they are imposed, if made in good faith

and apparently necessary to afford reasonable protection to such party. *Gallagher v. Vogel* 670

Mortgages.

1. A mortgage is security in the form of a conditional conveyance. *Butts v. Hale* 334
2. A mortgage which contains no exceptions conditionally conveys the entire estate of the mortgagor including appurtenances and easements extending over adjacent land. *Butts v. Hale* 334
3. The foreclosure and sale of lands passes to the purchaser every right or interest of the mortgagor including appurtenances and easements extending over adjacent lands. *Butts v. Hale* 334
4. Where it is sought to establish by parol testimony that a deed absolute on its face is a mortgage, the evidence must be clear, convincing, and satisfactory. *Kerns v. Kerns* 786
5. A petition for the foreclosure of a real estate mortgage must state whether any proceedings have been had for the recovery of the debt secured thereby. *Gasper v. Mazur* 857
6. The absence of an allegation in a petition to foreclose a mortgage as to any proceedings at law prevents it from stating a cause of action and is fatal to a judgment rendered thereon if the defect is taken advantage of by an appeal from the judgment. *Gasper v. Mazur* 857
7. Where default exists justifying holder of mortgage in accelerating payment of indebtedness secured thereby, the effect thereof cannot be defeated by the mortgagor without the concurrence of the holder of the mortgage. *Gasper v. Mazur* 857

Motor Carriers.

1. The State Railway Commission is authorized to classify motor carriers as regular or irregular route operators. It may test the operations of a certificate holder by the classification made by it. *Nebraska State Railway Commission v. Service Oil Co.* 712
2. The State Railway Commission has power to suspend, change, or revoke a certificate of convenience and necessity for a willful failure to observe and comply with the Motor Carrier Act or any lawful order or regulation of the commission or any term, condition, or limitation of the certificate. *Nebraska State Railway Commission v. Service Oil Co.* 712

3. Willful failure, as used in the Motor Carrier Act, is such behavior as justifies a belief that there was an intent entering into and characterizing the failure of which complaint is made. *Nebraska State Railway Commission v. Service Oil Co.* 712

Municipal Corporations.

1. Exercise of discretionary power of municipality to vacate streets or alleys is not ordinarily subject to judicial review, unless there has been an abuse of discretion, fraud, or glaring informality or illegality in proceedings, or absence of jurisdiction. *Hanson v. City of Omaha* 403
2. To overturn a city ordinance on the ground that it is unreasonable and arbitrary or that it invades private rights, the evidence of such facts must be clear and satisfactory. *Hanson v. City of Omaha* 403
3. An owner or person claiming an interest in property not abutting upon streets or alleys proposed to be vacated by action of a city council is not entitled to recover damages unless he has sustained an injury different in kind, and not merely in degree, from that suffered by the public at large. *Hanson v. City of Omaha* 403
4. The fact that property owners or persons having an interest in property that does not abut on streets or alleys proposed to be vacated may have to go a more roundabout way to reach certain points does not bring such property owners or persons an injury different in kind from the general public. *Hanson v. City of Omaha* 403
5. Property owners or persons claiming an interest in property that does not abut on streets or alleys proposed to be vacated by a city council cannot restrain such vacation unless they suffer peculiar damages not common to the public. *Hanson v. City of Omaha* 403
6. The doctrine of estoppel may be invoked against a municipal corporation where there have been positive acts by the municipal officers which may have induced the action of a party and where it would be inequitable to permit the corporation to stultify itself by retracting what its officers have done. *Nickel v. School Board of Axtell* 813
7. A lot owner is not required to repair an adjacent sidewalk until he has been notified by the city to do so. In the absence of such notice he is not liable

to pedestrians for damages for personal injuries. *Andresen v. Burbank* 909

Negligence.

1. 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. *Paxton v. Nichols* 152
   Cunning v. Knott 170
2. What amounts to gross negligence must depend upon the facts and circumstances. What would amount to gross negligence under certain circumstances might, under different circumstances, be even slight negligence. *Paxton v. Nichols* 152
   Cunning v. Knott 170
3. A series of acts of ordinary negligence may, under certain circumstances, operate to produce gross negligence but not necessarily so. *Paxton v. Nichols* 152
   Cunning v. Knott 170
4. In a suit by a guest against the driver of an automobile, a jury question is presented unless the court can definitely determine that the evidence of defendant's negligence, when taken as a whole, fails to reach a degree of negligence that is considered gross. *Paxton v. Nichols* 152
5. When evidence in a guest case is resolved most favorably toward the existence of gross negligence, the question of whether or not such facts will support a finding of the existence of gross negligence is a question of law. *Paxton v. Nichols* 152
6. Rules stated for determining liability of automobile host to a guest proximately caused by a defective condition of the automobile. *Paxton v. Nichols* 152
   Cronin v. Swett 662
7. Violations of statutes as to speed and as to stop signs are evidence of negligence. *Cunning v. Knott* 170
8. Evidence as to drinking intoxicants within a reasonable time prior to an accident is a circumstance to be considered in determining whether or not a driver of an automobile is guilty of gross negligence. *Cunning v. Knott* 170
9. When evidence in a guest case is resolved most favorably toward the existence of gross negligence, the question whether such facts will sustain a finding of the existence of gross negligence is a question of law. *Cunning v. Knott* 170
10. The burden of proof is upon a guest, riding in an

automobile by invitation, to prove by a preponderance of the evidence that the owner or operator was guilty of gross negligence. The fact that the operator of the automoblie may have been guilty of ordinary negligence is insufficient to warrant a recovery. *Cunning v. Knott* 170

11. Excessive speed of an automobile does not necessarily establish gross negligence, although it is a factor to be considered. *Cunning v. Knott* 170

12. It is not necessary in all cases that the operator of an automobile be aware of impending danger in order to hold him guilty of gross negligence, but that is a circumstance which should be considered. *Cunning v. Knott* 170

13. In an action to recover damages from a county by virtue of a defective highway or bridge, the burden is on the plaintiff to establish that negligence of the county was the proximate cause of the injury or that it was a cause that proximately contributed to it. *Olson v. County of Wayne* 213

14. Negligence may not be predicated upon the crookedness of a county highway or the location of a bridge constructed in accordance with the general plans of the highway and adopted as a part of it. *Olson v. County of Wayne* 213

15. A county is not obligated to erect and maintain safety warning signs along its highways apprising the public of conditions such as curves, turns, location of bridges, and similar situations that may be hazardous, unless the duty to exercise reasonable and ordinary care in the maintenance of its highways requires it to do so at a particular location. *Olson v. County of Wayne* 213

16. When the undisputed physical facts demonstrate that defendant was not negligent in the operation of his automobile at the time of a collision, the evidence is not sufficient to support a verdict for plaintiff. *Shiers v. Cowgill* 265

17. 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. *Shiers v. Cowgill* 265

18. Where the negligence of the driver of an automobile in which plaintiff is riding as a passenger is the sole proximate cause of a collision in which the

plaintiff is injured, plaintiff cannot recover from a third person for such injury. *Shiers v. Cowgill* 265

19. As a general rule it is negligence as a matter of law for a motorist to drive an automobile so fast on a highway at night that he cannot stop in time to avoid a collision with an object within the area illuminated by his lights. *Haight v. Nelson* 341

20. A driver of an automobile is legally obligated to keep such a lookout that he can see what is plainly visible before him and he cannot relieve himself of that duty. In conjunction therewith, he must so drive his automobile that when he sees the object he can stop his automobile in time to avoid it. *Haight v. Nelson* 341

21. The presence of smoke, snow, fog, mist, blinding headlights, or other similar elements which materially impair or wholly destroy visibility are not to be deemed intervening causes but rather as conditions which impose upon the drivers of automobiles the duty to exercise a degree of care commensurate with surrounding circumstances. *Haight v. Nelson* 341

22. Ordinarily where it appears from the evidence of a witness that, although he saw an automobile in movement immediately before the accident, but he had no reasonable length of time, movement in distance, or other means to use as a basis upon which to formulate an opinion as to the speed thereof, he should not be allowed to testify in regard thereto. *Haight v. Nelson* 341

23. Negligence is the omission to do something which a reasonable man guided by those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do. *Haight v. Nelson* 341

24. Where contributory negligence is pleaded as a defense, and there is no evidence to sustain it, it is reversible error to submit the issue to the jury. *Becker v. Hasebroock* 353

25. Negligence is the doing of something which an ordinarily prudent person would not have done under the same or similar circumstances, or the failure to do something which an ordinarily prudent person would have done under the same or similar circumstances. *Shupe v. County of Antelope* 374

26. An act wrongfully done by the joint agency or cooperation of several persons, or done contemporan-

eously by them without concert, renders them liable jointly and severally. *Shupe v. County of Antelope* 374

27. If the acts or neglects are not concurrent in time, and the party last in fault is chargeable with some duty to the other which, if performed, would have prevented the injury, the law will attribute to his culpable conduct the injurious consequence, and refuse to look beyond it. *Shupe v. County of Antelope* 374

28. Proximate cause is that cause which in a natural and continuous sequence, unbroken by an efficient intervening cause, produces the injury, and without which the injury would not have occurred. *Shupe v. County of Antelope* 374

29. An efficient intervening cause is a new and independent force which breaks the causal connection between the original wrong and the injury. The cause of an injury is that which actually produces it, while the occasion is that which provides an opportunity for the causal agencies to act. *Shupe v. County of Antelope* 374

30. An alleged cause of an accident may sometimes be merely a condition and not the real cause. The activities of inanimate things are usually mere conditions and not causes. *Shupe v. County of Antelope* 374

31. If the negligent act creates a condition from which injury flows only by a subsequent independent act of a third person, the two acts are not concurrent and the existence of the condition is not a proximate cause of the injury. *Shupe v. County of Antelope* 374

32. The words "slight" and "gross" as used in the comparative negligence statute are comparative terms. The intent of the statute is that the negligence of the parties shall be compared one with the other in determining questions of slight and gross negligence. *Andelt v. County of Seward* 527

33. The exceptions to the general rule requiring a motorist to so drive as to be able to stop within the range of his vision embrace all situations wherein reasonable minds may differ on the question of whether or not the motorist exercised the care and prudence required of a reasonably careful and prudent person under the circumstances of the particular situation. *Andelt v. County of Seward* 527

34. Where a driver of an automobile is suddenly confronted with an emergency requiring instant decision, he is not necessarily guilty of negligence in pursuing a course which mature reflection or de-

liberate judgment might prove to be wrong. *Andelt v. County of Seward* 527

35. 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. *Cronin v. Swett* 662

36. A motor vehicle having started to cross an intersecting street in accordance with a signal light is ordinarily entitled to complete the crossing notwithstanding a change in lights. *Laurinat v. Giery* 681

37. A person entering a street intersection with a traffic light in his favor is under an obligation to use due care and to yield the right-of-way to vehicles already in the intersection. His right-of-way is subject to the rights of those already in the intersection. *Laurinat v. Giery* 681

38. A motorist is not obligated to stop his motor vehicle or turn aside because a person gets so close to it that it is possible for him to walk into it. *Laurinat v. Giery* 681

39. In a personal injury action, negligence is never presumed and cannot be inferred from the mere fact that an accident happened. *Laurinat v. Giery* 681

40. 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. *Snyder v. Farmers Irr. Dist.* 771

41. An act of God does not necessarily mean an operation of natural forces so violent and unexpected that no human foresight or skill could possibly have prevented its effects. It is enough that the accident should be such as human foresight could not be reasonably expected to anticipate; and whether it comes within this description is ordinarily a question of fact. *Snyder v. Farmers Irr. Dist.* 771

42. It is the duty of the trial court, without request, to submit to and properly instruct the jury upon all the material issues presented by the pleadings and the evidence. This rule applies to the affirmative defense of contributory negligence. *Pongruber v. Patrick* 799

43. There is no presumption or inference as to the negligence of a driver of an automobile arising from the mere fact of collision between vehicles. *Pongruber v. Patrick* 799

44. A driver of an automobile should have his car under such reasonable control as will enable him to avoid collision with other vehicles, assuming that the drivers thereof will exercise due care. *Pongruber v. Patrick* 799
45. Reasonable control of motor vehicles is such as will enable the operators thereof to avoid collision with other vehicles operated without negligence and with pedestrians using due care. *Pongruber v. Patrick* 799
46. The doctrine of res ipsa loquitur means that the facts of the occurrence warrant the inference of negligence, not that they compel it. The doctrine is a rule of evidence and not a rule of substantive law. It merely takes the place of evidence as affecting the burden of proceeding with the case. *Security Ins. Co. v. Omaha Coca-Cola Bottling Co.* 923
47. When facts are adduced to which the doctrine of res ipsa loquitur has application an inference of negligence arises. It then presents a question for the jury as to liability. *Security Ins. Co. v. Omaha Coca-Cola Bottling Co.* 923
48. The applicability of the doctrine of res ipsa loquitur always depends upon the particular facts and circumstances of each case. *Security Ins. Co. v. Omaha Coca-Cola Bottling Co.* 923
49. Res ipsa loquitur is a doctrine of limited and restricted scope and should ordinarily be applied sparingly. *Security Ins. Co. v. Omaha Coca-Cola Bottling Co.* 923
50. As a general rule, the mere occurrence of a fire, with resultant damage, does not raise a presumption of negligence. *Security Ins. Co. v. Omaha Coca-Cola Bottling Co.* 923
51. The circumstances under which a fire occurs may sometimes be such as to justify the application of the doctrine of res ipsa loquitur and impose upon the defendant the burden of proving his freedom from fault. *Security Ins. Co. v. Omaha Coca-Cola Bottling Co.* 923

New Trial.

1. An application for a new trial must be made within ten days, either within or without the term, after the verdict, report, or decision is rendered. *Harsche v. Czyz* 699
2. Rule for computation of time for filing of motion for new trial is stated. *Harsche v. Czyz* 699

3. It is sufficient, in assigning the grounds for a motion for a new trial or in an amended motion for a new trial, to assign the same in the language of the statute and without further or other particularity. *Harsche v. Czyz* 699
4. To make a sufficient showing for a new trial upon the ground of newly discovered evidence, the proof in support thereof must show that the evidence came to the moving party since the trial and was not equally available to him previous thereto, and that it could not have been discovered or procured before the trial by the exercise of due diligence. *Rossmiller v. Becker* 756
5. The purpose of a new trial is to enable the court to correct errors that have occurred in the conduct of the trial. *Pongruber v. Patrick* 799
6. On motion for new trial, the alleged errors for consideration are those appearing in the record which are called to the attention of the court by motion or appropriate pleadings. *Pongruber v. Patrick* 799
7. Judicial discretion authorizes the court to determine the question as to whether or not a legal reason exists for the granting of a new trial. If a legal reason exits, the court has no discretion in the matter and the motion must be sustained. *Pongruber v. Patrick* 799
8. The procedure on appeal for review of an order granting a new trial is stated. *Pongruber v. Patrick* 799
9. Alleged errors asserted as basis for granting of new trial will be considered and determined by the Supreme Court so far as necessary, subject to the right to consider plain errors not assigned. *Pongruber v. Patrick* 799

Officers.

1. When an officer whose duty it is to approve a bond accepts the same for filing, places thereon his filing stamp, and records it in his office, it is presumed, in the absence of competent evidence to the contrary, that such officer approved the bond. *Prucka v. Eastern Sarpy Drainage Dist.* 284
2. The de facto officer doctrine does not rest upon a vindication of the right of one to occupy a position or to perform official acts but upon the principle of protection to the interests of the public and third parties. *Prucka v. Eastern Sarpy Drainage Dist.* 284

3. The acts of officers de facto with respect to matters affecting the public interests are to be regarded as valid and binding, as much so as if the same acts had been performed in the same manner by an officer de jure, and the legality of such acts may not be collaterally attacked. *Prucka v. Eastern Sarpy Drainage Dist.* 284
4. When a statute authorizes a public official to make a certificate as to some matter pertaining to and part of his official duty and file or keep the same as a record belonging to his public office, such certificate is ordinarily competent evidence of the matters or facts recited therein. *Sherrick v. State* 623

Parent and Child.
1. In awarding the custody of minor children as between parents, the court looks to the best interests of such children. Children 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. *Wakefield v. Wakefield* 611
2. Custody of minor children awarded their mother in a divorce action will not be disturbed unless it is shown that the mother is an unfit person to have their custody, or that their best interests require such action. *Wakefield v. Wakefield* 611

Parties.
An order granting a motion to bring in an additional party in a cause is not a final or an appealable order. *Lund v. Holbrook* 854

Partition.
1. A referee in partition is an officer of the court, subject to its lawful orders and directions. Every person who buys from a referee takes with knowledge that the contract of sale is not binding on the referee until the entire transaction is properly presented to and approved by the court. *Knouse v. Knouse* 748
2. In partition proceedings, it is the duty of referees and trial courts to endeavor to secure the highest possible price for property sold for the benefit of those persons lawfully entitled to the proceeds of the sale. *Knouse v. Knouse* 748
3. Where a substantially increased offer is made at a hearing in open court before confirmation of sale

and both the highest bidder and the person making the offer are present with their attorneys, the trial court in the exercise of its judicial discretion may confirm the sale of the property to the person making the highest offer at the hearing. *Knouse v. Knouse* 748

4. Ordinarily, property owners living in the vicinity and conversant with land sold at a referee's sale may be permitted to testify at a hearing to determine whether or not the land sold for the best price that could be realized. *Knouse v. Knouse* 748

5. The determination of the qualifications of witnesses to testify as to the value of land sold at a referee's sale is one resting in the sound discretion of the trial court. *Knouse v. Knouse* 748

Pleading.

1. An order sustaining a demurrer will be affirmed if any one ground of demurrer is well taken, without regard to the ground on which the ruling is based. *Valentine Oil Co. v. Powers* 71

2. A general demurrer admits allegations of fact in the pleading to which it is addressed, but does not admit the pleader's conclusions. *Valentine Oil Co. v. Powers* 71

3. In passing on a demurrer to a petition, the court will consider an exhibit attached thereto and made a part thereof to aid the petition. *Valentine Oil Co. v. Powers* 71

4. The rule of law is inflexible that the allegations and the proof must agree. *Benson v. Walker* 436

5. Under the code system of pleading, it is not necessary to state a cause of action or defense in any particular form. The facts are to be stated. All that the law requires is that there shall be a cause of action or defense. *Benson v. Walker* 436

6. A petition for the foreclosure of a real estate mortgage must state whether any proceedings have been had for the recovery of the debt secured thereby. *Gasper v. Mazur* 857

7. The absence of an allegation in a petition to foreclose a mortgage as to any proceedings at law prevents it from stating a cause of action and is fatal to a judgment rendered thereon if the defect is taken advantage of by an appeal from the judgment. *Gasper v. Mazur* 857

8. The sufficiency of a petition to state a cause of ac-

tion is not the test of jurisdiction of a court or of the validity of a judgment rendered upon the petition. *Gasper v. Mazur* 857

9. If the allegations of a petition are sufficient to inform the defendant the relief sought by the plaintiff and if the court has power to grant it in a proper action, jurisdiction exists. *Gasper v. Mazur* 857

10. The failure of a petitioner to sign or verify a petition for adoption is an irregularity but it is not jurisdictional. *Hiatt v. Menendez* 914

Principal and Agent.

1. Agency is the relationship which results from the consent by one person to act on behalf of another and subject to his control, and consent by the other so to act. *Valentine Oil Co. v. Powers* 87

2. The distinguishing features of agency are its representative character and its derivative authority. Whether a particular relationship is an agency depends on the relations of the parties as they in fact exist without regard to what they call their relationship. *Valentine Oil Co. v. Powers* 87

3. It is the duty of an agent, in all transactions concerning the subject matter of the agency, to act with the utmost good faith and loyalty to further the princpal's interests. *Valentine Oil Co. v. Powers* 87

4. The apparent authority of an agent which will bind his principal is such authority as the agent appears to have by reason of the actual authority which he has. *Stewart v. Spade Township* 93

5. To be admissible in evidence against the principal, an admission by an agent must have been a statement of fact within his own knowledge and not the expression of an opinion. *Borden v. General Insurance Co.* 98

6. The local agent of an insurance company may not bind his principal by his statements to the owner of property as to the value thereof made during negotiations for the writing of insurance. Such statements of the agent are inadmissible as original evidence of value in a suit on the policy to recover a loss. *Borden v. General Insurance Co.* 98

Process.

1. The adequacy of substituted service so far as due process is concerned is dependent upon whether or not the form of substituted service is reasonably cal-

culated to give the defendant actual notice of the proceedings and an opportunity to be heard. *Howell v. Fletcher* 196

2. Statutes prescribing the manner of service of summons are mandatory and strict compliance therewith must be had. *Ivaldy v. Ivaldy* 204
3. The requirement of publication of one notice once each week for three weeks in a newspaper is complied with by publication on one day of each of three weeks, that is, three successive weekly publications. *Prucka v. Eastern Sarpy Drainage Dist.* 284
4. Publication of notice is complete upon the distribution of the last issue of the paper containing the notice, though three full weeks did not elapse after the first publication. *Prucka v. Eastern Sarpy Drainage Dist.* 284

Property.

Definition of term "junk" is made. *Gallagher v. Vogel* 670

Public Assistance.

1. The application for, and grant of, old age assistance benefits creates a relationship between the recipient and grantor which is contractual in its nature, imposing an obligation for reimbursement of all payments made. *Arterburn v. Vandemoer* 68
2. The filing for record of a certificate of award of old age assistance benefits creates a lien upon any real estate owned by the recipient of such benefits for all amounts received subsequent to the effective date of the statute providing for such lien. *Arterburn v. Vandemoer* 68

Public Service Commissions.

1. As a condition precedent to the issuance of a certificate of convenience and necessity to a motor carrier, the Nebraska State Railway Commission must find that the service is or will be required by present or future public convenience and necessity. *Edgar v. Wheeler Transport Service, Inc.* 1
2. An applicant for a certificate of convenience and necessity must show that the operation under the certificate is and will be required by the present or future public convenience and necessity. *Edgar v. Wheeler Transport Service, Inc.* 1
3. It is the duty of a carrier to seek, and of regulatory agencies to permit, the elimination of those

services and facilities that are no longer needed or used by the public to any substantial extent. *Chicago & N. W. Ry. Co. v. City of Norfolk* 594

4. In the final analysis, when an application is made for additional service or to discontinue an existing service, the question to be determined is the public need or lack of need therefor. *Chicago & N. W. Ry. Co. v. City of Norfolk* 594

5. A final order of the Nebraska State Railway Commission granting a railroad company authority to discontinue specified passenger trains, operated at a loss and for the operation of which no public need exists, is within the scope of its authority and not arbitrary and unreasonable. *Chicago & N. W. Ry. Co. v. City of Norfolk* 594

6. On an appeal from an order of the State Railway Commission while acting within its jurisdiction, the matter for decision is whether or not the order is unreasonable or arbitrary. *Chicago & N. W. Ry. Co. v. City of Norfolk* 594
Nebraska State Railway Commission v. Service Oil Co. 712

7. The State Railway Commission is required to state in a certificate of convenience and necessity the type and scope of service the carrier is authorized to perform. *Nebraska State Railway Commission v. Service Oil Co.* 712

8. The State Railway Commission is authorized to classify motor carriers as regular or irregular route operators. It may test the operations of a certificate holder by the classification made by it. *Nebraska State Railway Commission v. Service Oil Co.* 712

9. The State Railway Commission has power to suspend, change, or revoke a certificate of convenience and necessity for a willful failure to observe and comply with the Motor Carrier Act or any lawful order or regulation of the commission or any term, condition, or limitation of the certificate. *Nebraska State Railway Commission v. Service Oil Co.* 712

10. Willful failure, as used in the Motor Carrier Act is such behavior as justifies a belief that there was an intent entering into and characterizing the failure of which complaint is made. *Nebraska State Railway Commission v. Service Oil Co.* 712

11. The State Railway Commission is authorized to govern its proceedings and in the absence of statutory or constitutional inhibition to adopt and pursue

its own rules and course of procedure. *Nebraska State Railway Commission v. Service Oil Co.* 712

Quo Warranto.

Quo warranto is employed only to test the actual right to an office or franchise. It can afford no relief for official misconduct or be used to test the legality of the official action of public or corporate officers. *Nickel v. School Board of Axtell* 813

Railroads.

1. It is the duty of a carrier to seek, and of regulatory agencies to permit, the elimination of those services and facilities that are no longer needed or used by the public to any substantial extent. *Chicago & N. W. Ry Co. v. City of Norfolk* 594
2. In the final analysis, when an application is made for additional service or to discontinue an existing service, the question to be determined is the public need or lack of need therefor. *Chicago & N. W. Ry. Co. v. City of Norfolk* 594
3. A final order of the Nebraska State Railway Commission granting a railroad company authority to discontinue specified passenger trains, operated at a loss and for the operation of which no public need exists, is within the scope of its authority and not arbitrary and unreasonable. *Chicago & N. W. Ry. Co. v. City of Norfolk* 594

Rape.

1. In a prosecution for rape, the prosecutrix may testify in chief, if within a reasonable time under all the circumstances, she made complaint to another but not as to its details; and that other may likewise testify in chief to such complaint but not as to its details. *Sherrick v. State* 623
2. A complaint of being raped must be voluntary and made as soon as practicable without any inconsistent delay. If the complaint is involuntary or delayed without sufficient reason therefor being shown, such as intimidation or threats, or lack of opportunity, the complaint has no force and is inadmissible for any purpose. *Sherrick v. State* 623
3. When a sex crime is charged, great latitude should be allowed in cross-examination of prosecutrix. However, in statutory rape of a female child under 15 years of age, prosecutrix cannot ordinarily be

cross-examined with regard to previous unchaste acts with others for the purpose of testing her credibility. *Sherrick v. State* 623

4. An accused charged with rape cannot be convicted solely on the uncorroborated testimony of prosecutrix. If prosecutrix is corroborated as to material facts and circumstances which tend to support her testimony and from which, together with her testimony as to the particular act an inference of guilt may be drawn, the corroboration is sufficient. *Sherrick v. State* 623

5. In a prosecution for aiding and abetting statutory rape, great latitude should be allowed in cross-examination of the prosecuting witness. Such witness may be cross-examined with reference to matters concerning which she has testified in her direct examination, and as to matters bearing upon her credibility and the weight to be given her testimony. *Callies v. State* 640

6. In a prosecution for aiding and abetting the crime of statutory rape, a female child under 15 years of age cannot ordinarily be cross-examined with reference to her consent, or with regard to previous unchaste acts with others for the purpose of testing her credibility. *Callies v. State* 640

Sales.

1. The rescission of a contract must be in toto and the parties must be placed in status quo so far as the circumstances will permit. *Bennett v. Emerald Service, Inc.* 176

2. Ordinarily in rescission a formal tender of property is not required if it appears that it would have been futile. *Bennett v. Emerald Service, Inc.* 176

3. A tender may not be regarded as valid or sufficient, even if it appears that it would have been futile, unless it is made to appear that at the time the tender was made there was a present and immediate ability to make the tender good. *Bennett v. Emerald Service, Inc.* 176

4. Evidence of contract to sell hay was sufficient to sustain the verdict of the jury. *Benson v. Walker* 436

Schools and School Districts.

1. Filing of claims monthly for transportation allowance is a mandatory prerequisite to the recovery of

school pupil transportation by the person claiming the same. *George v. School District* 791

2. Statutory requirement that claims for transportation shall be filed for payment monthly means that the claim must be filed in writing with an officer of the district during the calendar month following the furnishing of transportation services. *George v. School District* 791

3. A school district must be so formed or laid out as to afford to all the children within its boundaries an opportunity to enjoy with reasonable facility the benefits of the school. Every reasonable presumption is to be indulged in favor of a district as created and laid out. Equal convenience to all the children is not essential, since it is impossible to prevent varying degrees of convenience or inconvenience to children living in different parts of any district. *Nickel v. School Board of Axtell* 813

Specific Performance.

1. Based on the doctrine that equity will not render a decree which it is impractical to carry out, a decree for specific performance of a contract will not be granted if it would be nugatory and useless, or if it would be ineffectual or not beneficial to plaintiff. *Valentine Oil Co. v. Powers* 71

2. When land, or any interest therein, is the subject matter of an agreement, the power of a court of equity to enforce specific performance thereof is beyond question. *Mainelli v. Neuhaus* 392

3. The equitable remedy of specific performance is not demandable as a matter of right but one that may be granted by the court in its sound judicial discretion. It is not a discretion in the sense that it may be granted or denied at the will or pleasure of the judge. It is governed by the elements, conditions, and incidents that control the administration of all equitable remedies. *Mainelli v. Neuhaus* 392

4. Specific performance will not be enforced unless the contract has been entered into with perfect fairness and without misapprehension, misrepresentation, or oppression. It will not be granted where it would be unjust or inequitable to do so. *Mainelli v. Neuhaus* 392

5. Burden and elements of proof stated where party seeks performance of an oral contract for the con-

veyance of land of a deceased person. *Rush v. Heinisch* 545

Statutes.

1. In case of doubt as to the meaning of a statute, resort may be had to the title as an aid to discover the legislative intent, but not to enlarge the scope of the statute so as to include a subject not fairly expressed in the body of the act. *Omaha Nat. Bank v. Jensen* 22
2. The construction of a statute of doubtful meaning given it by those whose duty it is to enforce it, and which construction the Legislature has by its continued noninterference for a number of years acquiesced in, will be approved, unless as thus construed it contravenes some provision of the Constitution or is clearly wrong. *Omaha Nat. Bank v. Jensen* 22
3. When the court of last resort has judicially construed a statute, the rule permitting recourse to contemporaneous construction of the statute by administrative or executive officials, charged with the enforcement of such statute, is inapplicable. *Omaha Nat. Bank v. Jensen* 22
4. A legislative act will operate prospectively only unless the legislative intent and purpose that it should operate retrospectively is clearly disclosed. *Arterburn v. Vandemoer* 68
5. The basic rule of statutory construction is to ascertain and give effect to the intention of the Legislature as expressed in the statute. *Howell v. Fletcher* 196
6. In construing a statute the legislative intent may be gathered from the reason for its enactment. *Howell v. Fletcher* 196
7. Courts will not by interpretation or construction usurp the function of the lawmaking body and give to a statute a meaning not intended or expressed by the Legislature. *Hanson v. City of Omaha* 403
8. It is not the province of courts to read into a statute something not found therein or to give it a meaning not warranted by its legislative language. *Hanson v. City of Omaha* 403
9. The presumption is that the Legislature in using language in a statute gave to it the significance that had been previously accorded by the decisions of the Supreme Court unless a different meaning has

been provided by the context of the statute. *Gomez v. State ex rel. Larez* 738

10. Where one statute refers to another which is subsequently repealed, the statute repealed becomes a part of the one making the reference and remains in force so far as the adopting statute is concerned. *Hanson v. City of Omaha* 768

Taxation.

1. Statutory provisions for the levy of a tax are imperative. *Omaha Nat. Bank v. Jensen* 22
2. Taxation and the collection of taxes are strictly governmental activities as distinguished from private and proprietary activities, and the public as to such activities cannot be estopped. *Omaha Nat. Bank v. Jensen* 22
3. Applicable statute for the valuation for taxation of the shares of stock of a foreign corporation, domesticated in this state, is determined. *Omaha Nat. Bank v. Jensen* 22
4. Statutes providing for the levy of an ad valorem personal property tax on flight equipment used in interstate commerce, when such flight equipment is wholly and continuously outside of the state of the owner's domicile during the tax year, is not violative of the Commerce Clause of the Constitution of the United States when such tax bears a fair and reasonable relation to the use of the property in the taxing state. *Mid-Continent Airlines v. State Board of Equalization & Assessment* 425
5. Statutes providing for taxation of flight equipment of aircraft did not violate state or federal Constitutions. *Mid-Continent Airlines v. State Board of Equalization & Assessment* 425

Tenancy in Common.

1. Under Uniform Property Act, an owner of property can convey to himself and another and thereby create a joint tenancy, tenancy in common, or tenancy in partnership. *Crowell v. Milligan* 127
2. If a right of surviorship is attached either to a joint tenancy or a tenancy in common, it will be carried out in accord with the intent expressed to the extent that it can be made effective. *Crowell v. Milligan* 127

Tender.

1. Ordinarily in rescission a formal tender of property is not required if it appears that it would have been futile. *Bennett v. Emerald Service, Inc.* 176
2. A tender may not be regarded as valid or sufficient, even if it appears that it would have been futile, unless it is made to appear that at the time the tender was made there was a present and immediate ability to make the tender good. *Bennett v. Emerald Service, Inc.* 176

Time.

1. The requirement of publication of one notice once each week for three weeks in a newspaper is complied with by publication on one day of each of three weeks, that is, three successive weekly publications. *Prucka v. Eastern Sarpy Drainage Dist.* 284
2. Publication of notice is complete upon the distribution of the last issue of the paper containing the notice, though three full weeks did not elapse after the first publication. *Prucka v. Eastern Sarpy Drainage Dist.* 284

Trial.

1. The trial court must correctly instruct the jury on the proper method of determining the amount that the plaintiff may recover. *Borden v. General Insurance Co.* 98
2. Rule for consideration of motion for directed verdict stated. *Paxton v. Nichols* 152
   Cunning v. Knott 170
   Cronin v. Swett 662
   Securities Acceptance Corp. v. Blake 848
3. If the evidence is undisputed, or such that minds of men could not reasonably arrive at any other conclusion, the question of whether or not a person riding in a motor vehicle is a guest 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. *Paxton v. Nichols* 152
4. In a suit by a guest against the driver of an automobile, a jury question is presented unless the court can definitely determine that the evidence of defendant's negligence, when taken as a whole, fails to reach a degree of negligence that is considered gross. *Paxton v. Nichols* 152
5. When evidence in a guest case is resolved most

favorably toward the existence of gross negligence, the question of whether or not such facts will support a finding of the existence of gross negligence is a question of law. *Paxton v. Nichols* 152

6. Where a default has been regularly entered it is largely within the discretion of the trial court to say whether the defendant shall be permitted to come in afterwards and make his defense. Unless an abuse of discretion be made to appear, the Supreme Court will not interfere. *Roberts v. Roberts* 163

7. Every party should be given an opportunity to prosecute or defend his case in court. Courts will never deny such right except for the fault or gross laches of such party or his authorized attorney. *Roberts v. Roberts* 163

8. A motion to instruct a verdict admits the truth of all material and relevant evidence. The party against whom the motion is made is entitled to have it considered in the light most favorable to him and to have the benefit of all inferences reasonably deducible therefrom. *Olson v. County of Wayne* 213

9. It is the duty of the court to submit to the jury under appropriate instructions all issues presented by the pleadings and supported by evidence. *Rice v. American Protective Health & Accident Co.* 256

10. Physical facts may not be accepted as ground for refusal to submit a case to a jury as against the testimony of witnesses on a controverted question of fact unless such facts are demonstrable to a degree that reasonable minds cannot disagree as to their existence and unless the results flowing therefrom are demonstrable to a degree agreeable to the known and immutable laws of physics, mechanics, or mathematics. *Shiers v. Cowgill* 265

11. When there is a reasonable dispute as to what the physical facts show, the conclusions to be drawn therefrom are for the jury. The credibility of the witnesses and the weight to be given their testimony are solely for the consideration of the jury. *Shiers v. Cowgill* 265

12. The trial judge must instruct the jury upon the law of the case, whether requested by counsel to do so or not. Where the judge has failed to so instruct the jury, and it is apparent from the record that the jury probably took a wrong view of the law, a new trial will be awarded. *Shiers v. Cowgill* 265

13. Instructions given to a jury must be construed to-

gether and if, when considered as a whole, they properly state the law it is sufficient. *Shiers v. Cowgill* 265

14. 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. *Shiers v. Cowgill* 265

15. The giving of erroneous instructions is not cause for reversal if the instructions are more favorable to the complaining party than he is entitled to under the law. *Shiers v. Cowgill* 265

16. Stenographic notes of official court reporter may be read to jury upon its request as it is liable to be more accurate than the judge's recollection of the testimony. *Shiers v. Cowgill* 265

17. The practice of allowing an official stenographer to read to the jury his notes of the testimony of a witness, upon the request of the jury, should not be encouraged. *Shiers v. Cowgill* 265

18. 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 if it is clear that the jury disregarded the evidence or rules of law. *Shiers v. Cowgill* 265

19. In an action for damages, where the law furnishes no legal rule for measuring them, the amount to be awarded rests largely in the sound discretion of the jury and courts are reluctant to interfere with a verdict so rendered. *Shiers v. Cowgill* 265

20. It is reversible error for the trial court to permit plaintiff, on his case in chief, to show that defendant is indemnified from loss by an insurance company where such proffered evidence is not relevant to any material issue in the case. *Haight v. Nelson* 341

21. 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. *Haight v. Nelson* 341

22. To vitiate the verdict, an unauthorized inspection of the scene of an incident by a juror must be shown to have related to a matter in dispute and to have influenced the jury in arriving at a verdict. The

ruling of the trial court thereon will not ordinarily be disturbed in the absence of a showing of an abuse of its discretion. *Phillips v. State* 419

23. Misconduct on the part of a juror in discussing the case with a disinterested person will not vitiate the verdict where the discussion appears to have been casual and harmless, unrelated to any material issue on which the evidence was in conflict, and not calculated to influence the jury in arriving at its verdict. *Phillips v. State* 419

24. Instructions must be considered and construed together. If they are not sufficiently specific in some respects, it is the duty of counsel to offer requests for instructions that will supply the omission. Unless this is done, the judgment will not ordinarily be reversed for such defects. *Benson v. Walker* 436
Dorn v. Sturges 491

25. In a prosecution for murder in the first degree the jury should determine the guilt or innocence of the accused and, if guilty, whether the penalty should be death or imprisonment for life. The decision should not be influenced by or rest upon the fact of whether a pardon, parole, or other clemency is easy or difficult to secure. *Griffith v. State* 448

26. In a murder prosecution, an instruction by the court that the matter of eligibility for parole or other clemency is determined by the State Board of Pardons when it may see fit, and that the jury was not permitted to decide whether such power may or may not be exercised or to control the time or manner of such exercise, was not improper. *Griffith v. State* 448

27. The trial court may in the exercise of its discrecretion give or refuse to give an instruction on the effect of parole or other executive clemency. *Griffith v. State* 448

28. An order denying a motion for summary judgment determines only that the court making it was not then convinced by the record in the case that there was no genuine issue as to any material fact and that the party interposing the motion was entitled to a judgment as a matter of law. *Rehn v. Bingaman* 467

29. An order overruling a motion for a summary judgment is not a final order. *Rehn v. Bingaman* 467

30. On appeal, in testing the sufficiency of the 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. *Dorn v. Sturges* 491

31. It is not error to refuse a requested instruction if the substance of the requested instruction is covered by instructions given. *Peacock v. J. L. Brandeis & Sons* 514

32. Where a verdict in a personal injury case is excessive and it appears to have been returned under the influence of passion and prejudice, it is the duty of the Supreme Court to set the verdict aside and grant a new trial. *Peacock v. J. L. Brandeis & Sons* 514

33. Where it is clear that a verdict is excessive but there is no method by which the court can rationally ascertain the extent of the excess, a remittitur cannot be properly required. *Peacock v. J. L. Brandeis & Sons* 514

34. An award of damages by a jury will not be disturbed on appeal if it is supported by evidence and bears a reasonable relationship to the elements of injury and damage proved. *Peacock v. J. L. Brandeis & Sons* 514

35. It is prejudicial error for a trial court to submit to the jury a question of fact material to the case if there is no evidence from which a finding thereon can be made. *State v. County of Cheyenne* 533

36. The proof in a trial of a jury case must be confined to legal evidence which tends to prove or disprove an issue in the case. The admission of improper evidence is prejudicial error if it may have influenced the verdict. *State v. County of Cheyenne* 533

37. If it does not appear from the record that evidence wrongfully admitted in the trial of a jury case was harmless, its reception must be considered prejudicial error. *State v. County of Cheyenne* 533

38. The exercise of peremptory challenges may not be required until at least 12 jurors are in the jury box and passed for cause. *Sherrick v. State* 623

39. Cross-examination is a searching inquiry of the witness for further disclosure touching the particular matters detailed in his direct examination. Questions calling for evidence tending to show the improbability of or to throw doubt upon statements

made in the examination in chief are proper. *Sherrick v. State* 623

40. When the district court has by its instructions fully and correctly stated the law as it should be applied to the facts disclosed by the evidence in a criminal prosecution, it is not required to give further or additional instructions requested by defendant. *Sherrick v. State* 623

41. Any attempt by the trial court to collaterally encourage, invite, or induce a verdict of guilty in a criminal case is prejudicial error requiring reversal. *Sherrick v. State* 623

42. In a criminal case, a trial court is justified in directing a verdict of not guilty only (1) where there is a total failure of competent proof to support a material allegation in the information, or (2) where the testimony adduced is of so weak or doubtful a character that a conviction based thereon could not be sustained. *Sherrick v. State* 623
Callies v. State 640

43. Instructions are to be considered together. 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. *Callies v. State* 640

44. 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. *Cronin v. Swett* 662

45. 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. *Cronin v. Swett* 662

46. An instruction in a criminal case is not required to contain the exact language of the statute, if words equivalent in meaning are used in defining the offense or the elements of the case that the State must establish to justify conviction of the accused. *Sall v. State* 688

47. It is the duty of the trial court, without request, to instruct the jury on each issue presented by the pleadings and supported by evidence. A litigant is entitled to have the jury instructed as to his theory of the case as shown by pleadings and evi-

dence, and a failure to do so is prejudicial. *Harsche v. Czyz* 699

48. An instruction which conflicts with the propositions of law properly and correctly stated in another instruction on a vital issue of fact and tends to mislead or confuse the jury in deliberating on conflicting evidence is erroneous and prejudicial. *Harsche v. Czyz* 699

49. The trial court should instruct the jury on the proper measure of damages, and failure to do so is error. *Harsche v. Czyz* 699

50. Where the record contains competent evidence from which the jury may have reasonably arrived at its verdict, the judgment thereon will not be reversed for want of evidence to sustain it. *Rossmiller v. Becker* 756

51. 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. *Palmer v. Capitol Life Ins. Co.* 760

52. The court examines the evidence on motion for summary judgment, not to decide any issue of fact, but to discover if a real issue of fact exists. *Palmer v. Capitol Life Ins. Co.* 760

53. In an instruction stating the issues, the court should make a clear and concise statement thereof and not substantially copy the pleadings. Where prejudice results from the latter course, it is ground for reversal. *Snyder v. Farmers Irr. Dist.* 771

54. Where different minds may draw different inferences or conclusions from the facts proved, or if there is a conflict in the evidence, the matter at issue must be submitted to the jury. Where the evidence is undisputed, and but one reasonable inference can be drawn from the facts, the question is one of law for the court. *Snyder v. Farmers Irr. Dist.* 771

55. The question whether negative evidence is sufficient to take the case to the jury is to be decided according to all the circumstances of the case. No absolute rule can be laid down in regard thereto. *Pongruber v. Patrick* 799

56. It is the duty of the trial court, without request, to submit to and properly instruct the jury upon all the material issues presented by the pleadings and the evidence. This rule applies to the affirma-

tive defense of contributory negligence. *Pongruber v. Patrick* 799

57. Where an inspection of premises is made by the trial court in relation to issues involved, such inspection becomes a matter of evidence to be considered by the Supreme Court on appeal. *Petersen v. Thurston* 833

58. Circumstantial evidence is sufficient to sustain a verdict depending solely thereon for support if the circumstances proved by the evidence are of such a nature and so related to each other that the conclusion reached is the only one that can fairly and reasonably be drawn therefrom. *Koutsky v. Bowman* 919

59. As against a motion for a directed verdict, the plaintiff 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. *Koutsky v. Bowman* 919

Vendor and Purchaser.

1. A tender of performance of an option agreement in accordance with its terms, made in a pleading for the first time after the expiration of the option, is ineffective as an exercise of such option. *Master Laboratories, Inc. v. Chesnut* 317

2. As a general rule the assignee of a purchaser's interest in a contract for the sale of real estate may maintain a suit in his own name against the vendor to enforce specific performance of the contract, if the vendee himself, but for the assignment, could have obtained such relief. *Mainelli v. Neuhaus* 392

Waters.

1. Surface water is a common enemy. An owner of real estate may fight it as his judgment dictates, but he may not accumulate it in a drain, increase the flow, and discharge it on a servient estate or divert it in a different direction to the damage of a lower estate. *Keim v. Downing* 481

2. An oral arrangement for the construction and maintenance of a ditch and a graded road, serving as an embankment, in connection with drainage of land is valid and irrevocable if it has been accepted, executed, and used to advantage by the parties. *Keim v. Downing* 481

3. A proprietor may not collect surface waters into a

ditch or drain and discharge them in a volume on the lands of his neighbor, nor can he divert them so they go in a direction different from the natural flow. *Ricenbaw v. Kraus* 723

4. 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. *Ricenbaw v. Kraus* 723

5. Where surface water resulting from rain and snow flows in a well-defined course, its flow cannot be arrested or interfered with by a landowner to the injury of neighboring proprietors. *Ricenbaw v. Kraus* 723

Wills.

1. The intention of a testator is to be ascertained from a liberal interpretation and comprehensive view of all the provisions of a will. *Wall v. Wall* 360

2. No particular words, no conventional forms of expression, are necessary to make an effective testamentary disposition of property. *Wall v. Wall* 360

3. A court places itself in the position of the testator, ascertains his will, and, if lawful, enforces it. *Wall v. Wall* 360

4. Where the language in a will is clear and unambiguous it is not subject to construction. *Wall v. Wall* 360

5. A bequest to an existing cemetery association, directing that it be used for the purpose of maintaining its cemetery in proper condition and requesting that the graves of the testator's family and relatives have preference and be properly cared for, constitutes a valid bequest in trust for the purposes indicated. *Tetschner v. Cram* 734

Witnesses.

1. The owner of personal property is qualified to express an opinion of the value thereof solely because of his status as owner of it. *Borden v. General Insurance Co.* 98

2. A witness who is shown to be acquainted with property and its reasonable market value is qualified to testify to his opinion of such value. *Borden v. General Insurance Co.* 98

3. The qualification of a witness as to the value of

personal property is committed to the sound discretion of the trial court and its ruling thereon will only be disturbed when clearly erroneous. *Borden v. General Insurance Co.* 98

4. Cogent reasons that strengthen the opinion of an expert witness as to a scientific fact in issue and tend to weaken opposite expert opinions not so supported may determine the issue. *Dietz v. State* 324

5. A defendant in a criminal case who becomes a witness subjects himself to the rules of law applicable to other witnesses. *Griffith v. State* 448

6. The credibility of witnesses and the weight of the evidence are for the jury to determine in a criminal case. The verdict of the jury may not be disturbed by the Supreme Court unless it is clearly wrong. *Griffith v. State* 448
Sall v. State 688

7. Ordinarily, property owners living in the vicinity and conversant with land sold at a referee's sale may be permitted to testify at a hearing to determine whether or not the land sold for the best price that could be realized. *Knouse v. Knouse* 748

8. The determination of the qualifications of witnesses to testify as to the value of land sold at a referee's sale is one resting in the sound discretion of the trial court. *Knouse v. Knouse* 748

Workmen's Compensation.

1. On an appeal to the Supreme Court in a workmen's compensation case, the cause will be considered de novo upon the record. *Miller v. Livestock Buying Co.* 51

2. In a workmen's compensation case, the burden is upon the claimant to establish a right of recovery by a preponderance of the evidence. *Miller v. Livestock Buying Co.* 51

3. An award in a workmen's compensation case cannot be based on possibilities or probabilities, but must be based on sufficient evidence of a disability arising out of and in the course of the employment. *Miller v. Livestock Buying Co.* 51

4. The rule of liberal construction of the Workmen's Compensation Act applies to the law, not to the evidence offered to support a claim. The claimant must prove his right to compensation. A court is not permitted to award compensation where the re-

quisite proof is lacking. *Miller v. Livestock Buying Co.* 51
Dietz v. State 324
5. On appeal in a workmen's compensation case, a judgment of the district court will be affirmed where there is no bill of exceptions and the pleadings are sufficient to support the judgment. *Horn v. Gooch Feed Mill Co.* 125
6. An appeal in a workmen's compensation case will be considered by the Supreme Court de novo upon the record, subject to the rule with respect to superior opportunity of the trial court to see the witnesses and hear their testimony. *Dietz v. State* 324
7. 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. *Dietz v. State* 324
8. An employee who, solely because of his injury, is unable to perform or obtain any substantial amount of labor, either in his particular line of work, or in any other for which he would be fitted except for the injury, is totally disabled within the meaning of the workmen's compensation law. *Dietz v. State* 324
9. An employee who has established by a preponderance of the evidence that he had an accident arising out of and in the course of his employment, which resulted in compensable injury, may be allowed compensation for neurosis if it was proximately caused by the injury and resulted in disability. *Dietz v. State* 324
10. A proceeding to modify a previous award of workmen's compensation and to recover additional compensation for an increase in incapacity can be brought any time within 1 year from the time the employee knows or is chargeable with knowledge that his condition has materially changed and that there has been substantial increase in disability. *Peek v. Ayers Auto Supply* 363
11. The statute restricts the basis for a modification of a previous award of compensation to the increase or decrease of incapacity that has occurred since the award and has been caused by the violence to the physical structure of the body of the claimant by the accident. *Peek v. Ayers Auto Supply* 363
12. Any increase or decrease in incapacity of the claimant is insufficient to justify modification of the

award that is not due to the injury constituting the basis of the previous award. *Peek v. Ayers Auto Supply* 363

13. An application in the court which granted a previous award of workmen's compensation may be maintained to recover additional compensation for an increased disability after the payments required by the award have been completed and the award has been fully performed and discharged. *Peek v. Ayers Auto Supply* 363

14. The provisions of the Workmen's Compensation Act that the contract of an insurance carrier is a direct promise to and is enforceable in the name of one entitled to compensation benefits makes the carrier a proper party defendant in a proceeding to recover benefits provided by the act. *Peek v. Ayers Auto Supply* 363

15. An application to modify an award of workmen's compensation should be made to the court and in the proceeding in which the previous award was made. *Peek v. Ayers Auto Supply* 363

16. An application by an injured workman for additional compensation because of increased incapacity is not a new proceeding but is only another step in the proceeding initiated by the filing of the original petition for an adjustment of his claim. *Peek v. Ayers Auto Supply* 363

17. The jurisdiction acquired by the workmen's compensation court continues, except as otherwise provided in the Workmen's Compensation Act, as long as the workman suffers disability the proximate cause of which may be traced to the injury for which claim was originally made and compensation was awarded. *Peek v. Ayers Auto Supply* 363

18. The jurisdiction of the district court to modify an award of workmen's compensation made therein is identical with that of the compensation court concerning a modification of an award made in that court. *Peek v. Ayers Auto Supply* 363

19. A compensable injury within the Workmen's Compensation Act is one caused by an accident arising out of and in the course of the employment. *Seger v. Keating Implement Co.* 560

20. Whether an accident arises out of and in the course of the employment must be determined by the facts of each case. There is no fixed formula by which

the question may be resolved. *Seger v. Keating Implement Co.* 560

21. The fact that an employee was at the place of the injury because of his employment is not sufficient if the injury resulted from a cause having no relation to the employment. *Seger v. Keating Implement Co.* 560

22. The rule of liberal construction of the Workmen's Compensation Act is related to determination of the scope of the act and does not apply to evidence produced to establish a claim for compensation. *Seger v. Keating Implement Co.* 560

23. An award under the Workmen's Compensation Act may not be based upon possibilities, probabilities, or conjectural evidence. *Seger v. Keating Implement Co.* 560

24. The term "arising out of the employment" in the Workmen's Compensation Act covers all risks of accident from causative acts done or occurring within the scope or sphere of the employment. *Seger v. Keating Implement Co.* 560

25. In determining whether a risk arises out of the employment, the test to be applied to any act or conduct of an employee which does not constitute a direct performance of his work is whether it is reasonably incident thereto, or whether it is so substantial a deviation as to constitute a break in the employment and to create a formidable independent hazard. *Seger v. Keating Implement Co.* 560

26. The limitation prescribed by statute for the filing of a petition by an employee is tolled as long as such employee is under legal disability and, as to a minor employee, it does not begin to run until he becomes of age. *Krajeski v. Beem* 586

27. Failure of either a guardian or next friend to bring an action to recover workmen's compensation in behalf of a minor employee does not preclude such employee from asserting his rights within 1 year after becoming of age. *Krajeski v. Beem* 586

28. An employer who attempts to avoid liability on the ground that employee was willfully negligent must prove a deliberate act knowingly done, or at least such conduct as evidences a reckless indifference to his safety. *Krajeski v. Beem* 586

29. Reckless indifference to safety, as used in the workmen's compensation law, means more than want of ordinary care. It implies a rash and care-

less spirit, not necessarily amounting to wantonness, but approximating it in degree, a willingness to take a chance. *Krajeski v. Beem* 586

30. An accident within the meaning of the workmen's compensation law 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. *Ruderman v. Forman Bros.* 605

31. In a workmen's compensation case the burden is on the plaintiff to prove by a preponderance of the evidence that an accident occurred. *Ruderman v. Forman Bros.* 605

32. A compensation award cannot be based on possibilities or probabilities, but must be based on sufficient evidence that the injured person incurred disability or death as the result of an accident arising out of and in the course of his employment. *Ruderman v. Forman Bros.* 605

33. If an inference favorable to the claimant in an action for recovery under the workmen's compensation law may be reached only by speculation or conjecture an award may not be allowed. *Ruderman v. Forman Bros.* 605