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JOE PFEIFER, BEING THE SAME PERSON AS JOE P. PFEIFER, ET AL., APPELLES, V. LENA ABLEIDINGER ET AL., APPELLEES, IMPLEADED WITH STATE OF NEBRASKA, APPELLANT.
89 N. W. 2d 568

Filed April 18, 1958. No. 34345.

1. **Pleading.** A general demurrer admits all allegations of fact in the pleading to which it is addressed, which are issuable, relevant, material, and well pleaded; but does not admit the pleader's conclusions of law or fact.
2. ———. A general demurrer tests the substantive legal rights of parties upon admitted facts, including proper and reasonable inferences of law and fact which may be drawn from facts which are well pleaded.
3. ———. If the petition states facts which entitle the plaintiff to relief, whether legal or equitable, it is not demurrable upon the ground that it does not state facts sufficient to constitute a cause of action.
4. **Contracts: Statutes.** Every contract is made with reference to, and subject to, existing law, and every law affecting the contract is read into it and becomes a part thereof. This is true between individuals dealing between themselves by contract, express or implied, and likewise true between individuals and the government.
5. **Public Lands.** The rights of a lessee of school land are determined by the law as it was at the time the lease was made and the lessee may not be deprived of any substantial right resulting from the lease in his favor by subsequent legislation.
6. **States.** The state by entering into a contract abandons its attributes of sovereignty and binds itself, to the extent of its power to contract, substantially as an individual does who becomes a party to a contract.
7. **Constitutional Law.** The right of an owner to dispose of property is substantial and valuable. It is incident to and inheres in the constitutional right to acquire and own title to every species of property recognized by law. It may not be impaired or defeated by legislation after the right is vested.

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

Clarence S. Beck, Attorney General, and *Richard H. Williams*, for appellant.

R. J. Shurtleff, for appellees Pfeifer.

Hutton & Hutton, for appellees Ableidinger.

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

MESSMORE, J.

This is an action in equity brought in the district court for Boyd County by Joe Pfeifer, being the same person as Joe P. Pfeifer, and Martha Pfeifer, as plaintiffs, against Lena Ableidinger, Walter D. Ableidinger, and State of Nebraska, as defendants. The purpose of the action was to quiet title in the plaintiffs to the southeast quarter of Section 36, Township 34 North, Range 12 West of the 6th P. M., in Boyd County, Nebraska, because of a mineral reservation in the State of Nebraska contained in the deed to such quarter section of land which the plaintiffs claim is contrary to the Constitution and laws of the state; and further, to enjoin the State of Nebraska from asserting or claiming any legal right, title, or interest to any mineral, coal, oil, gas, potash, sand, gravel, clay, volcanic ash, tripoli, and saline rights contained on such land. The State demurred to the plaintiffs' petition on the ground that it did not state facts sufficient to constitute a cause of action against the State. The demurrer was overruled. The State refused to plead further and elected to stand upon its demurrer. The trial court entered its decree finding generally for the plaintiffs on their petition and against the defendants. The court ordered and decreed that the title to such real estate be quieted in the plaintiffs and against the reservation of the State of mineral rights and other natural resources, and against all claims of the State or any person or persons claiming by, through, or under the State; and that the State and its officers, various boards, departments, agents, and employees, and all persons, firms, or corporations claiming to act by or through the State be enjoined from claiming any right, title, or interest in said land. The State appealed.

The State sets forth the following assignments of error: (1) The trial court erred in finding that the petition stated a cause of action and in overruling the demurrer of the State; and (2) the trial court erred in quieting title to the mineral rights on said land in the plaintiffs, and in enjoining the State, or any person in its right, from going upon, trespassing upon, prospecting for or attempting to develop any of the mineral or natural resources in or upon said real estate, or asserting or claiming any right, title, or interest therein against the title, interest, and possession of the plaintiffs, or either of them, or their heirs, grantees, or successors in interest.

Due to the length of and involved facts alleged in the petition, we summarize the same.

The petition alleged that on or about December 21, 1894, Collins Veach made application to the proper boards and officers of the State to lease the southeast quarter of Section 36, Township 34, North of Range 12, in Boyd County, in the manner and form then provided by law for leasing common school lands; that for the purpose of and in order to induce and interest people in the leasing of school lands the Legislature of the state by laws duly passed and in force in 1894 and 1895 provided that persons leasing school lands would be and were granted the right to thereafter purchase the real estate leased by them during the terms of the lease upon application made by the holder of the lease to the proper authorities for a contract of purchase and sale of the leased lands in the manner provided by law at the time the lease was executed; and that the application of Collins Veach was duly approved and on February 10, 1895, a lease to the above-described real estate for 25 years was issued and properly recorded.

The petition further alleged that on August 31, 1903, Collins Veach sold, assigned, and transferred the above-described lease and all of his right, title, and interest therein to one Alden A. Barden, which assignment was

in proper form and duly recorded; that on March 4, 1909, Alden A. Barden sold, assigned, transferred, and conveyed to Charles L. Teaquist all his right, title, and interest to the leased real estate, which assignment was properly recorded; that on March 1, 1918, Charles L. Teaquist sold and assigned all his right, title, and interest to the leased real estate to Joe Bowers, which assignment was duly approved and recorded; and that on August 20, 1918, Joe Bowers sold, assigned, and conveyed all of his right, title, and interest in the leased real estate to F. W. Woods, which assignment was duly approved and recorded.

The petition further alleged that Collins Veach, by virtue of the contract entered into with the State on February 10, 1895, to lease the school land above described, then and thereby acquired and had the right during the term of said lease to purchase the real estate in accordance with the laws in force upon the date of the execution of the lease and contract; that by the leasing of the above-described real estate, the State thereby contracted and agreed with Collins Veach that it would sell and by its deed convey title in fee simple to him during the term of the lease of the real estate described upon the surrender of the lease, the rights of the purchaser and seller to be governed by the laws of the State in force upon the date of the execution of the lease; that shortly prior to July 1, 1919, F. W. Woods surrendered this lease and made application to purchase the land conveyed thereby in accordance with the statutes pertaining to such purchase; that a certificate of sale issued to F. W. Woods on July 17, 1919, contained the following provisions, among others: "In case the said F. W. Woods his assigns or legal representatives, shall pay the several sums of money aforesaid, punctually at the times above limited, and in all other respects observe and comply with the laws governing the leasing, selling, and general management of the Educational Lands, the State of Nebraska, will, on the

surrender of this certificate, cause to be made and executed unto the said F. W. Woods his assigns or legal representatives, a Deed conveying said land in fee simple"; that there were four certificates of sale, each covering one quarter of the southeast quarter section above described, and each certificate of sale showed the following words: "All mineral, coal, oil, gas, potash, sand, gravel, clay, volcanic ash, tripoli, and saline rights, are reserved to the state, with right to prospect for and devolop the same"; that on January 13, 1920, the four certificates of sale were assigned to George E. Knoll and Martin S. McDuffee; that on April 27, 1922, a deed was issued by the State to George E. Knoll and Martin S. McDuffee, which deed contained a reservation of the mineral rights in the same language contained in the sale certificates; and that thereafter this quarter section of land was subject to seven conveyances prior to the one to the plaintiffs in this action, each by warranty deed without mention of the mineral reservation in the State.

The petition further alleged that on April 27, 1922, the deed of the State issued in compliance with the certificate of sale, contained the following provision, among others: "To have and to hold the same premises and parcel of land above particularly described, with the appurtenances thereon, unto the said George E. Knoll & Martin S. McDuffee, their heirs and assigns, in fee simple forever."

The petition also alleged that the plaintiffs took possession of the real estate here involved on March 1, 1950, and are now in possession of the same; that they did not have actual knowledge of the mineral reservations contained in the deed from the State and would not have purchased the land had they known of that fact; that they demanded that the sellers, Lena Ableidinger and Walter D. Ableidinger, furnish them with a merchantable title or take such action necessary to clear the title of the reservation in favor of the State,

after attorneys examining the abstract for their loan company had declared the title unmerchantable because of the reservations hereinbefore noted; that the sellers refused to do so; and that the plaintiffs brought this action for the purpose of establishing the rights of the plaintiffs and defendants in the real estate here involved.

This real estate was purchased from Lena Ableidinger and Walter D. Ableidinger by contract which is set out fully in the petition and need not be set forth here.

The petition further alleged that the above-named defendants were the record joint-owners of the real estate; that in the agreement it was agreed that a deed would be executed and placed in escrow in the Spencer State Bank pending payment in full of the purchase price; and that the plaintiffs were denied permission to examine the abstract of title prior to the payment in full of the purchase price, but were assured that the abstract showed a merchantable title.

The petition also alleged that the land described in the certificates of sale and the deeds from the State consisted substantially of sand, gravel, and clay soil, and if the reservation set forth in the certificates of sale and deed were valid and enforcible, then said deed, contrary to its terms, conveyed nothing of value to the grantees therein named, was a sham conveyance, and a fraud upon the grantees; that the State claimed the right at any time through its own officers and agents, employees and departments, or private individuals, contractors, or prospectors to enter upon the land and deprive the grantees and their successors in interest of all rights in and to the real estate, thus not only destroying the title and its merchantability but all use and value of the land to those claiming to hold under the deed above described conveying the fee simple title to the land; and that had the plaintiffs known at the time they entered into the contract with the individual sellers, or at the time they paid the full purchase price, that such a reservation in favor of the State

was in existence and that the title to the real estate was subject to the apparent rights of the State, they would not have been interested in purchasing or owning the real estate.

The relief prayed for was to quiet title in the plaintiffs and to enjoin the State as hereinbefore indicated.

A general demurrer admits all allegations of fact in the pleading to which it is addressed, which are issuable, relevant, material, and well pleaded; but does not admit the pleader's conclusions of law or fact. A general demurrer tests the substantive legal rights of parties upon admitted facts, including proper and reasonable inferences of law and fact which may be drawn from facts which are well pleaded. If the petition states facts which entitle the plaintiff to relief, whether legal or equitable, it is not demurrable upon the ground that it does not state facts sufficient to constitute a cause of action. See Kinney Loan & Finance Co. v. Sumner, 159 Neb. 57, 65 N. W. 2d 240.

The following laws of this state are involved in this appeal. We set forth certain parts thereof that may assist in the determination of this appeal.

Laws of 1877, page 174, provides: "AN ACT To provide for the registry, sale, leasing and general management of all lands and funds set apart for educational purposes, and for the investment of funds arising from the sale of such lands." Section 7 of the act provides: "In all counties where the appraised value of any portion of unsold lands shall exceed seven (7) dollars per acre, the commissioner of public lands and buildings shall, either in person or by agent, attend at such times as the board may direct, but not more than once in any one year, and offer at public auction all the unsold lands, except such as have been leased, to the highest bidder; * * *." The section then provides for the procedure with reference to the sale, and that no lands shall be sold for less than the appraised value, nor offered for

sale, or sold for less than seven dollars an acre in addition to the improvements on the land.

Laws of 1879, page 110, provides: "AN ACT To amend sections 17 and 19 of the act entitled * * *" as given in the title to the 1877 act above. Section 1 of the 1879 act provides, with reference to the amendment of section 17 of the 1877 act: "Whenever any of the lands herein provided for have been offered for sale and not sold for want of bidders, the said board may lease the same on the following conditions: All persons desiring to lease such lands shall file their sealed proposal for the leasing of the same, under the terms and conditions hereinafter set forth, * * *."

Section 2 of the 1879 act provides that section 19 of the 1877 act be amended to read as follows: "The first payment shall be computed to the first day of January or July, as the case may be, next ensuing the date of executing the lease, and such lease shall contain a covenant or contract of the lease, that he or she will promptly pay the rental or interest semiannually, in advance; that no waste shall be committed upon the land, and that the premises shall be surrendered at the expiration of twenty-five years from the first day of January next ensuing after the date of the lease, or sooner with the consent of the board herein referred to; * * *. Any lessee of school or university lands may at any time, not oftener than once in any one year, apply in writing to the county treasurer of the county in which the land is situated, to have such land appraised for the purpose of sale. On the receipt of such application, and the payment of six dollars by such lessee, the county treasurer, * * *." Then it provides the method of appraisal, the surrender of the lease, the filing thereof, that the lessee may purchase said lands at their appraised value, but at not less than seven dollars an acre, that a contract of such sale shall be executed and recorded in all respects in the same manner and have the same force as in case of the public sale of other lands

under the provisions of this act, but in such case the contract shall recite the fact that such sale is made at private sale to a lessee under the provisions of this act.

Laws of 1885, chapter 85, page 335, related to the same subject matter as above noted. Section 1 of the act set forth the duty of the board of commissioners; section 2 provided that the commissioner of public lands and buildings should, under the direction of the board, cause suitable abstracts to be made of all lands owned by the state for educational purposes; section 3 provided the method of appraisement of the lands; section 4 the re-appraisement thereof; section 5 the sale of educational lands and the number of acres that could be purchased by any one person; and section 6 the terms of payment. Section 7 provided: "Payments made at such sale shall be made to the county treasurer, who shall deliver to the person making such payment a receipt therefor, and any person making full payment shall, upon the presentation of his receipt therefor to the board, be entitled to receive a deed from the state." Other provisions of the act need not be referred to.

In 1895, when the school lease on the southeast quarter of Section 36, Township 34, Range 12 in Boyd County was granted to Collins Veach, the legislative act of 1879, heretofore set out in part, was in effect. In 1897, the Legislature repealed in effect sections 1 and 2 of the act of 1879. Laws 1897, c. 71, § 1, p. 318.

In Laws of 1907, chapter 134, page 437, section 1 provided in part as follows: "None of the educational lands shall hereafter be sold except as follows: * * *." On page 440 of this act will be found the following language: "Any lessee who is the holder of an unexpired lease executed prior to July 9, 1897, may make application to purchase the lands described in said lease in the manner provided by law in force at the time of the execution of the said lease; Provided, that all appraisements made for the sale of any of said lands shall be subject to review by the board of educational

lands and funds before the same becomes effective."

In 1913, the law of 1907 relating to this subject was amended, but contained the same provision in the exact language as above stated. Laws 1913, c. 40, § 1, p. 135, which became section 5855, Rev. St. 1913.

The 1915 law amended section 5855, Rev. St. 1913, but contained the same identical language heretofore referred to appearing on page 440 of the Laws of 1907. Laws 1915, c. 103, § 1, p. 246.

In the thirty-sixth extraordinary session of the Legislature in 1918, chapter 7, page 43, the Legislature passed an act which is now sections 72-301 to 72-314, R. R. S. 1943. Section 1 of the act provided: "All common school, university, normal, saline or other public lands, lakes, lake beds, river beds and channels belonging to the state or under its control, and all lands which may hereafter be so owned, and all of such lands which have heretofore been sold or conveyed by the state or by its authority, in the conveyance of which there has been reserved mineral and other valuable substances therein, are reserved to the state, as well as lands that may hereafter be sold, and lands hereafter acquired by the state, shall be included within the provisions of this act, and shall be open to the prospecting for, and the development of, minerals, petroleum, gas, potash and other valuable substances upon conditions herein provided."

In Briggs v. Neville, 103 Neb. 1, 170 N. W. 188, this court sustained the constitutionality of the act of the extraordinary session of the Legislature of 1918, chapter 7, as against the contentions that it violated sections 11, 13, or 15, Article III, of the state Constitution, or the Fourteenth Amendment to the federal Constitution. That case did not, however, involve vested rights that might be acquired by virtue of former legislation pertaining to leases and the purchase of land belonging to the state for educational purposes.

The plaintiffs alleged that the 1918 act was contrary

to and in violation of Article I, section 3, of the Constitution of the state which provides: "No person shall be deprived of life, liberty, or property, without due process of law." The plaintiffs further alleged that the optionee and his successors in interest were deprived of valuable rights and property without due process of law; and that the act of 1918 was contrary to and in violation of Article I, section 16, of the state Constitution which provides: "No bill of attainder, ex post facto law, or law impairing the obligation of contracts, or making any irrevocable grant of special privileges or immunities shall be passed."

The plaintiffs pleaded that the act of 1918 was contrary to said article and section, in that it impaired the obligation of the contract entered into with the State by subsequent legislation; and that the act was contrary to Article I, section 21, of the Constitution of the state which is as follows: "The property of no person shall be taken or damaged for public use without just compensation therefor."

We will discuss the foregoing laws of the state and the constitutional provisions as hereinbefore set forth later in the opinion as the same may be applicable and as occasion requires.

The State contends that a citizen has no vested right in an existing law, so as to preclude its amendment or repeal, and there is no implied promise on the part of the state to protect its citizens against incidental injury occasioned by changes in the law. The State cites Mulloy v. Kyle, 26 Neb. 313, 41 N. W. 1117; Beisner v. Cochran, 138 Neb. 445, 293 N. W. 289; State ex rel. Jehorek v. McKelvie, 111 Neb. 224, 196 N. W. 110; State ex rel. Brown v. McPeak, 31 Neb. 139, 47 N. W. 691; State ex rel. Patterson v. Wenzel, 55 Neb. 210, 75 N. W. 579.

We deem it necessary to briefly analyze the above-cited cases to ascertain their applicability to the issues here presented.

Mulloy v. Kyle, *supra,* decided in 1889, involved the act of 1879 which is the same act under which the plaintiffs in the case at bar claim a vested right to purchase the school land and to obtain a deed in fee simple title to such land as hereinbefore described. In the cited case, a holder of school leases died intestate, leaving a large indebtedness. The county court entered an order for the sale of the school land leases. The administrator assigned duplicate leases to one Boggs, the originals having been lost. Boggs afterwards surrendered the leases and purchased the land. Through mesne assignments, the contracts of purchase were assigned to the defendant Kyle who, without knowledge of any other claim upon the land, paid full value therefor. Two surviving brothers of the deceased Mulloy brought an action to set aside the transfers to defendant Kyle on the grounds that the county court had no jurisdiction or authority to order the sale of the leases, as personal property. The court, after deciding that a lease for a term of 25 years is personal property, considered the contention of the plaintiffs concerning the option provision in the laws of 1879 relating to school lands. The court said: "This option, it may be observed, is not given in the lease itself, but as a general provision of law. (Sec. 15, ch. 80, Comp. Stat.) The provision is, that a lessee may apply in writing to the chairman of the county board to have the land embraced in his lease appraised for the purpose of sale. After such appraisement, the lessee may pay the county treasurer the appraised value of the land, and he shall then be entitled to receive a deed therefor, providing the land shall not be sold for less than $7 per acre. * * * But by the provisions of section fifteen, the right is reserved to the lessee. Until he avails himself of that right he has nothing but a lease. The right is given solely by law. * * * We find nothing in the section which would change the character of the lease."

The State argues that while the above decision dealt

specifically with the question of whether the right constituted a contract to purchase under the statute cited, the general principle is clearly established that the right to purchase was one given solely by statute, not by written lease, and that until the lessee chose to avail himself of that right he held nothing but a lease. The right is given solely by law, and the same situation is true in the case at bar.

The State further argues that the general law might have been left as it was after the act of 1897, whereby the right to purchase was withdrawn, and a lessee of a prior lease would not have been deprived of any vested right. If the Legislature later permitted a reinstatement of this right to purchase, it was merely an exercise of the legislative prerogative. If the Legislature later decided to modify the title which could be given to this class of lessee, where such lessee had not as yet exercised the option, that also was within the discretion of the Legislature. This the Legislature did do by the extraordinary session of 1918, when it reserved the mineral rights in all common school lands owned by the state. Therefore, when F. W. Woods chose to purchase the land in 1919, the offer was limited to a deed to the agricultural lands.

The court held in Mulloy v. Kyle, *supra,* that a lease of real estate for a period of years was personal property. The court indicated that an option granted persons leasing school lands was a contract for the purchase of real estate, but not an interest therein.

The plaintiffs make no contention in the case at bar that any option, including the option granted by the laws of 1895, grants an interest in real estate of any nature.

The State cites the following from 11 Am. Jur., Constitutional Law, § 372, p. 1200, as supporting its position: "There can, in the nature of things, be no vested right in an existing law which precludes its change or repeal, nor vested right in the omission to legislate

on a particular subject. In no case is there an implied promise on the part of the state to protect its citizens against incidental injury occasioned by changes in the law." This citation incorporates the State's contention as heretofore mentioned. This section also states: "Every citizen in making his arrangements in reliance on the continued existence of laws takes on himself the risk of their being changed, and the state incurs no responsibility in consequence of the change proving injurious to his private interests. A repeal or amendment of a statute, however, cannot have the effect of extinguishing vested rights which have been acquired under the former law." This last sentence is applicable to the case at bar, as will be shown later in the opinion.

In 11 Am. Jur., Constitutional Law, § 371, p. 1200, it is said: "Vested rights may be created by the common law, by statute, or by contract. No matter how created, they are entitled to the same protection. The mere fact that the enactment of a statute may have been dictated by public policy does not preclude the acquisition of vested rights thereunder. The failure to exercise a vested right before the enactment of a subsequent statute which seeks to divest it in no way affects or lessens such right. Accordingly, when a claim or right has arisen resting upon a transaction regarded by the law as a quasi contract, there is no just ground for the position that such a claim falls with the repeal of the statute under which the transaction was had."

Applying the above language appearing in section 371, as aforesaid, to the instant case would mean that the act of 1897 repealing the acts creating the option in 1895 did not affect the plaintiffs' rights, nor did the act of 1918, as subsequently will appear by the decisions cited from this jurisdiction.

The State cites Beisner v. Cochran, *supra*. This was a suit for a declaration of the rights and legal relations of the parties under sections 60-435 to 60-444, Comp.

St. Supp. 1937, as affected by chapter 78, Laws 1939. The defendants were the administrative officers of the state charged by law with the enforcement of such statutes. The trial court sustained a general demurrer to the petition and dismissed the action. Prior to 1937, the statutes of Nebraska provided that motor vehicles should be equipped with adequate brakes and lights. In 1937 a statute was passed requiring the owners of motor vehicles to procure annual certificates of inspection showing that brakes, lights, and other equipment on their cars complied with the statutes of the state and the regulations of the administrative department. The statute provided further that a public garage, by meeting certain requirements, could become an authorized inspection station and make a charge for each complete inspection. The plaintiffs operated public garages and made investments in special machinery and equipment to qualify to inspect motor vehicles and make the statutory charge therefor. In 1939 the Legislature passed a new statute with more rigorous requirements with respect to brake and light equipment, and repealed the provisions of the 1937 act requiring compulsory inspection and authorizing official inspection stations. Laws 1939, c. 78, p. 317. The plaintiffs contended that the repeal statute destroyed the value of their special machinery and equipment in a manner violative of the due process clauses of the state and federal Constitutions and also constituted a taking or damaging of private property for public use without just compensation contrary to constitutional prohibitions. The court said: "We think the rule is, that a citizen has no vested right in statutory licenses, permits and privileges. This being true, a license to carry on a particular trade may be recalled by legislative action at any time. No one has a vested right to be protected against consequential injuries arising from a proper exercise of public powers. That the state under its police power may regulate the use of motor vehicles on the public high-

ways cannot be questioned. Consequently, any incidental damage resulting from a legislative invocation of its police power does not give rise to a right to enjoin the act or to claim compensation from the public." We believe this case involving the police power of the state is not applicable to the legal propositions raised in the instant case related to the purchase of school lands.

In the case of State ex rel. Brown v. McPeak, *supra,* the lease granted under the act of 1879 provided for an appraisal of the land every 5 years by three appraisers, one of which was to be appointed by the lessee. An act of 1883 attempted to withdraw the right of the lessee to appoint one of the appraisers. It was held that: "While the legislature may change or modify the remedy it cannot, by a direct act, deprive the party of a substantial contract right." In other words, it was held that the lessee had obtained a substantial right granted by the contract of lease which could not be taken away from the lessee during the life of the contract. This case fails to support the State's contention, but rather favors the plaintiffs' position.

The case of State ex rel. Jehorek v. McKelvie, *supra,* was based upon a factual situation accruing before the enactment of the act of 1918. It holds that mineral reservations made in sales contracts for common school lands in 1917, on the sole authority of a resolution passed by the Board of Educational Lands and Funds, were of no validity and the purchasers were entitled to a deed free and clear of such reservations. At the time there was no provision of law requiring or authorizing the officers of the state, in making sale of the state's common school lands, to make any such mineral reservations as were attempted to be made in the cited case. The court held that the transaction must be governed and the rights of the parties determined by the law in force when the contract of sale was made in 1917. As a consequence the law of 1918 reserving mineral rights in the common school lands to the state could in

no event apply. It is apparent, by citing the above case, that it is the State's contention that the laws of 1918, which were in force in 1919 when the contract of sale was made in the case at bar, governs. The court said that the purchaser paid for a fee simple title and was entitled to a deed that insured him such a title. As we interpret the rule heretofore set out it means all of the law in force and applicable to the transaction at the time the contract of sale was made, not only part of it, meaning not only the law of 1918 but the law of 1915 in force at the time.

In the case of State ex rel. Patterson v. Wenzel, *supra,* a school land lease was issued to S. L. Northrop for a term of 25 years from and after January 1, 1876. Patterson became the lessee by virtue of assignments of the lease from Northrop and those claiming under him. On August 10, 1897, Patterson elected to exercise the option to purchase the land. This was after the Legislature of 1897 repealed the law with reference thereto. He brought an action of mandamus to require the proper officials to enter into a sales contract as provided for by the laws of 1879. The state defended on the grounds (1) that at the time the lease was executed no statute existed authorizing the lessee to purchase at private sale; and (2) that the privilege granted by the provisions of the act of 1879 authorizing the purchase by the lessee at private sale was granted without consideration by the state and could be withdrawn at any time before its acceptance and by the passage of the act of 1897 the state did withdraw the option prior to the election to exercise it. The court said: "We conclude, therefore, that by the passage of the act of 1897 the state intended to and did withdraw from sale all its unsold and unleased school lands and the school lands leased prior to the taking effect of the act of 1879, the lessees of which had not availed themselves of the privilege of purchasing such lands prior to the taking effect of the act of 1897. The district court correctly refused the writ of

mandamus * * *." In the opinion the court further said: "We think the contention of the respondents correct so far as it relates to lessees of school lands whose leases were executed prior to the taking effect of the act of 1879. The case at bar does not require us to decide whether the state could pass a valid law withdrawing the option to purchase from lessees whose leases were executed after the passage of the act of 1879, and we do not, therefore, decide that question." It is obvious that the cited case does not involve the same issues as are involved in the case at bar.

It is apparent that the cases above cited and analyzed do not deal distinctively with the issues here involved. It is true that in some of the cases cited the court held the rights of lessees of state school lands are determined by the law in force governing the leasing of school lands at the time of the execution of the lease. This was also the law in 1895, as heretofore pointed out.

We believe the following to be applicable to the case at bar. In the case of Scotts Bluff County v. State, 133 Neb. 508, 276 N. W. 185, this court held: "Every contract is made with reference to, and subject to, existing law, and every law affecting the contract is read into it and becomes a part thereof. This is true between individuals dealing between themselves by contract, express or implied, and likewise true between individuals and the government." See, also, County of Johnson v. Weber, 160 Neb. 432, 70 N. W. 2d 440; McWilliams v. Griffin, 132 Neb. 753, 273 N. W. 209, 110 A. L. R. 1039; Niklaus v. Miller, 159 Neb. 301, 66 N. W. 2d 824.

This court said, in the case of Todd v. Board of Educational Lands & Funds, 154 Neb. 606, 48 N. W. 2d 706: "The law on the subject in force at the time of the execution of a lease is a part thereof and determines the rights of the lessee. A lease made in compliance with the direction and permission of the Legislature between the state and the lessee is a contract and is property. The rights resulting from the contract vest on its ex-

ecution and delivery. The state may not subsequently by legislation deprive the lessee of any substantial right secured to him by the lease. Constitutional guaranties and prohibitions safeguard it. These include the mandate that no state shall deprive any person of property without due process of law; no state shall enact any law impairing the obligations of a contract; and the property of no person shall be taken or damaged for public use without compensation. State v. Platte Valley Public Power & Irrigation Dist., 147 Neb. 289, 23 N. W. 2d 300, 166 A. L. R. 1196; Reavis v. State, 140 Neb. 442, 300 N. W. 344; Stanser v. Cather, 85 Neb. 305, 123 N. W. 316; Hile v. Troupe, supra (77 Neb. 199, 109 N. W. 218); State ex rel. Patterson v. Wenzel, 55 Neb. 210, 75 N. W. 579; State ex rel. Beer v. Thayer, 46 Neb. 137, 64 N. W. 700; State ex rel. Brown v. McPeak, 31 Neb. 139, 47 N. W. 691.

"The right to dispose of property is substantial and valuable. It is incidental to and inheres in the constitutional right to acquire and own property. It may not be impaired or defeated by legislation after the right has vested. To take from property one of its elements of value and deny the owner the right to sell or transfer it in any legitimate manner is as much a deprivation of property as if the physical property itself were taken."

In applying the above language to the case at bar this would be equally applicable whether the rights arise from printed words of the lease or the statutes in force at the time granting the rights not printed in the lease as has heretofore been pointed out.

The Legislature by the act of 1897 could not lawfully and constitutionally deprive the lessee of his rights to acquire a fee simple title within the option to purchase by the laws in effect in 1895, and the Legislature could not by its act in 1918 lawfully and constitutionally do so.

In Ritter v. Drainage District, 137 Neb. 866, 291 N. W. 718, this court held: "Where contractual and vested rights are created pursuant to statute, they cannot be

destroyed by a subsequent act of the legislature." The court also said: "'It has become the established law that a legislative enactment, in the ordinary form of a statute, may contain provisions which, when accepted as the basis of action by individuals or corporations, become contracts between them and the state within the protection of the clause of the federal Constitution forbidding impairment of contractual obligations.' 6 R. C. L. 338, sec. 331. See, also, 12 C. J. 969."

In Kucera v. Kavan, 165 Neb. 131, 84 N. W. 2d 207, this court held: "An option founded upon a valuable consideration cannot be withdrawn before the time specified therein has expired." See, also, Merritt v. Ash Grove Lime & Portland Cement Co., 136 Neb. 52, 285 N. W. 97.

We conclude that the Legislature, by the act of 1897, could not lawfully and constitutionally deprive the lessee of his right to a fee simple title under his option to purchase by the laws in effect in 1895. The Legislature in 1918 could not constitutionally so do. His rights were vested rights which this court protects.

For the reasons given herein, the judgment of the trial court in overruling the State's demurrer should be, and is hereby affirmed.

AFFIRMED.

ORVAL R. CHADD, APPELLEE, V. WESTERN CASUALTY AND SURETY COMPANY ET AL., APPELLANTS.
89 N. W. 2d 586

Filed April 18, 1958. No. 34348.

1. **Workmen's Compensation.** The incapacity into which the courts may inquire under the provisions of subdivision (b), section 48-141, R. R. S. 1943, and use as a basis for the modification of an award is that of increase or decrease of incapacity which is due solely and only to that violence to the physical structure of plaintiff's body which resulted from his accident, and which

increase or decrease has occurred since the award was rendered.

2. ———. Before recovery may be had for an increase of incapacity due solely to the injury, within the meaning of subdivision (b), section 48-141, R. R. S. 1943, the plaintiff must prove by a preponderance of the evidence that his incapacity has been increased; that is, that there now exists a material and substantial change for the worse in the plaintiff's condition—a change in circumstances that justifies a modification, distinct and different from that for which an adjudication had been previously made.
3. ———. 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.
4. ———. Any increase or decrease in incapacity of the claimant the cause of which is not the injury received in the accident, the basis of the previous award, is insufficient to justify modification of the award.
5. ———. All calculations to be made under the provisions of section 48-121, R. R. S. 1943, and amendments thereof, have reference to wages, percentages, and results as of the time of the injury.
6. **Workmen's Compensation: Statutes.** Statutes, increasing the amounts payable under the compensation act, enacted subsequent to the time of the injury are not applicable retroactively to the time of the injury or prospectively from the time of the enactment of the act.
7. **Workmen's Compensation.** Where a defendant is not liable for a physical disability under the compensation act, he is not liable for medical fees based on that specific liability.

APPEAL from the district court for Lancaster County: HARRY R. ANKENY, JUDGE. *Reversed and remanded with directions.*

Chambers, Holland, Dudgeon & Hastings, for appellants.

Lloyd E. Chapman, for appellee.

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

SIMMONS, C. J.

This is an appeal in a workmen's compensation case

brought under the provisions of section 48-141, R. R. S. 1943, for the modification of the amount of an award on the ground of increase of incapacity due solely to an injury. The trial court granted the application. Defendants appeal.

The appeal presents three questions generally stated as follows: Did plaintiff meet the burden of proof required by the act? May the amount of the award be based on an increase by legislative act in the weekly base payment subsequent to the injury and the original award? Did the court err in allowing medical fees for services and expert witness charges?

We reverse the judgment of the trial court and remand the cause with directions to dismiss the plaintiff's petition.

The matter is here for trial de novo under the provisions of section 48-185, R. R. S. 1943, as construed in Werner v. Nebraska Power Co., 149 Neb. 408, 31 N. W. 2d 315, and subsequent cases down to and including Miller v. Peterson, 165 Neb. 344, 85 N. W. 2d 700.

The de novo trial and determination is limited to those questions of fact which may be and are properly presented and are properly determinable in this sort of a proceeding.

"The incapacity * * * into which the courts may inquire in this proceeding and use as a basis for the modification of an award is that increase or decrease of incapacity which is due solely and only to that violence to the physical structure of plaintiff's body which resulted from his accident, and which increase or decrease has occurred since the award was rendered." Ludwickson v. Central States Electric Co., 142 Neb. 308, 6 N. W. 2d 65. The above holding is quoted and approved in Riedel v. Smith Baking Co., 150 Neb. 28, 33 N. W. 2d 287.

We stated the rule also in Huff v. Omaha Cold Storage Co., 136 Neb. 907, 287 N. W. 764: "Before recovery may be had for an increase of incapacity due solely to the injury, within the meaning of subdivision (b), sec. 48-

142, *supra* (now section 48-141, R. R. S. 1943), the plaintiff must prove by a preponderance of the evidence that her incapacity has been increased (meaning amplified, enlarged, expanded, extended or intensified. Webster's New International Dictionary); that is, that there now exists a material and substantial change for the worse in the plaintiff's condition,—a change in circumstances that justifies a modification, distinct and different from that for which an adjudication has been previously made."

Plaintiff filed a petition in the compensation court June 18, 1954, alleging severe and permanent injuries in the course of his employment arising as a result of being hit on the head by a falling timber on a construction project at the Lincoln Air Base. Defendants admitted the accident and denied generally. The matter was heard before one judge of the compensation court resulting in an order dismissing the petition. A rehearing was had before the court en banc. The result, so far as important here, was a judgment awarding plaintiff "30% permanent partial disability to plaintiff's body as a whole."

The compensation court further found "that plaintiff has failed to meet the burden of proof required to establish by a preponderance of the evidence any causal connection between the disabilities, if any, of plaintiff's eyes and ear and the accidental injury of January 13, 1954." The matter was appealed to the district court by the defendants, resulting in a judgment of affirmance on May 19, 1955. That judgment became final.

Thereafter plaintiff brought this proceeding in the district court seeking a modification of the above judgment and an award of compensation based on permanent total disability to his body as a whole. The district court rendered judgment awarding $30 per week permanent total disability for the remainder of the 300-week period from January 13, 1954, and thereafter compensation at $25 per week for the remainder of the life of the plaintiff. It awarded medical fees payable to

Dr. D. D. Sanderson in the sum of $150. Other items are not assigned as error.

We must first determine the effect of the finding, which has become final, that plaintiff failed to prove any causal connection between the disabilities, if any, of his eyes and ear, and the accidental injury.

The rules are: 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. Any increase or decrease in incapacity of the claimant the cause of which is not the injury received in the accident, the basis of the previous award, is insufficient to justify modification of the award; or as stated in the body of the opinion: "It is a claim of right of additional recovery because of a new effect and result of the same injury caused by the accident, the basis of the previous award." Peek v. Ayers Auto Supply, 157 Neb. 363, 59 N. W. 2d 564.

We are unable to determine just what injuries the compensation court determined were the result of the violence to the physical structure of plaintiff's body caused by the accident and upon which it based its finding of "30% permanent partial disability to plaintiff's body as a whole." It is patent that plaintiff received a skull fracture resulting from a blow on the head. The results flowing from it were the items that made up the partial disability rating.

We do know (as a result of the finding quoted above) that any disabilities of eyes or ear were not elements that entered into that permanent partial rating. Those disabilities must be put aside and not considered in this proceeding.

We have, then, this question: What increase of incapacity has occurred since the award that has been caused by the violence to the physical structure of the body of plaintiff by the accident?

On this question the plaintiff, having the burden of proof, offered his own testimony and that of his wife and daughter. This consisted of evidence of his condition at the time of the hearing that he was "worse" now than at the hearing before the compensation court and that he was totally disabled. We do not deem it necessary to set out the evidence in detail, because threaded through it and as an integral part of the whole are the alleged contributing factors of his eyes and ear difficulties.

Plaintiff also offered the evidence of Dr. D. D. Sanderson, an eye and ear specialist. His findings and conclusions must be put aside for the above reason.

Plaintiff's other witness was Dr. Paul D. Marx. It is quite apparent that the award by the compensation court rested in large part upon his testimony. It is not too clear as to whether Dr. Marx did or did not consider the eyes and ear conditions in his testimony in the instant trial. It is not his specialty. He had examined the plaintiff on a number of occasions before the compensation court trial and since. He had treated the plaintiff. He had given the plaintiff a complete examination a few days before this trial. He testified on direct examination that plaintiff's physical condition had not changed enough to warrant a complete X-raying; that plaintiff was weak, nervous, and had periods of dizziness; that he had impaired memory; that he had difficulty in articulating; that there was not any great increase or worsening as to either memory or articulation, but showed no improvement; and that he had a decrease in muscular power of hands, shoulders, and legs (relative to which limited activity or almost complete inactivity was a factor, though certain tenderness earlier apparent was now missing).

On cross-examination he testified that plaintiff's complaints were substantially the same as they had been from the beginning "with very slight increase in some"; that plaintiff "has stabilized but is now showing prob-

ably some findings as a result of age and arteriosclerosis, which are usually aggravated by this type of trauma"; and that essentially his "findings are the same as they have been all along."

Obviously under that evidence of findings plaintiff has shown no increase of incapacity required by the rules quoted above. Patently Dr. Marx' findings do not support an award showing an increase in incapacity. His conclusion was this: "A- Well, I find and feel this man —as I thought before, but even more so now—permanent or one hundred percent disability." Stated otherwise, Dr. Marx disagreed with the finding of the compensation court and continued to disagree with it as to the percentage of the disability. Manifestly that evidence will not support an award based on an increased disability. To so hold would be to convert this modification proceeding into a new trial on the merits. It is not that, and under the statute cannot be.

It follows that the award of the trial court granting the plaintiff an increase of compensation based on an increase of incapacity since the award cannot be sustained and must be set aside.

At the time plaintiff was injured the law provided, applicable here, total disability compensation at the rate of not more than $28 per week nor less than $17 per week, and thereafter for the remainder of life 45 percent of the wages received at the time of injury but not exceeding $22 per week nor less than $15 per week. § 48-121, R. R. S. 1943, as amended by Laws 1953, c. 162, § 1, p. 506. It was under this statutory provision that plaintiff's award of temporary total and permanent partial disability was made.

In 1955 the Legislature increased the rate of $28 per week to $30 per week nor less than $20 per week, and the maximum after 300 weeks to $25 per week nor less than $17 per week. § 48-121, R. S. Supp., 1953, as amended by Laws 1955, c. 186, § 1, p. 527.

The trial court in its award in the instant proceeding

granted a total disability award prospectively at the rate of, first, $30 a week for 300 weeks and thereafter at the rate of $25 per week for the remainder of his life under the 1955 act.

The second assignment of error is that the trial court erred in applying the 1955 rate of total disability to this case. Defendants contend that the 1953 act fixed the amount of compensation. Plaintiff contends that the 1955 act operates prospectively from the date of the enactment and that the trial court was correct in applying it.

The 1957 session of the Legislature increased these comparative figures to $34 per week nor less than $20 per week for total disability for the first 300 weeks, and not to exceed $27 per week nor less than $17 per week for the remainder of the life of the employee. § 48-121, R. S. Supp., 1955, as amended by Laws 1957, c. 204, § 1, p. 716.

The statute in effect when the accident happened and the compensation court award was made provided that for disabilities partial in character (with exceptions not applicable here) the compensation should be 66⅔ percent of the difference between the wages received *"at the time of the injury"* and the earning power of the employee thereafter but not more than $28 per week (with time limits not involved here). § 48-121, R. R. S. 1943, as amended by Laws 1953, c. 162, § 1, p. 506.

At the time of this accident the statute provided: "Wherever in this act the term 'wages' is used, it shall be construed to mean the money rate at which the service rendered is recompensed under the contract of hiring in force *at the time of the accident.*" § 48-126, R. R. S. 1943, as amended by Laws 1953, c. 163, § 1, p. 512. (Emphasis supplied.)

That language was retained in the 1957 amendment. § 48-126, R. S. Supp., 1955, as amended by laws 1957, c. 204, § 3, p. 721. So we must start with the fact that

the base figure in calculating the compensation is the wage "in force at the time of the accident."

It will be seen that the Legislature throughout has fixed the time for the calculations as to compensation to be that of the "time of the injury." It is a matter of common knowledge that wage scales have increased markedly these last years. Obviously the Legislature intended by the 1955 and 1957 amendments to keep the compensation payments in some relative balance in proportion to the wages received at the time of the accident.

It is apparent that all calculations were intended by the Legislature to have reference to wages, percentages, and results as of the time of the injury.

The trial court erred in increasing the amount of the award for permanent partial disability.

The trial court in the modification of award decree directed the defendants to pay to Dr. Sanderson a fee in the sum of $150. This was testified to as $80 for services prior to and at the hearing before the compensation court; $20 for examinations made subsequent thereto; and $50 for a witness fee in the district court at this hearing. As to the $80, plaintiff states that it was "overlooked" at the time of the award of the compensation court. It is obvious that it was not overlooked but was disallowed because of the denial of liability of defendants for any eyes and ear disabilities. That denial became a final award. The same reasoning applies to the fee for examination preliminary to and testifying in the instant case. If the defendants are not liable for the disability arising from the eyes and ear conditions, they are not liable for the fee here which involves that disability. The court erred in the allowance of this item. See Schmidt v. City of Lincoln, 137 Neb. 546, 290 N. W. 250.

The judgment of the trial court is reversed and the cause remanded with directions to dismiss the petition for modification of the award.

REVERSED AND REMANDED WITH DIRECTIONS.

GEORGE BACKER ET AL., APPELLANTS, V. CITY OF SIDNEY, NEBRASKA, APPELLEE.

89 N. W. 2d 592

Filed April 25, 1958. No. 34268.

SUPPLEMENTAL OPINION

APPEAL from the district court for Cheyenne County: ISAAC J. NISLEY, JUDGE. On motion for rehearing. See 165 Neb. 816, 87 N. W. 2d 610, for original opinion. *Original opinion corrected. Motion for rehearing overruled.*

Holtorf & Hansen and *Thorpe & Babcock*, for appellants.

Clinton & McNish, for appellee.

Clarence S. Beck, Attorney General, and *Harold S. Salter*, amici curiae.

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

MESSMORE, J.

In reconsidering syllabus No. 3 in the original opinion, 165 Neb. 816, 87 N. W. 2d 610, we conclude that it should be withdrawn and in its place the following substituted: The most satisfactory distinction between general and special benefits is that general benefits are those which arise from the fulfillment of the public object which justified the taking, and special benefits are those which arise from the peculiar relation of the land in question to the public improvement. In other words the general benefits are those which result from the enjoyment of the facilities provided by the new public work and from the increased general prosperity resulting from such enjoyment. The special benefits are ordinarily merely incidental and may result from physical changes in the land, from proximity to a desirable object, or in various other ways.

Any language appearing in the opinion or holding

contrary to the foregoing is hereby withdrawn and should be disregarded.

Insofar as special benefits are concerned, as a matter of law there were none except as the same may refer to drainage and the court was in error in submitting that issue generally. In view of the foregoing any language appearing in the opinion to the effect that no special benefits accrued to the plaintiffs' lots should not be considered as applying to drainage. In other words, it is a question for a jury to determine as to whether or not any special benefits accrued to plaintiffs' lots by virtue of the improved drainage resulting thereto by reason of the improvement and the trial court should limit the issue of special benefits thereto.

The original opinion is corrected as above set out.

The motion for rehearing is overruled.

ORIGINAL OPINION CORRECTED.

MOTION FOR REHEARING OVERRULED.

YEAGER, J., participating on briefs.

ORVIL E. KUHLMANN, APPELLEE AND CROSS-APPELLANT, V. PLATTE VALLEY IRRIGATION DISTRICT, A CORPORATION, APPELLANT AND CROSS-APPELLEE.

EMMETT P. KUHLMANN ET AL., APPELLEES AND CROSS-APPELLANTS, V. PLATTE VALLEY IRRIGATION DISTRICT, A CORPORATION, APPELLANT AND CROSS-APPELLEE.

89 N. W. 2d 768

Filed April 25, 1958. Nos. 34309, 34310.

1. **Trespass: Injunction.** The owner of real estate has the legal right to use and operate it free from repeated acts of trespass, and an injunction will be granted to restrain such acts especially where committed under a claim which indicates a continuance of the trespass.
2. ———: ———. In such cases equity looks to the nature of the injury inflicted and the fact of its constant repetition rather than to the magnitude of the damage inflicted as the ground for granting relief.

3. **Pleading: Evidence.** A party may at any time invoke the language of the pleading of his adversary on which the case is tried, on a particular issue, as rendering certain facts indisputable and in so doing he is neither required nor permitted to offer the pleading in evidence.
4. ———: ———. An admission made in a pleading on which the trial is had is more than an ordinary admission. It is a judicial admission and constitutes a waiver of all controversy so far as the adverse party desires to take advantage of it and is therefore a limitation of the issues.
5. ———: ———. A judicial admission is a formal act done in the course of judicial proceedings which is a substitute for evidence, thereby waiving or dispensing with the production of evidence by conceding for the purpose of litigation that the subject of the admission is true.
6. ———: ———. A judicial admission is ordinarily final and conclusive upon the party by whom it is made unless the trial court, in the exercise of a judicial discretion, timely relieves him from that consequence.
7. **Trial: Appeal and Error.** This court may in an equity case give proper consideration to the fact that the trial court inspected the premises and 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 cause.
8. **Easements: Adverse Possession.** The use and enjoyment which will create title by prescription to an easement is substantially the same in quality and characteristics as the adverse possession which will give title to real estate. The use and enjoyment must be adverse, under claim of right, continuous, open, exclusive, with the knowledge and acquiescence of the owner of the servient tenement, must continue for the full prescriptive period, and must be substantially identical.
9. **Easements.** To establish a prescriptive right to an easement all of the elements of a prescriptive use and enjoyment must be established by clear, convincing, and satisfactory evidence.
10. ———. If an easement is acquired by prescription, the extent of the right is fixed and determined by the user in which it originated. To establish an easement by prescription the evidence must show the extent of the adverse user for a period of 10 years.
11. ———. An alleged easement that is too indefinite for a determinate description cannot be established and protected by a court of equity.

12. Stipulations. A stipulation in writing of attorneys concerning the manner of the trial of the case, approved by and made an order of the court, is binding upon the parties and the court and a judgment rendered in the case contrary to the stipulation is prejudicially erroneous.
13. ———. Stipulations in writing voluntarily entered into between the parties to a cause or their attorneys for the government of their conduct and the control of their rights during the trial or the progress of the cause will generally be respected and enforced by the courts if such stipulations are not contrary to good morals or sound public policy.
14. ———. Courts should enforce valid stipulations unless good cause is shown for declining to do so, especially where the stipulation has been acted upon so that the parties may not be placed in status quo.

APPEAL from the district court for Lincoln County: JOHN H. KUNS, JUDGE. *Affirmed in part, and in part reversed and remanded.*

Baskins & Baskins, for appellant.

Crosby, Crosby & Nielsen, for appellees.

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

BOSLAUGH, J.

The purpose of this litigation is to prevent appellant by permanent injunction from discharging water from a lateral of the district into Scout Creek and transporting it thereby to and into the North Platte River; the recovery from appellant of damages caused appellees, as they claim, by discharging irrigation water from the works of the district into Scout Creek; and general equitable relief.

The issues of these cases relating to the right of appellees to have a permanent injunction against appellant preventing it from discharging irrigation water from its works into Scout Creek were by stipulation of the parties and the approval and order of the trial court tried simultaneously and the proof offered and received on the trial of these issues was made part of the record of

each of the above-described cases. There was an appeal to this court in each of the cases from the findings and judgment of the trial court of the issues concerning the remedy of injunction and the appeals in this court, identified as case No. 34309 and case No. 34310, were by this court consolidated. The appeals are essentially identical and will be disposed of as though there was but a single appeal. The appellees in the two appeals will be referred to by the respective name of each or collectively as appellees.

Appellees alleged in substance, as the basis for the permanent injunction they sought, these matters:

Orvil E. Kuhlmann is the owner of parts of Section 19, Township 14 North, Range 30 West of the 6th P. M., Lincoln County, described in detail in the petition in the case brought by him. Emmett P. Kuhlmann and Willard D. Kuhlmann are the owners of parts of Sections 19 and 29, Township 14 North, Range 30 West of the 6th P. M., Lincoln County, described in detail in the petition in the case brought by them.

Scout Creek, a natural watercourse, meanders over and across the lands of appellees. Appellant, a Nebraska corporation and an irrigation district, has acquired and uses ditches to carry water for irrigation purposes west, northwest, and southwest of the lands of appellees and in the vicinity of Scout Creek. Scout Creek, under natural conditions, transports a small stream of water except when its flow is augmented by run-off waters caused by heavy rain in the area which it drains and thereby Scout Creek has in instances run bank full prior to the happening of the matters complained of herein but the creek has only infrequently experienced flood stage from natural causes. Appellant caused a ditch to be excavated between its irrigation system and Scout Creek west of the lands of appellees to permit waters not used by irrigators along the irrigation system of appellant to discharge and flow into and through the creek to the river

east of the lands of appellees. Scout Creek has within the last 4 years, due to the water placed therein by appellant by the means aforesaid, overflowed its banks frequently each year; has thereby flooded the lands of appellees; and has caused them continuing and increasing and irreparable damage to their lands and annual crops planted and growing thereon. Water put by appellant into the creek has caused it to change its course, has caused continuing and increasing erosion, has washed out bridges, has endangered buildings, and has substantially lowered the water table of the lands of appellees. The flooding of the lands of appellees, because of the situation which exists, causes the water to be trapped upon their lands so that the productivity of the flooded lands has been destroyed. Appellees have utilized and exhausted the means known to them to prevent and minimize the damage done and threatened to their land and property by the water discharged by appellant into Scout Creek as aforesaid without material or successful result. Appellees have advised appellant of the facts and requested and demanded that the condition created by it be remedied but appellees have secured no permanent relief by consultation with or demands made upon appellant in this regard. The officers of appellant have advised appellees that nothing can be done to improve their situation and that appellant must continue to discharge irrigation waters into the creek as it has done in the past because of the nature of the operation of appellant. Scout Creek has been and is unable to accommodate within its banks the discharge of water from the system of appellant into it during the last 3 or 4 years and the available remedy for the situation of which appellees complain is the prevention of the discharge of irrigation water from the works of appellant into Scout Creek.

Appellant by answer admitted the ownership of the lands described in the petitions of appellees and that Scout Creek crosses their lands, denied all other mat-

ters pleaded by appellees, and alleged new matters as follows:

Scout Creek has two branches west of the lands of appellees. One extends more than 5 miles to the southwest and the other about 3 miles northwest from where they converge near the west line of Section 19, Township 14 North, Range 30 West of the 6th P. M., in Lincoln County. Appellant has an irrigation lateral, known as lateral No. 23, the course of which is recited in detail in the answer but it is not necessary to do so here. The east terminal of the lateral for many years was at the west line of Section 23, Township 14 North, Range 31 West of the 6th P. M., in Lincoln County, and any waste water from it was spilled into the road ditch and carried south to the southwest corner of Section 23 and thence east to the south branch of Scout Creek. Subsequently the lateral was extended eastward with its east terminus in Section 24. More than 10 years ago appellant excavated a ditch from the east end of the lateral to the south branch of Scout Creek and thereby spilled the water from the lateral into the creek. Since and during said time the ditch has been used as a spillway to return the waste water from the lateral to the North Platte River. Appellant has obtained by user an easement in Scout Creek across the lands of appellees. The quantity of water emptied into and transported through Scout Creek by appellant to the North Platte River has not materially varied during the last 20 years. Appellant asked the court to deny the relief sought by appellees, to find and adjudge that appellant has an easement across the lands of appellees in Scout Creek for the transportation of the waste water from the lateral to the river, and for general equitable relief.

The reply of appellees denied the new matter in the answer of appellant.

The trial court found generally for appellees on the issues relating to their right to an injunction as prayed

for by them; that appellant should be enjoined from continuing to spill water in any manner from lateral No. 23 into Scout Creek at any place along the creek without the consent of appellees or their successors in interest; that the water spilled into Scout Creek by appellant increased the flow of it through the lands of appellees; that appellant had failed to establish an easement to flood the lands of appellees because of the uncertainty of the extent and manner of the use during the claimed prescriptive period; that the proof as to damage claimed to the lands of appellees and the causation thereof was uncertain and speculative and no damages could be assessed or allowed; that because thereof appellees should not be permitted to proceed further to try the issue of damages claimed due them from appellant; and that the cause of action for damages should be dismissed with prejudice. Judgment was rendered by the district court in harmony with the findings. The motion of appellant for a new trial and the motion of appellees for a new trial as to the issue of right to and the amount of damages only were each denied. Appellant has prosecuted an appeal and appellees have cross-appealed as to the issue of damages and the adjudication thereof adverse to them.

Appellant had an irrigation supply canal referred to in the record as lateral No. 23 and hereafter spoken of as the lateral. For many years and until soon after the year 1930 it came from the west and had its east terminus at the road ditch on the west of Section 23, Township 14 North, Range 31 West. There was only a small amount of water spilled from the lateral at that time but whatever there was went south in the road ditch to the southwest corner of Section 23 and turned east along U. S. Highway No. 30 to where it intersected the south branch of Scout Creek. The lateral was soon after 1930 extended east to and upon what is called in the record the Rowley land which is a part of Section 24, Township 14 North, Range 31 West. There was a re-

stricted amount of water wasted from the east terminus of the lateral during the dry years of the 1930's following the extension of the lateral until the district was able to purchase storage water. One witness described the condition in the dry years as appellant having 30 to 65 second feet of water at the headgate and 200 dry men calling for the water. During this period appellant often made hay dams in the river in an attempt to induce water to flow into its works from the river. Its water was so limited that appellant practiced a relay system in furnishing water to its users from the lateral. The water therein was relayed to the users commencing at the west end and continuing eastward. The first user was supplied water for a certain period, depending on the area to be watered. The next user was then furnished water for his land on a similar basis. This method was followed until all users were served if the supply of water was sufficient. At times it was not when there was a deficiency of precipitation. The relay system was used by appellant as late as 1950. The date appellant first purchased storage water is not shown by the record but it is definite that appellant has since the year 1950 distributed to its users storage water in addition to what direct-flow water is secured under its appropriation of 202 second feet. Scout Creek had a continuously flowing stream of water until the year 1924 when a drainage ditch was constructed a short distance south of it and generally parallel with it from west of the area involved in this case and extending east to the North Platte River. Since then the creek has had no natural flow of water except during periods of run-off resulting from rains or melting snow.

The east end of the lateral when it was extended into the Rowley land terminated in a pasture near a cottonwood grove that was the east line of the west eighty of the Rowley land. There is evidence that the lateral followed a ridge that was higher than the ground on either side of it and that any water discharged at

the east end of the lateral went partly to the north into what is spoken of in the record as "marsh," "marshy land," or "Halligan's slough," along and through which the north branch of Scout Creek passed and to the east thereof it joined the south branch of Scout Creek west of the lands of appellees and the two formed Scout Creek. It proceeded from and through the lands of appellees in an irregular course to and emptied into the North Platte River. There is also evidence that some of the water from the lateral went into a "low spot" on the Rowley land and finally reached the south branch of Scout Creek.

Appellant excavated a ditch in May of 1947 that connected the east end of the lateral with the south branch of Scout Creek. This was on a part of the Rowley land described as the southeast quarter of Section 24. Appellant has since used the artificial ditch to discharge and spill water from the lateral into Scout Creek. This has been and is the method by which appellant returned unused irrigation water taken by it from the North Platte River to that stream.

The overflow of Scout Creek in the vicinity of and on the lands of appellees before the construction of the ditch on the Rowley land which connected the lateral and the south branch of Scout Creek occurred only on the occasion of heavy run-off of surface water. One of the owners of land involved in this case testified he sustained no damage by any flooding before the construction of the ditch and his evidence in this respect is not controverted. During what is spoken of in the record as "later years" appellant bought storage water. This was after 1947 when the artificial ditch was constructed by appellant. Appellant, because of the storage water available to it, changed its plan of operation and thereafter attempted to keep its ditches full of water. The creek would overflow at night because of the increased discharge from the lateral. There was more water than the users wanted and all of them would

sometimes let it go by in the lateral; hence the increased discharge of water into the creek. If there was a rain the users would discontinue taking water and it would be discharged from the lateral into the creek. There were times when the lateral spilled considerable quantities of water because some or all of the users would, without notice to the ditch rider, discontinue taking water. If the headgate was not closed, water would go down the lateral into Scout Creek and it would frequently overflow. This had been the custom and result for years.

Appellee Orvil E. Kuhlmann owned land in Section 19, Township 14 North, Range 30 West, which was west of the land of appellees Emmett P. and Willard D. Kuhlmann in Section 19 which extended east to and bordered on the North Platte River. Orvil E. Kuhlmann testified: After the ditch was made by appellant connecting the lateral with the south branch of Scout Creek as above described there was a material change in the water that flowed in the creek. The water would come down the creek suddenly, it would fill rapidly, and the creek would many times overflow its banks. In 1954 the water was high enough that the witness was compelled to construct a dike along the south bank of Scout Creek north of the buildings on his land to keep the water out of his buildings and he has since maintained the dike as a necessary protection. He had no such experience before the artificial ditch was made. He followed the water up the creek and found it was coming from the lateral, through the ditch made by appellant, into Scout Creek, and thence to and upon the lands of appellees. The floodwaters substantially destroyed about 10 acres of good grassland located a short distance northwest of the buildings on his land and north of the creek. The floodwaters filled a slough on his land and seeped between 40 and 60 acres of meadow. The situation was such that the floodwater was trapped in this area. Before the meadow was flooded it had been good hay

land. Afterwards it was destroyed for practical purposes. The witness made a record of the times he knew Scout Creek overflowed and flooded on his land during the irrigation season of the years 1954, 1955, and 1956. Numerous times the creek was out of its banks during this period. He investigated and found that the water causing the overflow was coming from the lateral, through the artificial ditch, and down Scout Creek. The witness observed damage to the land of appellees Emmett P. and Willard D. Kuhlmann from east of his land to the river. A part of the land of Emmett P. and Willard D. Kuhlmann directly north of the buildings on their land which had been good grassland had been substantially destroyed by flooding and seepage caused by the overflow of Scout Creek. There was other damage which consisted of the banks of Scout Creek being washed and caved in and the creek had deepened 2 or 3 feet. The bottom of it in prior years was mud and vegetation but now the bed of the creek is gravel. The increased water in the creek had cut it down to gravel. The course of the creek changed in some places on the lands of the appellees. The cutting of the bed of Scout Creek to gravel lowered the water table under the land in Section 29 and made it impossible to irrigate that land. There were numerous occasions when there had been no recent rain that the witness observed high water in the creek east of the east end of the lateral. This was true from 1947 or 1948 to the time of the trial of this case. He had seen water flowing in Scout Creek east of the outlet of the lateral when there was no water in Scout Creek in Section 25, Township 14 North, Range 31 West, southwest of the connection of the artificial ditch made by appellant and Scout Creek. The witness did not give written consent to appellant to spill or flow any water into or through Scout Creek.

Appellee Emmett P. Kuhlmann testified: He had lived on the land he owned that is involved in this litigation since 1928. There was no ditch that connected the

east end of the lateral and Scout Creek in 1946. The ditch that provided this connection was there to his knowledge in 1949 or 1950. The water flowing in Scout Creek had increased and in 1950 he investigated to ascertain the cause of it. He found it was coming from the lateral. He on one occasion irrigated 40 acres of ground in less than 24 hours with water appellant had discharged from the lateral. There had not been rain recently before that time and there was no water then in the south branch of Scout Creek. His land in Section 29 had been irrigated as long as he could remember. The bottom of the creek was lowered to gravel. Thereafter when water was put on the land in Section 29 it would go to gravel. It pulled over to the creek and the water went down to the river instead of remaining in the soil. The banks of the creek were eroded and the creek formed channels other than the original one. The damage to the meadow on the land of the witness was almost complete.

A member of the board of directors of appellant from 1944 through 1952, a Mr. Wilson, testified that on several occasions while he was director, Henry Kuhlmann, the father of appellees and the former owner of the lands now owned by appellees, would call Mr. Wilson and complain about water that was flooding the Kuhlmann land. The director said the source of the water complained of was the lateral. He said he would turn the water out of the lateral. He said that this would happen after a rain or when the people would shut off on 23 and the water would go down the wasteway and Henry (Kuhlmann) would call Mr. Wilson. He said he and Henry Kuhlmann got along pretty well on that arrangement.

Harris v. Steele, 110 Neb. 213, 193 N. W. 268, declares: "Where a landowner, for the purpose of irrigation for the benefit of himself and others, diverts water from a river through lands of others without the latter's consent, or without procuring the right by condemnation

proceedings, or without obtaining the consent in writing of a majority of the residents and landowners bordering on a stream or channel through which it is proposed to conduct the water as provided in section 8458, Comp. St. 1922 (now § 46-252, R. R. S. 1943), such landowner may be restrained by injunction from continuing the trespass * * *." In the opinion it is said: "Defendants urge that * * * an injunction was not a proper remedy. We are unable to agree with this contention. The plaintiffs have the legal right to own and operate their lands free from the interference of others, in such manner as suits their own convenience or whims; and this right cannot be interfered with except in the manner provided by law. * * * The flowing of the water over the plaintiffs' lands is a continuing trespass against which injunction is the proper remedy."

This court said in Hagadone v. Dawson County Irr. Co., 136 Neb. 258, 285 N. W. 600: "The owner of real estate has the legal right to use and operate such land free from repeated acts of trespass, and an injunction will issue to restrain such acts, especially where committed under a claim which indicates that the trespass will be continued."

In Lackaff v. Bogue, 158 Neb. 174, 62 N. W. 2d 889, it is said: "In such cases, equity looks to the nature of the injury inflicted, together with the fact of its constant repetition or continuation, rather than to the magnitude of the damages inflicted, as the ground of affording relief." See, also, Fenster v. Isley, 143 Neb. 888, 11 N. W. 2d 822; Faught v. Platte Valley Public Power & Irr. Dist., 147 Neb. 1032, 25 N. W. 2d 889.

The acts enjoined by the trial court were committed under a claim and circumstances which indicate that the trespass will be continued and repeated. Appellant is committed to serve its users of water from the lateral to and including the Rowley land. The needs of the users require storage water and the abandonment of the relay system. Appellant is obligated by law to return

any unused irrigation water to the North Platte River. § 46-265, R. R. S. 1943. So long as rainfall run-off and water discharged from the lateral must flow through Scout Creek as it does now, the injury to appellees will continue. Appellant cannot predict rainfall and denial of irrigation waters so that spill water of an amount short of overflow and flooding can be planned. It is obvious that damaging use and nondamaging use are in this instance inseparable. This was probably apparent when the premises were viewed by the trial judge. Appellant is unyielding in its insistence of necessity and right to maintain and continue its operations as it has conducted them in the past.

Appellant argues that in the year 1947 Rowley, the owner of the land where the work was done, constructed a drainage ditch which connected the east end of the lateral with Scout Creek so that the discharge of irrigation water from the lateral was conducted to and placed in Scout Creek; that the excavation was done by a contractor at the instance of Rowley and he paid the expense of it to the contractor; that the ditch was made without the knowledge or consent of the appellant; that the evidence is that appellees suffered no damage to their lands before the drainage ditch was constructed in 1947; that appellees failed to establish that the injuries of which they complain would have occurred if the drainage ditch had not been constructed but, on the contrary, their proof shows that it was "the construction of that ditch that caused their trouble"; that there was therefore an intervening cause that produced any damage sustained by appellees; that the intervening cause was the construction of the drainage ditch which connected the lateral and Scout Creek; and that appellant "had nothing to do with that intervening cause and that it had not even any knowledge of it."

The assertion and conclusion of appellant that the evidence of appellees "affirmatively shows that it was the construction of that ditch that caused their (appel-

lees') trouble" is correct. The record shows this without dispute. The futility of the argument and conclusion of appellant is that the record shows that there is no basis of fact for either. The answer of appellant, one of the pleadings on which this case was tried, alleges that defendant (appellant in this court) built a ditch that connected the east end of lateral No. 23 with the south branch of Scout Creek upon the southeast quarter of Section 24; and that the spill water from lateral No. 23 has been spilled and emptied into Scout Creek and the same has been used as a spillway to return waste water from lateral No. 23 to the North Platte River. Barkalow Bros. Co. v. English, 159 Neb. 407, 67 N. W. 2d 336, declares: "The allegations of a pleading are always in evidence for all purposes of the trial. * * * A party may at any and all times invoke the language of the pleading of his adversary on which the case is tried, on a particular issue, as rendering certain facts indisputable; and in doing this he is neither required nor permitted to offer the pleading in evidence. * * * Admission made in a pleading on which the trial is had is more than an ordinary admission. It is a judicial admission. It is not a means of evidence, but a waiver of all controversy, so far as the adverse party desires to take advantage of it, and is therefore a limitation of the issues." See, also, Wright v. Lincoln City Lines, Inc., 160 Neb. 714, 71 N. W. 2d 182; Schaub v. City of Scottsbluff, 164 Neb. 805, 83 N. W. 2d 775.

The record evidences that during the trial the parties to this litigation stipulated in open court that "M to L represents a man-made ditch connecting the east end of Lateral 23 with Scout Creek, a ditch constructed by the defendant." The designation therein, "M to L," referred to and identified a line on an exhibit in the case. "M" on the exhibit represents the east end of the lateral and "L" designates where the ditch constructed by defendant (appellant in this court) connected with and emptied into the south branch of Scout Creek. The

line on the exhibit from M to L represents the ditch constructed for the purpose of connecting and which does connect the lateral and Scout Creek. The stipulation in this instance has not been modified and remains in force and effect as made. There has been no effort by appellant to dissipate the effect of the stipulation as to it. Appellant cannot be heard in this litigation to contend anything contrary to the stipulation. It is conclusively bound by the agreement made at the trial.

LeBarron v. City of Harvard, 129 Neb. 460, 262 N. W. 26, 100 A. L. R. 767, states: "A formal, judicial stipulation by the parties as to facts, so long as it stands, is conclusive between them, and cannot be contradicted by evidence tending to show the facts otherwise."

Kipf v. Bitner, 150 Neb. 155, 33 N. W. 2d 518, states: "A judicial admission is a formal act done in the course of judicial proceedings which is a substitute for evidence, thereby waiving or dispensing with the production of evidence by conceding for the purpose of litigation that the proposition of fact alleged by the opponent is true. * * * A judicial admission is ordinarily final and conclusive upon the party by whom it was made, unless the trial court, in the exercise of a judicial discretion, timely relieves him from that consequence."

It must therefore be accepted as a fact incapable of dispute in this litigation that appellant constructed the ditch connecting its lateral No. 23 and the south branch of Scout Creek. It follows in the circumstances of the record that appellant is responsible for the consequences of the construction and use of that ditch which caused the injuries and damage to appellees complained of by them in this litigation. It may with propriety be said that appellant does not seriously maintain that appellees are not entitled to the injunctive relief granted them by the judgment of the district court, unless appellant has a prescriptive easement to spill its unused irrigation water into and carry it through Scout Creek, because in the first announcement of the brief of appellant it is

said that the question involved is: "Does the defendant (appellant) have an easement in Scout Creek, which crosses the lands of the plaintiffs (appellees), to carry its waste water from the end of Lateral No. 23, to the North Platte River?" Appellant poses no other question under the title "QUESTION INVOLVED" as being presented by this litigation in this court.

This is an equity case. The trial court made an inspection of the premises and the physical matters involved. It is said in Keim v. Downing, 157 Neb. 481, 59 N. W. 2d 602: "This 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." See, also, Shepardson v. Chicago, B. & Q. R. R. Co., 160 Neb. 127, 69 N. W. 2d 376; Bahm v. Raikes, 160 Neb. 503, 70 N. W. 2d 507.

It is concluded that appellees are entitled to the injunctive protection awarded them by the judgment of the district court unless appellant has established the prescriptive easement it claims in Scout Creek.

Appellant asserts that it has acquired and has a prescriptive easement in Scout Creek, to the extent of its capacity, to discharge unused irrigation water from the lateral into Scout Creek and to transport such water through the creek across the lands of appellees to the North Platte River, the source from which the water is derived. Appellant relies upon the testimony of its witnesses to establish the easement it claims.

Wallace I. Quinn testified that he was 77 years of age and was first employed by appellant as a ditch rider on the lateral in 1938. He did not know how long he was employed but he estimated that he worked off and on, but not steadily, for 7 or 8 years. The lateral in 1938 went east to and upon a part of the Rowley land. There

was water discharged from the east end of the lateral on the Rowley land. The witness did not say how much. He said it went into Scout Creek. There was a ditch that ran a little south and east until it got to the east end of the grove that was the east line of that west eighty and there was a pasture there. He then said: "It flowed south when I was there. If I told you any more, I would have to say that I was gone." Whether or not any water was discharged from the lateral at that time depended upon the occurrence or absence of precipitation. When the witness was asked the direction the ditch extended which he claimed was there in 1938 he said: "Well, it would naturally go south if you let it go just a natural course." Later he said any water from the lateral came along through the slough and road and wherever it happened to flow. The slough he referred to was north of the terminus of the lateral. It was much lower than the ground where the lateral was located. The slough is designated on a map in evidence as "marshy land" and is spoken of in the record as Halligan's slough. During the time the witness was employed by appellant it had difficulty in getting water for its purposes and it frequently resorted to the construction of hay dams in the river in an attempt to get water to flow into its works.

William Calhoun testified he was a member of the board of directors of appellant in 1935, 1936, and 1937. He was at the east end of the lateral at times during that period. The water went southeast from the end of the lateral. There was a ditch there. Appellant was short of water when he was on the board. In later years there was plenty of water because appellant had secured storage water. Before it had storage water appellant was short of water for its needs.

Everett E. Wilson testified he was a director of appellant for 8 years commencing in 1944 and continuing into 1952. He knew the lateral as long as he could remember. He said water discharged from the lateral on

the Rowley place went in an easterly direction but it did not go to Scout Creek. He thought it went within about 200 feet of it. There was a low spot there and water from it went into Scout Creek.

C. H. Bostwick testified he was a director of appellant 3 years, 1932-1935. He used water from the lateral and was familiar with it when he was on the board and at various other times. Any water discharged from the lateral on the Rowley land when he was on the board went southeasterly and dropped over in Rowley's pasture. At that time that was the end of it.

Clarence W. Wilson testified he was an assistant ditch rider during 1948 and 1949. He had knowledge of the lateral. Any water from it while he was employed by appellant went towards the southeast but he did not know its destination. There was very little if any water discharged from the lateral the years he worked as ditch rider.

Appellees offered proof that the ditch constructed by appellant connecting the lateral and Scout Creek did not exist in the fall of 1946. The ditch from the east end of the lateral to Scout Creek was constructed by appellant in May 1947. There was no indication of any previous ditch that conducted water from the lateral to Scout Creek. There was a slough at that location. Appellees also produced evidence that before the ditch was made by appellant in 1947 any water discharged from the lateral ran down off of the table and went north to Halligan's slough, sometimes referred to in the record as the north branch of Scout Creek. The lateral was on ground higher than the surrounding area. There was a distinct drop from the lateral to Halligan's slough. The drop box which conducted water from the lateral into the ditch constructed by appellant was installed in 1949.

The character of the litigation requires this court to try the issues de novo and to reach a conclusion independent of and not influenced by the findings of the

trial court except to the extent the evidence is irreconcilably conflicting and as to that this court may consider the fact that the trial court saw the witnesses, observed their manner while testifying, and accepted one version of the facts. This court is also privileged to give proper consideration to the fact that the trial court inspected the premises and the physical matters involved and was thereby influenced in his consideration and decision of the matters at issue. Keim v. Downing, *supra.*

The proof concerning the issues involving the claim of appellant of a prescriptive easement in Scout Creek is equivocal and in some respects inconsistent and unsatisfactory. It is not of the quality that is required to establish such a right. A prescriptive right is not looked on with favor by the law and it is essential that all the elements of use and enjoyment necessary to give title to real estate concur in order to create an easement by prescription. The elements are adverse user under claim of right; continuous, open, exclusive, and notorious enjoyment and knowledge of the servient owner for the full prescriptive period; and identity of the thing enjoyed. The proof must be clear, convincing, and satisfactory.

In Jurgensen v. Ainscow, 155 Neb. 701, 53 N. W. 2d 196, it is said: "The use and enjoyment which will give title by prescription to an easement is substantially the same in quality and characteristics as the adverse possession which will give title to real estate. * * * The use must be adverse, under a claim of right, continuous and uninterrupted, open and notorious, exclusive, with the knowledge and acquiescence of the owner of the servient tenement, and must continue for the full prescriptive period. * * * To prove a prescriptive right to an easement all of the elements to a prescriptive use must be generally established by clear, convincing, and satisfactory evidence." See, also, Stubblefield v. Osborn, 149 Neb. 566, 31 N. W. 2d 547; Onstott v. Airdale Ranch

& Cattle Co., 129 Neb. 54, 260 N. W. 556; Dunn v. Thomas, 69 Neb. 683, 96 N. W. 142; Beckley Nat. Exchange Bank v. Lilly, 116 W. Va. 608, 182 S. E. 767, 102 A. L. R. 462.

A sufficient obstacle to finding that appellant has the right in Scout Creek it claims is the absence of clear, convincing, and satisfactory evidence of when the claimed period of adverse user began; of when appellant commenced to discharge from its lateral a "bankfull" volume of water in Scout Creek which is the extent of the easement now claimed by appellant; of how a bank full easement would or could be estimated, measured, or ascertained; of what amount of water was actually discharged in Scout Creek at different times during any period; or of what amount of discharged water was intended to be adverse in nature and under claim of right. The law treats with disfavor a claim of prescriptive right based on adverse user and requires the elements to be clearly, convincingly, and satisfactorily established. A claimed easement must be viewed from both ends of the prescriptive period. The nature and extent or scope of the user must from the beginning be clearly established. At the end of the period it must appear in retrospect that there has been no material change or variance from the limits or course adopted or established at the beginning. A lesser user prevents a right to an easement and a greater user is of no importance until the full prescriptive period has elapsed from the initiation of the greater use. The law requires that the easement must be clearly definable and precisely measured.

Dunn v. Thomas, *supra,* before considering the user had during the claimed prescriptive period, closely examined and defined the nature and extent of the user in the beginning. It also declared that a prerequisite to acquiring an easement by adverse user was that it must be continuous and substantially identical during the entire statutory period as to manner and extent. In that

case the moving of the location of a ditch a short distance was considered sufficient to defeat the claim of an easement. The language of the case is: "In order to acquire an easement by prescription, the adverse user must not only be continuous in point of time, but also substantially identical, during the whole of the statutory period, with respect to manner and extent. * * * One who seeks to acquire an easement of maintaining a ditch over another's land by adverse user must maintain it without material change of location for the full statutory period."

Hagadone v. Dawson County Irr. Co., *supra*, states: "An easement for the drainage of waste waters from an irrigation ditch, into a creek flowing through the land of another, which greatly raises the natural level of said creek, cannot be acquired until it has been freely exercised without material change under a claim of right for the full period of ten years."

Onstott v. Airdale Ranch & Cattle Co., *supra*, decided: "An easement by prescription can be acquired only by an adverse user for ten years. Such use must be open, notorious, exclusive and adverse. * * * To establish an easement by prescription, the evidence must establish the extent of the adverse use for a period of ten years. * * * An easement acquired by prescription is limited in extent to adverse use during the ten-year period."

The language of Drieth v. Dormer, 148 Neb. 422, 27 N. W. 2d 843, includes the following: "The rule as to the right of the dominant tenant with regard to an easement obtained by prescription is well stated in 28 C. J. S., Easements, § 74, p. 751, as follows: 'Where an easement is acquired by prescription, the extent of the right is fixed and determined by the user in which it originated, or, as it is sometimes expressed, by the claim of the party using the easement and the acquiescence of the owner of the servient tenement.' In 17 Am. Jur., Easements, § 100, p. 997, the rule is stated as follows:

'If an easement is acquired by prescription, the purpose for which the easement may be used is limited by the user under which the easement was acquired. The presumption of a grant is afforded only because possession amounting to a continuous claim of title has been acquiesced in for a period necessary to give a prescriptive right. Therefore, the presumed grant can never extend further than the user in which the other property has acquiesced.' "

The court in Fox v. Pierce, 50 Mich. 500, 15 N. W. 880, said: "A right of way that is too indefinite for a determinate description cannot be established and protected by a court of chancery. * * * A bill to establish a right of way and to enjoin encroachments upon it cannot be sustained where it does not furnish the means for declaring exactly what the right is and the precise locality which it occupies with the shape and dimensions thereof, and where the proofs show nothing but an oral agreement for its establishment, and such occasional variations in the bounds of the locality as to make it impossible to determine where it originally existed."

The majority rule applicable to the somewhat analogous situation of the right of the owner of a dam who has obtained a prescriptive easement to overflow land of the servient owner lends support to the position of appellees in this case. The measure of the prescriptive right which one may acquire to flow the lands of another by the maintenance of a dam is not generally determined by the height of the structure of the dam but is commensurate with the actual enjoyment of the easement as evidenced by the extent to which the land of the owner of the servient tenement was habitually or usually flowed during the period of prescription. In Johnson v. Twin Falls Canal Co., 66 Idaho 660, 167 P. 2d 834, the court said: "The right to flood another's land acquired by prescription is coextensive with the extent to which right has been enjoyed during period of prescription, so that manner and extent of use during

prescriptive period, with reference to head of water maintained and other circumstances, limit extent to which privileges available after right has fully vested." See, also, Donnelly Brick Co. v. City of New Britain, 106 Conn. 167, 137 A. 745; Whitehair v. Brown, 80 Kan. 297, 102 P. 783; Shelton v. Mosier, 19 Ohio App. 89; Smith v. Russ, 17 Wis. 227, 84 Am. Dec. 739; Annotation, 18 Ann. Cas. 218.

Appellant says that the easement established by user in this case is the right of appellant to discharge water into and transport it through Scout Creek, that the extent of the easement is the width and depth of Scout Creek, and that the amount of water put in the creek at any time by appellant is unimportant. Appellant claims an easement to flow its surplus water into and through Scout Creek to the full capacity of the creek. The only authority for this position referred to by appellant is Hagadone v. Dawson County Irr. Co., *supra*. In that case this court specifically found the evidence was not sufficient to establish any easement for a right to continue the overflow of the land of plaintiffs which caused the damage attempted to be recovered in that case. That case does not support the contention of appellant.

The record in this case is barren of anything indicating the ability of appellant to comply with an easement of the character now claimed by it and this is indicative of the indefinability and extent of the alleged easement. The evidence is convincing that any use by appellant of Scout Creek has been variable and not substantially identical. Appellant was unable to trace the location or course of its spillway before the year 1947. The burden of the claimed easement was influenced by the location of the spillway and it was required to be substantially in the same place during the prescriptive period in order for it to support the creation of an easement in favor of appellant. Appellant in 1947 excavated a ditch from the eastern terminus

of its lateral to Scout Creek. There was then a change in the operations of appellant and in its water delivery methods resulting in a greatly increased amount of unused irrigation water that was discharged into Scout Creek. This was less than 10 years before this litigation was commenced. The record fails to show that appellant has acquired an easement to discharge water into Scout Creek and to transport it therein through the lands of appellees to the North Platte River. The findings and adjudication of the district court in this respect are correct.

The parties, on the date designated by the court for the trial of the two cases concerned in this litigation, stipulated that the issues between the parties relating to the liability of appellant for the acts complained of by appellees and the right of appellees to an injunction against appellant should be heard simultaneously; that the evidence offered and received and the proceedings had at the trial should be a part of the record of each of the causes; and that the issues relating to the nature, extent, and value of damages suffered by appellees by reason of the acts of appellant should be continued until a later date set by the court when the cases should be tried separately as to those issues. The stipulation was in writing thereon attested by signature of the judge of the district court, and was approved and made an order of the court. The stipulation was filed on the date made in the office of the clerk of the district court and it is exhibited by the transcript. The trial then proceeded on the issues presented, not, however, including the issues as to the extent and amount of damages claimed by appellees. The cause of action for damages in each of the cases was excluded from the trial.

The stipulation was respected throughout the trial. There was no desire evinced or effort made by anyone to modify or nullify it. After the trial was completed the case was taken under advisement by the

court. When it was later decided the court found that the meager evidence adduced at the trial as to damages claimed by appellees and the causation thereof was so uncertain and speculative that no damages could be assessed or allowed and that appellees should not be allowed to proceed further to try the issue of damages claimed by them due from appellant. The court then rendered a judgment of dismissal of the cause of action pleaded in each of the cases for damages. A motion for a new trial was filed in each case by the respective appellees. The motions were each denied and appellees have cross-appealed because of the judgment of dismissal.

It is not claimed that the stipulation was not binding on the parties and the court or that a cause of action for damages against appellant was not sufficiently pleaded in each of the cases. The trial court only found, before there was or could have been, because of the stipulation, a trial of the causes of action for damages, that the damages claimed by appellees were so uncertain and speculative that none could be assessed or allowed.

The very early case of Rich v. State Nat. Bank, 7 Neb. 201, 29 Am. R. 382, declares: "Written agreements of attorneys, or those entered into by them in open court, in regard to the disposition of cases, will be enforced * * *." See, also, Drake v. Ralston, 137 Neb. 72, 288 N. W. 377; Schmehl v. Buffalo County, 149 Neb. 277, 30 N. W. 2d 882; § 7-107, R. R. S. 1943.

In Smith v. Smith, 90 Fla. 824, 107 So. 257, the court said: "The general rule is that stipulations voluntarily entered into between the parties to a cause or their attorneys, for the government of their conduct and the control of their rights during the trial or progress of the cause, will be respected and enforced by the courts, where such stipulations are not contrary to good morals or sound public policy."

In Penney v. First Trust & Savings Bank, 102 Fla.

185, 135 So. 805, it was said: "Courts will enforce valid stipulations unless some good cause is shown for declining to do so, especially where the stipulation has been acted upon so that the parties could not be placed in status quo." See, also, Pasco Holding Co. v. Wells, 126 Fla. 636, 171 So. 674; 50 Am. Jur., Stipulations, § 12, p. 612.

The stipulation made by the parties and approved and adopted by the court was binding upon the parties and the court. The action of the trial court dismissing the cause of action for damages alleged in each of the cases was prejudicial error. The cross-appeal of appellees should be and is sustained.

The judgment of the district court granting appellees a permanent injunction prohibiting appellant from spilling water from its irrigation system into Scout Creek and adjudicating that appellant does not have a prescriptive easement to discharge unused irrigation water from its works into Scout Creek should be and it is affirmed. The judgment of the district court dismissing the cause of action against the appellant for damages pleaded in the petition in each of the cases involved in this litigation should be and is reversed and the cause is remanded for further proceedings in each of said cases in accordance with this opinion and the stipulation entered into on the 19th of June 1956, by the parties to this litigation which was approved and adopted by the trial court.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED.

YEAGER and WENKE, JJ., participating on briefs.

CLIFTON BRYANT, APPELLEE, V. EDMOND E. GREENE, APPELLANT.
89 N. W. 2d 579

Filed April 25, 1958. No. 34318.

1. **New Trial.** The district court has the power and is required to consider and determine motions for a new trial by the exercise of its judicial discretion.
2. ———. 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.
3. **Trial.** While the trial court need not give its reasons for reaching a decision, the justification of the decision must be one that can be established from the record.
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. ———: ———. Errors sufficient to cause the granting of a new trial must be errors prejudicial to the rights of the unsuccessful party.
6. ———: ———. 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.
7. ———: ———. If on the retrial the facts relating to the issues upon which the findings were made are substantially the same as those adduced at the former trial of the cause, such findings are binding on the parties, the trial court, and this court as the law of the case. It is when 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.
8. **Trial: Appeal and Error.** In deciding whether or not there is error in a sentence or phrase of an instruction it will be considered with the instruction of which it is a part and the remainder of the charge to the jury and the meaning thereof will be determined not from the sentence or phrase alone but

by consideration of all that is said upon the subject.

9. Trial. Instructions to a jury should be considered as a whole and if they fairly submit the case that is all the law requires.

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

Crawford, Garvey, Comstock & Nye, for appellant.

Alfred A. Fiedler, 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 Clifton Bryant as plaintiff in the district court for Douglas County, against Edmond E. Greene, defendant, to recover damages caused by the negligence of the defendant in the operation of his automobile. The case was tried to a jury resulting in a verdict in favor of the defendant. The plaintiff filed a motion for a new trial which was sustained. From the order sustaining the plaintiff's motion for new trial, the defendant appeals.

The plaintiff's petition alleged in substance that about 4:29 p.m., on May 27, 1954, the plaintiff was crossing Q Street at Twenty-eighth Street, the same being a thoroughfare in the city of Omaha, from the north to the south curb in the legal pedestrian walk; that at about the same time the defendant was operating his 1951 Plymouth coupé north on Twenty-eighth Street and made a right turn, turning east on Q Street, and negligently drove into and against the plaintiff's person knocking him to the pavement and causing injuries to him; and that the defendant was negligent in that he failed to yield the right-of-way to the plaintiff as provided in the ordinances of the city of Omaha and the statutes of Nebraska, and failed to keep a proper lookout. The petition then alleged the injuries sustained by the plaintiff and the expenses incident thereto, such as

hospital and medical expenses and loss of time from work, and prayed judgment against the defendant in the amount of $5,158.15 and costs of the action.

The defendant, for answer to the plaintiff's claim, alleged that a payment was made to the plaintiff and a release obtained from plaintiff in full and complete settlement of the said accident. In addition the defendant's answer denied any negligence on his part but alleged the proximate cause of the accident was the contributory negligence of the plaintiff, and prayed that the plaintiff's petition be dismissed.

For his reply to the answer of the defendant, the plaintiff alleged that any payment made to the plaintiff or release obtained from him was based on fraud and misrepresentation on which the plaintiff relied to his damage; and that said payment made was inadequate in that the sum of $34 was paid plaintiff for said release, together with a promise to pay doctor and hospital bills. The plaintiff renewed the prayer of his petition asking judgment against the defendant.

The defendant contends that the trial court erred in sustaining the plaintiff's motion for a new trial.

While this is the third opinion in this case in this court, we make reference only to its second opinion found in 164 Neb. 15, 81 N. W. 2d 580, wherein this court reversed the judgment and remanded the cause, holding that the trial court was in error in directing a verdict for the defendant at the close of the plaintiff's case on the issue of whether or not the settlement and release were obtained by misrepresentation and fraud.

The following authorities are applicable to a determination of this appeal.

In Greenberg v. Fireman's Fund Ins. Co., 150 Neb. 695, 35 N. W. 2d 772, it was said: "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, Pongruber v. Patrick, 157 Neb. 799, 61 N. W. 2d 578.

In the instant case the trial court gave no reasons for its decision. In this connection, it is said in Greenberg v. Fireman's Fund Ins. Co., *supra:* "If, as in the instant case, the trial court gave no reasons for its decision, then the appellant meets the duty placed upon him when he brings the record here with his assignments of error and submits the record to critical examination with the contention that there was no prejudicial error. Under these circumstances the appellant is not required to establish a negative. The duty then rests upon the appellee to point out the prejudicial error that he contends exists in the record and which he contends justifies the decision of the trial court. The appellant then in reply has the right, if he desires, of meeting those contentions.

"By that process the questions to be determined here are presented in a practical manner. Those errors will then be considered and determined here so far as necessary to the appeal, subject, of course, to our right to notice and consider plain errors not assigned. Such a procedure fully protects the rights of the parties." See, also, Pongruber v. Patrick, *supra,* and cases cited therein.

"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." Olson v. Shellington, 162 Neb. 325, 75 N. W. 2d 709.

The record discloses that at the time of the accident the plaintiff was 26 years of age. He had an eighth-grade education, and at the age of 13 years started to work. On the day of the accident he was employed in a packing plant. He left the packing plant

about 4:30 p.m. He stopped at the northeast corner of the intersection of Twenty-eighth and Q Streets and when the traffic light turned green, he started south across Q Street at the cross walk on the east side of the intersection. When he was within approximately 6 or 8 feet of the south curb of Q Street he was struck by the defendant's automobile as it was making a right turn from Twenty-eighth Street onto Q Street. Defendant did not stop but reported to a police officer nearby that he thought he had hit a pedestrian at Twenty-eighth Street. The defendant was later arrested on the charge of reckless driving. After the accident the plaintiff was taken to the County Hospital where he remained a short period of time. After that he was in the Methodist Hospital where he remained from Thursday, the day he was injured, until the following Sunday. He was taken to the police station and booked as a complaining witness. He returned to work the following Wednesday.

The defendant was found guilty of reckless driving and paid a fine of $35 and costs.

The defendant testified that he stopped for a red light, and at the time of the accident was traveling approximately 5 or 6 miles an hour; that he made a right turn, not knowing that he struck anyone; that a person in his car told him to stop as he thought he had hit someone; and that the plaintiff got in touch with him by telephone and he told the plaintiff to see Mr. DeFrance, the agent for the company that was the insurance carrier on the defendant's automobile.

The plaintiff testified that on June 12, 1954, he went to the office of Mr. DeFrance to discuss a settlement; that Mr. DeFrance told him he was in trouble with "a bunch of cops" and if he made the settlement he would not have to worry about going to jail or getting into any more trouble with the police; and that he would not be in any trouble if he agreed to a settlement of the hospital bills and $34 for the loss of 2 days' work.

He asked Mr. DeFrance what about his injuries and was told that the hospital bill and the 2 days' work in the amount of $34 would be taken care of. He further testified that he was paid $17 a day for 2 days, and received nothing for his injuries.

Mr. DeFrance testified that he was in the general insurance business, representing a number of companies including the Fireman's Fund Indemnity Company, and had been in the insurance business since 1919; that he had the liability and property damage insurance on the defendant's car; that he called the plaintiff on the telephone and told him when he was ready to settle, to come to his office; that the plaintiff called and said that he would come to the office; that the plaintiff came to the office; that DeFrance asked the plaintiff if he had his bills and how much time he had lost from work, and also if he would be satisfied if he was paid for 2 full days' time; and that the plaintiff said he would. DeFrance asked the plaintiff about the hospital bill and made a check out to the plaintiff who endorsed it to the hospital. The plaintiff then signed the release. There was no conversation whatever with regard to the release. DeFrance denied any statement to the effect that if the plaintiff would sign the release he need not be afraid of the police. He further testified that he had nothing to do with the police court hearing, as the defendant had his own attorney; and that the plaintiff made no request to this witness other than that his wages, and doctor and hospital bills be paid. He further testified that he felt the settlement was fair.

The plaintiff testified with reference to his injuries, that his right hand was bleeding, and he suffered pain in his lower back; that he went back to work on Wednesday; that he stopped working on Friday a week after the accident because he was unable to perform his duties due to the injuries to his back and hand; and that he tried to work on construction but was unable to do so because it was too heavy work. He further

testified that he saw Dr. Richard Smith in June, and other doctors because of the injuries to his back and fingers. At the time of the trial his back was still stiff most of the time and he suffered pain. Due to his injuries he had not been able to work steadily since the accident.

Dr. Richard Smith testified that on June 26, 1954, the plaintiff complained of a stiff and painful back, that he was unable to grip with his right hand, and that he had soreness in the middle finger of his right hand. As a result of his examination, the doctor felt that the plaintiff had a contusion of the lumbar region of his low back and right hand at the time of the injury. He found tenderness at the third lumbar level in his low back, and also found guarded lumbar motion at that time, and muscle guarding. The plaintiff had a list to the right in his low back due to pain, and was unable to lift heavy objects at that time. The doctor again examined the plaintiff on May 7, 1957, and stated that the plaintiff had pain in his back which could have resulted from the accident and could possibly have lasted from the date of the accident. He further testified that he had X-ray pictures of the plaintiff made by Drs. Simonds, Hardy, and McArdle. On cross-examination he testified that he found no bruises on the plaintiff's back or hand on the occasions of his examinations on June 26, 1954, and May 7, 1957.

Dr. William T. Rance testified in behalf of the defendant. He had examined the plaintiff in January 1956, and at that time the examination disclosed nothing abnormal about the plaintiff's hand, arm, or back. He did not take X-ray pictures as he understood that previous X-rays had proved negative.

The plaintiff was first seen by Dr. Bach who gave first aid to the plaintiff at the hospital. Dr. Bach was paid the sum of $10 by the defendant's insurance company.

In the case of Bryant v. Greene, *supra,* heretofore referred to, this court said: "Upon a consideration of the evidence and the surrounding circumstances, together

with the reasonable inferences to be drawn therefrom, we conclude that the evidence was sufficient for consideration by a jury to determine if the settlement and release were obtained by misrepresentation and fraud." Therefore, the principal issue in this case that was submitted to the jury was whether or not the settlement and release were obtained by misrepresentation and fraud. There is apparently no question of the liability of the defendant as to the accident or that personal injuries were received by the plaintiff.

In Benedict v. Eppley Hotel Co., 161 Neb. 280, 73 N. W. 2d 228, this court held: "If on the retrial the facts relating to the issues upon which the findings were made are substantially the same as those adduced at the former trial of the cause, such findings are binding on the parties, the trial court, and this court as the law of the case. It is when 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."

The plaintiff contends that the trial court failed to instruct the jury as to the law applicable to the material issues raised by the pleadings and supported by the evidence; and that the trial court gave instructions that were so worded as to mislead the jury in the consideration of the case. In other words, the instructions given by the trial court were misleading and confusing, and in this situation the trial court properly granted a new trial.

The plaintiff complains of instruction No. 7 which contained the language "was only a payment for actual damages and did not include the payment of any sum for the injuries suffered" in referring to the pleadings, but that the trial court failed to instruct that the burden of proof required that the plaintiff prove that he was paid nothing for his injuries suffered, and if he sustained such proof he should recover.

The plaintiff complains of instruction No. 8, wherein

the trial court defined "fraud," "misrepresentation," and "adequate consideration," but failed to apply it to the theory of the issues involved, thus misleading and confusing the jury.

The plaintiff further complains that nowhere does an instruction appear, as to the law of the case, and as requested, in connection with evidence tending to show that the plaintiff was overreached, that the minds of the parties never met in the consummation of a valid agreement, or that the jury should consider the fact that the settlement allowed nothing for the injuries sustained.

Instruction No. 7 states: "You are hereby instructed that the defendant has alleged as a defense to this suit that a payment was made to the plaintiff and a release obtained from the plaintiff in full and complete settlement of the entire matter, and, in that connection, the plaintiff has by reply contended that the purported payment to the plaintiff, or release, was obtained from him by fraud and misrepresentation on which the plaintiff relied to his damage, and further that the said purported payment in addition to being based on fraud and misrepresentation was inadequate in that the sum of $34 and the endorsement of a check for $27.65 to the Methodist Hospital was only a payment for actual damages and did not include the payment of any sum for the injuries suffered.

"You are instructed in that connection that this places on the plaintiff the burden of proving by a clear preponderance of the evidence that said release was secured by fraud and misrepresentation on which the plaintiff relied to his damage, and that the purported payment did not compensate him adequately for the injuries suffered.

"In this case it is therefore your duty to first determine whether or not the plaintiff has sustained this burden of proof. The Court will amplify in other instructions the requirement imposed upon plaintiff with

regard to his sustaining the burden of proof in this case on the issue of fraud and misrepresentation.

"If the plaintiff has failed to establish the burden of proof with reference to the release by a clear preponderance of the evidence, or if the evidence thereon is evenly balanced, or preponderates in favor of the defendant, you are instructed to return a verdict for the defendant."

Instruction No. 8 properly defined the terms "fraud," "misrepresentation," and "adequate consideration."

Instruction No. 9 states: "The plaintiff in this case claims that the release signed by him on June 12, 1954 was obtained from him by a representative of defendant's insurance carrier by fraud. In this connection you are instructed that fraud is never presumed but must be proved by the one alleging it. The burden of proof in this case is upon the plaintiff to establish by a preponderance of the evidence that the release was obtained through fraud perpetrated by the defendant or his representatives in the payment for the same. To set aside a release and satisfaction for fraud the evidence and proof thereof must be clear and convincing. While fraud may be inferred from facts and circumstances, such inference must not be guesswork or conjecture, but must be the rational and logical deduction from the facts and circumstances. Evidence simply justifying or giving rise to a suspicion is not sufficient. To obtain redress or relief from the injurious consequences of deceit and fraud, it is necessary for the complaining party to prove (1) the representation; (2) the materiality of the facts represented; (3) the falsity of the representation; (4) plaintiff's ignorance of its falsity; (5) plaintiff's belief that it was true; (6) defendant's knowledge of its falsity, or his making of it, without knowledge, as a positive statement of a known fact; (7) defendant's intent that it should be acted upon; (8) plaintiff's right to rely on it; (9) plaintiff's reliance on it, and action upon it; (10) plaintiff's injury by reason

thereof; and (11) the amount of damage thus suffered.

"In this connection you are instructed that any fraud or misrepresentation of the agent of the insurance company is imputed to the defendant in this case. However, you are instructed that fraud will not be imputed where the facts and circumstances upon which the charge of fraud is based may be consistent with honesty of purpose. Therefore, in order for the plaintiff to set aside the release for fraud or misrepresentation, it is not only necessary that the plaintiff establish fraud by the defendant or his insurance carrier, but it is equally necessary that the plaintiff prove, so that it is made to appear directly and not merely by inference or conjecture, that he had a right to rely, and did rely, upon the representations made, and that he altered his condition in consequence thereof, and suffered damage thereby."

Instruction No. 10 states: "You are hereby instructed that the burden of proving by a preponderance of the evidence that the plaintiff suffered injuries clearly in excess of any that were contemplated by the parties when the settlement and release of liability were made is upon the plaintiff, and, if you find from the evidence by a preponderance thereof that the plaintiff suffered such injuries in excess of those contemplated, it is evidence that may be properly considered along with the other evidence and circumstances in the case, in determining the question of fraud and misrepresentation in the procurement of the settlement and release."

In instruction No. 12 the court informed the jury that if it found that the release in this case was obtained from the plaintiff by misrepresentation and fraud and was therefore void, then the jury was to proceed to consider the claim of the plaintiff against the defendant, and informed the jury that the burden of proof was upon the plaintiff to establish by a preponderance of the evidence the following propositions with reference to his claim against the defendant: "1- That the defendant was negligent in one or more of the particulars charged

against the defendant in Instruction No. 1; 2- That any such negligence was the proximate cause of the injury, pain, suffering and damage to the plaintiff; and 3- The nature and extent of such injury, pain, suffering and damage." The court further instructed the jury: "If the plaintiff has so proved all the foregoing numbered propositions by a preponderance of the evidence, then your verdict should be for the plaintiff and against the defendant. If, however, the plaintiff has failed to establish any one of the foregoing propositions by a preponderance of the evidence, or if the evidence thereon is evenly balanced, or preponderates in favor of the defendant, the plaintiff cannot recover on his claim against the defendant, and your verdict should be for the defendant."

In Benedict v. Eppley Hotel Co., *supra,* this court held: "In deciding whether or not there is error in a sentence or phase of an instruction it will be considered with the instruction of which it is a part and the remainder of the charge to the jury and the meaning thereof will be determined not from the sentence or phase alone but by consideration of all that is said upon the subject.

"Instructions to a jury should be considered as a whole and if they fairly submit the case that is all the law requires."

From an examination of the instructions we conclude that the instructions as a whole fairly state the law and the trial court did not commit prejudicial error in the giving of its instructions to the jury.

The plaintiff requested certain instructions which were refused by the trial court. The plaintiff specifically relied on requested instructions Nos. 5 and 6, which have been examined. We find no prejudicial error in the refusal to give the above-mentioned requested instructions. The subject matter contained therein is substantially set forth in the instructions given by the trial court.

"Errors sufficient to cause the granting of a new

trial must be errors prejudicial to the rights of the unsuccessful party." Vielehr v. Malone, 158 Neb. 436, 63 N. W. 2d 497.

"When the evidence is conflicting, the verdict of the jury will not be set aside unless it is clearly wrong." Myers v. Platte Valley Public Power & Irr. Dist., 159 Neb. 493, 67 N. W. 2d 739.

For the reasons given herein, the order of the trial court in sustaining the plaintiff's motion for new trial and setting aside the verdict of the jury is reversed and the cause remanded with directions to the trial court to reinstate the verdict of the jury and to enter judgment thereon.

REVERSED AND REMANDED WITH DIRECTIONS.

JIM H. YOUNG, APPELLEE, V. LAVEDA M. YOUNG, APPELLANT.
89 N. W. 2d 763

Filed April 25, 1958. No. 34329.

1. **Divorce.** An application for a change with respect to care and custody of minor children, which has been provided for in a decree of divorce, made at any time after the decree has been entered must be founded upon new facts and circumstances which have arisen subsequent to the entry of the decree. In the absence of such facts and circumstances the matter will be deemed res judicata.
2. **Parent and Child.** The foregoing rule would not apply in a different proceeding wherein the parties are not the same as in the divorce action nor in an action concerning the welfare of children wherein the interest of the state, as parens patriae, is directly involved. And this would be particularly true of facts which, although existing at the time the original decree was rendered, were not presented to and considered by the trial court.
3. **Evidence: Appeal and Error.** The litigant who offers incompetent and irrelevant evidence in the trial of a case, which is admitted over proper objection of the adverse party, may not have any benefit or advantage because of its reception. This court disregards such evidence in the trial de novo of a case.
4. **Parent and Child: Evidence.** 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.

5. ———: ———. Such findings of fact must rest on the preponderance of evidence adduced under such rules. Hearsay, gossip, bias, prejudice, trends of hostile neighborhood feeling, and the hopes and fears of social workers are all sources of error and have no place in any court.
6. **Divorce.** In a divorce action, wherein a divorce has been granted and the custody of children has been fixed, the court in a proper proceeding may, where the circumstances of the parties have changed or it shall be to the best interests of the children, modify the decree as it concerns the care, custody, and maintenance of the children, or any of them, having due regard for the rights of fit, proper, and suitable parents.
7. ———. A parent may not be deprived of the custody of his child by the court until it is established that the parent is unfit to perform the duties of the relationship of parent and child or has forfeited the right to the custody of the child.
8. ———. The unfitness which deprives a parent of the right to the custody of his child must be positive, and not comparative, and the mere fact that the children would be better nurtured or cared for by a stranger is not sufficient to deprive a parent of his right to their custody.
9. ———. In a divorce case it is generally the best policy to keep minor children within the jurisdiction of the court.

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

Maupin, Dent, Kay & Satterfield and *William E. Morrow, Jr.*, for appellant.

Sam S. Diedrichs, 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 Lincoln County. It involves the custody of four minor children whom the trial court gave to the welfare department of Lincoln County.

The background out of which this litigation arose is as follows: Jim H. Young, as plaintiff, commenced an action against Laveda M. Young, as defendant, in the district court for Lincoln County. Plaintiff was therein granted a divorce from the defendant on February 19, 1955, on the ground of extreme cruelty. At that time the custody of their four minor children was awarded to the defendant. On August 3, 1957, the defendant filed an application therein asking for authority to remove these children from the State of Nebraska to the State of Colorado. Plaintiff filed objections thereto and, in addition, made application that the decree be modified so as to give him custody of the children. A hearing was had on the foregoing on August 23, 1957. As a result of that hearing the custody of the children was awarded to the welfare department of Lincoln County and they were immediately taken from the defendant. Her motion for new trial having been overruled, the defendant appealed therefrom.

At the time of the hearing on August 23, 1957, the children, who, up to that time, had always been in the care of defendant, their mother, were of the following ages: Daniel Jim, a son, 5; Elaine Sue, a daughter, 6; Roger Lavonne, a son, 7; and Larry Dean, a son, 9.

"It is the duty of this court, on appeal of proceedings to modify a decree of divorce, to try it de novo on the record and to reach a conclusion uninfluenced by what was done by the trial court, except if there is irreconcilable conflict in the evidence the court may consider that the trial court saw the witnesses and accepted one version of the facts." Firebaugh v. Firebaugh, 163 Neb. 79, 77 N. W. 2d 891. See, also, Hodges v. Hodges, 154 Neb. 178, 47 N. W. 2d 361.

There is irreconcilable conflict in the evidence on some material questions of fact but in this respect we think the witnesses called by appellant were much better qualified to testify in regard thereto than those called by appellee, the father. And this is also true of

the social worker and her supervisor who were called as witnesses by the court. Neither of these witnesses seemed to have any, or at least very little, actual knowledge of the conditions in the home and how it was being conducted. As to the parties we are fully aware of the fact that they are naturally prejudiced in their views because of the difficulties that have and still exist between them and will consider their testimony accordingly.

Appellant complains of the fact that the trial court admitted evidence, over proper objection, of her conduct prior to the date the divorce was granted appellee. It appears that at the time of the hearing, on which the original decree was based, the appellee submitted proof of the same conduct. This hearing was on November 17, 1954. The trial judge, at that time, continued the matter until such time as he could make a full investigation of all matters and circumstances involved. The decree which followed was rendered on February 19, 1955, at which time he awarded appellant custody of the children.

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

In interpreting this statute this court has held that an application for a change with respect to care and custody of minor children, which has been provided for in a decree of divorce, made at any time after the decree has been entered must be founded upon new facts and circumstances which have arisen subsequent to the entry of the decree. In the absence of such facts and circumstances the matter will be deemed res judicata. Harder v. Harder, 162 Neb. 433, 76 N. W. 2d 260. See, also, Anderson v. Wilcox, 163 Neb. 883, 81 N. W. 2d 314.

While that decision would be a finality as between

the parents, however, the foregoing rule would not apply in a different proceeding wherein the parties were not the same as in the divorce action nor in an action concerning the welfare of children wherein the interest of the state, as parens patriae, is directly involved. Barnes v. Morash, 156 Neb. 721, 57 N. W. 2d 783. And this would be particularly true of facts which, although existing at the time the original decree was rendered, were not there presented and considered by the trial court.

"The litigant who offers incompetent and irrelevant evidence in the trial of a case, which is admitted over proper objection of the adverse party, may not have any benefit or advantage because of its reception. This court disregards such evidence in the trial de novo of a case." Shepardson v. Chicago, B. & Q. R. R. Co., 160 Neb. 127, 69 N. W. 2d 376.

Appellant also contends the testimony of the social worker, and her supervisor, is not of such character as justified the trial court in taking the action that it did since it was based solely on hearsay and the witnesses' fears, as social workers, as to what might happen if the children were left with the mother. We have already intimated how little these witnesses actually knew about the conditions in the home. It appears the social worker had actually visited in the home just once, some 8 or 9 months prior to the hearing, whereas the supervisor had never been in it. She received all her information from the social worker.

As we said in Krell v. Mantell, 157 Neb. 900, 62 N. W. 2d 308, 43 A. L. R. 2d 1122, by quoting from In re Matter of Hill, 78 Cal. App. 23, 247 P. 591: " '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.' " We also held, by quoting from People v. Lewis, 260 N. Y. 171, 183 N. E. 353, 86 A. L. R. 1001,

that: " '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.' "

Section 42-312, R. R. S. 1943, hereinbefore set forth, is the basis for the court's authority in such matters. We have held, in applying that authority, as follows: In a divorce action, wherein a divorce has been granted and the custody of children has been fixed, the court in a proper proceeding may, where the circumstances of the parties have changed or it shall be to the best interests of the children, modify the decree as it concerns the care, custody, and maintenance of the children, or any of them, having due regard for the rights of fit, proper, and suitable parents. Morehouse v. Morehouse, 159 Neb. 255, 66 N. W. 2d 579. See, also, Campbell v. Campbell, 156 Neb. 155, 55 N. W. 2d 347; Lichtenberg v. Lichtenberg, 154 Neb. 278, 47 N. W. 2d 575; Towle v. Towle, 141 Neb. 21, 2 N. W. 2d 536; McNamee v. McNamee, 154 Neb. 212, 47 N. W. 2d 383. As stated in Morehouse v. Morehouse, *supra:*

"A parent may not be deprived of the custody of his child by the court until it is established that the parent is unfit to perform the duties of the relationship of parent and child or has forfeited the right to the custody of the child.

"The custody of a child is to be determined by its best interests with due regard to the superior rights of fit and suitable parents.

"The unfitness which deprives a parent of the right to the custody of his child must be positive, and not comparative, and the mere fact that the children would be better nurtured or cared for by a stranger is not sufficient to deprive a parent of his right to their custody." See, also, Anderson v. Wilcox, *supra;* Clarke v. Lyon, 82 Neb. 625, 118 N. W. 472, 20 L. R. A. N. S. 171;

Terry v. Johnson, 73 Neb. 653, 103 N. W. 319; In re Guardianship of Peterson, 119 Neb. 511, 229 N. W. 885.

As stated in Clarke v. Lyon, *supra:* "The statute declares and nature demands that the right shall be in the parent, unless the parent be affirmatively unfit. The statute does not make the judges the guardians of all the children in the state, with power to take them from their parents, so long as the latter discharge their duties to the best of their ability, and give them to strangers because such strangers may be better able to provide what is already well provided."

We shall only discuss the appellant, her home, and the children as they relate to her being a proper, fit, and suitable person to have custody of the children. In doing so we shall not go into detail for that would serve no useful purpose. We make the observation that the evidence adduced shows appellee to be a fit, proper, and suitable person to have their custody but, as stated in Campbell v. Campbell, *supra:* "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." And this would be particularly true here since the children have always been with the mother until taken from her on August 24, 1957, and turned over to the welfare department of Lincoln County.

When the divorce decree was rendered appellant was given the household goods. They were very modest, except for a nice bedroom suite, but apparently adequate for the needs of the mother and her children. Appellant, for reasons which to us seem reasonable, has, on five different occasions since the divorce was granted, moved the home. Once she moved to Crawford, Nebraska, but later returned to North Platte, which always had been and was, at the time of the hearing, her home. It appears that she kept an average home; that the children were well fed; that the children were kept clean and dressed within her means; that

the two oldest children attended school regularly and were able to make passing grades; that the daughter had attended kindergarten; that the children regularly attended Sunday school, which the mother taught; that one of the boys was a cub scout in which organization the mother took an active part; and that the children were well mannered and minded their mother.

The record shows the mother had a deep concern and love for these children, to which the children seemed to respond in kind; that she attended church and took an active interest in the Home League as a member thereof, which is an organization sponsored by the Salvation Army to foster better homes and mothers; and that she never leaves the children alone in the home, always getting someone to stay with them when she is absent therefrom. It is true that appellant drinks alcoholic liquor, primarily beer. There is evidence that on occasions she has possibly consumed more than ordinarily would be proper and desirable. There is also evidence that on one or possibly two occasions a party of friends, who had brought their own liquor, became noisy while in her home. While we do not approve such conduct on her part, however, we do not think it was of such a character that it completely destroyed her right to raise her children. The same is true of the fact that she had men as friends for such was certainly her right and privilege as a single woman.

Without going further into detail we find, from the evidence properly before us for our consideration de novo, that appellant is still a fit, proper, and suitable person to have the care of her children and that the trial court was in error when it took them from her. See McNamee v. McNamee, *supra.*

We do not think the record justifies appellant's request to be permitted to take the children to Colorado for, as stated in Campbell v. Campbell, *supra:* "In a divorce case it is generally the best policy to keep

minor children within the jurisdiction of the court."

All costs in the district court and this court, including an attorney's fee of $150 allowed appellant as attorney's fee for the services of her attorney in this court, are taxed to appellee. We note a charge of $98 was made by the official court reporter for preparing the bill of exceptions whereas the proper charge, in view of section 24-342, R. R. S. 1943, should have been $35.40. The district court is directed to retax the cost thereof in that amount. See, Pueppka v. Iowa Mutual Ins. Co., *ante* p. 203, 88 N. W. 2d 657; Campbell v. Campbell, *supra*.

We reverse the judgment of the district court and direct it to enter a judgment in accordance herewith and therein direct the welfare department of Lincoln County to immediately return these children to appellant and therein restore the allowance of $90 per month to be paid by appellee for the support and maintenance of these children.

REVERSED AND REMANDED WITH DIRECTIONS.

JOE G. LIGHT, APPELLEE, V. NEBRASKA WORKMEN'S COMPENSATION COURT, APPELLANT.
89 N. W. 2d 833

Filed April 25, 1958. No. 34380.

1. **Workmen's Compensation.** The right of either party to a workmen's compensation proceeding to waive a rehearing and appeal to the district court under the provisions of section 48-181, R. R. S. 1943, is an optional right and does not negative the right of the opposing party to a rehearing before the workmen's compensation court en banc.
2. ———. The right of either party to a workmen's compensation proceeding to refuse to accept the findings, order, award, or judgment of the judge of the workmen's compensation court who is assigned to hear the same, and to secure in the manner provided by law a rehearing thereof by such compensation court and a determination by a majority of the members thereof,

is paramount to and exclusive of the right of appeal from such original decision.

3. ———. It is the failure to make application for rehearing in the manner provided by statute that defeats the right to a rehearing.

4. ———. Section 48-180, R. R. S. 1943, refers to the power of the workmen's compensation court to correct ambiguity or clerical error on its own motion.

APPEAL from the district court for Lancaster County: HARRY R. ANKENY, JUDGE. *Reversed and remanded with directions.*

Clarence S. Beck, Attorney General, and *Richard H. Williams,* for appellant.

Johnston & Grossman, for appellee.

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

SIMMONS, C. J.

The district court granted a writ of prohibition preventing the workmen's compensation court sitting en banc from proceeding in a workmen's compensation case. The workmen's compensation court appeals. We reverse the judgment of the trial court and remand the cause with directions to dismiss the petition for the writ.

Herein we will refer to the plaintiff before the compensation court as the plaintiff and the defendants before the compensation court as the defendants.

The matter was submitted to the trial court on a general demurrer to the petition for the writ. It was overruled and the compensation court elected to stand on its demurrer. The writ issued.

The record shows these material facts:

Plaintiff filed his petition in the compensation court alleging an accident and a compensable injury. Issues were made and hearing was had before one judge of the compensation court pursuant to the provisions of section 48-177, R. R. S. 1943.

The result of that hearing was a finding "assuming,

but specifically not so finding, that the plaintiff did suffer an accident as he has alleged * * *; that there is insufficient evidence to show * * * any causal connection between plaintiff's back difficulties and the alleged accident; * * * therefore, plaintiff's petition should be dismissed." It was therefore ordered, adjudged, and decreed that the petition "is dismissed."

Five days later plaintiff filed a waiver of rehearing before the compensation court en banc as provided by section 48-181, R. R. S. 1943, and filed his petition on appeal in the district court. Under that procedure, if effective, plaintiff would have the right to a trial de novo in the district court as provided in the act.

Twelve days after the dismissal above recited, defendants filed a refusal to accept the order of dismissal and requested a rehearing before the compensation court en banc as provided in section 48-179, R. R. S. 1943, where the statute provides for a hearing de novo. They recited in their application for rehearing the contentions that the award failed to find that plaintiff did not suffer an accident within the course of his employment and that the failure to so find was contrary to law and the evidence.

Thereafter the compensation court and the district court each proceeded with the cause, claiming jurisdiction. The intermediate procedural steps need not be recited. Plaintiff then petitioned for and secured the writ of prohibition.

Plaintiff contends here that defendants by the order of dismissal secured all that they sought, were not prejudiced, and hence had no right to petition for a rehearing.

Defendants contend that their right to a rehearing before the compensation court en banc was a right paramount to the right of the plaintiff to waive rehearing and to appeal.

There is argument here that the award above recited would be res judicata of any subsequent claim by the plaintiff. When plaintiff elected to waive a rehearing

and appeal to the district court, defendants were not then confronted with the question of allowing the award to become final and testing its sufficiency as a determination of the issues presented. They were presented with the question of whether to elect to have a hearing de novo before the compensation court en banc or a trial de novo in the district court. They elected a hearing de novo before the compensation court and took the requisite steps to secure it.

The question, then, becomes that of whether the compensation court or the district court has jurisdiction of the cause.

The statute itself answers the question in this language: "Either party at interest who refuses to accept the findings, order, award, or judgment of the court on the original hearing may, within fourteen days after the date thereof, file with the Nebraska Workmen's Compensation Court an application for a rehearing before the court sitting en banc, plainly stating the errors on which such party relies for reversal or modification." § 48-179, R. R. S. 1943. However, section 48-181, R. R. S. 1943, provides in part: "In any such case, any party thereto may serve notice upon and waive rehearing before the Nebraska Workmen's Compensation Court. In such case any appeal shall be directly to the district court of the county in which the accident occurred; * * *."

Section 48-171, R. R. S. 1943, provides: "The words 'order,' 'award,' and 'judgment,' as used in section 48-101 to 48-190, are used interchangeably and are deemed to have the same meaning." The Legislature obviously recognized a distinction between "findings" and "order, award or judgment."

There is nothing in the language of the statute that negatives the right of "either party at interest" to refuse to accept the "findings" and request a rehearing before the court en banc if he desires to do so. It need

not be demonstrated that defendants are parties "at interest."

These statutes were exhaustively considered by us in City of Lincoln v. Nebraska Workmen's Compensation Court, 133 Neb. 225, 274 N. W. 576. We there recognized that there was some conflict in the provisions. The statutes were construed to determine the legislative intent. It was there held that the right of either party to a workmen's compensation proceeding to waive a rehearing and appeal to the district court under the provisions of section 48-181, R. R. S. 1943, is an optional right and does not negative the right of the opposing party to a rehearing before the workmen's compensation court en banc. The ultimate holding was: The right of either party to a workmen's compensation proceeding to refuse to accept the findings, order, award, or judgment of the judge of the workmen's compensation court who is assigned to hear the same, and to secure in the manner provided by law a rehearing or retrial thereof by such compensation court and a determination by a majority of the members thereof, is paramount to and exclusive of the right of appeal from such original decision; or as stated in the body of the opinion, "* * * this right is in no manner subject to modification by exercise of the powers defined by the terms of the proviso under consideration, and that the right to a rehearing by the court as such, in due course of administration of its powers, is preeminent, and the rights of appeal provided by the terms of the proviso exist only in subordination thereto."

This decision was approved in Mook v. City of Lincoln, 143 Neb. 254, 9 N. W. 2d 184. We there held: "* * * it is the failure to make application for rehearing in the manner provided by statute that defeats the right to a rehearing."

One further contention of the plaintiff requires mention. Section 48-180, R. R. S. 1943, provides: "The Nebraska Workmen's Compensation Court may, on its

own motion, modify or change its findings, order, award or judgment at any time before appeal and within ten days from the date of such findings, order, award or judgment for the purpose of correcting any ambiguity or clerical error."

Plaintiff contends that the defendants failed to proceed to secure a correction of the findings within the 10 days and hence is barred from a rehearing.

Obviously that statute has no application here. It refers to the power of the compensation court to correct ambiguity or clerical error "on its own motion." That action the compensation court may take within 10 days from the date of the findings or award.

It follows that the workmen's compensation court at all times possessed exclusive jurisdiction of the compensation litigation. The judgment of the district court granting the writ of prohibition was erroneous.

The judgment of the trial court is reversed and the cause remanded with directions to dismiss the petition for the writ of prohibition.

REVERSED AND REMANDED WITH DIRECTIONS.

CARTER, J., dissenting.

Appellee filed a claim in the compensation court for benefits under the Workmen's Compensation Act. After a hearing before one member of the compensation court, appellee's claim was dismissed. He waived his right to a rehearing before the full court, and appealed to the district court. The defendant in that proceeding then served notice to have the matter reheard before the compensation court sitting en banc. This action was brought to determine whether the district court or the compensation court had jurisdiction of the proceeding.

I submit that the defendant in the original proceeding had no right to have the decision reviewed because he was not aggrieved by the judgment entered. If appellee had not appealed to the district court and had elected to abide the decision of the single judge of the compensation court, can it be said that the de-

fendant had a right of review? The majority by its decision says that defendant has such right. In my opinion he does not.

It is the general rule that the right of review is restricted not only to those interested in the subject matter of the suit, but to those injuriously affected or aggrieved by the judgment or order complained of. See 4 C. J. S., Appeal & Error, § 183a, p. 554, and the cases therein collected. In Cowherd v. Kitchen, 57 Neb. 426, 77 N. W. 1107, we said: "But these appellants were not prejudiced by the order of discharge, and it is elementary that one cannot appeal from a decision, however erroneous, which does not affect his substantial rights." In Sturtevant Co. v. Bohn Sash & Door Co., 59 Neb. 82, 80 N. W. 273, we said: "One not prejudiced by a judgment can not obtain a review thereof." In Bragonier v. Stevenson, 104 Neb. 578, 178 N. W. 186, we said: "Ordinarily a party cannot appeal from a judgment granting him the relief demanded by his pleadings. A wrong reason for a correct conclusion of the trial court is generally immaterial on appeal." In the case of In re Estate of Bolton, 121 Neb. 737, 238 N. W. 358, this court said: "Appellees contend that a party who cannot possibly under the law receive more relief than he secured in the lower court has no right of appeal, and a pertinent inquiry would be: Could the district court make any order more favorable to the appellants than the county court has made? We think not. * * * The district court could have made no more favorable order and did right in dismissing their attempted appeal." I submit that the defendant in the original proceeding received the benefit of a judgment or order granting him all the relief demanded by his pleadings, no part of such judgment or order was adverse to his interests, and he was in no manner prejudiced by the final order made. It was a final order disposing of the litigation unless a proceeding to have it reviewed was properly initiated. I have found no case which

permits a review by a defendant under such circumstances.

The majority rely primarily on City of Lincoln v. Nebraska Workmen's Compensation Court, 133 Neb. 225, 274 N. W. 576, and Mook v. City of Lincoln, 143 Neb. 254, 9 N. W. 2d 184. In these cases the parties appealing to the full compensation court were denied a part of the relief sought before the one-member court. Such was not the case here. The distinction is a controlling one, and brings to this court a case of first impression.

There are provisions of the Workmen's Compensation Act which create a procedural monstrosity. No reason exists for abandoning established legal principles solely because of this fact. The majority completely overlooks the language of the statute requiring "an application for a rehearing before the court sitting en banc, plainly stating the errors on which such party relies *for reversal or modification.*" § 48-179, R. R. S. 1943. The defendant did not seek a reversal or modification of the order of dismissal, which is the relief he sought in the first action. The purported appeal to the full compensation court is a spurious one that has the effect only of toying with the processes of the courts.

Under the holding of the majority, a party who has obtained all he demanded by his pleadings may take an appeal which the full compensation court must hear, even though the party against whom such final order was entered may elect to abide the result. It permits the anomalous situation of an appeal being properly vested in the district court and then being divested by the subsequent action of an adverse party who had obtained all that he sought by his pleadings. It has been a rule of statutory construction by this court, frequently announced, that when a statute is subject to two constructions, one of which results in absurdity and the other avoids such result, the latter construc-

tion should be adopted. Safeway Cabs, Inc. v. Honer, 155 Neb. 418, 52 N. W. 2d 266; Maska v. Stoll, 163 Neb. 857, 81 N. W. 2d 571. This rule has particular application to the case at bar.

It is my opinion that the defendant in the former action had no right of review. He could not therefore lodge jurisdiction of the case with the full compensation court by any proceeding to secure a review. The appeal of the appellee to the district court was authorized and invested that court with jurisdiction to hear the case on appeal. The defendant, having no legal right to a review, could not subsequently divest the jurisdiction of the district court by a specious proceeding for such a review. Since the trial court arrived at this conclusion, I would affirm the judgment.

CECIL DOVEL, APPELLEE, V. SCHOOL DISTRICT NO. 23 ET AL., APPELLANTS, WALTER WILHELM ET AL., INTERVENERS-APPELLEES.
90 N. W. 2d 58

Filed May 2, 1958. No. 34338.

1. **Appeal and Error.** The rule is well settled that one cannot accept or secure a benefit under a judgment, and then appeal from it, when the effect of his appeal may be to annul the judgment, unless his right to the benefit is absolute and cannot possibly be affected by the reversal of the judgment.
2. ———. It is the possibility that his appeal may lead to a result showing that he was not entitled to what he has received under the judgment appealed from that defeats his right to appeal. Where there is no such possibility, the right to appeal is unimpaired by the acceptance of benefits under the judgment appealed from.
3. ———. Where a right of appeal is not afforded by statute, a proceeding in error is the proper remedy to correct errors of law of an inferior court or tribunal.
4. ———. A petition in error in the district court to review a judgment or final order of an inferior court or tribunal is in

its nature an independent proceeding having for its purpose the removal of the record from an inferior to a superior tribunal to determine if the judgment or final order entered is in accordance with law.

5. ———. In an error proceeding in the district court, that court, and this court on appeal therefrom, must look to the transcript of the proceedings of the inferior court or tribunal filed with the petition in error to ascertain if the final order entered is in accordance with law. Such proceeding is ordinarily tried on the questions of law set out in the petition in error and appearing in the transcript.

6. ———. New evidence is not permitted in the appellate court to determine if errors of law occurred in the court or tribunal giving rise to the error proceeding.

7. ———. In an error proceeding from an inferior court or tribunal to the district court, and on appeal therefrom to this court, error cannot be predicated on the sufficiency or insufficiency of the evidence as a matter of law to affirm or reverse the findings and judgment of the inferior court or tribunal from which error was prosecuted, unless all of the material and relevant evidence is properly presented in a bill of exceptions.

8. ———. Where alleged errors of law dependent upon evidence are asserted, it will be conclusively presumed that the evidence adduced in the inferior court or tribunal supports the judgment or final order therein made in the absence of a proper bill of exceptions.

9. **Schools and School Districts.** A proceeding under section 79-402, R. S. Supp., 1955, which authorizes the creation of a new school district from other districts, or a change in the boundaries thereof, contemplates mutuality of action by the districts affected, and requires a concurrence of the respective petitions filed therefor in all material respects with regard to the changes requested therein, and unless the petitions of the several districts affected concur in substantially the identical action requested, the county superintendent of schools is without jurisdiction or authority to act thereon.

APPEAL from the district court for Otoe County: JOHN M. DIERKS, JUDGE. *Affirmed.*

Bernard M. Spencer and *Perry, Perry & Nuernberger,* for appellants.

Wellensiek & Morrissey, for appellees.

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

CARTER, J.

This is an appeal from a judgment of the district court for Otoe County in an error proceeding in which it was determined that an order issued by the county superintendent of schools for Otoe County attaching all or part of school districts Nos. 23, 24, 45, 46, 59, 67, 79, 93, and 95 to school district No. 44, was null and void. The defendants in error in the district court have appealed.

Appellees have filed a motion to dismiss the appeal for the reason that by a subsequent proceeding the county superintendent of schools had entered an order attaching all or parts of school districts Nos. 24, 45, 67, 79, 93, and 95 to school district No. 44. It is contended that this is an acceptance of the judgment of the district court in the present action and precludes an appeal.

We think the ruling on the motion to dismiss the appeal is controlled by First Trust Co. v. Hammond, 139 Neb. 546, 298 N. W. 144, wherein we said: "The rule is well settled that one cannot accept or secure a benefit under a judgment, and then appeal from it, when the effect of his appeal may be to annul the judgment, unless his right to the benefit is absolute, and cannot possibly be affected by the reversal of the judgment. * * * It is the possibility that his appeal may lead to a result showing that he was not entitled to what he has received under the judgment appealed from that defeats his right to appeal. Where there is no such possibility, the right to appeal is unimpaired by the acceptance of benefits under the judgment appealed from."

The case of Bennett v. City of Emmetsburg, 138 Iowa 67, 115 N. W. 582, contains language that is applicable here. The court said: "The motion proceeds upon the assumption that the interests of the plaintiffs and ap-

pellants are joint, and hence that a settlement or adjustment with one must be given operation to conclude the others. There is nothing upon which to rest such an assumption. The interest of each lot owner is separate and distinct from that of every other. The plaintiffs are in court together only because the statute authorizes such a course to avoid a multiplicity of suits. And, because in such a case one of the plaintiffs may be dismissed, or shall withdraw from the case, it does not follow that the right of the others to be heard is thereby destroyed." See, also, People of State of New York ex rel. Woodhaven Gaslight Co. v. Public Service Commission, 269 U. S. 244, 46 S. Ct. 83, 70 L. Ed. 255; Stanhope v. Rural High-school Dist. No. 1, 110 Kan. 739, 205 P. 648.

In Jackson v. Denver Producing & Refining Co., 96 F. 2d 457, the court said: "A case will not be dismissed where only a part of the controversy has become moot and other questions remain for decision."

We conclude that the case is not moot and that the appeal cannot possibly operate to show that appellants are not entitled to any benefits received under the judgment from which the appeal was taken. The motion to dismiss is therefore without merit.

The record shows that on April 13, 1957, the county superintendent of schools held a hearing, after notice, to determine the validity and sufficiency of petitions on file to change the boundaries of school district No. 44 by including therein the territory within school districts Nos. 23, 24, 45, 46, 59, 67, 79, 93, and 95. The petitions filed were contingent upon enough rural districts filing petitions with sufficient signers to attach to school district No. 44 sufficient territory to bring the total assessed valuation of school district No. 44 and the districts to be included to at least $2,000,000 valuation based on the 1956 valuations for tax purposes. It is not disputed that the total assessed valuation so required, with-

out including school district No. 23, is less than the required amount.

It is contended that the petition filed by the petitioning electors of school district No. 23 does not contain the signatures of 55 percent of the legal voters of that district as required by section 79-402, R. S. Supp., 1955, and that the petition filed was therefore insufficient to authorize the county superintendent to attach school district No. 23 to school district No. 44.

The county superintendent found that there were 25 legal voters in school district No. 23 and that 15 legal voters signed the petition, and that 55 percent of the legal voters of the district had signed the petition as required by the statute. The district court found that there were 28 legal voters in school district No. 23 and that 15 legal voters had signed the petition, the same being less than 55 percent, and that such petition was therefore insufficient to authorize the county superintendent to attach school district No. 23 to school district No. 44. The validity of the petition filed by the legal voters in school district No. 23 is dependent on whether or not Clarence Pfeiffer, J. C. Crounse, and Lydia Crounse are legal voters of school district No. 23. It is stipulated in the record that Clarence Pfeiffer is a legal voter of the district. The question of the sufficiency of the petition is therefore dependent upon whether or not J. C. Crounse and Lydia Crounse were legal voters in school district No. 23.

The trial in the district court was heard de novo. Both parties offered evidence without objection. The trial court determined that J. C. Crounse and Lydia Crounse were legal voters in school district No. 23 upon the evidence thus adduced, and found, consistent with such determination, that the petition of school district No. 23 had an insufficient number of signers. We think it was error for the trial court to consider such evidence.

The hearing before the county superintendent of schools is a quasi-judicial hearing. The order of the

county superintendent is final unless a review is sought in a proper proceeding. Since the controlling statutes do not provide for an appeal, the only method of review is by a proceeding in error. An error proceeding has for its purpose the removal of the record from an inferior to a superior tribunal to determine if the judgment or final order entered is in accordance with law. It is in the nature of a new action in that a petition in error is required to be filed in accordance with section 25-1903, R. R. S. 1943, and a summons is required to be issued upon the written praecipe of the petitioner in error in accordance with section 25-1904, R. R. S. 1943. A transcript of the proceedings containing the final judgment or order sought to be reversed, vacated, or modified must be filed by the petitioner in error as required by section 25-1905, R. R. S. 1943. From the record so made, the appellate court must determine if errors of law occurred which require a reversal, vacation, or modification of the final judgment or order of the inferior tribunal. New evidence is not permitted in the appellate court to determine if errors of law occurred in the tribunal giving rise to the error proceeding. If no reversible error is found to exist, the appellate court is required to enter an affirmance in accordance with section 25-1909, R. R. S. 1943. Where reversible error is found in the record before the court, a judgment reversing the final judgment or order should be entered and certified to the inferior tribunal, except in cases where the statute authorizes the retention of the cause for trial on the merits as on appeal. See § 25-1910, R. R. S. 1943.

We think the taking of new evidence dehors the record before the county superintendent of schools was not consistent with the nature of the proceeding before the court and that such evidence may not be considered. To hold otherwise would have the effect of permitting an appeal where an appeal is not authorized. The question presently for determination is whether or not the

record of the proceedings before the county superintendent of schools discloses error as a matter of law.

There was evidence at the hearing before the county superintendent of schools indicating that the Crounses were legal voters in school district No. 23. The evidence was preserved in the form of minutes of the hearing which were contained in the transcript of the proceedings had before the county superintendent of schools. It is the rule, frequently announced by this court, that where evidence is required to establish an error of law by the inferior tribunal, it must be presented by a bill of exceptions. In the case of In re Estate of Vance, 149 Neb. 220, 30 N. W. 2d 677, we said: "It is elementary that in error proceedings from the county court to the district court, and upon appeal from the district court to this court, error cannot be predicated on the insufficiency of the evidence as a matter of law to support the findings and judgment of the court from which error was prosecuted, unless all the material relevant evidence was preserved in a bill of exceptions." This same rule was announced in Olsen v. Grosshans, 160 Neb. 543, 71 N. W. 2d 90, a case similar to the one presently before us. See, also, School Dist. No. 49 v. Kreidler, 165 Neb. 761, 87 N. W. 2d 429. Since it is necessary to show by evidence that J. C. Crounse and Lydia Crounse were legal voters in school district No. 23, and there is no evidence properly before the court, the finding of the county superintendent that J. C. Crounse and Lydia Crounse were not legal voters, must be affirmed. We stated the rule in Olsen v. Grosshans, *supra*, as follows: "Furthermore, when a question of the sufficiency of the evidence is involved in an error proceeding, the findings and judgment of the lower court should be affirmed by the district court and by this court upon appeal therefrom when all of the material and relevant evidence with reference thereto is not contained in a bill of exceptions and the transcript fails to disclose any error prejudicial to the party

prosecuting the error proceeding." We conclude that there is no evidence before this court which may properly be considered. It follows that there is nothing in the record to support a finding that J. C. Crounse and Lydia Crounse were legal voters, and therefore the trial court was in error in not affirming the order of the county superintendent on this issue.

In Schaub v. City of Scottsbluff, 164 Neb. 805, 83 N. W. 2d 775, it appears that this court considered evidence taken before the city council of the city of Scottsbluff which had been transcribed and attached to the petition in error. We disapprove the opinion in that case to the extent that it gives consideration to evidence taken before the inferior tribunal which was not preserved in a bill of exceptions.

The only question remaining, therefore, is whether or not errors of law are shown by the transcript of the proceedings held before the county superintendent of schools without regard to any evidence adduced at the hearing before the county superintendent of schools or in the trial in the district court.

On this question the transcript shows that the petition submitted on the part of the legal voters of school district No. 46 did not include the southwest quarter of Section 31 which was within the established boundaries of that district. The petition also included the statement that "Buses will transport the children of districts to school in Douglas." The transcript also shows that the petition submitted on the part of the legal voters of school district No. 95 did not include the southwest quarter of Section 19 which was within the established boundaries of that district. The petition also included the statement that "District 44 Otoe County, Nebraska will send a bus or buses into the district 95 area to pick up the children of the area and transport them to school in Douglas."

The accepting petition of school district No. 44 provides for the annexation of the whole of school districts

Nos. 46 and 95, among others. The petition makes no reference whatever to the transportation of children by bus from any district being annexed to school district No. 44.

The want of mutuality between the petitions of the legal voters in school districts Nos. 46 and 95 and the accepting petition of school district No. 44 have the effect of voiding the proceedings as between such districts. It must be assumed that the failure to include all the lands of school districts Nos. 46 and 95 in the petitions of the legal voters of such districts were inducements to the signers of the petitions from such districts. The accepting petition of school district No. 44 provided for the annexation of the whole of such districts. The want of mutuality in the petitions of the legal voters of school districts Nos. 46 and 95, and the accepting petition of the annexing school district No. 44, make the respective petitions fatally defective and deprive the county superintendent of jurisdiction to annex school districts Nos. 46 and 95 to school district No. 44. The provisions of the petitions submitted by the legal voters of school districts Nos. 46 and 95 with reference to the transportation of children from the area within school districts Nos. 46 and 95, without an acceptance by the petition of school district No. 44, likewise voids the proceedings as to such districts for want of mutuality.

We had this question before us in Olsen v. Grosshans, *supra,* wherein we said: "Such question has not been previously raised or adjudicated in this jurisdiction. However, there are authorities from other jurisdictions. As we view it, section 79-402, R. S. Supp. 1951, which authorizes creation of a new school district from other districts or a change in the boundaries of any district, contemplates mutuality of action by the districts affected and requires a concurrence of the respective petitions filed therefor in all material respects with regard to the changes requested therein, and unless the petitions of the separate districts affected concur in sub-

stantially the identical action requested, the county superintendent or superintendents are without jurisdiction or authority to act thereon."

We necessarily conclude that the petitions of school districts Nos. 46 and 95 are fatally defective for want of mutuality with the accepting petition of school district No. 44, and the county superintendent of schools therefore lacked jurisdiction to order the consolidation of these districts. The trial court having arrived at the same conclusion on this issue, the judgment of the district court holding the order of the county superintendent of schools under date of April 16, 1957, to be of no force and effect is correct, and the judgment is affirmed.

AFFIRMED.

KATHERINE MORSE, APPELLANT, V. THEODORE I. GRAY ET AL., APPELLEES.

89 N. W. 2d 842

Filed May 2, 1958. No. 34350.

1. **Trial.** In every case, before the evidence is submitted to the jury, there is a preliminary question for the court to decide, when properly raised, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed.
2. **Negligence.** In an action for damages for negligence the burden is on the plaintiff to show by direct or circumstantial evidence that there was a negligent act or omission by the defendant and that it was the proximate cause of plaintiff's injury or a cause which proximately contributed to it.
3. ———. Invitees are those who are expressly or impliedly invited as a customer to a store. The duty of the owner toward an invitee is to exercise reasonable care to keep the premises in a safe condition.
4. ———. A possessor of land is subject to liability for personal injuries to business visitors by a natural or artificial condition thereon if he knows, or by exercise of reasonable care could discover, the condition which, if known to him, he should realize as involving an unreasonable risk to them.

5. ———. 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.
6. ———. Proximate cause, as used in the law of negligence, is that cause which in a natural and continuous sequence, unbroken by an efficient intervening cause, produces the injury, and without which it would not have occurred.
7. **Automobiles: Husband and Wife.** The negligence of a husband while driving an automobile with his wife as a guest is not imputable to her.

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

Edgerton & Powell, for appellant.

John E. Dougherty, for appellees.

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

WENKE, J.

This is an appeal from the district court for Merrick County. It involves an action brought therein by Katherine Morse against Theodore I. Gray and Mary I. Gray, husband and wife, to recover damages for injuries she claims to have suffered in an accident occurring on defendants' place of business together with expenses incurred by reason thereof for doctors' services, medicines, and hospital care, loss of wages, and for damages to the car in which she was riding. The basis for plaintiff's claim is that the defendants maintained their property in a manner which she claims was negligent and which she contends was a proximate cause of the accident which resulted in her injuries.

Trial was had and, at the conclusion of plaintiff's evidence, the trial court sustained defendants' separate motions to enter an order of dismissal and thereupon dismissed plaintiff's petition. Plaintiff then filed a motion for new trial and took this appeal from the over-

ruling thereof. The primary issue raised by the appeal is the question of whether or not appellant's evidence is sufficient to present a jury question.

The principles applicable to the foregoing question are as follows:

"A motion for directed verdict or its equivalent must, for purpose of decision thereon, be treated as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence." Davis v. Spindler, 156 Neb. 276, 56 N. W. 2d 107. See, also, Kepler v. Chicago, St. P., M & O. Ry. Co., 111 Neb. 273, 196 N. W. 161.

"In every case, before the evidence is submitted to the jury, there is a preliminary question for the court to decide, when properly raised, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed." Krichau v. Chicago, B. & Q. R. R. Co., 150 Neb. 498, 34 N. W. 2d 899. See, also, Coyle v. Stopak, 165 Neb. 594, 86 N. W. 2d 758.

"* * * where there is any evidence which will support a finding for a party having the burden of proof, the trial court cannot disregard it and direct a verdict against him." Davis v. Spindler, *supra*. See, also, Herman v. Firestine, 146 Neb. 730, 21 N. W. 2d 444.

"In an action for damages for negligence the burden is on the plaintiff to show by direct or circumstantial evidence that there was a negligent act or omission by the defendant and that it was the proximate cause of plaintiff's injury or a cause which proximately contributed to it." Egenberger v. National Alfalfa Dehydrating & Milling Co., 164 Neb. 704, 83 N. W. 2d 523. See, also, Sipprell v. Merner Motors, 164 Neb. 447, 82 N. W. 2d 648.

"The burden of proving a cause of action is not sustained by evidence from which negligence can only be surmised or conjectured." Bowers v. Kugler, 140 Neb. 684, 1 N. W. 2d 299. See, also, Wolcott v. Drake, 162 Neb. 56, 75 N. W. 2d 107.

"Negligence is not presumed; the mere happening of an accident does not prove negligence." Bowers v. Kugler, *supra*. See, also, Wolcott v. Drake, *supra*.

On Tuesday, July 10, 1956, the appellees were operating a Dairy Queen business in Central City, Nebraska, for the purpose of selling and dispensing ice cream and kindred products to the public. The appellees' place of business was just north of and adjacent to U. S. Highway No. 30 with a north-south street immediately to the east thereof. Between 10:30 and 10:45 p.m. of that day appellant and her husband, Franklin Morse, stopped at this Dairy Queen in their car for the purpose of and did buy malted milks, one for each of them. They entered the appellees' place of business from the east, on a driveway provided for that purpose, and parked their car at the southeast corner of the Dairy Queen building. It was parked, facing west, about 3 feet east of the sidewalk on the east side of the building and in an area provided for that purpose. The building in which the Dairy Queen business was being operated faces south toward highway No. 30 and had two service windows in the south side thereof. There is a cement sidewalk, 3 feet wide, along and immediately adjacent to the east, north, and west sides of the building and one on the south side thereof which extends out to a sidewalk running along the street or highway immediately to the south. There were round posts, varying between 24 and 34 inches in height, placed at each corner of the building just outside of the 3-foot cement sidewalk but immediately adjacent thereto. They were put in to protect the building from the cars of customers. After the car, in which appellant was riding and which her husband was driving, had parked, both of them got out on

their respective sides. The husband went to the east service window to buy the malts while appellant went around the building, on the sidewalks hereinbefore referred to, to find a fountain in order to get a drink of water, which she did. She then joined her husband at the service window and, when he received the malts from a woman attendant, he gave her one of them and kept the other. They then returned to the car to consume them, appellant going around the back of the car to get in on her side. The husband finished his malt. He then started the car, turned on the lights, backed up some 5 feet, and started forward, turning his wheels to the left in order to go south onto highway No. 30. After he had proceeded forward about 7 feet the car suddenly hit something and came to a direct stop, killing the motor. As a result appellant was apparently thrown against the windshield and injured. The appellant's husband got out and discovered he had run into a post located at the southeast corner of the building. He got the bumper, which had come to rest on top of the post, off of it. He then got into the car and backed it up and proceeded to drive to their home some 7 miles west of Aurora, Nebraska.

As to the duty appellees owed appellant, we held in Haley v. Deer, 135 Neb. 459, 282 N. W. 389: "Invitees are those who are expressly or impliedly invited, as a customer to a store; * * *. The duty of the owner toward an invitee is to exercise reasonable care to keep the premises in a safe condition, * * *." In regard thereto we said in Haley v. Deer, *supra,* in discussing the case of Dowling v. MacLean Drug Co., 248 Ill. App. 270, that: "The law does not charge one with anticipating dangerous and negligent conditions, but he may assume that others have done their duty to give proper warning of hidden dangers." See, also, 7A Blashfield, Encyclopedia of Automobile Law and Practice (Perm. Ed.), § 5071, p. 609; Girard v. Auto Specialties Athletic Assn., 300 Mich. 272, 1 N. W. 2d 538; Siegel v. Detroit City Ice

& Fuel Co., 324 Mich. 205, 36 N. W. 2d 719; Bennett v. Louisville & Nashville R. R. Co., 102 U. S. 577, 26 L. Ed. 235; Palmer v. Boston Penny Sav. Bank, 301 Mass. 540, 17 N. E. 2d 899, 120 A. L. R. 633; Sipprell v. Merner Motors, *supra*. As held in Goodman v. Theatre Parking, Inc., 286 Mich. 80, 281 N. W. 545: "A possessor of land is subject to liability for personal injuries to business visitors by a natural or artifical condition thereon if he knows, or by exercise of reasonable care could discover, the condition which, if known to him, he should realize as involving an unreasonable risk to them." See, also, Siegel v. Detroit City Ice & Fuel Co., *supra*.

Appellant contends that the appellees, in connection with their Dairy Queen business, negligently maintained a dark colored post at the southeast corner of the building used for that purpose, which extended at a low angle out over the driving area provided for customers, without attaching reflectors or any other type of warning thereto, and in failing to properly illuminate the premises; and that this negligence was a proximate cause of the accident in which she was injured.

From the evidence adduced a jury could find as follows: That a round post some 6 to 8 inches in circumferance, which appellees had caused to be placed at the southeast corner of their building, was so placed as to extend at a low angle for a distance of some 27 inches out over the driving area which they had provided for their customers, the top thereof being some 15 to 17 inches above the ground; that the post had been creosoted, was unpainted, and dark brown in color; and that no reflectors or other type of warning had been placed thereon.

We said in Shupe v. County of Antelope, 157 Neb. 374, 59 N. W. 2d 710, that: "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 cir-

cumstances." See, also, McClelland v. Interstate Transit Lines, 142 Neb. 439, 6 N. W. 2d 384; Burhoop v. Brackhan, 164 Neb. 382, 82 N. W. 2d 557. Certainly, if a jury found the foregoing to be true, then appellees were guilty of doing something which an ordinarily prudent person would not have done under the same or similar circumstances and consequently they would be guilty of negligence.

A jury could also find, from the evidence adduced by the appellant, that appellant's husband parked their car just to the east of the post at the southeast corner of the building; that he parked it facing west; that neither appellant, nor her husband, ever saw the post as they drove up to park, after they got out to buy malts, as they got back in the car, or at any time until after he drove into it as he was proceeding to leave the premises; and that sometime prior to their starting to leave the premises all of the lights used in connection with the Diary Queen business had been turned off.

Appellant contends the negligent maintenance of the post in the position it was in at the time of the collision was a proximate cause of the accident, whereas appellees contend the post merely created a condition and that it was the intervening negligent driving of the husband which was the sole proximate cause of the accident.

In order for the appellant to recover damages she must prove both the negligence of appellees and that such negligence was a proximate cause of the injuries complained of.

"Proximate cause, as used in the law of negligence, is that cause which in a natural and continuous sequence, unbroken by an efficient intervening cause, produces the injury, and without which it would not have occurred." Bear v. Auguy, 164 Neb. 756, 83 N. W. 2d 559. See, also, Ecker v. Union P. R. R. Co., 164 Neb. 744, 83 N. W. 2d 551; Coyle v. Stopak, *supra*. As stated in Coyle v. Stopak, *supra,* by quoting with approval

from Barney v. Adcock, 162 Neb. 179, 75 N. W. 2d 683: " 'Actionable negligence exists when the injury or the loss is the proximate result thereof. The proximate result must be the natural and probable consequence which ought to have been foreseen or reasonably anticipated in the light of the attendant circumstances. An injury is not actionable if it would not have resulted from the alleged negligence but for the interposition of a new and independent cause. Proximate cause, as used in the law of negligence, is that cause which in the natural and continuous sequence, unbroken by an efficient intervening cause, produces the injury, and without which the injury would not have occurred. 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 agency to act.' "

Appellees rely on Steenbock v. Omaha Country Club, 110 Neb. 794, 195 N. W. 117, and Frerichs v. Eastern Nebraska Public Power Dist., 154 Neb. 777, 49 N. W. 2d 619, as sustaining the trial court's holding on the basis that the post, at most, only created a condition. As stated in Steenbock v. Omaha Country Club, *supra:* "It is not sufficient that the negligence charged does nothing more than furnish a condition by which the injury is made possible, and if such condition causes an injury by the subsequent independent act of a third person, the two acts are not concurrent and the existence of the condition is not the proximate cause of the injury." As stated in Frerichs v. Eastern Nebraska Public Power Dist., *supra:* "On the facts of this case the defendant cannot be said to have known, reasonably anticipated, or foreseen in the absence of notice that any such operation as was carried on in this field would in probability ever come about."

However, we said in Johnson v. Mallory, 123 Neb.

706, 243 N. W. 872, that: "The doer of an original wrongful act that should reasonably cause one to anticipate an injury therefrom is not relieved from liability for an injury immediately brought about by an intervening cause, wrongful or otherwise, that is set into operation by such original wrongful act, and that alone would not have caused the injury, but which with the aid of the original wrong does cause such injury." See, also, Tralle v. Hartman Furniture & Carpet Co., 116 Neb. 418, 217 N. W. 952; McClelland v. Interstate Transit Lines, *supra*. As held in McClelland v. Interstate Transit Lines, *supra,* by quoting from Meyer v. Milwaukee, E. R. & L. Co., 116 Wis. 336, 93 N. W. 6: " 'It suffices to charge a person with liability for a negligent act if some injury to another ought reasonably to have been foreseen as the probable result thereof by the ordinarily intelligent and prudent person under the same circumstances, even though the specific injury might not be foreseeable.' " We think the factual situation as to the post, which we have set forth that a jury could find from the evidence adduced as existing on the premises, brings the situation here presented within the principles announced in the foregoing cases and those hereinbefore set forth as relating to a business invitee. We therefore come to the conclusion that the evidence produced presented a jury question.

Appellant's husband admits that after he had backed up and was proceeding forward to leave the premises he was only watching the corner of the building to avoid hitting it and that he never looked ahead to see what was in front of him until after he bumped into the post with the bumper of his car. Under these admissions he was guilty of contributory negligence as a matter of law sufficient to defeat any right of recovery he might otherwise have had against the appellees for it was certainly his duty to watch ahead to see where he was going and avoid hitting whatever might be in front of him. This is not a situation where a driver was looking

ahead and failed to see an object in the road ahead of him because of the nature thereof which would, under certain circumstances, present an issue for the jury as to whether or not the driver was guilty of contributory negligence. See Buresh v. George, 149 Neb. 340, 31 N. W. 2d 106. The foregoing precludes any right to recover for doctor bills, medicine, hospital bills, and damage to the car for which the right to recover was assigned by the husband to appellant, as her right to recover therefor would be no better than that of her husband.

We want to make it clear that the question of whether or not the negligence of appellant's husband was the sole proximate cause of the accident, a defense pleaded by appellees, is still one for the jury and, under the evidence adduced, should be submitted. However, the foregoing negligence of the appellant's husband cannot be imputed to her for there is nothing in the evidence adduced to show any joint enterprise between her and her husband such as would permit imputing his negligence to her. In the absence thereof we have held: "The negligence of a husband while driving an automobile with his wife as a guest may not be imputable to her * * *." Bartek v. Glasers Provisions Co., 160 Neb. 794, 71 N. W. 2d 466.

Appellees, in their answer, also charge appellant with being guilty of negligence sufficient to defeat any right she might otherwise have against appellees. Her duty, as a guest, is set forth in Scott v. Service Pipe Line Co., 159 Neb. 36, 65 N. W. 2d 219, as follows: "The duty of a guest riding in an automobile is to use care in keeping a lookout commensurate with that of an ordinary prudent person under similar circumstances. The guest is not required to exercise the same degree of care as the driver. If the guest observes danger, or if danger should ordinarily be anticipated, the guest should warn the driver, but ordinarily a guest is not required to watch the road or advise the driver in the management of the

car. Where a driver observed or should have observed the danger as well as the guest, the guest is not ordinarily negligent in failing to warn the driver." The evidence shows that appellant at no time observed the post and that at the time her husband was preparing to leave the premises she had her head down consuming her malted milk, which, under the circumstances shown, she had a perfect right to do. In view thereof we do not think the facts adduced by appellant presented any issue of negligence on her part sufficient to require that issue to be submitted to the jury nor to defeat her right of recovery as a matter of law.

We have come to the conclusion that the trial court was wrong in sustaining appellees' motions to dismiss and, because thereof, dismissing appellant's petition. We therefore reverse its action doing so and remand the cause to the district court for retrial in accordance with the holdings in the opinion.

REVERSED AND REMANDED.

IN RE APPLICATION OF CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLEE, V. CITY OF ALLIANCE ET AL., APPELLANTS, IMPLEADED WITH CITY OF RAVENNA ET AL., APPELLEES.

89 N. W. 2d 837

Filed May 2, 1958. No. 34361.

1. **Public Service Commissions: Railroads.** 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 discon-

tinue 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. **Public Service Commissions: Appeal and Error.** 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.*

Reddish & Reddish and *Glen A. Fiebig,* for appellants.

J. W. Weingarten and *W. P. Loomis,* for appellee Chicago, B. & Q. R. R. Co.

Clark J. Mingus, John H. Evans, and *Tedd C. Huston,* for appellees City of Ravenna et al.

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

CHAPPELL, J.

The Chicago, Burlington & Quincy Railroad Company, hereinafter called plaintiff, commenced this proceeding before the Nebraska State Railway Commission, hereinafter called the commission, seeking permission to discontinue Sunday operations of passenger trains 41 and 44 between Lincoln and Alliance. Objections thereto were filed by the city of Alliance and others, hereinafter called defendants.

After two public hearings, the commission granted plaintiff's application and subsequently overruled defendants' motion for rehearing and stay of the commission's order. Therefrom defendants appealed, assigning in substance: (1) That the commission erred by receiving in evidence, over objections, exhibits Nos. 6, 6A, 10, and 10A, which presented for consideration plaintiff's revenue, expenses, and net loss from operation of the trains; (2) that the commission erred in failing to

make a timely and appropriate ruling upon defendant's motions numbered 1 through 8, filed by defendants on May 10, 1957; and (3) that the decision and order of the commission was unreasonable and arbitrary. We conclude that the assignments should not be sustained.

Preliminary to a consideration of defendants' assignments and the record upon the merits, we call attention to recent applicable and controlling authorities from this jurisdiction. In Chicago & N. W. Ry. Co. v. City of Norfolk, 157 Neb. 594, 60 N. W. 2d 662, citing numerous authorities, we held: "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 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.

"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.

"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." See, also, Chicago, B. & Q. R. R. Co. v. Burgess, *ante* p. 29, 87 N. W. 2d 630; Chicago, R. I. & P. R. R. Co. v. Farmers Union Creamery, *ante* p. 32, 87 N. W. 2d 616.

The opinion in Chicago & N. W. Ry. Co. v. City of Norfolk, *supra,* also adversely disposes of defendants' first assignment, the substance of which was to contend that the commission erred by receiving in evidence, over objections, exhibits Nos. 6, 6A, 10, and 10A, which set forth at length plaintiff's theory of allocation of

revenues, cost of operation, and net loss from operation of trains 41 and 44 on Sundays in December 1955 to August 1956, inclusive, and in September 1956 to April 1957, inclusive, and for April 1956 and March 1957.

In that connection, to quote at length from that opinion would serve no useful purpose. If the commission did not err prejudicially in the admission of such evidence, and we conclude that it did not, then defendants' second assignment of error should not be sustained. In such respect, on May 10, 1957, prior to a second hearing timely ordered and noticed to be held on May 20, 1957, defendants filed motions numbered 1 through 8, inclusive, requesting a continuance and an order for the production by plaintiff of a great mass of detailed original records, most of which were kept in Chicago, Illinois, by which defendants hoped to show that the undisputed loss of operation by plaintiff was less than that shown by plaintiff's exhibits aforesaid and evidence in support thereof. It appears that although defendants had ample time and opportunity to file such motions and to have them heard and disposed of before May 20, 1957, they did not do so. Rather, defendants waited until the commission convened for rehearing on the merits May 20, 1957, and after defendants had filed an answer on that date, at which time they requested a ruling on the motions. Thereupon the commission overruled the motions and proceeded with the hearing without objection by defendants. Also, at that time, defendants joined in plaintiff's request that all the evidence and exhibits, including Nos. 6 and 10, which had been received at the first hearing on September 19, 1956, should be received in evidence, and pursuant thereto such evidence was offered by plaintiff and received as part of the record of the proceedings in the second hearing on May 20, 1957. We conclude not only that defendants' assignment has no merit, but also that defendants are in no position to complain with regard thereto.

In connection with defendants' third assignment of

error relating to the merits, we have examined the voluminous record, which, as far as important here, discloses substantially the following: Trains 41 and 44 operated daily, including Sundays, between Lincoln and Alliance, a distance of 366 miles. Train 41 was scheduled to leave Lincoln at 7 p. m. and arrive in Alliance at 4 a. m. Train 44 was scheduled to leave Alliance at 11 a. m. and arrive in Lincoln at 8 p. m. They also made certain interchange connections with other trains operated by plaintiff.

Train 41 had 39 stations on its route between Lincoln and Alliance, 8 of which were flag stops. Train 44 had 39 stations between Alliance and Lincoln, 2 of which were flag stops. Each such train required one engineer, one fireman, one conductor, one brakeman, and one baggageman and expressman to operate it. Each train was generally powered by a single-unit diesel electric locomotive of 2,000 to 2,250 horsepower. On Sundays each train usually carried three baggage and express cars, and an air-conditioned reclining chair car, having a seating capacity of from 60 to 66 passengers. On other days they also carried a railway post-office car. However, as an economy measure and lack of need caused by closing of post offices on Sundays, the federal government had discontinued such operation of a railway post-office car on Sundays which caused plaintiff a Sunday loss of revenue amounting to an average of $369 in April 1956 and $342 in March 1957.

Detailed revenues received, out-of-pocket expenses, and net losses incurred by the operation of trains 41 and 44 on Sundays were shown by oral evidence and exhibits appearing in the record for each of 39 Sundays in December 1955 to August 1956, inclusive, and for each of 34 Sundays in September 1956 to April 1957, inclusive, from which accurate calculations and just conclusions may be made.

On the 39 Sundays during such first period, despite reasonable efforts to increase patronage, train 41 travel-

ing west, thence northwest toward a sparsely-settled section of the state, averaged only 5.6 passengers per train mile, and train 44 traveling back southeast and east toward the more thickly-populated section of the state averaged only 10.7 passengers per train mile. Also, on the 34 Sundays during such second period, train 41, despite reasonable efforts to increase patronage, averaged only 5.8 passengers per train mile, and train 44 averaged only 11.6 passengers per train mile. In other words, train 41 averaged but little more passengers per train mile than the five employees required to operate the train, and train 44 averaged but little more than twice the number of passengers per train mile than the five employees required to operate it. Further, on each of the first 39 Sundays, plaintiff's expenses for operating the trains were between $102 and $486 more than plaintiff received for the operations, and on each of the second 34 Sundays plaintiff's expenses for operating the trains were between $83 and $630 more than plaintiff received for the operation. The foregoing amply supports the conclusion that Sunday trains 41 and 44 were not only operated at a substantial unwarranted loss, but also that no present need existed for their operation.

Furthermore, plaintiff's faster train 43 is also scheduled to leave Lincoln at 12:15 a. m. and arrive in Alliance at 6:10 a. m., and plaintiff's faster train 42 is scheduled to leave Alliance at 11 p. m. and arrive in Lincoln at 7:05 a. m. Both such trains travel the same route as trains 41 and 44, and operate daily including Sundays. They also each carry sleeping cars, coaches, and headends, and make regular scheduled stops at all principal intermediate towns between Lincoln and Alliance. Also, upon discontinuance of Sunday trains 41 and 44, plaintiff has arranged for conditional or flag stops by trains 42 and 43 to pick up and discharge passengers at Thedford, Dunning, and Anselmo between Broken Bow and Alliance, and at Litchfield between Broken Bow and Ravenna, and to make such stops at

all other stations upon timely notice or flagging whenever trains 42 and 43 have not theretofore been scheduled to stop. Also, Sunday trains 42 and 43 will carry the balance of the express, cream, and mail formerly carried by trains 41 and 44.

In addition, plaintiff's railroad between Lincoln and Alliance is paralleled by an improved, hard-surfaced, modern highway the entire distance, which highway passes through or closely connects with every community on the railroad served by trains 41, 44, 42, and 43, and makes automobile, bus, and truck transportation flexible, speedy, and convenient. In that connection, there is ample convenient Sunday bus service to and from all of plaintiff's intermediate stations between Lincoln and Grand Island and between Grand Island and Broken Bow, and such service is prospectively planned to be given between Broken Bow and Alliance if the patronage justifies it. Thus, if trains 41 and 44 are discontinued, only the following towns between Thedford and Alliance, which have a population as numerically designated, will in any event have no regular Sunday train or bus service, to wit: Hecla, 4; Whitman, 150; Ashby, 175; Bingham, 100; Ellsworth, 11; Lakeside, 75; and Antioch, 30. However, those places each averaged only about one passenger every tenth Sunday, except Whitman which showed a higher average because on December 4, 1955, in the first period aforesaid, 12 passengers boarded train 44 because of a severe snow storm and below freezing temperatures.

The foregoing situation also refutes defendants' contention that there is any public need for Sunday operation of trains 41 and 44. As usual in such cases, the record discloses that a few persons and businesses may be adversely affected in some respects, and that a few persons may suffer some inconvenience by discontinuing Sunday trains 41 and 44, but that is not a controlling factor where, as it appears herein, no public need exists because the public has practically abandoned the use

of such trains. In such cases as that at bar consideration should be given to the public need rather than to individuals.

For reasons heretofore stated, we conclude that the commission did not err in any manner prejudicial to defendants, and that the order of the commission discontinuing Sunday trains 41 and 44 was not unreasonable and arbitrary. Such order should be and hereby is affirmed.

AFFIRMED.

JOHN D. GERDES ET AL., APPELLANTS, V. THE OMAHA HOME FOR BOYS ET AL., APPELLEES.
89 N. W. 2d 849

Filed May 2, 1958. No. 34364.

1. **Appeal and Error.** An equity case is tried de novo on the record in this court and only the evidence that is properly before it is considered.
2. **Contracts: Evidence.** If negotiations between parties result in an agreement in reference to the subject matter thereof and if they reduce the agreement to writing, execute, and deliver it, the writing, in the absence of fraud, mistake, or ambiguity, is the only competent evidence of the contract.
3. ———: ———. If the existence of a written contract has been induced by prior or contemporaneous oral agreement, parol evidence is not admissible to add to, contradict, or vary the terms of the written contract.
4. ———: ———. If a written contract contains a complete obligation without ambiguity as to the object and extent of the engagement, it is conclusively presumed that the whole agreement of the parties was included therein. The fact that a matter has been omitted which might have been embodied therein will not open the door to the admission of parol evidence in that regard.
5. **Evidence.** The parol evidence rule is not merely one of evidence but is a rule of substantive law which declares that certain kinds of facts are legally ineffective and forbids them to be proved.
6. **Contracts.** A written contract expressed in unambiguous lan-

guage is not subject to interpretation or construction and the intention of the parties to such a contract must be determined from its contents.

7. ———. Contemporaneous instruments will generally be construed together in order to determine the nature of the transaction and the intent of the parties but this is not true when the instruments, though both relating to the same transaction, concern separate subjects or provide for different things.

8. **Wills: Frauds, Statute of.** The making of a will by which all property of a testator is given to a named beneficiary is not of itself evidence of the existence of a contract in reference thereto between the testator and the beneficiary nor is it evidence of part performance of a contract in the absence of other evidence clearly indicating it was made pursuant to such an agreement.

9. **Specific Performance: Frauds, Statute of.** The evidence must be clear, satisfactory, and convincing to sustain a claim of a person to the estate of a deceased person by virtue of an alleged oral contract.

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

Lyle Q. Hills, for appellants.

Mecham, Stoehr, Rickerson & Sodoro and *Crossman, Barton & Quinlan,* for appellees.

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

BOSLAUGH, J.

The object of this litigation is to secure specific performance of an alleged oral contract by which appellants claim Leo G. Butler and Margaret B. Butler obligated themselves to give their property by wills to appellants.

The following is the substance of the petition of appellants: Leo G. Butler and Margaret B. Butler, husband and wife, by an oral agreement made August 19, 1950, with appellants bound themselves to devise and bequeath all their property, except five nominal legacies, to appellants in consideration of their agreeing to devise

all their property to Leo G. Butler and Margaret B. Butler with the exception of two nominal legacies. In performance of the agreement each of the parties thereto on the date stated made a will. A copy of each of the wills is attached to and made a part of the petition. The wills were each prepared by the same lawyer, made at the identical time, attested by the same witnesses, and each will was deposited in the county court of Douglas County. Margaret B. Butler died during June 1956. Leo G. Butler was named as the only beneficiary of the will of his wife but no proceedings were had for the probate of her will or for the administration of her estate. Leo G. Butler, on or about January 15, 1957, for the purpose of defrauding appellants, made a second will and thereby and therein revoked the will he made on August 19, 1950, and thereby violated the oral agreement made with appellants on August 19, 1950. They did not learn of the second will of Leo G. Butler until after his death late in January 1957. Appellants in good faith performed the oral agreement of August 19, 1950. Leo G. Butler by the terms of his second will gave $15,000 in cash to The Omaha Home for Boys, one of the appellees, and the residue of his property to Fred Butler, his brother, one of the appellees. The gifts made by the second will and the claimed rights of O. M. Campbell as executor of the will constitute a cloud upon the title of appellants to the property owned by Leo G. Butler at the time of his death for the removal of which appellants have no adequate remedy at law. Appellants asked for specific performance of the oral agreement.

The copy of the will of Leo G. Butler dated August 19, 1950, attached to the petition, provided for the payment of his debts and the expenses of his last illness and burial and subject thereto gave all his property to his wife, Margaret B. Butler; contained a statement that the will was made as a result of an understanding and agreement that his wife would make a like will; pro-

vided that in case of the death of the testator and his wife in a common disaster or if his wife should predecease him, a gift of $1 was made to Fred Butler and the residue of the property of the testator was given to appellants equally or in case of the death of either before the death of the testator, then the survivor should take the residue and if appellants predeceased the testator the residue was given to the Masonic Boy's Home of Omaha, Nebraska; and provided for the appointment of his wife as executrix if she survived the testator, otherwise Lyle Q. Hills was named executor and he was appointed attorney for the representative of the estate of the testator. This was the pattern of each of the wills made August 19, 1950, and they were identical except as to the name of the person making the will, the names of the beneficiaries, and the person designated as executor. The will of Leo G. Butler made January 15, 1957, gave The Omaha Home for Boys $15,000 in cash; gave Fred Butler, brother of the testator, the residue of his estate; and appointed O. M. Campbell executor of it.

The answer of O. M. Campbell denied the statements of the petition. The answer of Fred Butler denied the averments of the petition except it admitted the residences of the parties and the corporate status of The Omaha Home for Boys as alleged in the petition and that Leo G. Butler made a will on January 15, 1957, which revoked all prior wills made by him. The new matters of the pleading of Fred Butler were: The probate of the will of Leo G. Butler made January 15, 1957, and the appointment and qualification of O. M. Campbell as executor thereof; the execution of a written contract on August 19, 1950, by Leo G. Butler and Margaret B. Butler and by appellants, together with an addendum thereto, copy of which is made a part of the answer, by virtue of which appellants obligated themselves to make wills in favor of Leo G. Butler and Margaret B. Butler but they or either of them did not agree to

make a will or wills in favor of appellants; the written contract of August 19, 1950, made a part of the answer, was a result of negotiations between the parties thereto and evidenced the complete agreement in reference to the subject matter of the negotiations, was duly signed and delivered by the parties, and constituted the exclusive medium of ascertaining the agreement between the signatory parties; and that Leo G. Butler and Margaret B. Butler fully performed all the terms of the contract required to be performed by them. The prayer of the answer was dismissal of the action of appellants. The written contract of August 19, 1950, made a part of the answer of Fred Butler, will be later set out and discussed herein.

The Omaha Home for Boys by an allegation in its answer denied the statements of the petition and asked that the case be dismissed.

The reply of appellants to the answer of Fred Butler was a denial and an admission that appellants and Leo G. Butler and Margaret B. Butler made the contract, a copy of which is attached to the answer of Fred Butler.

The trial court found generally for appellees and against appellants and that Leo G. Butler and Margaret B. Butler, or either of them, did not promise to make a will in favor of appellants or either of them. A judgment of dismissal of the case was rendered and the motion of appellants for a new trial was denied. This appeal presents the record for trial de novo in this court.

Appellants were the owners of residence property at 1724 North Sixtieth Street, the legal description of which was Lots 245 and 246 of Morningside Addition, Douglas County, where they had resided since December 26, 1940. They were each 70 years of age on August 19, 1950, at the time of the transaction concerned in this litigation. Leo G. Butler was then 61 years of age and Margaret B. Butler was then 47 years of age. These four persons had been acquainted and friendly for about 20 years. John D. Gerdes was disabled by a back condition.

Neither he nor his wife, Blanche Gerdes, were gainfully employed and they had no income except the amount contributed to them as old age assistance. Leo G. Butler and Margaret B. Butler were each gainfully employed and continued to be until their respective deaths. Blanche Gerdes testified that there was an old age assistance lien on the property of appellants. She further testified: "That is the only way we could live, and that is why we took on these other doings because we could not get along when he was crippled, and we could not get enough from old age assistance to help us out, so we decided to do something else with our place."

It was under these necessitous and distressing circumstances that appellants engaged in negotiations with Leo G. Butler and Margaret B. Butler, hereafter referred to as the Butlers or by their respective names, concerning the residence property and the use of it on some basis that would afford the appellants the relief and assistance which they imperatively required. Appellants had previously consulted Lyle Q. Hills who represents them in this litigation. They had known him for some time previous to the transaction between appellants and the Butlers. The latter had not had contact with Lyle Q. Hills, who will be referred to as Hills, or his office. Appellants and the Butlers went to the office of Hills and the former introduced the latter to the persons who were there. Appellants and the Butlers had negotiations in which Hills participated in reference to the residence property of appellants and the use and occupancy of it including the matter of the Butlers occupying the house with appellants, remodeling it, and paying the expenses of the utilities and the household expenses. The negotiations were continued on two other occasions when the appellants and Butlers were at the office of Hills and consulted with him about the matters concerning the use and occupancy of it. Hills prepared the four wills, exhibited as a part of the petition, and a written contract concerning the im-

provement and occupancy of the house. These documents were submitted to the parties for their information, examination, and study and when they later returned to the office of Hills on August 19, 1950, that being the fourth occasion of negotiations concerning the matter, the documents were signed. The wills were signed and attested. The written contract was signed, the signatures witnessed, and the contract was delivered in the sense it was to be effective without condition or qualification.

Appellants were named and described in and executed the contract as parties of the first part and the Butlers were named and described in and executed the contract as parties of the second part. The written contract, omitting the formal parts of it, the signatures of the parties to it, and the signatures of the attesting witnesses, expresses the following:

"NOW, THEREFORE, it is agreed by and between the parties as follows, to-wit:

"THAT parties of the second part shall place certain improvements on the property of parties of the first part, making it suitable to the parties, said improvements to be agreed upon by and between the parties; and after said improvements are made parties of the second part will occupy part of the dwelling located upon said premises as their home and parties of the first part will occupy the remainder of said dwelling located upon said premises, as their home.

"IT IS FURTHER AGREED by and between the parties that in consideration of making said premises their home, parties of the second part, in addition to improving said dwelling located upon said premises as aforesaid, will pay all taxes and upkeep upon the entire dwelling located upon said premises and will furnish all heat and water required in said dwelling upon said premises and will in addition pay to said parties of the first part the sum of Forty and No/100 ($40.00) Dollars at the beginning of each month and upon the first

day of each month thereafter, during the lifetime of said parties of the first part, or either of them.

"IT IS FURTHER UNDERSTOOD AND AGREED that said payment of taxes and said payment of the sum of $40.00 per month and the expense of furnishing heat and water for said dwelling shall commence upon the entrance of said parties of the second part upon said premises and upon their commencement of occupation of said premises as their home.

"IT IS FURTHER AGREED by and between the parties that the said John D. Gerdes and Blanche Gerdes, parties of the first part, in consideration of the above performance by parties of the second part, shall allow said parties of the second part to occupy said premises with said parties of the first part, as their home; and said occupation will be without payment of rent therefor, and parties of the first part hereby covenant with parties of the second part that they will not sell or dispose of said property and shall provide and declare and make a Will, giving said parties of the second part, said property, upon the termination of the life of said parties of the first part."

This contract was acted upon and fully performed by the parties to it. Its validity and integrity have not been questioned. The record shows no attack made on it for fraud, mistake, ambiguity, or other defect or infirmity. The parties to the contract of August 19, 1950, executed another written contract in October 1953, sometimes referred to as an addendum to the contract of August 19, 1950, concerning the sale of part of Lot 245 of Morningside Addition, Douglas County, a portion of the residence property owned by appellants, and therein they expressly confirmed and ratified the written contract of August 19, 1950, by these words: "IT IS FURTHER AGREED by and between the parties hereto that the provisions of the agreement executed on the 19th day of August, 1950, same being attached here-

to, shall remain in full force and effect in all other respects between the parties."

The cause of action pleaded by appellants was based on an oral agreement said to have been made on August 19, 1950, the date of their written contract, by which they allege the Butlers obligated themselves to devise and bequeath all of their property, except five legacies of $1 each, to appellants in consideration of their agreement to devise all of their property, except two legacies of $1 each, to the Butlers. Appellants at the trial offered their testimony and the testimony of another in an obvious attempt to prove an oral agreement of the kind and effect which they had alleged in their petition. This testimony was concerning conversations and statements of the parties during the negotiations preceding the execution of the written contract of the parties on August 19, 1950. If this testimony was not for that purpose it was wholly irrelevant. Appellees made correct, timely, and repeated objection to the testimony. The trial court admitted it, sometimes with the assurance that he would only consider competent evidence in his consideration and decision of the case. The presumption is that the trial court disregarded incompetent evidence in reaching its conclusion in the case, and this court, because of the character of the cause, will consider only the evidence properly before it. Kucaba v. Kucaba, 146 Neb. 116, 18 N. W. 2d 645. This testimony was incompetent and improperly admitted. The written contract, the subject matter of the transaction, is complete and the only competent evidence of the agreement of the parties. Appellants may not extract from their negotiations an understanding which they claim was arrived at by the parties concerning reciprocal wills and frame a cause of action thereon independent from and in disregard of their written contract subsequently made which concerns the subject matter of the negotiations. The agreement of the parties may not be thus fragmentized.

Whatever was said by the parties concerning the making of wills by them was a part of the negotiations concerning and relating to the subject matter of their written contract and any oral understanding of the parties to the contract concerning it should have been, and to be effective was required to be, included in the written contract.

In Barkalow Bros. Co. v. English, 159 Neb. 407, 67 N. W. 2d 336, this court said: "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."

Bitler v. Terri Lee, Inc., 163 Neb. 833, 81 N. W. 2d 318, declares: "If negotiations between parties result in an agreement in reference to the subject matter thereof and if they reduce their agreement to writing, execute, and deliver it, the writing, in the absence of fraud, mistake, or ambiguity, is the only competent evidence of the contract." In the opinion in that case this court quoted with approval the following from Annotation, 33 A. L. R. 2d 968: " 'All oral negotiations or stipulations between the parties, preceding or accompanying the execution of the written instrument, are regarded as merged in it, and the instrument is treated as the exclusive medium of ascertaining the agreement of the parties to it. * * * The reason for this rule is that it is only reasonable, where parties have entered into a written agreement, to suppose that they have introduced into the instrument every material term and circumstance; and, consequently, all parol testimony of conversations made by either of them, whether before or after, or at the time of, the completion of the contract,

will be rejected. * * * With respect to the first-mentioned theory (adding by parol evidence to the contract evidenced by writing), it has been well said that the rule forbids to add by parol where the writing is silent, as well as to vary where it speaks, that generally it will be presumed that the parties have introduced into the written contract every material item and term, and that parol evidence cannot be admitted to add another term to the agreement, although the writing contains nothing on the particular feature to which the parol evidence is directed.' "

Master Laboratories, Inc. v. Chesnut, 157 Neb. 317, 59 N. W. 2d 571, states the rule in this manner: "When the 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. The fact that a point has been omitted which might have been embodied therein will not open the door to the admission of parol evidence in that regard. * * * The parol evidence rule is not merely one of evidence, but 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."

Hansen v. E. L. Bruce Co., 162 Neb. 759, 77 N. W. 2d 458, states: "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 is the contract of the parties. * * * A written contract expressed by clear and unambiguous language is not subject to interpretation or construction. * * * The intention of the parties to a written contract expressed by clear and unambiguous language must be determined from its contents. * * * The entire contract must be regarded with a conscious effort to give effect to every part of it without disproportionate emphasis upon one to the neglect of other provisions." See, also, Hafeman

v. Gem Oil Co., 163 Neb. 438, 80 N. W. 2d 139; Boettcher v. Goethe, 165 Neb. 363, 85 N. W. 2d 884.

The circumstances of this case make it impossible for it to escape the reach and effect of the doctrine expressed and sustained by the above authorities.

The testimony of appellants concerning conversations and transactions with the Butlers was also incompetent, should have been excluded, and will be disregarded in this court because it was given by parties who had direct legal interest in the result of the litigation in which the adverse parties were representatives of deceased persons and there was no waiver of the bar of the statute. § 25-1202, R. R. S. 1943; Colbert v. Miller, 149 Neb. 749, 32 N. W. 2d 500; Fischer v. Wilhelm, 140 Neb. 448, 300 N. W. 350; Johnson v. Omaha Loan & Bldg. Assn., 128 Neb. 37, 257 N. W. 370; Broeker v. Day, 124 Neb. 316, 246 N. W. 490.

Appellants speak of interpreting contemporaneous instruments as though they were one. The correct doctrine in this regard means that if there is a provision in one instrument affecting a provision of another, they will be given effect as between the parties and all who are charged with notice so that the whole agreement actually made may be determined and effectuated. It does not mean that a provision of one document is imported bodily into another contrary to the intent of the parties or the express provision of the latter. They may be intended to be separate writings though made at the identical time by the same parties and to provide for entirely different things. The statement that contemporaneous instruments may be treated and interpreted as one means only that this will be done when it will effectuate the intention and if the provisions of the two instruments if put together will not be incompatible. The court may not do violence to a complete, unambiguous contract by consolidating it with another writing if the effect of doing so would be to avoid an essential part of the contract. If contracts or writings are

in effect independent they should not be construed together even though the same parties and the same subject matter may be concerned. Two instruments relating to distinct subjects or things should not be construed together to determine the intent and transaction of the parties though made at the same time and though they relate to the same transaction because both must have the same object in order to be taken together as evidencing the same thing.

In Thorp v. Mindeman, 123 Wis. 149, 101 N. W. 417, 68 L. R. A. 146, 107 Am. S. R. 1003, the court said: "Construing together simply means that, if there be any provisions in one instrument limiting, explaining, or otherwise affecting the provisions of another, they will be given effect as between the parties themselves and all persons charged with notice, so that the intent of the parties may be carried out, and that the whole agreement actually made may be effectuated. This does not mean that the provisions of one instrument are imported bodily into another, contrary to the intent of the parties. They may be intended to be separate instruments, and to provide for entirely different things, as in the very case before us."

Brest v. Maenat Realty Co., 245 Wis. 631, 15 N. W. 2d 798, says: "It is quite true that when instruments are executed and delivered at the same time they will be construed together in order to determine the nature of the transaction and the intent of the parties. But this is not true when the two instruments, though both relating to the same transaction, relate to two distinct subjects or provide for two distinct things. * * * To be taken together as evidencing the same thing the two instruments must not only both relate to the same transaction, but they must both have the same object."

The doctrine presently discussed does not aid the case of appellants. If the written contract of August 19, 1950, made by the parties is construed with the four separate wills made at that time, this does not in any

manner affect the conclusion previously expressed herein that the evidence of appellants intended to establish an oral agreement of the Butlers to make wills giving their property to appellants was and is incompetent and must be disregarded. The result is that there is no competent evidence of such an agreement by the Butlers or either of them. The wills were separate instruments of the four persons who made them. There was no provision that any of them should be irrevocable. There is no reference in either of the Butler wills to the wills of appellants or vice versa. Each will was deposited in the county court as a separate and distinct document, was therein identified by a separate number, and a separate receipt was issued to each maker. The record contains no competent evidence of any agreement or arrangement for reciprocal wills by appellants and the Butlers. The circumstances of this case make it almost inconceivable that there could have been an agreement for the Butlers to give their property by will to appellants and that such an important matter was omitted from the carefully prepared and complete written contract after repeated negotiations and with the aid of competent legal counsel. This is especially true because the contract was developed and prepared by the attorney who had acted in other matters for appellants. They were his clients. He by every consideration would have been alert to their rights and protection. The record is convincing that there never was such an agreement as is sought to be enforced herein. In any event it is not established by clear, satisfactory, and convincing evidence.

Diez v. Rosicky, 145 Neb. 242, 16 N. W. 2d 155, contains language appropriate to this case: "It is evident that the making of a will whereby all of testator's property is left to his wife is not of itself evidence of the existence of a contract between the testator and his wife. Nor is it evidence of part performance of a contract in the absence of other evidence indicating clearly

that it was made pursuant to such an agreement. We do not think the record shows by clear, definite, satisfactory and unequivocal evidence that a contract was made. Declarations of intention or of the wishes of the parties do not tend to support any such conclusion."

In Eagan v. Hall, 159 Neb. 537, 68 N. W. 2d 147, the court states: "In the case at bar an oral contract was not established by clear, satisfactory, and unequivocal evidence. In fact, there was no evidence in the record tending to support any such agreement. In addition thereto, there is no evidence of part performance which imports the existence of the pleaded oral agreement and no other. To meet the requirements of the rule the act alleged to constitute part performance must be such that its existence can be accounted for only by the existence of the pleaded oral agreement. It must refer to, result from, or be in pursuance of the oral agreement sought to be enforced, and not from any other relation. Such was not the case here." See, also, Wyrick v. Wyrick, 162 Neb. 105, 75 N. W. 2d 376; Drew v. Hawley, 164 Neb. 141, 82 N. W. 2d 4.

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

AFFIRMED.

NEBRASKA CONFERENCE ASSOCIATION OF SEVENTH DAY ADVENTISTS ET AL., APPELLEES, V. COUNTY OF HALL, APPELLANT.

90 N. W. 2d 50

Filed May 9, 1958. No. 34325.

1. **Appeal and Error.** The failure of an appellant to file a petition in the district court within the time required by law when an appeal is taken to the district court from action of a county board of equalization does not affect or defeat jurisdiction of the

appeal by the district court. The default in this respect is an irregularity and not a jurisdictional defect.

2. ———. Parties to a case appealed to the district court may waive the filing of an additional pleading or pleadings in that court and try and submit the case on the transcript of the proceedings had in the tribunal from which the case was appealed.
3. **Taxation.** It is the exclusive use of property which determines its exempt character from taxation.
4. ———. Property is exempt from taxation in this state if it is owned and used exclusively by a religious or educational institution in carrying on its educational work, if all the income from the property is used exclusively for the support of its educational endeavors, and if no financial gain or profit inures to the owner of the property.
5. ———. The doctrine that property owned and used by institutions exclusively for educational, religious, or charitable purposes, as interpreted by this court in its decisions, is exempt from taxation has become inherently part of the law affecting such institutions, their property, and operations and if any change therein is to be made it should be accomplished by means other than action by this court.
6. **Courts.** The doctrine of stare decisis is based on public policy and is entitled to great weight. It should be adhered to unless the reasons therefor do not exist, are clearly erroneous or mischievous, or unless more harm than good will result from doing so.

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

Gerald B. Buechler and *Rosemary L. Mara*, for appellant.

Luebs & Elson and *Howard E. Tracy*, for appellees.

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

BOSLAUGH, J.

This litigation concerns the problem as to whether or not property owned by Nebraska Conference Association of Seventh Day Adventists devoted to the payment of the expenses of the operation, upkeep, and improvement of a school owned and conducted by the Nebraska Conference Association of Seventh Day Adventists is

exempt from taxation by the State of Nebraska and its subdivisions.

The Nebraska Conference Association of Seventh Day Adventists and the Platte Valley Academy made application to the Hall County board of equalization June 22, 1955, that the real estate and personal property used by and for the support of the Platte Valley Academy in Hall County be determined to be exempt from taxation and that they be removed from the tax rolls of the county. It was asserted in the application that the property was owned and used by the Nebraska Conference Association of Seventh Day Adventists, the owner thereof, exclusively for educational and religious purposes; that it or any part thereof was not owned for financial gain or profit by either of the applicants or otherwise; and that the property was by the Constitution and laws of Nebraska exempt from taxation.

The application was by the board of equalization of Hall County denied. The Nebraska Conference Association of Seventh Day Adventists prosecuted an appeal therefrom to the district court for Hall County. The trial court found that the Nebraska Conference Association of Seventh Day Adventists was the owner of the property involved, that the property was located in Hall County, and that it had been wrongfully ordered placed on the tax rolls and assessed for tax purposes by the authorities of that county. It was adjudged by the trial court that the property, real and personal, owned by the Nebraska Conference Association of Seventh Day Adventists used in the operation of the Platte Valley Academy in that county should be and it was adjudged to be exempt from taxation and that the assessment and levy thereof previously made was void. The appellant made a motion for a new trial which was denied.

The Nebraska Conference Association of Seventh Day Adventists is the sole appellee in this court and it will be herein so designated. The reason this is true is that

notwithstanding Platte Valley Academy was named as a party to the cause, it was in fact not one because it is not a legal entity but only a name used for convenience of a school operated by appellee as one of its activities. The sole appellant is County of Hall and it will be referred to in that manner.

Appellant had a change of county attorneys during the pendency of this litigation and its present legal officer who appears for appellant in this court, after the motion of the county for a new trial of the case was denied, made a motion on behalf of the county to vacate the judgment rendered herein for the reason that his predecessor in office had directed and conducted this litigation until the judgment had been rendered, that the succeeding county attorney had learned that no petition on appeal had been made or filed in the case by appellant in the trial court, and that therefore that court had not obtained jurisdiction of the cause. This motion was overruled and this appeal is prosecuted from the judgment rendered and the denial of the motion to vacate the judgment.

The procedure for an appeal to the district court from action of a county board of equalization is that prescribed for an appeal from a judgment of a justice of the peace court to the district court. § 77-1510, R. R. S. 1943; § 23-137, R. R. S. 1943; § 27-1303, R. R. S. 1943. The failure of an appellant to file a petition in the district court on or before 50 days after the entry of action taken by a board of equalization on the records of the county by the county clerk does not affect or defeat jurisdiction of the district court of the appeal. City of Seward v. Gruntorad, 158 Neb. 143, 62 N. W. 2d 537, decided: "The failure of appellants to timely file a petition in the district court does not affect or defeat jurisdiction." The authority of the court to relieve the litigant from his default in failing to file a petition within the time prescribed "on good cause shown" is repugnant to the idea that the filing of the petition is a juris-

dictional matter. § 27-1307, R. R. S. 1943. It has been determined that if a transcript is filed in a district court by the party taking an appeal as the statute requires on or before the 30th day after the rendition of a judgment by a justice of the peace court, the district court thereby acquires jurisdiction of the appeal from the judgment.

In Union P. R. R. Co. v. Marston, 22 Neb. 721, 36 N. W. 153, the court said: "Where a transcript is filed by either party on or before the thirtieth day after the rendition of the judgment, the court will thereby acquire jurisdiction of the case."

In Fulton v. Ryan Bros., 33 Neb. 456, 50 N. W. 430, the court concluded: "Where a transcript of a judgment rendered in a justice court is filed by either party in the district court within thirty days from the day of the judgment, the appellate court will thereby acquire jurisdiction of the case, although the transcript is not full and complete."

In Myers v. Hall County, 130 Neb. 13, 263 N. W. 486, the court declared: "The procedure on appeal from the county board is the same as on appeal from a justice of the peace. * * * Plaintiff gave notice of appeal and furnished an appeal bond in compliance with law and filed in the office of the clerk of the district court within 30 days a transcript of the proceedings of the county board. The district court thus acquired jurisdiction." See, also, In re Estate of Lindekugel, 148 Neb. 271, 27 N. W. 2d 169; In re Petition of School District of Omaha, 151 Neb. 304, 37 N. W. 2d 209; Anderson v. State, 163 Neb. 826, 81 N. W. 2d 219.

The district court for Hall County acquired jurisdiction of the appeal taken in this cause from the action of the board of equalization of that county and the failure of appellant in that court to timely file a petition therein did not affect the jurisdiction of the court. It was an irregularity but it was not a jurisdictional defect.

There was no petition filed in the case in the district court. The legal officer of Hall County until trial was had and the judgment was rendered and who acted therein for appellant testified on the hearing of the motion to vacate the judgment that it was the understanding of each of the attorneys who were in charge of the litigation that the case would be tried in the district court on the record "that came up from the Hall County Board of Supervisors." Later in the hearing he said: ". . . I know Mr. Luebs (the opposing attorney) and I always considered it would be tried on the transcript." Mr. Luebs, who was counsel for appellee, stated that he and the then county attorney discussed specifically the matter of trying the case in district court on the transcript and this was agreeable to the then county attorney; that on the day of the trial but before it commenced the judge who was to preside inquired if there were to be other pleadings in the case and Mr. Luebs in the presence of the then county attorney advised the court that by agreement the case was to be tried on the transcript; and that the then county attorney did not object or disagree with that statement made to the court. The judge who presided at the trial expressed his recollection that before it commenced he examined the court file in the case and inquired if there were to be other pleadings. One of the counsel informed the court that the case was to be heard on the transcript without additional pleadings and the other counsel acquiesced in that arrangement.

All parties interested in the litigation participated in the trial. The case was decided and judgment was rendered without objection or protest. The motion for a new trial made by appellant did not assign error because a petition on appeal had not been filed in the district court. It only complained that the judgment was not sustained by sufficient evidence and that it was contrary to law. The motion was denied and the case was finished in that court. It was 19 days later that a

motion was made to vacate the judgment on the basis that a petition on appeal had not been filed and that the district court had "thus not obtained jurisdiction in this cause."

The trial court was correct in denying the motion to vacate the judgment. The record supports the conclusion that the parties consented to waive new and additional pleadings in the district court and to proceed with the case on the basis of what the transcript contained. The parties to a cause appealed to the district court may waive or dispense with the filing of an additional pleading or pleadings in that court and may submit the case on the transcript of the proceedings had in the tribunal from which the cause was appealed, as they did by their statements and conduct in this case. Traill v. Ostermeier, 140 Neb. 432, 300 N. W. 375; Scheer v. Kansas-Nebraska Natural Gas Co., 158 Neb. 668, 64 N. W. 2d 333. The parties did proceed to trial and disposition of the case with full knowledge that a petition on appeal had not been filed and without objection or protest. It was only after a judgment unfavorable to appellant was rendered and after its motion for a new trial was denied that appellant made objections to and protest of the absence of a petition on appeal. That was much too late under the circumstances of this case. There is no substance to the argument of appellant in this regard.

Appellee is a nonprofit corporation connected with the Nebraska Conference of Seventh Day Adventists generally known as the denomination of Seventh Day Adventists. Appellee is a religious body of the denomination in charge of its churches in Nebraska and the operation of the school known as Platte Valley Academy hereafter referred to and described. The purpose of appellee is to hold title to the property of the Nebraska Conference of Seventh Day Adventists; to receive gifts, loans, and deposits of money; to acquire and hold title to any kind of property by gift or purchase; and to

do all lawful things that may be desirable or necessary as an incident to said matters.

Appellee has authority to maintain and conduct educational institutions of grammar and academic grades in harmony with the educational policy of the Seventh Day Adventists denomination and in connection therewith to maintain industrial and vocational departments, including farming, gardening, dairying, and general agriculture, under the direct supervision and control of the school management. The proceeds of the sale of any products or manufactured articles from the departments are required to be expended by the school in maintaining itself and improving its equipment and facilities. Appellee does not exist for gain. Its property is used and expended in performing the legitimate ends and aims of its existence but not for its profit or the gain of any individual or group. The affairs of appellee are managed, controlled, and directed by a board of seven trustees. Appellee has no stock or stockholders. It pays salaries only to the faculty members of the academy and wages to other employees needed in the actual operation of the activities conducted within the limits of the objects and purposes of its existence.

Appellee does and has for more than 35 years maintained and conducted a school known, for convenience, as Platte Valley Academy in Hall County a short distance east of the town of Shelton. The school is not a legal entity but an activity of appellee. It is not sectarian but it is a religious school. The school year is 9 months. The enrollment last year was 83 students.

The support of the school is met by amounts paid by students, the products of the farm hereafter discussed, gifts, and by contributions made by appellee to satisfy any deficiency. During the fiscal year June 30, 1954, to June 30, 1955, appellee paid on account of the expenses of the school operation a deficiency of $14,084.78 and the following fiscal year the amount contributed

for that purpose by appellee was $10,730.12. It has satisfied a substantial deficiency that has accrued in each year of the operation of the school. Appellee has not been required to pay any federal income tax.

The academy offers instruction in grades 9 to 12, both inclusive. The school offers vocational training for boys in the field of agriculture and farming mechanics and for girls there is offered instruction in home economics, bookkeeping, shorthand, and typing. Each student is required, as a condition of graduation, to have one unit of vocational training. The school offers instruction in other subjects appropriate to a school of its class. The industries in connection with the academy are farming, dairying, the operation of a laundry, and a cafeteria. The laundry or cafeteria does not serve the public. They are only for the benefit of the persons connected with the school. The students are encouraged to perform work on the farm, in the cafeteria, in the laundry, or in the dairy for the experience and training and to help defray their expenses in attending school. They are credited for work they do on the tuition charged them by the school. It is not required that an applicant for admission to the school be a member of the Seventh Day Adventists Church. Racial discrimination is not practiced. Any qualified person who will conform to the requirements of the school may be admitted. The cost to students for meals at the cafeteria are kept at a minimum and the cost thereof is decreased because of things grown on the farm operated in connection with the school. It would probably be impossible to operate the school if it did not have the benefits it receives from the farm.

There is no one who receives any pecuniary benefits from any of the uses to which the farm, the dairy, or the livestock are put except the school. The farm, the improvements on it, the livestock, the machinery, and equipment incident to it are used exclusively for the purposes of education.

The academy is an accredited school and it graduates students who meet its requirements. A graduate of the school is entitled to college entrance. The academy is in all respects on a par with public schools.

In the period commencing November 5, 1918, and continuing through March 23, 1954, appellee acquired several tracts of land in Hall County consisting of a total of 370 acres. The first land purchased was the north half of the southeast quarter of Section 31, Township 10 North, Range 12 West of the 6th P. M., in Hall County on which the academy is located. The area owned by appellee is a well balanced unit and a highly developed farm. It is irrigated by 7 wells. The farm is fully equipped for a successful operation. It has shops for the care and repair of its machines and for the upkeep of its buildings and facilities. The entire products of the farm and the proceeds of any part thereof that are sold are used and received by the school and are expended on the cost of its operation. The land, all it produces, and everything derived therefrom is used exclusively for educational purposes. This has been true since the first tract of land was acquired by appellee. As each subsequent purchase of land was made it became a part of the farm for the benefit exclusively of the school and has since been used only for that purpose. Substantially everything about the operation and activities carried on contributes to the training, education, and advantage of the students of the school.

The relevant constitutional provision relating to exemptions from taxation is in part as follows: "The Legislature by general law may exempt * * * property owned and used exclusively for educational, religious, charitable, or cemetery purposes, when such property is not owned or used for financial gain or profit to either the owner or user." Art. VIII, § 2, Constitution of Nebraska. The Legislature has by general law provided that property owned and used exclusively for educational, religious, or charitable purposes when not owned

or used for financial gain or profit to the owner or user shall be exempt from taxation. § 77-202, R. R. S. 1943.

This state is committed to the doctrine that in determining whether or not property is within a tax exemption provision, the use of the property and not the status or character of the owner of the property controls. In Academy of the Sacred Heart v. Irey, 51 Neb. 755, 71 N. W. 752, this court said: "It is the exclusive use of the property which determines its exempt character. If it is devoted exclusively to educational purposes, it is not liable to taxation, unless such use is not direct, but remote. * * * The sole constitutional and statutory requirement to create the exemption is that the property shall be devoted exclusively for school or some other specified exempt purpose * * *." See, also, Ancient and Accepted Scottish Rite v. Board of County Commissioners, 122 Neb. 586, 241 N. W. 93, 81 A. L. R. 1166; Mary Lanning Memorial Hospital Assn. v. Adams County, 117 Neb. 618, 221 N. W. 959; House of the Good Shepherd v. Board of Equalization, 113 Neb. 489, 203 N. W. 632.

Central Union Conference Assn. v. Lancaster County, 109 Neb. 106, 189 N. W. 982, considered these facts: Central Union Conference Association was an organization of Seventh Day Adventists and was engaged in religious and school work. Union College in Lancaster County was a part of the association and held title to the college grounds, buildings, equipment, farm lands, and dairy property used in connection with the educational institution. The county authorities subjected the farm lands and dairy property to taxation. The district court, upon an appeal of the matter to it, set aside the levy of taxation on the ground that the assessed property was used exclusively for school and educational purposes. There was an appeal to this court which was discussed and decided in this manner: "It is argued that the farm and the dairy are not used exclusively for school or educational purposes and that therefore the property assessed

is not exempt from taxation. Agriculture and dairying are subjects of instruction at Union College. The milch cows are fed on products of the farm. The dairy, if considered by itself, seems to be a source of profit. On this premise the argument against exemption is principally based. The farm and the dairy are forms of property used in carrying out a purpose of the school and are as useful for educational purposes as the equipment in class rooms. Some of the products from the dairy are used in other departments. The proceeds from the sale of milk and cream go into the general treasury of Union College from which all disbursements are made. Products of the dairy, therefore, inure to the benefit of the school as a whole and any profit therefrom is a mere incident of the general purpose for which school property is used. Outside of school purposes no one receives any pecuniary profit from the use to which the farm and dairy property is put. The better rule, one sanctioned by precedent, is that the property in controversy is used exclusively for school purposes within the meaning of the constitutional and statutory provisions relating to exemptions."

St. Elizabeth Hospital v. Lancaster County, 109 Neb. 104, 189 N. W. 981, was a contest as to the exempt character of the property of St. Elizabeth Hospital from taxation. The county officials levied taxes on the property. The district court, upon an appeal to it, set aside the levy on the ground of exemption of the property from taxation. This court therein said: "The Franciscan Sisters, a religious society, founded the hospital and hold title to its property. The Sisters of St. Francis of the Perpetual Adoration have charge of the institution. The general purpose of the sacred order to which these Sisters belong is to nurse the sick and take care of orphans. Twenty-six Sisters engaged in their life work are caring for the sick at St. Elizabeth Hospital. In devoting themselves to it they are prompted by the love of God. They are bound by a vow of poverty. Property owned by

them is used for the purposes to which they have dedicated their lives. Beyond food, clothing and shelter they receive nothing for their services. No individual, society or corporation receives any pecuniary profit from hospital property, funds or earnings. Surplus and donations are used to enlarge buildings and to improve hospital facilities, equipment and service. The institution is open alike to charity patients and others without regard to race or religious beliefs. Reasonable compensation is required from those who are able to pay it. Only a small percentage of those who seek rooms, food and hospital care, however, can be considered charity patients, but this does not change the charitable purpose for which the property as a whole is used, where no one receives any pecuniary profit from any source. * * * The better rule, one sanctioned by precedent, is that the property in controversy is used exclusively for religious and charitable purposes within the meaning of the constitutional and statutory provisions relating to exemptions."

House of the Good Shepherd v. Board of Equalization, *supra,* involved a laundry property consisting of real estate and a modern laundry equipped for doing general laundry work in competition with commercial laundries in Omaha. The considerable income from it was used to support the institution known as House of the Good Shepherd and its inmates. The district court decided the laundry property was exempt from taxation. The House of the Good Shepherd was organized by members of the religious and charitable order of the Good Shepherd to reform fallen women, to give protection to other females situated so that their virtue might be endangered, to surround them with virtuous influences, and to accustom them to habits of industry and self-respect. Nothing was paid to the members of the organization. Their charitable and humanitarian labors and acts were entirely uncompensated in any pecuniary way. The corporation acquired property and facilities

appropriate for the undertaking. Connected with one of the buildings was a laundry, fully equipped for general laundry work. It was the laundry property, including the lots on which it was located, that the board of equalization sought to tax. There were about 300 inmates in the home, most of whom were girls of limited ability, subnormal intellect, and in need of moral training and acquisition of habits of industry that they might earn for themselves a living. There was only limited work they could do and because of this the laundry was provided so that they could learn to sew and do laundry work. Laundry work was done for hotels, restaurants, and others in competition with the other laundries in the city. The income realized was used to support the home and its inmates. The home conducted a school for the younger inmates and conducted religious services each day.

It was contended that the laundry property was not used exclusively for educational, religious, or charitable purposes, that the property was used as a commercial enterprise for profit and gain, and that the fact that the income therefrom was used for educational or charitable purposes did not render the property from which the income was derived exempt from taxation. This court sustained the exemption of the laundry property from taxation by the following language: "That appellee is an educational, religious and charitable organization is established beyond question. Its main purpose is to care for and rehabilitate fallen women and to educate and train a class of girls who, but for such care, would become moral delinquents and a charge upon society at large. It is necessary that such girls should be educated, should become accustomed to habits of industry and trained in some occupation that will make them useful citizens, and also receive moral training. To provide for this class of girls, appellee has established an institution and erected a laundry in which the girls are employed, and where they are taught an occupation

and trained to become useful citizens and accustomed to habits of industry. Under such circumstances, we think the laundry may be fairly said to be used exclusively for educational and charitable purposes. It is necessary to give these girls training in industry. The fact that an income is derived from the laundry work does not militate against the fact that the property is used for the purposes indicated. So long as the income derived does not inure to the benefit of the owners or the users, it does not transgress the statute providing for exemption from taxation."

The interpretation and application made by this court in the decisions quoted of the provisons of the Constitution and the statute of the state alluded to above exempting property from taxation are decisive of this case. The doctrine that property owned and used by institutions exclusively for educational, religious, and charitable purposes as interpreted by this court in its decisions is exempt from taxation has become inherently part of the law affecting such institutions, their property, and operations and if any change therein is to be made it should be accomplished by means other than action by this court. The doctrine of stare decisis is based on public policy and is entitled to great weight. It should be adhered to unless the reasons therefor do not exist or are clearly erroneous or mischievous or unless more harm than good will result from doing so. Muller v. Nebraska Methodist Hospital, 160 Neb. 279, 70 N. W. 2d 86.

The judgment of the district court should be affirmed.

AFFIRMED.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, A CORPORATION, APPELLEE, V. COUNTY OF BOX BUTTE, NEBRASKA, APPELLANT.

90 N. W. 2d 72

Filed May 9, 1958. No. 34353.

1. **Taxation.** The words "any levy," contained in section 77-1104, R. S. Supp., 1955, mean the levy for each particular fund that a political subdivision is authorized to make, and not the one maximum levy authorized.
2. **Constitutional Law: Statutes.** The object of the act of 1953 (sections 77-1104 and 77-1105, R. S. Supp., 1955) was to provide a limitation on the raising of funds for county purposes for a period of 2 years, and the provisions it makes are in addition and supplementary to the statutes already existing for such purposes. It does not contain the sections so amended, nor repeal such sections. It is therefore a violation of Article III, section 14, of the Constitution, and void.
3. ———: ———. Even though an act of the Legislature professes to be an independent act, and does not formally purport to amend any prior act, yet if, in fact, the legislative intent is to make changes in existing acts by adding new provisions or changing existing ones, and to mingle the new and the changed with the old sections on the same subject so as to make of the old, the changed, and the new a connected piece of legislation covering the same subject, the later act must be considered an amendment of the former acts and within the constitutional prohibition.

APPEAL from the district court for Box Butte County: LYLE E. JACKSON, JUDGE. *Reversed.*

Clark S. Nichols, for appellant.

J. W. Weingarten, *W. P. Loomis*, and *Stubbs & Metz*, for appellee.

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

CARTER, J.

This is an action to recover the excessive and void portion of a tax paid to the county, it being alleged that the tax assessed and collected is in excess of the amount

authorized by section 77-1104, R. S. Supp., 1955. The defendant asserts that the tax levied is not in excess of the amount authorized, and that, in any event, Laws 1953, chapter 290, page 985, codified as sections 77-1104 and 77-1105, R. S. Supp., 1955, is unconstitutional and void in that it violates Article III, section 1, Article II, section 1, Article III, section 14, and Article III, section 18, of the Nebraska Constitution. The trial court found for the plaintiff and the defendant appealed.

The case involves an interpretation of section 77-1104, R. S. Supp., 1955, which provides in part: "Until two years after June 13, 1953, it shall be unlawful for * * * any county board * * * to fix or make any levy upon the assessed value of all the taxable property * * * within a political subdivision * * *, except intangible property and except as otherwise prescribed in this section and section 77-1105, that will increase the revenue produced by such levy in excess of five per cent of the revenue from such a tax levy by * * * any political subdivision, * * * for the preceding year, except * * * (7) where any political subdivision * * * which was subject to a statutory levy limitation in 1952, but in that year did not make the maximum levy permitted by law, nothing in this section * * * shall prevent it in succeeding years from raising the amount of revenue, plus five per cent, that would have been raised in 1952 had the maximum levy permitted by law been used; * * *."

It is the contention of the plaintiff that the restriction contained in the foregoing statute applies to each fund of the general levy which the county is authorized to make. The defendant contends that the statute applies to the total amount levied by the county after excluding the exceptions contained in the act. If plaintiff's interpretation of the act is correct, the levies for general purposes in 1953 and 1954 are admittedly in excess of the amounts authorized by section 77-1104, R. S. Supp., 1955. If the interpretation of the defend-

ant is correct, the levy made was within authorized limits.

On January 9, 1953, this court released its opinion in Laflin v. State Board of Equalization & Assessment, 156 Neb. 427, 56 N. W. 2d 469. The effect of this opinion was to reiterate that all property in the state which was not expressly exempt was subject to taxation and was to be valued and assessed at its actual value. The evidence recited in the opinion showed that property had been equalized at less than actual value. A bill was immediately introduced into the Legislature which became the statutory provisions before us for interpretation. The purpose of the bill as shown by the statement of the Revenue Committee, which accompanied the introduction of the bill, was to prevent an abnormal return in taxes if property should be reassessed in such a way as to result in a marked increase in total assessed valuation. In the language of the Revenue Committee, the purpose of the proposed bill was to accomplish the following: "The result will be to keep the revenue at the same level as that of the preceding year and to relieve the natural fear which taxpayers have that if property is reassessed at a new and higher value that the tax will be greatly increased."

While it might be argued that the intent of the Legislature in enacting the bill was to limit the gross expenditures by counties for 2 years, except as to specifically excluded funds, we must look to the language used to determine the manner in which the restrictions were to be applied. The meaning hinges largely on the use of the words "any levy" contained in the act.

It seems clear to us that the use of the words "any levy" means the levies for particular funds rather than the one general levy. If the latter had been intended, the words "the levy" would have been used. The term "any levy" means any one of the number of levies and excludes the contention that the Legislature had in mind the single general levy which constitutes the

final act of the county board of equalization. The word "any" when so used has been generally defined to mean any one of an indefinite number. Iowa-Illinois Gas & Electric Co. v. City of Bettendorf, 241 Iowa 358, 41 N. W. 2d 1; Winslow v. Fleischner, 110 Ore. 554, 223 P. 922. This conclusion is further supported by the fact that certain funds were excluded from the operation of the statute by specific exceptions, which indicates an intention that the act would operate upon each particular fund making up the general levy, except those specifically excepted. We conclude that the position of the plaintiff is the correct one on this point.

The defendant contends that the statute is in violation of Article III, section 14, of the Nebraska Constitution which in part provides: "And no law shall be amended unless the new act contain the section or sections as amended and the section or sections so amended shall be repealed."

The statute in question purports to be an independent act relating to revenue and taxation, and having for its purpose a restriction upon the amount of revenue which certain political subdivisions could raise for a period of 2 years from its effective date. In other words, the effect of the act is to limit the revenue of certain political subdivisions for 2 years to less than that theretofore permitted by the maximum amounts authorized. Prior to the enactment of sections 77-1104 and 77-1105, R. S. Supp., 1955, sections 77-1601 and 77-1603, R. R. S. 1943, provided the method to be followed in levying taxes. Section 77-1601 contained no limitations on the amount that could be levied. Section 77-1603 limited the amount that could be levied for ordinary county revenue to three mills on the dollar. Section 23-119, R. R. S. 1943, fixed the maximum limit which a county may levy for county purposes at five mills on the dollar actual valuation. The effect of the present act is to amend these particular provisions of the statute by fixing lesser maximums on some funds for a limited

period of time. If this is not an amendatory act, irrespective of its form, we fail to see how Article III, section 14, of the Constitution could ever have application. Its effect is to amend specific provisions of existing statutes without mentioning them in any way. The constitutional provision plainly requires that no law shall be amended without setting forth the section as amended, nor without repealing the amended section. No attempt was made to comply with this constitutional provision in the present act.

The fact that the legislation is cast in the form of an independent act is not a controlling feature. In determining questions of constitutionality, it is the substance and not the form that must be considered. In State ex rel. Beal v. Bauman, 126 Neb. 566, 254 N. W. 256, this court said: "In truth, the new enactment accomplished nothing of independent nature and its effect is wholly confined to 'changes' of what theretofore existed, with the evident intent of its authors that by the mingling of the new changes with old provisions a connected piece of legislation covering the same and original subject would result. But this is strictly a process of amendment, and no portion of this act has any other mission. It therefore must be regarded as nothing but an amendatory act and strictly within the scope of the constitutional limitation controlling in the enactment of statutes for an exclusively amendatory purpose: * * *." See, also, Sovereign v. State, 7 Neb. 409.

The act before us does not cover the whole subject or general scheme to which it relates. Its purpose was not comprehensive. The act is not complete in itself. It relates itself to other existing statutes dealing with the identical subject matter. It fails to meet the requirements of an independent act complete in itself. In Minier v. Burt County, 95 Neb. 473, 145 N. W. 977, a case very similar in principle was before the court. The court said: "Unquestionably the general subject of this legislation is to provide a method of raising

funds for the erection of public buildings, and the provision it makes is in addition and supplementary to the provisions already existing for that purpose. It therefore enlarges the means for raising such funds, and must be considered as amendatory of the former acts. If such legislation is permissible under the constitutional provision above quoted, it would be difficult to suggest any legislation that would be affected and controlled by that provision." Paraphrasing the language of the foregoing decision, we can well say in this case: It therefore limits the means for raising such funds, and must be considered as amendatory of the former acts.

Plaintiff relies primarily on Jensen v. Omaha Public Power Dist., 159 Neb. 277, 66 N. W. 2d 591, to sustain its contention that the statute is a complete and independent act. We think the plaintiff misconceives the holding of that case. It was therein said: "The act sets up a complete, independent, uniform eminent domain procedure." The language is significant. In that case the court was dealing with a new uniform act designed to supersede all former acts governing procedure in eminent domain cases. It was a complete act and covered the whole subject with which it dealt. Such legislation will ordinarily be sustained even though it may modify, change, or destroy the effect of other statutes. Beisner v. Cochran, 138 Neb. 445, 293 N. W. 289. But in the case at bar the statute does not cover the whole subject to which it relates; it plainly limits existing statutes temporarily and is amendatory thereof.

The people of this state in enacting the Constitution saw fit to provide that in all cases the law as amended shall be given in full, with such reference to the old law as will clearly show for what the new law is substituted. The wisdom of the constitutional provision is not a matter for this court to determine. The constitutional limitation placed upon the Legislature in amending existing statutes must be followed, and where, as

here, its terms are not complied with, the act is void and of no force or effect.

Our conclusion is that, notwithstanding their form, because of their substance and sole purpose, sections 77-1104 and 77-1105, R. S. Supp., 1955, are adjudged to have been passed in contravention of Article III, section 14, of the Nebraska Constitution, and are void. This holding makes it unnecessary for us to determine other assignments of error raised by the appeal.

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

REVERSED.

RAYMOND R. COX, ADMINISTRATOR OF THE ESTATE OF SHIRLEY L. COX, DECEASED, APPELLEE, V. DANIEL BABINGTON, APPELLANT.

90 N. W. 2d 64

Filed May 9, 1958. No. 34375.

1. **Trial.** A motion for directed verdict or for judgment notwithstanding the verdict must, for the purpose of decision thereon, be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence.
2. ———. In every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed.
3. **Negligence.** Negligence is a question of fact and may be proved by circumstantial evidence. All that the law requires is that the facts and circumstances proved, together with the inferences that may be legitimately drawn from them, shall indicate, with reasonable certainty, the negligent act complained of.

4. **Trial.** Where there is a reasonable dispute as to what the physical facts show, and the conclusions to be drawn therefrom, and when the evidence of the witnesses is in sharp conflict, then the credibility of each witness, the probative weight to be given to his testimony, and any proper inferences therefrom are questions lying clearly within the sole province of the jury.
5. **Negligence: Trial.** Where different minds may reasonably draw different conclusions or inferences from the adduced evidence, or if there is a conflict in the evidence, as to whether or not the evidence establishes negligence or contributory negligence, and the degree thereof, when one is compared with the other, such issues must be submitted to a jury.

APPEAL from the district court for Douglas County: L. ROSS NEWKIRK, JUDGE. *Affirmed.*

Story, Pilcher & Howard, for appellant.

Fitzgerald, Hamer, Brown & Leahy and *Lyle E. Strom,* for appellee.

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

MESSMORE, J.

This is an action at law brought in the district court for Douglas County by Raymond R. Cox, administrator of the estate of Shirley L. Cox, deceased, as plaintiff, against Daniel Babington, defendant. The purpose of the action was to recover damages for the wrongful death of Shirley L. Cox due to the negligence of the defendant in causing a collision between an automobile driven by him and an automobile driven by the plaintiff's mother in which the deceased was a passenger. Trial was had to a jury resulting in a verdict for the plaintiff. The defendant filed a motion for judgment notwithstanding the verdict or in the alternative for a new trial. This motion was overruled. From the order overruling said motion, the defendant appealed.

The plaintiff's petition, insofar as it need be considered, alleged in substance that Shirley L. Cox, the plaintiff's wife, was riding as a passenger in a Studebaker automo-

bile operated by Mabel N. Morris in an easterly direction upon L Street in Omaha, and when said automobile reached a point on the L Street Viaduct approximately 190 feet west of the intersection with Twenty-ninth Street, a Buick automobile driven by the defendant in a westerly direction upon L Street was negligently driven by the defendant in part upon the south half of L Street into and against the said Studebaker automobile which collision caused the death of Shirley L. Cox; and that the negligence of the defendant which proximately caused the collision and resulting damages, injury, and death consisted of the following: (1) In failing to maintain a proper lookout for approaching automobiles and particularly the automobile operated by said Mabel N. Morris; (2) in failing to accord to the automobile driven by Mabel N. Morris the use of the south half of the traveled portion of the L Street Viaduct, and in not driving said Buick automobile on its right half, or north half, of the traveled portion of said L Street Viaduct; (3) in driving said Buick automobile upon the south side of the center of the L Street Viaduct in such manner as to cause it to come into collision with the automobile driven by Mabel N. Morris; and (4) in failing to keep said Buick automobile under control.

The defendant's answer to the plaintiff's petition alleged that the collision referred to therein was due solely and proximately to the negligence of Mabel N. Morris, the driver of the Studebaker automobile. The defendant denied every allegation contained in the plaintiff's petition not admitted in the answer.

The plaintiff's reply to the defendant's answer denied generally the allegations contained therein except those which were admissions of allegations contained in the plaintiff's petition.

For convenience, and as occasion requires, we will refer to Raymond R. Cox as plaintiff; to Daniel Babington as defendant; to Shirley L. Cox as the deceased; to

the defendant's automobile as the Buick; and to the automobile driven by Mabel N. Morris as the Studebaker.

The record discloses that the accident occurred at about 1:30 a.m., on May 19, 1956, and that the deceased was a passenger in a 1952 model Studebaker automobile operated by Mabel N. Morris, the plaintiff's mother and the deceased's mother-in-law. Both Shirley L. Cox and Mabel N. Morris were killed in the accident. The defendant, at the time of the accident, was operating his 1954 model Buick automobile. The Studebaker was proceeding in an easterly direction and the Buick was proceeding in a westerly direction when the accident occurred on the L Street Viaduct extending between Twenty-seventh and Thirtieth Streets in Omaha.

It was established that the plaintiff is the duly appointed, qualified, and acting administrator of the estate of Shirley L. Cox, deceased.

There is a plat in evidence, drawn to scale, which represents that portion of the L Street Viaduct as it existed on May 19, 1956, and shows the roadway on the part of the viaduct where it is claimed the collision occurred. This roadway is 43 feet in width, leaving 21½ feet in width for eastbound traffic and 21½ feet for westbound traffic on the viaduct. The viaduct extends uphill from the west end to a point a short distance west of the Stockyards Viaduct intersection which is 344 feet from the west curb line of the L Street Viaduct. The plat shows this to be a 6 percent grade. Along both the north and south sides of the roadway there is an elevated wooden plank walk 5 feet wide for use by pedestrians, and on the outside edge of these walks there is erected a wooden guardrail. On the south side of L Street at the west end of the L Street Viaduct there was a traffic light which regulated the use of lanes of traffic by eastbound vehicles.

A night watchman for the Sutherland Lumber Company, which is about 200 feet north of the west end of the L Street Viaduct, testified that about 1:30 a.m., the

day of the accident, he was sitting in his automobile on the west side of the lumberyard, a distance of 400 to 500 feet from the viaduct. He heard a crash. He then walked over to the viaduct where he met a man and they went up the viaduct on the north walk to the place where a Buick automobile was standing. Afterwards he went across the street to where a Studebaker automobile was standing. He and the man he met were the first persons to arrive at the scene of the accident. They opened the door of the Studebaker and helped while another man got some children out. The children were down on the floor between the front and back seats. He then returned to the Buick on the north side of the viaduct where he heard the defendant tell how badly his automobile was mashed up, and ask a bystander if he had a car. The bystander said he did, and the defendant asked him to take him home as he had to go to work the next morning. This witness then examined the interior of the Buick and saw a package which he later observed to be a 6-pack of beer, containing five cans of beer. After that he went across the street to help get the ladies out of the Studebaker. Afterwards he observed debris on the pavement. He testified that this debris was in the second lane on the south side of the roadway, which would be on the south half of the L Street Viaduct. With respect to the Studebaker, it was east of the Studebaker a distance of 50 to 60 feet. He observed only a little metal from the cars on the north half of the L Street Viaduct in an area of 40 to 60 feet from both automobiles. He believed this metal to be pieces off the front of the bumpers, or bumper guards. He observed no dirt or fine pieces of glass or anything of that nature on the north side of the roadway in an area from 40 to 60 feet east of the automobiles. He further testified that one car went through the area prior to his arrival at the scene of the accident; that he met this car going west at the end of the viaduct; and that there was another vehicle that went west after

he arrived where the Studebaker and Buick were standing. He did not notice where that vehicle went in relation to the debris. Shortly thereafter police officers arrived. He found an open can of Falstaff beer under the viaduct directly beneath the Buick, which he turned over to a police officer. He further testified that the police arrived about 10 to 15 minutes after he arrived. They then blocked off the traffic on the viaduct from both the west and east.

On cross-examination this witness testified that by the term "debris" he meant mud and dirt, anything that is underneath an automobile or that would cling to the bottom of an automobile; and that he saw no mud or dirt anywhere else on the viaduct. It was about 10 minutes before people arrived and were walking around on the roadway. He saw the rescue squad car come from the east. It passed over the viaduct. He also saw the police cars come from the east, but did not notice any that came from the west. There were several police cars there. The police ambulance came from the east. At the time of the crash he saw a big cloud of dust which rose 15 to 20 feet, covering quite a big space. He was at the scene of the accident when the wrecker car came to pull away the damaged cars. This was about an hour after the accident. He was interested in taking care of the people in the Studebaker. He did not see any gouge mark of any kind in the pavement and did not examine the north side of the pavement of the viaduct at that time.

A police officer who was called to the scene of the accident arrived at about 1:45 a.m. He testified that he and his partner were the first police officers to arrive. Upon arrival he went to the Buick where he had a conversation with the defendant who admitted that he was the driver of the Buick and asked the officer to take care of his car, and said that he did not know how he was going to get to work. This officer asked the defendant how much he had had to drink and the defend-

ant stated: "A few beers." The officer then proceeded to the south side of the roadway to the Studebaker. Shortly after arriving at the scene of the accident he was ordered to go to the west end of the viaduct to direct traffic north on Thirtieth Street. From the time he arrived until he went to the west end to direct traffic, only one car went over the viaduct. The rescue squad arrived shortly after he and his partner arrived. On cross-examination he testified that the ambulance and rescue squad car came from the east to the west, and that other police cars arrived.

Police officer Shestak, assigned as a traffic investigator, testified that he was advised at 1:47 a.m., that there had been a collision in the vicinity of Twenty-ninth and L Streets. He arrived at the scene of the accident about 5 minutes after receiving the call. Other police officers had preceded him to the scene of the accident. The defendant was not there when he arrived. The deceased was in the rescue squad car. He checked the registrations of the automobiles involved in the collision, and proceeded back to his cruiser car to assemble his camera and then proceeded to take pictures. He took five pictures within a period of half an hour. These photographs were admitted in evidence.

Officer Shastak further testified that he observed a pile of dirt and debris, some broken glass, and a horseshoe-shaped gouge mark in the roadway. The gouge mark was white and clean, and was located 2 feet south of a line which was made by the overlapping of the asphalt. This line made by the asphalt overlap was 21 inches south of the center of the roadway, so the gouge mark was 3½ to 4 feet south of the center of the L Street Viaduct roadway. This mark was 189 feet west of the west curb line of Twenty-ninth Street, and the accumulation or pile of dirt and debris was south to southwest of the gouge mark extending over an area of approximately 8 feet. This witness further testified that there was no dirt or debris, similar to that which

he described as being found on the south side of the L Street Viaduct, on the north side of the viaduct or north of the gouge mark. Nor was there any dirt or debris on the north side of the viaduct within an area of 15 feet from the north curb. He further testified, as a traffic investigator, that as a result of the impact of vehicles dirt and debris of the kind he observed were deposited. Upon his arrival he saw the Studebaker which was 47 feet southwest of the gouge mark, measuring to its right side center. The Buick was 59 feet northwest of the gouge mark. He observed no tire marks either on the east or west of the gouge mark, or the north or south half of the viaduct. After an investigation at the scene of the accident, he went to the county hospital where he saw the defendant and questioned him. The defendant said that he did not know what happened, and that he must have fallen asleep. The defendant also stated that he had bought some beer in Council Bluffs, Iowa. This officer observed that the defendant had been drinking. He smelled liquor on his breath. He had found five cans of beer in a 6-pack in the defendant's automobile. While this officer was there, inspector Whinnery of the police department who was also there asked the defendant if he would submit to a blood test. The defendant indicated that he wanted permission from his mother to take the test. The defendant stated that he drank a couple of beers. He made no statement about the Studebaker coming over into his path.

On cross-examination this witness testified that when he arrived at the scene of the collision, at approximately 1:52 a.m., traffic across the viaduct had been blocked off; that at the time he took the pictures at the scene of the accident the sheriff's car was there at a point west of the Studebaker and Buick and facing west; that a rescue squad car was there, and other police automobiles were also at the scene of the accident, and quite a few pedestrians were there when he arrived and

were in different places over the area; that debris that comes from the undercarriage of automobiles is loose when it falls out, can be kicked around, and the wind will blow it; and that the place where the debris goes when two automobiles collide is determined somewhat by the direction of the automobiles and the momentum of the same at the time they stop. He further testified that he had to clear out the traffic and the pedestrians before he could take the pictures.

An inspector of police testified that he had 22 years experience in the police department and had received training in traffic investigation and administration, which training included dynamics of accidents with respect to directions of force and depositing of debris, and tire marks referred to as physical facts that surround traffic accidents. This witness testified that police regard the location of the debris in the way of dirt that has accumulated under the undercarriage of automobiles as a matter of significance with respect to where a collision has occurred, that is, on one side of the center of the street or the other side of the center of the street. However, he did not discuss the explanation of the collision with the defendant, nor was he at the scene of the accident until the day after it had occurred. He saw the defendant at the county hospital when he arrived there about 2:45 a.m., and talked to the defendant. He further testified that the defendant was logical in his answers to the questions propounded to him. The defendant told the inspector that he had a couple of beers at the H and H Tavern, and that after that he had been driving around. At first the defendant was evasive, and towards the end of the interview he became belligerent. At no time while the inspector was interviewing the defendant did the defendant make any statement that the Studebaker was on the north half of the viaduct roadway or that it jumped over into his path and caused the collision. In the inspector's opinion the defendant, at the time he

talked with him, was under the influence of intoxicating liquor.

A surgeon on duty when the defendant was brought to the Douglas County Hospital testified that he was present during the time the defendant was being questioned by the inspector of police. He ordered a hypodermic injection of Demerol for the defendant. He could not say whether or not the defendant was intoxicated, but testified that the defendant did act like a lot of people act who have been in automobile accidents, and that the defendant, with support, walked into the hospital. The defendant was conscious and had normal blood pressure. This witness gave the defendant no treatment for shock because it was not necessary. He further testified that the defendant made no statement or claim that the Studebaker came over onto the north side of the viaduct or that it jumped over directly into his path of travel.

A city fireman, captain of the rescue squad, was notified of the accident about 1:45 a.m., and arrived at the scene of the accident at 1:47 a.m. He helped remove the occupants of the Studebaker. He testified on cross-examination that while he was at the scene of the accident he saw no cars drive either east or west over the viaduct; that in arriving at the scene of the accident he had driven over the viaduct from the east proceeding west; that he stopped his vehicle with its back end about even with the Studebaker; and that there were about half a dozen people scattered about trying to help.

Photographs, as exhibits in evidence, show the Studebaker to be on the south side of the roadway facing northwest, the Buick on the north side facing southwest, and that the Studebaker and Buick were both damaged on the left side and front.

The defendant testified that he was 24 years of age; that he was employed at the Independent Metal Products Company; that he attended Omaha University; that he owned a 1954 Buick; that the accident happened

about 1:30 a.m.; that he had come onto L Street at Twenty-fifth Street; that he was alone in his automobile; that he was going west on L Street; and that there were signal lights at Twenty-sixth and Twenty-seventh Streets but his progress was not stopped by them. He was traveling about 25 miles an hour as he approached the viaduct and continued to operate his car at that speed. When he was traveling on the viaduct, he was on the north side of the roadway. As he started down the west incline of the viaduct he was in the north lane and his car was approximately 6 feet in from the north curb of the roadway. As he passed the last traffic light he saw an automobile approaching from the west. It was about at the bottom of the viaduct at that time, that is, where the viaduct starts going to the east. He continued to observe this approaching car and saw it at the bottom of the viaduct, and as he went through the green light, keeping on his side of the roadway, the other car was approaching up the viaduct and all of a sudden its driver jerked the car onto the defendant's side, or north side of the roadway. He was unable to estimate the speed of the approaching car. The two cars collided after the approaching car was jerked over into the defendant's lane of travel. The defendant's car was facing west and the approaching car was facing northeast at the time the two automobiles came together. He further testified that he did not know what happened. There was just a crash, and the next thing he knew he woke up in St. Joseph's Hospital where he was in bed. He also testified that he had a carton of beer in his car in a sack, and that he had not consumed any of it; that he made no investigation of the accident at all; and that he did not remember of having any conversation with the two police officers at the county hospital.

On cross-examination the defendant testified that he had purchased the 6-pack of beer at a bar in Council Bluffs about midnight before the accident; and that he

stopped to purchase it after he left the Seventeen Club located in downtown Council Bluffs. While at the club dancing, he said he had a "small beer." After purchasing the 6-pack of beer he drove, by himself, in Council Bluffs for about 45 minutes. Then he proceeded across the Douglas Street Bridge to Thirteenth Street, south on Thirteenth Street to Vinton Street, west on Vinton Street to Twenty-fifth Street, south on Twenty-fifth Street to L Street, and west on L Street to the scene of the collision. He further testified that he arrived at Twenty-fifth and L Streets at about 1:25 a.m. He further testified that he saw the oncoming lights of the Studebaker when he was in the intersection of the L Street Viaduct and the Stockyards Viaduct, and at that time the Studebaker was at the west end of the viaduct.

In rebuttal, a court reporter testified to certain questions and answers given by the defendant in response to questions of the deputy county attorney with regard to the accident, in which the defendant stated that he went to Council Bluffs and drove around the south side of the city and came back; that he did not stop at any place in Council Bluffs; that he did not know what happened; that he "passed out"; that he did not see the other car, and never did see it; and that he was driving west on L Street.

The defendant made a motion at the close of the plaintiff's evidence and at the close of all of the evidence for a directed verdict or in the alternative to dismiss the plaintiff's petition. These motions were overruled.

The defendant assigns as error that (1) the trial court erred in overruling the defendant's motion to direct a verdict in favor of the defendant or in the alternative to dismiss the plaintiff's petition at the close of all the testimony; and (2) the trial court erred in overruling the defendant's motion for judgment notwithstanding the verdict, or in the alternative to grant the defendant a new trial.

A motion for directed verdict or for judgment notwithstanding the verdict must, for the purpose of decision thereon, be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence. Hilzer v. Farmers Irr. Dist., 156 Neb. 398, 56 N. W. 2d 457.

"The rule is that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed." Farr Co. v. Union P. R. R. Co., 106 F. 2d 437. See, also, Guerin v. Forburger, 161 Neb. 824, 74 N. W. 2d 870; Davis v. Dennert, 162 Neb. 65, 75 N. W. 2d 112.

"Negligence is a question of fact and may be proved by circumstantial evidence. All that the law requires is that the facts and circumstances proved, together with the inferences that may be legitimately drawn from them, shall indicate, with reasonable certainty, the negligent act complained of." Davis v. Dennert, *supra.* See, also, Rocha v. Payne, 108 Neb. 246, 187 N. W. 804; Shields v. County of Buffalo, 161 Neb. 34, 71 N. W. 2d 701.

A witness may describe the marks that he observed near the place of an accident. The inference to be drawn from the testimony regarding such marks is solely the province of the jury. See, Davis v. Dennert, *supra;* Danner v. Walters, 154 Neb. 506, 48 N. W. 2d 635.

The plaintiff's case, to a large extent, depends upon circumstantial evidence. We have said in this regard: "All that plaintiff was required to do was to establish, to a reasonable probability, that the accident happened in the manner alleged in his petition, and where facts

and circumstances are established from which the way the accident happened could be logically inferred, it was not error to submit that issue to the jury." Markussen v. Mengedoht, 132 Neb. 472, 272 N. W. 241. See, also, Taylor v. J. M. McDonald Co., 156 Neb. 437, 56 N. W. 2d 610; Davis v. Dennert, *supra*.

The defendant contends that the gouge mark, as testified to by officer Shestak, is not related in any manner to either automobile or any part of the same, nor does it disclose the position of either automobile in the roadway at the time of the impact; that the debris in the roadway, as testified to by officer Shestak and the night watchman, had been run over by several automobiles on both sides of the roadway and trampled upon by pedestrians before it was observed by any witnesses and consequently is not satisfactory evidence of what occurred; and, in addition, that officer Shestak admitted that there was debris on the north half of the roadway. Therefore, the evidence was insufficient to submit the case to the jury.

Applying the rules of law heretofore set forth to the evidence, we conclude that the jury had a right to consider all of the direct and circumstantial evidence and the physical facts to determine whether or not the defendant was guilty of negligence as charged in the petition of the plaintiff. Suffice it is to say that the evidence discloses a conflict therein sufficient to submit the case to the jury, and the trial court did not err in so doing.

In addition to the physical facts as heretofore set forth and the inferences which with reasonable certainty may be drawn therefrom, there is also the testimony of the defendant that he "passed out" or must have fallen asleep when he was asked by officer Shestak and the deputy county attorney about what happened that evening on the viaduct. This type of testimony relates itself to whether or not the defendant kept a proper lookout for the oncoming Studebaker in which the plaintiff's decedent was a passenger. The plaintiff's petition

contained an allegation of negligence to the effect that the defendant did not keep a proper lookout as heretofore set out in the opinion.

"Where there is a reasonable dispute as to what the physical facts show, and the conclusions to be drawn therefrom, and when the evidence of the witnesses is in sharp conflict, then the credibility of each witness, the probative weight to be given to his testimony, and any proper inferences therefrom are questions lying clearly within the sole province of the jury." Dischner v. Loup River Public Power Dist., 147 Neb. 949, 25 N. W. 2d 813. See, also, Moore v. Krejci, 139 Neb. 562, 297 N. W. 913.

"Where different minds may reasonably draw different conclusions or inferences from the adduced evidence, or if there is a conflict in the evidence, as to whether or not the evidence establishes negligence or contributory negligence, and the degree thereof, when one is compared with the other, such issues must be submitted to a jury." Pierson v. Jensen, 150 Neb. 86, 33 N. W. 2d 462. See, also, Davis v. Dennert, *supra*.

For the reasons given herein, the judgment of the trial court is affirmed.

AFFIRMED.

VACLAV F. KOBZA ET AL., APPELLEES AND CROSS-APPELLANTS, v. CLARENCE E. SPATH, APPELLANT AND CROSS-APPELLEE, IMPLEADED WITH JOHN DOE ET AL., APPELLEES.
90 N. W. 2d 246

Filed May 16, 1958. No. 34322.

1. **Vendor and Purchaser.** In the ordinary contract for the sale of real estate, equity will not regard time as of the essence, but it may be made such where so expressly stipulated or an intention that it shall be such is clearly manifested by the agreement as a whole, construed in the light of the surrounding circumstances.

2. **Vendor and Purchaser: Specific Performance.** Where time is of the essence of such a contract, a court of equity will refuse to enforce specific performance in favor of a party who is in default, unless strict performance has been waived or excused.
3. **Specific Performance.** The specific performance of a contract by a court of equity is not generally demandable or awarded as a matter of absolute legal right but is directed to and governed by the sound legal discretion of the court, dependent upon the facts and circumstances of each particular case. It will not be granted where enforcement would be unjust, and may be denied where the party seeking it has failed to perform.
4. **Vendor and Purchaser: Specific Performance.** Where failure to convey land under an executory contract of sale is due solely to the refusal of the purchaser to pay or tender the stipulated purchase price according to the terms of his agreement, he is not entitled to specific performance or to damages for breach of contract.
5. **Specific Performance.** A party who seeks specific performance must show not only that he has a valid legally enforceable contract but also that he has substantially complied with its terms, by performing or offering to perform on his part the acts which formed the consideration of the undertaking on the part of defendant or that he is ready, able, and willing to perform his obligations under the contract and do whatever has been made a condition precedent on his part, or show a valid excuse for nonperformance of the covenants incumbent upon him.
6. **Tender.** Unless waived or excused, a tender of performance under such a contract must be upon conditions for which there is a foundation in the contractual relation between the parties.
7. **Crops.** Unless reserved, crops standing upon the ground, matured or not, pass to the grantee named in a deed of conveyance.
8. **Brokers.** When an owner lists his property with a real estate broker for sale, it is generally understood that the broker's duties are merely to find a purchaser.

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

Ginsburg, Rosenberg & Ginsburg, for appellant.

William L. Walker and *Earl Ludlam*, for appellees.

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

SIMMONS, C. J.

This is an action for the specific performance of a written contract wherein defendant agreed to sell land to the plaintiffs. All defendants named in the action except the defendant Clarence E. Spath defaulted. He, as appellant, will be referred to herein as defendant. Issues were made and trial was had. The trial court granted specific performance and determined credits due to each party as against the purchase price. Items in the decree will be referred to later herein.

Defendant appeals and plaintiffs cross-appeal.

We reverse the judgment of the trial court and remand the cause with directions to deny specific performance.

The land involved is a quarter section of farm land, consisting largely of pasture land, and some tillable land planted at the time of the contract to alfalfa and wheat.

Defendant was the owner of the land subject to a mortgage to an insurance company in the sum of $5,000. On March 19, 1955, Mr. H. M. Holbert, a real estate broker with whom the property was listed for sale, secured a written offer of purchase of the land from plaintiffs for $18,000. We shall refer to the terms of the offer later in this opinion.

Mr. Holbert received by check payable to him the sum of $2,000 to apply on the purchase price. The receipt is a part of the "Purchase Agreement" form. On the same date defendant signed an acceptance of the offer on the terms stated and agreed to execute a conveyance upon the terms and conditions set forth in the offer of purchase. Endorsed on the copy retained by defendant is this: "H. M. Holbert to receive $800.00 as full commission."

On or about April 11, 1955, plaintiffs were advised that defendant refused to perform the contract. Defendant pleads that on or about May 5, 1955, and after plaintiffs were in default, he gave notice of rescission.

On April 14, 1955, plaintiffs served upon defendant a written demand for performance and an offer to perform the contract. Defendant did not comply with the demand. We will refer to this instrument later in this opinion.

Plaintiffs filed their petition in this action on May 2, 1955. In their petition plaintiffs alleged the execution and delivery of the offer of purchase, the making of the down payment to H. M. Holbert, and the acceptance of the offer by the defendant; that they were ready and willing to perform at all times since on and prior to April 1, 1955; that on April 12, 1955, they were advised defendant was not willing to perform; that they served a demand for performance and that defendant refused to perform; that subsequent to the purchase agreement defendant had mortgaged the property to a third party; that they had performed all obligations on their part to be performed by them and were ready to perform; that they had gone into possession of the house on the property prior to April 14, 1955; and that defendant had excluded them from possession.

Plaintiffs then alleged damages in that defendant had prevented them from the use of the pasture land on the premises subsequent to May 1, 1955; that defendant permitted waste of the alfalfa field; and that they had suffered material damage from being excluded from the farm and the house for a home.

Plaintiffs prayed for specific performance of the contract including the right of possession as of May 1, 1955; that the amount due on the mortgage (placed thereon by defendant after the execution of the contract) be deducted from the purchase price; that they be ordered to pay the principal on the mortgage which they had assumed and agreed to pay, and to pay interest thereon subsequent to the time they are let into possession; that taxes and expenses of sale be deducted from the purchase price; for other equitable relief; and

for $15 per day for each day they are kept out of possession.

Defendant answered and pleaded that time was of the essence of the contract; that performance was to be had not later than April 1, 1955; that performance was not had at that time; and that the contract was therefore of no force and effect.

Defendant further alleged that at all times plaintiffs were in default of performance.

Defendant by cross-petition alleged that plaintiffs had caused the contract to be recorded in the office of the register of deeds, and that it constituted a cloud upon the title of defendant.

Defendant prayed for a dismissal of the petition; for the quieting of title in the defendant; and for equitable relief.

Plaintiffs for reply and in answer to the cross-petition denied generally and pleaded ability and willingness at all times to perform, and alleged facts upon which such contention was based.

The cause went to trial on these issues on November 9 and 10, 1955. Both parties offered evidence. Plaintiffs offered evidence to the effect that the value of the land had depreciated between April 1, 1955, and the date of trial in the sum of $3,000.

On November 10, 1955, the cause was continued to be taken up by agreement of the parties.

On February 28, 1956, plaintiffs secured permission to file an amended petition to comply with evidence received at the trial. Plaintiffs' amendment was an allegation of damages as a result of the depreciation in value and a prayer for a recovery of the depreciation as damages suffered by the delay in performance. Defendant then offered evidence that the value had appreciated during that time.

The trial court rendered its decree June 11, 1957. The trial court decreed specific performance of the contract; that the premises be conveyed subject to the $5,000 mort-

gage; and that the purchase price of $18,000 be abated and reduced by the sum of $5,000 and by the earnest money paid in the sum of $2,000 to which was to be added $400 paid by defendant on the $5,000 mortgage, making a total of $11,400 due defendant on the purchase price. To this the court ordered interest to be added from May 1, 1955, to February 28, 1956, in the sum of $605, making a grand total of $12,005. From this amount the court ordered deducted the amount of $2,804.03 principal and interest on the second mortgage placed on the premises by the defendant subsequent to the contract, calculated to February 28, 1956, and thereafter interest was to be added at the rate of 70 cents per day "or whatever balance is due when paid off." The court further ordered the payment of interest on a judgment (paid off except interest) in the sum of $3.84 calculated to February 28, 1956, and thereafter at the rate of 1.7 cents per month. The court further allowed plaintiffs to recover $735 for 105 acres of pasture land with interest for 4 months from November 1, 1955, or a total of $749.70, and $250 for 25 acres of alfalfa hay with interest from August 1, 1955, for 7 months, or a total of $258.75; $50 for 5 acres of prairie hay with interest from August 1, 1955, for 7 months, or a total of $51.75; and $202.50 for house rent and 6 months' interest, from September 1, 1955, or a total of $204.52.

The court ordered all costs to be taxed to the defendant to be deducted from the purchase price.

The court ordered defendant to deliver the abstract of title to the plaintiffs subject to the rights of the mortgagee. The court dismissed defendant's cross-petition with prejudice.

Defendant argues here that the court erred in granting specific performance, contending that the plaintiffs were themselves in default of performance; that the contract was so ambiguous as to preclude specific performance; that the court should not have ordered specific performance after having had the case under con-

sideration for a period of over 16 months; and that the decree is so ambiguous as to preclude specific performance by the defendant.

Plaintiffs submit argument in answer to those contentions.

By cross-appeal plaintiffs argue that they should not have been required to pay interest on the $11,000 balance from April 1, 1955, to February 28, 1956; that they should have been allowed to recover the depreciation in value of the land between the date of the purchase and November 9, 1955 (the date of the beginning of the trial); and that the decree should be clarified and construed as to the payment of principal and interest on the second mortgage.

The first question we are called upon to determine is whether time was of the essence of the contract. The rule is: In the ordinary contract for the sale of real estate, equity will not regard time as of the essence, but it may be made such where so expressly stipulated or an intention that it shall be such is clearly manifested by the agreement as a whole, construed in the light of the surrounding circumstances. Dodge v. Galusha, 151 Neb. 753, 39 N. W. 2d 539.

The offer of purchase which defendant accepted provided for payment of "$11,000.00 Cash to be paid on or before April 1st 1955 or as soon there after as good and sufficient title is furnished and deed delivered, * * *." It further provided that plaintiffs were to "assume and pay with interest thereon from April 1st 1955" the $5,000 mortgage indebtedness on the property, and that "Seller is to retain and harvest all the growing wheat * * * Purchase (sic) to have possession on or before Mat (sic) 1st 1955 * * *. I (the purchaser) agree to close said purchase in accordance herewith, on or before, 10 days after abstract of title has been furnished to me for examination. * * *."

The word "Mat" above was construed by the parties to mean "May." The evidence shows that the house

on the land was occupied by a tenant. The May 1 provision was inserted so as to permit the defendant to give a 30-day notice to vacate. That was done and the tenant vacated the premises on or before April 11, 1955. The evidence shows that the abstract of title was delivered to plaintiffs' representatives on or before March 25, 1955. Under the above provision as to closing after the abstract was furnished the "on or before" time of performance was fixed as of April 6, 1955.

The evidence shows that the defendant had pressing financial obligations which he was required to meet on April 1 which he expected to pay out of the purchase money. Not having received the purchase money, defendant on April 14, 1955, mortgaged the premises for $2,600 and thereby secured the needed funds.

The evidence shows that plaintiffs were farmers; that they wanted this land for farming operations; that they had sold the premises they then occupied and were required to give possession; and that they desired immediate possession of the land involved in this litigation. The evidence is that the plaintiffs moved one load of furniture into the house on the premises on April 11, 1955, planted trees and shrubbery, and were prevented from moving additional property by the defendant. Plaintiffs at all times had the required money on deposit to make the required $11,000 payment and testified to attempts to settle on or before April 1, 1955, and on or before April 5 or 6, 1955.

The reservation by the defendant of the "growing wheat" on the premises is indicative of an intent to make time of the essence.

We accordingly hold that from the provisions of the contract and the circumstances above stated that it is clearly manifested that time was of the essence of the contract.

Defendant is shown to have been ready and willing to perform up and until April 11, 1955, when he notified plaintiffs that he considered the contract as at

an end because of the plaintiffs' failure to perform.

The applicable rules are: Where time is of the essence of such a contract, a court of equity will refuse to enforce specific performance in favor of a party who is in default, unless strict performance has been waived or excused. Dodge v. Galusha, *supra*. This rule was also followed in Johnson v. Norton, 152 Neb. 714, 42 N. W. 2d 622, where the court held: "The specific performance of a contract by a court of equity is not generally demandable or awarded as a matter of absolute legal right but is directed to and governed by the sound legal discretion of the court, dependent upon the facts and circumstances of each particular case. It will not be granted where enforcement would be unjust, and may be denied where the party seeking it has failed to perform. * * * Where failure to convey land under an executory contract of sale is due solely to the refusal of the purchaser to pay or tender the stipulated purchase price according to the terms of his agreement, he is not entitled to specific performance or to damages for breach of contract." These rules were also approved in Sofio v. Glissmann, 156 Neb. 610, 57 N. W. 2d 176, where the court further held: "A party who seeks specific performance must show not only that he has a valid legally enforceable contract but also that he has substantially complied with its terms, by performing or offering to perform on his part the acts which formed the consideration of the undertaking on the part of defendant or that he is ready, able, and willing to perform his obligations under the contract and do whatever has been made a condition precedent on his part, or show a valid excuse for nonperformance of the covenants incumbent upon him."

This brings us to the question of plaintiffs' performance and their demand for performance by defendant made on April 14, 1955.

The additional applicable rule is: Unless waived or excused, a tender of performance under such a con-

tract must be upon conditions for which there is a foundation in the contractual relation between the parties. Dodge v. Galusha, *supra.*

There is no contention that the contract provisions were waived or excused.

Toward its close the tender and demand recited that plaintiffs "tender full performance to you as above described and pursuant to said contract."

We have above set out provisions of the offer of purchase which was accepted according to its terms by the defendant.

We now refer to terms of the offer of purchase in contrast with provisions in the tender and demand for a deed.

The contract called for a consideration of $18,000 "$2,000.00 Cash receipt of which is hereby acknowledged," the balance of $11,000 cash, and $5,000 in the form of the mortgage. The $2,000 was paid to the real estate broker. The tender and demand recited that "said $13,000.00 has been deposited with Mr. William L. Walker, Attorney, * * * with direction to pay same to you upon your delivery * * *" of the deed described in the agreement.

The evidence is that a check for $11,000 payable to defendant was left with Mr. Walker endorsed "Balance of purchase price * * *" and that the $2,000 was at all times held by the broker in his bank account. The receipt signed by the broker is as follows: "Diwight (sic), Nebr. March 19th 1955 Received from Vaclav F. Kobza and Antonia M. Kobza, the sum of Two thousand and No/100- - - - - Dollars, to apply on the purchase price of the above described property on terms and conditions stated above, it being hereby agreed and understood that in case of any legal defects in the title, which cannot be cured after filing with us written notice of such legal defect, the money hereby paid is to be refunded, and in the event of the refusal or failure of the buyer to consummate the purchase, to be retained

as liquidated damages for failure to carry out said contract of sale as herein agreed to. This receipt is given and proposition taken subject to approval of sale by the owner, earnest money deposited to be refunded if offer not accepted. By H. M. Holbert Agent."

Obviously the plaintiffs assumed that they controlled and had taken control of the disposition of the earnest money payment. This conclusion is fortified by another item in the tender and demand. It recited that the broker had notified the purchasers that he claimed a lien on the proceeds of the sale and the right to retain for his commission the sum of $800 under a certain listing contract. It is: "You are further notified to pay the State and County taxes in the sum of $114.86 for 1954 or permit the same to be deducted from the purchase price and all expenses of abstracting owed by you in addition to said commission for Mr. H. M. Holbert."

Obviously the question of the commission and the amount of it was a matter to be determined initially by defendant and Mr. Holbert. Plaintiffs arrogated to themselves the right to adjudicate that issue and make the payment of the commission a condition of performance by them. We find nothing in the contract that gave that right.

The purchase agreement provided for the conveyance of the premises "by warranty deed." It was signed by the two plaintiffs, without any showing that they were husband and wife.

The tender and demand required the delivery of a deed "properly made, executed and acknowledged" to Mr. Walker. The tender and demand called for a deed naming the plaintiffs as "husband and wife, as joint tenants with rights of survivorship and not as tenants in common." To the tender and demand was attached "a filled in blank form of the deed that will be suitable for acceptance * * *."

It is what is known as a joint tenancy deed. Defendant contends that he did not contract to give that kind

of a deed and that the joint tenancy provision impaired the liability of the purchasers under the assume and pay provision of the purchase agreement.

Defendant further claims that the deed is not in accord with the purchase agreement for this reason. By it the defendant was to "retain and harvest all the growing wheat." The proposed deed carried no reservation of that kind.

We have held: Unless reserved, crops standing upon the ground, matured or not, pass to the grantee named in a deed of conveyance, or to a party to whom the land is devised. In re Estate of Andersen, 83 Neb. 8, 118 N. W. 1108, 131 Am. S. R. 613.

In Cooper v. Kennedy, 86 Neb. 119, 124 N. W. 1131, 136 Am. S. R. 701, 31 L. R. A. N. S. 761, we held: "In the absence of a reservation, such crops pass by the deed; but a reservation is a collateral contract which may exist at the same time as a contract to convey the real estate."

Defendant having contracted for a reservation of the growing wheat was not required to execute a deed that did not contain that reservation.

In the tender and demand plaintiffs fixed the time of performance as of April 18, 1955, between the hours of 9 to 12 a.m. or 1 to 4:30 p.m. at Mr. Walker's office in the Stuart Building, Lincoln, Nebraska. Defendant contends that there was no provision for closing the transaction at that place. He relies on the holding in Veith v. McMurtry, 26 Neb. 341, 42 N. W. 6, that where no place is designated in a contract for the payment of money, it is for the vendor to determine where the payment is to be made.

The evidence is such that it could be held that it was agreeable to both parties to have performance completed at the office of the National Farm Loan Association office in Lincoln, Nebraska. Defendant testified that he expected performance at his farm home in Lancaster County and the evidence shows that he was available

there for that purpose. In any event there is no provision in the purchase agreement that calls for settlement at Mr. Walker's office at a specific hour or day.

The purchase agreement has this provision with reference to taxes: "Said property to be delivered to me free and clear of all encumbrances and taxes now due and payable; except" and in typing, "Pay any and all taxes up to and including the year of 1954."

The plaintiffs recognized that there was a doubt as to who should pay the 1954 taxes. In their amended petition they alleged: "(h) In the event the court should construe Exhibit 'A' to intend that plaintiffs pay the 1954 taxes, in the sum of $114.86, then defendant should be credited with said amount. Otherwise, defendant should pay the same."

Nevertheless in the tender and demand plaintiffs notified defendant to pay the 1954 taxes or permit the same to be deducted from the purchase price. Stated otherwise, they resolved the question of doubt in their own favor and made an acceptance of the decision a condition of the tender and demand.

The purchase agreement further provided that plaintiffs would "furnish the seller a written opinion from my attorney showing defects, if any, in the title to the above described property." The attorney furnished a written opinion on March 29, 1955, in which he required a bonded abstractor's certificate covering certain entries in the abstract. He also required a new release of a mortgage and certain showings as to the parties thereto. He waived objection as to certain defects he found in an action to quiet title. This written opinion was never furnished to the defendant. It appears that it was furnished to the broker, who, without reference to the defendant took the required procedures to meet the objections so stated. Nevertheless in the tender and demand plaintiffs notified the defendant to pay or permit the deduction from the purchase price of "all expenses of abstracting" without itemizing or showing the amounts

involved. We have held: "When an owner lists his property with a real estate broker for sale, it is generally understood that the broker's duties are merely to find a purchaser. No good reason exists why the owner should be required, when he uses the ordinary expressions employed in such contracts, to hedge it about with conditions limiting the authority of such a broker and preventing him from entering into a contract of sale without further consultation with the owner; but there is good reason why the broker should see that his authority to enter into a contract should affirmatively appear, if he desires his authority to extend beyond what is, as an almost universal rule, given to such brokers in the relation between a real estate agent and his principal." Gould v. Rockwell, 105 Neb. 724, 181 N. W. 655.

Under the circumstances it follows that the delivery of the written opinion of the attorney to the broker was not delivery to the defendant as the purchase agreement required.

Plaintiffs have not shown themselves as offering to perform or performing their obligations under the purchase agreement. On the contrary it appears clearly that they demanded performance by the defendant on terms and conditions either contrary to or not authorized by the purchase agreement.

It necessarily follows that plaintiffs are not entitled to a decree of specific performance and that the trial court erred in rendering such a decree.

The judgment of the trial court is accordingly reversed and the cause remanded with directions to deny the prayer for specific performance and to render a decree quieting defendant's title against the recorded instruments having to do with the contract here involved.

All costs are to be taxed to the plaintiffs down to the time of the entry of such a decree.

This determination forecloses any necessity of determining the cross-appeal.

REVERSED AND REMANDED WITH DIRECTIONS.

CHARLEY W. PETERSON, APPELLEE, V. J. ED HANCOCK ET AL., APPELLANTS.
90 N. W. 2d 298

Filed May 16, 1958. No. 34342.

Taxation. Section 77-1211, R. S. Supp., 1957, has no application to the listing and assessing of motor vehicles and is not in conflict with section 77-1240.01, R. S. Supp., 1957.

APPEAL from the district court for Holt County: DAYTON R. MOUNTS, JUDGE. *Reversed and remanded with directions.*

Clarence S. Beck, Attorney General, *Homer G. Hamilton*, and *William W. Griffin*, for appellants.

Francis D. Lee, for appellee.

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

SIMMONS, C. J.

This is an action for a declaratory judgment to determine the constitutionality of what is now section 77-1240.01, R. S. Supp., 1957, and to secure an order to refund a motor vehicle tax alleged to be erroneously and wrongfully collected.

The defendants are the county treasurer and the county assessor of Holt County and the Director of the Department of Roads and Irrigation for the State of Nebraska.

The action was determined upon a general demurrer that the facts stated were insufficient to constitute a cause of action. The demurrer was overruled. The defendants refused to plead further. The trial court rendered a decree holding the section to be unconstitutional and ordered a refund of the motor vehicle tax.

Defendants appeal.

We reverse the judgment of the trial court and remand the cause with directions.

The petition of plaintiff alleges that on July 28, 1955,

he purchased an automobile; on August 4, 1955, he applied to the county treasurer for a license; and that a license was not issued because he refused to pay the motor vehicle tax imposed by section 77-1240.01, R. S. Supp., 1953, in the sum of $19.14.

Plaintiff further alleges that he was assessed in Nebraska and South Dakota for the year 1955 on all personal property owned by him and that the automobile above referred to came into his ownership in exchange for personal property listed and assessed for taxation during the year 1955.

He alleged the unconstitutionality of section 77-1240.01, R. S. Supp., 1953, for three reasons. (1) The act of which this section was a part was enacted on June 11, 1953, was amendatory in nature, repealed certain sections, and did not amend or repeal section 77-1211, R. R. S. 1943. Although not so pleaded, plaintiff here refers to L.B. 165, Laws 1953, c. 268, p. 881. (2) Section 1 of L.B. 165 amends section 60-303, R. R. S. 1943, and section 7 thereof (now section 77-1240.01, R. S. Supp., 1957) imposes a motor vehicle tax in lieu of ad valorem taxes and is in direct conflict with section 77-1211, R. R. S. 1943, in that the latter section makes no distinction between motor vehicles and other types of personal property. (3) That the statute is unconstitutional for the further reason that for the year 1955 compliance therewith resulted in double taxation and was in violation of Article I, section 3, of the Constitution of Nebraska and section 1 of the Fourteenth Amendment to the Constitution of the United States.

The trial court obviously overruled the demurrer on its finding of a conflict between section 77-1240.01, R. S. Supp., 1957, and section 77-1211, R. R. S. 1943.

Here defendants argue that L.B. 165, Laws 1953, c. 268, p. 881, is an act complete in itself and that as such it may repeal, amend, or modify existing statutes without complying with constitutional provisions relating to repeal and amendment of statutes; that section 77-1211,

R. R. S. 1943, is a general statute in conflict with a special statute (L.B. 165) and the special statute prevails; that where there is a conflict between statutes the last enactment in point of time prevails; that a requirement for the payment of taxes as a condition for the registration of a motor vehicle does not result in a denial of due process or equal protection of the law; and that double taxation has not resulted here.

Plaintiff here rests his cause on the argument that L.B. 165 was an amendatory act, not a new and independent act, and hence is unconstitutional. This relates itself to the title of the act, and although not so stated, to the constitutional requirement: "No bill shall contain more than one subject, and the same shall be clearly expressed in the title. And no law shall be amended unless the new act contain the section or sections as amended and the section or sections so amended shall be repealed." Art. III, § 14, Constitution of Nebraska.

The title of L.B. 165, Laws 1953, c. 268, p. 881, is: "An Act to amend * * * (6 sections of the statutes), relating to revenue and taxation; * * * to repeal the original sections and also section 77-1243, Reissue Revised Statutes of Nebraska, 1943; * * *." But it does not stop there. It recites further that it is "An Act * * * to provide for a motor vehicle tax and the manner of assessing motor vehicles and fixing the valuation thereof; to provide when the tax shall be paid; to define terms; to provide credits on the tax; * * *."

The act in addition to its amending and repealing sections enacts some 14 sections under the purposes expressed in the remainder of the title. There is no contention here that more than one subject is contained in the bill and that the same is not clearly expressed in the title.

The authority for the act rests upon the amendment of Article VIII, section 1, of the Constitution of Nebraska, adopted in 1952, relating to revenue by taxation

which provides: "Taxes shall be levied by valuation uniformly and proportionately upon all tangible property and franchises, *except that the Legislature may provide for a different method of taxing motor vehicles;* * * *." (The new matter is italicized by us.)

It is quite apparent that the crucial point in this case as pleaded by the plaintiff is the fact that L.B. 165 does not purport to amend or repeal section 77-1211, R. R. S. 1943; and the alleged conflict between its provisions and the provisions of section 77-1211, R. R. S. 1943, which are: "When any person shall bring personal property into the state or from one county thereof to another county after March 10 and prior to July 1 in any year, it shall be the duty of the owner to list and return such property for taxation that year, unless he shall show to the county assessor or to the county clerk where he is ex officio county assessor, under oath and by producing a copy of the assessment duly certified to by the proper officer of the state or county in which said property was assessed, that the property has been listed for taxation for that year in some other county in this state, or in some other state or territory of the United States, or that such property has been received by him in exchange for money or property already listed for taxation during that year. If such property is brought into any county, after the assessor has made his return for that year to the State Tax Commissioner, the assessor shall at once assess such property and shall enter the same on the tax books as in other cases. The persons so assessed shall have the right to appear before the county assessor at any time before the taxes become due, and the county assessor shall equalize such person's assessment."

We do not determine whether plaintiff's allegations are sufficient to invoke the provisions of section 77-1211, R. R. S. 1943.

The clear answer to the plaintiff's contention as a matter of law is that section 77-1211, R. R. S. 1943, is

not applicable to motor vehicles and there is no conflict between it and section 77-1240.01, R. S. Supp., 1957.

In 1935 the Legislature amended section 77-1401, Comp. St., 1929, so as to read: "Personal property, *except motor vehicles,* shall be listed in the manner following: * * *." (New language italicized by us.) Laws 1935, c. 133, § 1, p. 479. That language has remained in the law and is now a part of section 77-1201, R. S. Supp., 1957. Section 77-1201, R. S. Supp., 1957, was originally enacted as section 28 of Laws 1903, c. 73, p. 394. Section 77-1211, R. R. S. 1943, was originally enacted as section 37 of that same 1903 act.

The Legislature in the 1935 act further provided: "The term 'motor vehicle', as used in this Act, shall be construed to mean and include every motor vehicle and trailer subject to the payment of registration fees under the laws of this state." Laws 1935, c. 133, § 2, p. 480. L.B. 165 (Laws 1953, c. 268, § 2, p. 882, section 77-1238, R. S. Supp., 1957) provided in part: "(1) Motor vehicle shall mean every motor vehicle and trailer subject to the payment of registration fees or ad valorem taxes under the laws of this state; * * *." It follows that the Legislature in 1935 enacted legislation for the taxation of motor vehicles. It is manifest that the only reason for amending section 77-1401, Comp. St. 1929, was to remove motor vehicles from the provisions of the act as to the listing of personal property generally.

The legislative intent that section 77-1211, R. R. S. 1943, does not apply to motor vehicles is further shown by the fact that the Legislature in L.B. 165 repealed section 77-1243, R. R. S. 1943. That section provided: "The county treasurer shall, on March 10, and on the first of each month thereafter, up to and including July 1 of each year, furnish the county assessor or county clerk where he is ex officio county assessor a list of all motor vehicles registered by his office for the current year; *Provided, that any motor vehicle placed on the tax roll after March 10 of any year shall be placed thereon*

in accordance with the provisions of section 77-1211. Such list shall give the name and address of the owner, township, road district and school district, name of the manufacturer, motor number, model, type, color of the car, kind of wheels, number of cylinders, seating capacity, weight and carrying capacity, and if a truck, the year, model or letter denoted by the manufacturer, if any." (Emphasis supplied.)

The obvious purpose of the repeal of this section was to remove any applicability of section 77-1211, R. R. S. 1943, to motor vehicles.

The judgment of the trial court is accordingly reversed and the cause remanded with directions to render a declaratory judgment holding that section 77-1211, R. S. Supp., 1957, has no application to the listing and assessing of motor vehicles, and to deny the plaintiff the relief prayed for against the defendant county treasurer for a refund of the tax.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLANT, V. OLIVER A. POCRAS, DOING BUSINESS AS LINCOLN NEWS AGENCY, APPELLEE.
90 N. W. 2d 263

Filed May 16, 1958. No. 34344.

1. **Obscenity: Municipal Corporations.** A city has jurisdiction under its police power to protect its citizens against obscenity in its various forms.
2. **Obscenity: Constitutional Law.** Such enactments cannot, however, transgress the boundaries fixed by the Constitution, and they should not go beyond what is reasonably necessary to effect their objective.
3. **Criminal Law.** A crime must be defined with sufficient definiteness and there must be ascertainable standards of guilt to inform those subject thereto as to what conduct will render them liable to punishment thereunder.
4. **Municipal Corporations.** Where a city declares an offense in words of no determinate signification, or its language is so general and indefinite that it may embrace not only acts commonly

recognized as reprehensible but also others which it is unreasonable to presume were intended to be made criminal, the enactment will be declared void for uncertainty.

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

Ralph D. Nelson, Norma VerMaas, and *Thomas J. Gorham,* for appellant.

Wagener, Marx & Galter, 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 Lancaster County. It involves a charge originally brought in the name of the State of Nebraska against Oliver A. Pocras, doing business as the Lincoln News Agency, in the municipal court of the city of Lincoln. The charge, insofar as here material, is as follows: "* * * that * * * Defendant * * * on or about the 3rd day of October, A.D. 1956, * * * did unlawfully cause to be offered for sale and dispose of obscene, lewd and indecent publications contrary to the ordinance in that behalf provided, * * *."

The ordinance therein referred to is section 21-213 of the Lincoln Municipal Code of 1936 which provides, insofar as here material, that: "It shall be unlawful for any person or persons within the limits of said city * * * to sell or offer for sale, or dispose of in any manner, any obscene, lewd, or indecent book, picture, or other publication or thing."

In the municipal court the defendant entered a plea of "not guilty." However, that court found him "guilty as charged." From that conviction defendant appealed to the district court. In the district court defendant filed a motion to dismiss the complaint filed against him contending the ordinance, under which he was being complained against, to be unconstitutional, and there-

fore invalid, for several reasons. The trial court sustained this motion and dismissed the complaint. The State's motion for new trial having been overruled the city of Lincoln, in the name of the State of Nebraska, took this appeal therefrom. We shall herein refer to the appellee as the defendant. The question presented by the appeal is whether or not that part of the ordinance hereinbefore set forth is, for any of the reasons set forth by the defendant, unconstitutional.

The ordinance was passed by the city of Lincoln in the exercise of its police power. As stated in 67 C. J. S., Obscenity, § 4, p. 23: "The state (here city) has jurisdiction under its police power to protect its citizens against obscenity in its various forms, * * *. Such enactments cannot, however, transgress the boundaries fixed by the constitution, and they should not go beyond what is reasonably necessary to effect their objective." And, as stated in Annotation, 1 L. Ed. 2d, § 2(a), p. 2211: "It is established beyond doubt that no constitutional defect is inherent in federal or state regulation of obscene literature—that is, that such regulations are not ipso facto unconstitutional." See, also, Near v. Minnesota ex rel. Olson, 283 U. S. 697, 75 L. Ed. 1357, 51 S. Ct. 625; Winters v. New York, 333 U. S. 507, 92 L. Ed. 840, 68 S. Ct. 665; Roth v. United States, 354 U. S. 476, 1 L. Ed. 2d 1498, 77 S. Ct. 1304. As stated in Near v. Minnesota ex rel. Olson, *supra:* "Liberty of speech, and of the press, is also not an absolute right, and the State may punish its abuse. * * * the primary requirements of decency may be enforced against obscene publications." And, as held in Roth v. United States, *supra:* "But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. * * * We hold that obscenity is not within the area of constitutionally protected speech or press." See, also, First Amendment, Constitution of the United States; Article I, section 5, Constitution of Nebraska.

However, both state and federal Constitutions provide that no person shall be deprived of his life, liberty, or property without due process of law. See, Fifth Amendment, Constitution of the United States; Fourteenth Amendment, section 1, Constitution of the United States; Article I, section 3, Constitution of Nebraska.

In this regard it was said in Connally v. General Construction Co., 269 U. S. 385, 70 L. Ed. 322, 46 S. Ct. 126: "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."

And in Winters v. New York, *supra,* the court held that: "It is settled that a statute so vague and indefinite, in form and as interpreted, as to permit within the scope of its language the punishment of incidents fairly within the protection of the guarantee of free speech is void, on its face, as contrary to the Fourteenth Amendment."

Likewise, as stated in State v. Becker, 364 Mo. 1079, 272 S. W. 2d 283: "It may be conceded that a crime must be defined with sufficient definiteness and there be ascertainable standards of guilt to inform those subject thereto as to what conduct will render them liable to punishment thereunder."

The above principles are applicable to ordinances exercising police power and the question arises, is the language of the ordinance so vague and indefinite in this respect that it violates these principles? The language of the ordinance above referred to is as follows: "* * * any obscene, lewd, or indecent book, picture, or other publication or thing."

It was said in Connally v. General Construction Co., *supra:* "* * * the decisions of the court upholding statutes as sufficiently certain, rested upon the conclusion that they employed words or phrases having a technical or other special meaning, well enough known to enable those within their reach to correctly apply them, * * *." See, also, Winters v. New York, *supra;* Roth v. United States, *supra;* People v. Friedrich, 385 Ill. 175, 52 N. E. 2d 120; State v. Becker, *supra.* As stated in State v. Becker, *supra:* "The words of the statute 'obscene, lewd, licentious, indecent, lascivious, immoral, scandalous' are used therein as descriptive of the character of the publication prohibited to be possessed with intent to sell or circulate, are all synonymous and of similar meaning. Those descriptive words are neither vague nor indefinite. They are words of common usage and understanding, and as used in this statute, and in law, they have a meaning understood by all. Those words set out within this statute a clear and ascertainable standard of guilt which is readily to be comprehended." We find the language of the ordinance above quoted meets the constitutional requirements of due process of law.

There is a like question raised as to the following language of the ordinance, to wit: "* * * to sell or offer for sale, or dispose of in any manner, * * *." The ordinance must necessarily be tested by its operation and effect. Near v. Minnesota ex rel. Olson, *supra.* In doing so the following principles are applicable:

"Where the statute uses words of no determinative meaning, or the language is so general and indefinite as to embrace not only acts commonly recognized as reprehensible, but also others which it is unreasonable to presume were intended to be made criminal, it will be declared void for uncertainty." State v. Diamond, 27 N. M. 477, 202 P. 988, 20 A. L. R. 1527, and also quoted in Winters v. New York, *supra.* See, also,

State ex rel. English v. Ruback, 135 Neb. 335, 281 N. W. 607.

"Where a statute is so vague as to make criminal an innocent act, a conviction under it cannot be sustained." Winters v. New York, *supra.*

In State ex rel. English v. Ruback, *supra,* we quoted from Fairmont Creamery Co. v. Minnesota, 274 U. S. 1, 71 L. Ed. 893, 47 S. Ct. 506, 52 A. L. R. 163, with approval the following: "It is not permissible to enact a law which, in effect, spreads an all-inclusive net for the feet of everybody upon the chance that, while the innocent will surely be entangled in its meshes, some wrongdoers also may be caught." And therein we went on to quote from 16 C. J., Criminal Law, § 28, p. 68, the following: "* * * where the legislature declares an offense in words of no determinate signification, or its language is so general and indefinite that it may embrace not only acts commonly recognized as reprehensible but also others which it is unreasonable to presume were intended to be made criminal, the statute will be declared void for uncertainty."

The ordinance provides, insofar as here material to the foregoing principles, that: "It shall be unlawful for any person * * * to * * * dispose of in any manner, any obscene, lewd, or indecent book, picture, or other publication or thing." Let us presume that someone sent a publication of the above character to a citizen of Lincoln. Under the above ordinance it would be a violation thereof for such citizen to either burn it, throw it in the trash container, or dispose of it in any manner, even by giving it to the police. Certainly such is far in excess of any reasonable exercise by the city of its police power and void for uncertainty. Under it a citizen wholly innocent of any wrongdoing could be charged and convicted. Such would violate due process of law as guaranteed to the citizen by both state and federal Constitutions.

It follows from what has been said that the portion

of the ordinance last referred to and discussed is invalid and of no effect and consequently the charge made against the defendant, based thereon, is without force and effect. State ex rel. English v. Ruback, *supra*. In view thereof the district court was correct in dismissing the complaint and we affirm its judgment doing so.

AFFIRMED.

CHAPPELL, J., dissenting.

I respectfully dissent. As far as important here, the city ordinance involved provides: "It shall be unlawful for any person * * * *to sell or offer for sale, or dispose of in any manner,* any obscene, lewd, or indecent book, picture, or other publication or thing." (Italics supplied.)

As I view it, the words "dispose of in any manner" should be read in context with the words "to sell or offer for sale." In doing so, the principle contained in the legal doctrines of "ejusdem generis" and "noscitur a sociis" gives the language a meaning which includes all related dispositions to another of "any obscene, lewd, or indecent" property which may be made consistent with the intent and purpose of the ordinance to prohibit the selling or offering for sale.

To "dispose of" in a popular sense as used in reference to property means to part with a right to or possession or ownership of it to another. If that does not take place, it could hardly be said that the property was disposed of when as here "dispose of in any manner" which, as general language, follows and is associated with "sell or offer for sale," words of like kind or character. When used in that context, "dispose of in any manner" was intended to include all those cases where persons by some artifice, indirection, or design, have attempted to cover up or circumvent a sale or offer for sale of "obscene, lewd, or indecent book, picture, or other publication or thing" and thus evade the penalty of the law.

Viewed in such light, I am unable to comprehend

that a citizen wholly innocent of any wrongdoing could be charged and convicted under the ordinance.

Authorities supporting the foregoing conclusions are too numerous to repeat here. They are cited in Words and Phrases (Perm. Ed.), Vol. 12 A, pp. 497, 500, 501, 505, and 507; and Words and Phrases (Perm. Ed.), Vol. 38, pp. 567, 568, and 569. See, also, 82 C. J. S., Statutes, § 331, p. 654, and § 332, p. 656, with authorities cited. In such last-cited section at page 660, dealing with the doctrine of "ejusdem generis" it is said: "It has been held especially applicable to penal or criminal statutes, and statutes which partake of the nature of criminal process.

"This rule or maxim is an illustration or specific application of the broader maxim noscitur a sociis, which is discussed supra § 331. * * *

"The rule finds application and has frequently been applied where such terms as 'other,' 'any other,' 'others,' 'or otherwise,' or 'other thing' follow an enumeration of particular classes, and where this occurs such words are to be read as 'other such like,' and are construed to include only others of like kind or character."

As I view it, the district court erroneously dismissed the complaint and the judgment doing so should have been reversed.

I am authorized to say that Simmons, C. J., concurs in this dissent.

IN RE APPLICATION OF RALPH NEUDECK FOR A WRIT OF HABEAS CORPUS.

RALPH NEUDECK, APPELLEE, V. WALTER G. BUETTOW, SHERIFF OF MADISON COUNTY, NEBRASKA, APPELLANT.

90 N. W. 2d 254

Filed May 16, 1958. No. 34381.

1. **New Trial.** The time for filing a motion for new trial begins

to run from the time the decision is rendered. With certain exceptions, such requirement is mandatory.

2. ———. A motion for a new trial which is not filed within the time specified by statute is a nullity and of no force and effect.
3. **Habeas Corpus.** Habeas corpus, under statutes like our own, is a special proceeding, civil in character, providing a summary remedy open to persons illegally detained.
4. ———. The sufficiency of evidence adduced at a preliminary hearing to hold an accused to answer for a crime with which he is charged may be raised and tried in habeas corpus proceedings.
5. ———. In a habeas corpus proceeding instituted for the purpose of testing the sufficiency of evidence taken at a preliminary examination to require a person to be tried on a criminal charge, the court will not weigh the evidence but will only inquire as to the existence of evidence to sustain the charge.
6. ———. Where the testimony shows that an offense has been committed and there is testimony tending to show that the accused committed the offense, the court, on a writ of habeas corpus, will not discharge him.
7. **Criminal Law.** Evidence that would justify a committing magistrate in finding that probable cause existed for the detention of a defendant need not necessarily be sufficient to sustain a verdict of guilty when he is placed on trial.
8. **Statutes.** It is not within the province of this court to deal with the policy of the law, nor to attempt to extend it, even though an extension should be considered desirable; but its duty is to go so far only as to interpret the law as it stands, and determine what the Legislature, at the time of the enactment, intended by it.
9. **Licenses.** In the absence of a statute specifically so providing the performance of a single act, or even a number of isolated acts, pertaining to a particular business or occupation does not constitute engaging in, or carrying on, such business or occupation within the meaning of a law imposing a license or tax thereon unless an intent to engage in the business is clearly apparent, although where a statute so intends a single transaction may constitute the carrying on of the business or occupation licensed or taxed.

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

Clarence S. Beck, Attorney General, *Leslie Boslaugh*, and *Eugene C. McFadden*, for appellant.

Daniel D. Jewell, for appellee.

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

WENKE, J.

This is an appeal from the district court for Madison County. It involves a habeas corpus action brought by Ralph Neudeck as relator against Walter G. Buettow, sheriff of Madison County, as respondent. Its purpose is to obtain the discharge of relator from the custody of the respondent on the ground that he is being unlawfully deprived of his liberty. The trial court ordered his discharge. Respondent appealed from that decision on November 27, 1957. We shall herein refer to the parties as the relator and respondent.

The respondent also endeavored to appeal from the order overruling his motion for a new trial. See § 25-1912, R. R. S. 1943. This, however, contemplates that an application for a new trial has been made in accordance with the provisions of section 25-1143, R. R. S. 1943. The transcript shows a hearing was had on relator's application on October 4, 1957. At the conclusion of this hearing the trial court "took said cause under advisement until the 30th day of October, 1957." Thereafter, on October 30, 1957, the court rendered its decision discharging the relator. However, in the meantime, on October 28, 1957, the respondent filed a motion for new trial which the trial court purported to overrule on November 15, 1957.

The time for filing a motion for new trial begins to run from the time the decision is rendered. With certain exceptions not here controlling such requirement is mandatory. See, Molczyk v. Molczyk, 154 Neb. 163, 47 N. W. 2d 405; Frenchman-Cambridge Irr. Dist. v. Ferguson, 154 Neb. 20, 46 N. W. 2d 692; Klause v. Nebraska State Board of Agriculture, 150 Neb. 466, 35 N. W. 2d 104; § 25-1143, R. R. S. 1943. As stated in Frenchman-Cambridge Irr. Dist. v. Ferguson, *supra*:

"A motion for a new trial which is not filed within the time specified by statute is a nullity and of no force and effect." That is the situation here.

"Habeas corpus, under statutes like our own, is a special proceeding, civil in character providing a summary remedy open to persons illegally detained." Tail v. Olson, 144 Neb. 820, 14 N. W. 2d 840. See, also, Selicow v. Dunn, 100 Neb. 615, 160 N. W. 991. Section 29-2823, R. R. S. 1943, provides the appeal in habeas corpus proceedings shall be the same as in civil cases. See, Selicow v. Dunn, *supra;* Tail v. Olson, *supra.*

However, the appeal being within 1 month from the decision rendered October 30, 1957, it is here for our consideration. See § 25-1912, R. R. S. 1943. Since respondent failed to file a valid motion for new trial errors of law occurring at the trial may not be considered by this court. See, Oertle v. Oertle, 146 Neb. 746, 21 N. W. 2d 447; Gillard v. Clark, 105 Neb. 84, 179 N. W. 396. As stated in Gillard v. Clark, *supra:* "We are therefore not at liberty to review any of the questions which were required to be presented to the district court by motion for a new trial. Tait v. Reid, 91 Neb. 235." As stated in Krepcik v. Interstate Transit Lines, 151 Neb. 663, 38 N. W. 2d 533: "The right of the Legislature to authorize an appeal within a time limited from the rendition of the judgment and a trial in this court de novo upon the entire record made, including the evidence taken in the district court, without the filing of a motion for a new trial, has been sustained and the procedure enforced." See, also, Birdsley v. Kelley, 159 Neb. 74, 65 N. W. 2d 328.

In view of the foregoing the following from Birdsley v. Kelley, *supra,* is here applicable: "In the light of these rules the district court examined the evidence adduced at the preliminary hearing and came to the conclusion and adjudicated that this evidence was insufficient upon which to hold appellee to the district court for trial. It is from this conclusion and adjudica-

tion that the appeal herein is taken. This requires an examination and review of the evidence."

Relator was charged in two counts with violation of the Nebraska "Blue-Sky Law." The county court of Madison County, wherein the charges were filed, bound the relator over to the district court for Madison County to stand trial on each of the two charges made against him. Section 29-506, R. R. S. 1943, provides, insofar as here material, that: "If upon the whole examination * * * it shall appear that an offense has been committed and there is probable cause to believe that the person charged has committed the offense, the accused shall be committed to the jail of the county in which the same is to be tried, there to remain until he is discharged by due course of law * * *." The purpose of this action is to test the sufficiency of the evidence adduced at the preliminary hearing conducted in the county court of Madison County pursuant to which relator was held for trial in the district court.

"The sufficiency of evidence adduced at a preliminary hearing to hold an accused to answer for a crime with which he is charged may be raised and tried in habeas corpus proceedings." State ex rel. Pribyl v. Frank, 165 Neb. 239, 85 N. W. 2d 328. See, also, Hoffman v. State, 164 Neb. 679, 83 N. W. 2d 357; Cotner v. Solomon, 163 Neb. 619, 80 N. W. 2d 587; Birdsley v. Kelley, *supra*.

"In a habeas corpus proceeding instituted for the purpose of testing the sufficiency of evidence taken at a preliminary examination to require a person to be tried on a criminal charge, the court will not weigh the evidence but will only inquire as to the existence of evidence to sustain the charge." Cotner v. Solomon, *supra*. See, also, Birdsley v. Kelley, *supra*.

"Where the testimony shows that an offense has been committed and there is testimony tending to show that the accused committed the offense, the court, on a writ of habeas corpus, will not discharge him." State ex

rel. Flippin v. Sievers, 102 Neb. 611, 168 N. W. 99. See, also, Cotner v. Solomon, *supra*.

"Evidence that would justify a committing magistrate in finding that probable cause existed for the detention of a defendant need not necessarily be sufficient to sustain a verdict of guilty when he is placed on trial; * * *." Rhea v. State, 61 Neb. 15, 84 N. W. 414. The court therein went on to say: "It is further urged, however, that the evidence discloses that for his compensation Rhea was to receive a certain per cent of the money so collected by him; that he was, therefore, a part owner of the property and could not be guilty of embezzlement of that which belonged to him. Whether the point would be a good defense upon the trial we will not stop to inquire. Sufficient to say that there was evidence enough to make out a case of probable cause."

Count I charged that relator did: "Willfully and feloniously offer for sale and sell to Walter Ries a certain security to-wit: A preorganization subscription in a corporation to be known as Brucenite Corporation, when the said security was not authorized for sale or exchange by the Department of Banking of the State of Nebraska."

The evidence adduced at the preliminary hearing shows that on March 12, 1956, in Norfolk, Madison County, Nebraska, relator, and others, sold to Walter Ries, a rancher and farmer of Atkinson, Nebraska, 20,000 shares of capital stock in the Brucenite Corporation for the sum of $1,000, which corporation was to be incorporated in the near future, without having first obtained authority from the Department of Banking of the State of Nebraska to sell such securities. See §§ 81-315 and 81-318, R. R. S. 1943.

Section 81-314, R. R. S. 1943, provides: "No person or persons shall issue, sell, exchange, offer to sell or exchange, or solicit or promote the offer, sale or exchange, within the State of Nebraska, of any security or securities or interest therein, unless and until said

security, securities or interest therein, are specifically exempt pursuant to the provisions of section 81-312 from the provisions of sections 81-302 to 81-346, or unless the security, securities or interest therein, at the time of the issue, sale, exchange or offer, solicitation or promotion of the issuance, sale or exchange, then are authorized for sale or exchange by the Department of Banking, and unless the person or persons selling, exchanging or offering to sell or exchange, or soliciting or promoting the sale or exchange of such security, securities or interest therein, by the terms or provisions of said sections are then lawfully privileged to do so."

And section 81-333, R. R. S. 1943, provides, insofar as here material, that: "Any person who, either or both as issuer, principal, salesman, agent, broker, underwriter, officer, director or individual, shall issue, sell, assign, transfer or exchange any security or securities, or offer to or negotiate for the issuance, sale, assignment, transfer or exchange of any security or securities, or interest therein, or by any means or through any medium, offer or attempt to take subscriptions for or promote the offering, issuance, sale, assignment, exchange or transfer of any securities, not specifically exempt from the provisions of said sections, within this state, without authority from the department as provided for in section 81-318, or who shall cause or participate therein, shall be guilty of a felony, and upon conviction thereof shall be punished by imprisonment in the penitentiary for not more than ten years."

With regard to the Blue-Sky Law we said in Nebraska State Railway Commission v. Alfalfa Butter Co., 104 Neb. 797, 178 N. W. 766: "The evident purpose of this enactment was to stop the sale of stock in companies organized for fraudulent stock exploitation. The frauds thus perpetrated seem to have been considered by the legislature to especially arise in the organization and sale of stock in new companies and promotion schemes, having no proper plan or bona fide intent of applying

the proceeds from the sale of such stock to the carrying on of any actual business, but for the purpose only of exploiting the public." And then went on to say: "As to corporations to be thereafter created in this state, the legislature evidently considered it necessary to prohibit the sale of stock unless the organization and plan of the enterprise to be carried on and the sale of stock should be under the supervision of and be approved by some agency of the state."

The intention of the Legislature, which must necessarily be here controlling, provides in section 81-318, R. R. S. 1943, insofar as here material, that: "If it appears to the Department of Banking that applicant has complied with all the requirements of law * * * and that the enterprise conducted or contemplated is not a mere scheme of a promoter or promoters to obtain money or property at the expense of the purchasers of the aforesaid securities * * * the department shall issue to the applicant such written order as the department in its discretion may deem necessary, essential and expedient in the existing case, authorizing for the period of one year, or for such lesser period of time subsequent to the date of entry of such order, the issuance or sale of securities described and requested in the application, and in such amount as the department may determine; otherwise, an order denying the application shall be entered; * * *." See, also, Nebraska State Railway Commission v. Alfalfa Butter Co., *supra*. As stated in Nebraska State Railway Commission v. Alfalfa Butter Co., *supra*: "It is not within the province of this court to deal with the policy of the law, nor to attempt to extend it, even though an extension should be considered desirable; but its duty is to go so far only as to interpret the law as it stands, and determine what the legislature, at the time of the enactment, intended by it."

But relator contends the factual situation presented by the evidence adduced at the preliminary hearing brings the situation within subsection (14) of section

81-312, R. R. S. 1943, and therefore specifically exempt from the provisions of section 81-333, R. R. S. 1943. In this respect section 81-312, R. R. S. 1943, provides: "Except as in sections 81-302 to 81-346 specifically provided, the provisions of said sections shall not apply to: * * * (14) Capital stock of a corporation being organized, wherein the stock is issued to and retained by the incorporators and not offered for sale to others; * * *."

Section 81-313, R. R. S. 1943, provides: "In any action, civil or criminal, where any person relies for his defense upon any of the exemptions provided for in section 81-312, the burden of proof to establish such exemption shall be upon such person." See Robbins v. State, 144 Neb. 43, 12 N. W. 2d 152. This burden of proof did not require relator to affirmatively claim the exemption. It was available to him under the plea of not guilty and in regard thereto he was entitled to the benefit of all the evidence adduced.

The evidence adduced at the preliminary hearing shows that relator was acquainted with Walter Ries; that relator talked to Ries by telephone on March 11, 1956, and wanted him to take some stock in a corporation they were organizing to operate a sand mine down in Oklahoma; that Ries came to Norfolk the following morning and there met with relator and others in a hotel room; that the sand mine and how the sand could be used was explained to Ries; that he was then informed a corporation, to bear the name of Brucenite Corporation, was being formed and that he could get in on the ground floor and get some of its capital stock as an investment; that he was to become one of its incorporators, although it is evident Ries did not know exactly what that meant; that Ries was informed that the capital stock was not to be offered for sale to anyone except incorporators; that Ries bought 20,000 shares of the capital stock for $1,000, which he intended to keep, and thus become one of the persons interested in forming the corporation; and that Ries was never asked to

nor did he sign any articles of incorporation. In fact, there is no evidence showing the corporate organization was ever completed, ever started, and no stock therein was ever issued to Ries or anyone else.

There are two additional statutory provisions that relate to the situation here presented. Section 81-304, R. R. S. 1943, insofar as here material, provides: "The words and phrases used in sections 81-302 to 81-346 shall, unless the context otherwise indicates, have the following meaning: (1) The term 'security' or 'securities' shall include each and all of the following: * * * (c) * * * a preorganization certificate or subscription * * *." And, as stated in section 21-107, R. R. S. 1943: "The articles of incorporation shall be signed by each of the incorporators * * *." We think these two provisions are here controlling and clearly indicate what the Legislature meant by the use of the word "incorporators" as found in subsection (14) of section 81-312, R. R. S. 1943. Since Ries is not shown to be an "incorporator" within the meaning of this statutory subsection we think the county court was correct in binding Neudeck over to the district court for trial on Count I.

We have read the cases and other authorities cited by relator giving a broader classification as to whom should be included as incorporators in relation to the organization of corporations. However, in view of what the Legislature has said in regard thereto we are necessarily bound by the latter, that is, to be an incorporator within the meaning of the statutes requires that such person must sign the articles of incorporation. If the classification fixed by the Legislature is too restrictive then relief therefrom must come from it but it cannot be had by judicial opinion. See 1 Fletcher, Cyclopedia Corporations (Perm. Ed.), c. 4, § 81, p. 278.

Count II charges that relator: "Did then and there unlawfully willfully and feloniously offer for sale and sell to Walter Ries a certain security to-wit: A preorganization subscription in a corporation to be known

as Brucenite Corporation, when he, the said Ralph Neudeck, was not lawfully privileged to sell such security under the statutes of the State of Nebraska."

The evidence adduced at the preliminary hearing shows that no permit was ever issued by the Department of Banking of the State of Nebraska to relator as a broker or salesman of securities.

Insofar as here material the Blue-Sky Law provides as follows:

"No broker shall, within the State of Nebraska, sell or exchange or offer for sale or exchange any securities, or by advertisement or otherwise profess to engage in the business of selling or exchanging or offering for sale or exchange securities, whether or not such securities may be exempted under section 81-312, until such broker shall have secured from the Department of Banking a permit to do business as broker." § 81-305, R. R. S. 1943.

"Such permit shall entitle each broker to sell, exchange, offer for sale or negotiate, in the State of Nebraska, such securities as are exempt under section 81-312, or the sale of which has been authorized by a permit or order from the Department of Banking; * * *." § 81-306, R. R. S. 1943.

"Any issuer or broker may appoint one or more salesmen to sell or solicit the sale or exchange of securities within this state, but no such salesman shall sell or solicit the sale or exchange of securities within this state unless and until he shall have secured from the Department of Banking a permit to do business as a salesman." § 81-309, R. R. S. 1943.

"Such permit shall entitle the salesmen to sell, offer for sale, exchange, offer for exchange, or negotiate in this state such securities as are exempt under section 81-312, or securities the sale of which at the time of sale has been, and then is, authorized for sale by permit from the Department of Banking; * * *." § 81-310, R. R. S. 1943.

"No person or persons shall issue, sell, exchange, offer to sell or exchange, or solicit or promote the offer, sale or exchange, within the State of Nebraska, of any security or securities or interest therein * * * unless the person or persons selling, exchanging or offering to sell or exchange, or soliciting or promoting the sale or exchange of such security, securities or interest therein, by the terms or provisions of said sections are then lawfully privileged to do so." § 81-314, R. R. S. 1943.

Section 81-338, R. R. S. 1943, which has application to the foregoing provides: "Any person, firm or corporation, their agents, employees or servants who shall violate any of the provisions of sections 81-302 to 81-337 for which penalties are not otherwise specifically provided, shall be deemed guilty of a felony, and upon conviction thereof shall be fined in any sum not more than one thousand dollars or shall be imprisoned in the penitentiary not more than ten years, or both."

Section 81-304, R. R. S. 1943, by subsections (5) and (6) thereof, defines a broker and salesman as follows:

"(5) The word 'broker' shall mean and include every person, corporate or real, other than an issuer or salesman, who in this state engages either for all or part of his time directly or through an agent or agents, salesman or salesmen, in the business of selling any securities issued by another person, or purchasing or otherwise acquiring such securities from another for the purpose of reselling them, exchanging them, or of offering them for sale or exchange to the public, or offering, buying, selling or exchanging, or otherwise dealing or trading in securities as principal or as agent for commission, earnings or at a profit, or who deals in futures or differences in market quotations or prices or values of any securities, or accepts margins on purchases or sales or pretended purchases or sales of such securities.

"(6) The word 'salesman' or 'salesmen' shall mean and include every person, other than the issuer or

broker, employed, appointed or authorized by any issuer or broker to sell or solicit the sale of securities, or the exchange of securities in any manner within this state, whether the contract of sale or exchange of such securities shall be consummated in this state or elsewhere."

Reading the foregoing provisions together, as we must since they all relate to the same subject matter, and relating them to the other sections of the Blue-Sky Law, it becomes evident that it was the intention and purpose of the Legislature to thereby, through the Department of Banking, regulate the business of dealing in securities, including both those requiring the authorization of the Department of Banking and those exempt from that requirement under the provisions of section 81-312, R. R. S. 1943, by licensing those engaging therein as brokers and salesmen regardless of whether or not they are operating on a full or part time basis. See, § 81-337, R. R. S. 1943; Guynn v. Shulters, 223 Miss. 232, 78 So. 2d 114, 50 A. L. R. 2d 1088. As stated in 53 C. J. S., Licenses, § 27, p. 556: "In the absence of a statute specifically so providing, the performance of a single act, or even a number of isolated acts, pertaining to a particular business or occupation does not constitute engaging in, or carrying on, such business or occupation within the meaning of a law imposing a license or tax thereon unless an intent to engage in the business is clearly apparent, although where a statute so intends a single transaction may constitute the carrying on of the business or occupation licensed or taxed."

The evidence adduced at the preliminary hearing fails to establish relator was engaged in or intended to engage in the business of offering for sale or selling securities to the public on either a full or part time basis within the meaning of the Blue-Sky Law applicable thereto since it only establishes that he participated in the one sale to Walter Ries which has hereto-

fore been referred to. In view thereof we find he should not have been bound over to the district court for trial on Count II and that the court was correct in discharging him therefrom.

It should, of course, be understood, as stated in Van Buren v. State, 65 Neb. 223, 91 N. W. 201, that: "A preliminary hearing, however, is in no sense a trial in which defendant's rights, in respect to their guilt or innocence, are adjudged, determined or prejudiced, whether a hearing results in the discharge of an accused person, or in holding him to appear at the district court to answer the accusation made against him." See, also, State ex rel. Flippin v. Sievers, *supra;* In re Application of Garst, 10 Neb. 78, 4 N. W. 511; Michaelson v. Beemer, 72 Neb. 761, 101 N. W. 1007. The same is true of a habeas corpus proceeding based thereon.

We therefore reverse the judgment of the trial court and direct it to return relator to the custody of respondent to stand trial in the district court for Madison County on Count I.

REVERSED AND REMANDED WITH DIRECTIONS.

CHICAGO & NORTH WESTERN RAILWAY COMPANY, A CORPORATION, APPELLANT, V. CITY OF SEWARD, NEBRASKA, A MUNICIPAL CORPORATION, APPELLEE.
90 N. W. 2d 282

Filed May 23, 1958. No. 34297.

SUPPLEMENTAL OPINION

APPEAL from the district court for Seward County: H. EMERSON KOKJER, JUDGE. On motion for rehearing. See *ante* p. 123, 88 N. W. 2d 175, for original opinion. *Motion for rehearing overruled.*

Neely, Otis & Neely, for appellant.

Paul H. Bek and *Ivan A. Blevens,* for appellee.

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

WENKE, J.

It is apparent, from reading appellant's motion for rehearing, that it fails to understand why we refused to allow its request for refund, made under and pursuant to section 77-1735, R. R. S. 1943, after holding, as we did, that the city of Seward should have assessed all, not half, of the cost of improving and paving the four "T" intersections in Improvement District No. 60 upon all of the taxable property of the city. In view of that fact we think a further statement of our reasons for doing so is desirable.

There are two basic principles which should be kept in mind in relation thereto:

First, special assessments on property in improvement districts of cities of the second class, which would include Improvement District No. 60, are made and levied on the basis of special benefits accruing thereto as a result of the improvement and not on the basis of the cost of the improvement made immediately in front of such property. See, §§ 17-509, 17-510, 17-511, 17-524, R. R. S. 1943, and authorities cited in the opinion.

Second, all property in such an improvement district which either abuts on or is adjacent to the improvement made is liable for benefits accruing thereto by reason of the improvement made unless it is properly exempted therefrom by the Legislature. See, §§ 17-509, 17-510, 17-511, 17-519, R. R. S. 1943. As stated in section 17-511, R. R. S. 1943: "* * * the governing body * * * shall levy assessments on the lots and parcels of land abutting on or adjacent to such street, streets, alley or alleys especially benefited thereby in such district in proportion to such benefits, to pay the cost of such improvement." Here all of the property of appellant, including that on top or to the west of the four "T" intersections, was within Improvement District

No. 60 and either abutted on or was adjacent to Tenth Street, which was the street improved, and none of it was exempted by the Legislature from being taxed for special benefits accruing thereto by reason of the improvement made.

After that part of Tenth Street, which was within Improvement District No. 60, had been improved appellee determined that the property of appellant within the district, all of which either abutted on or was adjacent to that part of Tenth Street which had been improved, was specially benefited thereby to the extent of $8,692.35. It thereupon proceeded to levy special assessments against appellant's property in that amount. It did this by levying special assessments thereon at the rate of $7.645 per lineal front foot on each of appellant's 1,137 feet abutting on Tenth Street, which included the 80 feet fronting on top of each of the four "T" intersections. It is the special assessments levied on each of these four 80-foot tracts, or a total of $2,446.40, which appellant herein seeks to have refunded. Since these tracts abut on and are adjacent to that part of Tenth Street which was improved there is no basis for a refund thereof as appellee had authority to determine the extent of the benefits that accrued thereto by reason of the improvements made and to levy a special assessment therefor.

What did happen is that appellee improperly included in the total costs of the improvements made, which could properly be charged in the form of special benefits to all the real estate in the district chargeable therewith, the cost of the west half of each of these four "T" intersections. The requirement of the statute that the cost of paving intersections be paid by the city is an exclusion of the cost of improving the intersection as a charge against the property in the paving district, and not an exclusion of any abutting property from the assessment of benefits. Consequently the owners of all of the property in the district which was taxed for spe-

cial benefits accruing thereto had cause for complaint, for the benefits accruing thereto must be proportionately fixed to pay the cost of such improvement properly chargeable thereto. But that was not the basis upon which the claim was made and not one which the pleadings and evidence will support.

With this additional explanation we overrule appellant's motion for rehearing.

MOTION FOR REHEARING OVERRULED.

IN RE APPLICATION OF BASIN TRUCK COMPANY, A CORPORATION.

BASIN TRUCK COMPANY, APPELLEE, V. R. B. "DICK" WILSON, INC. OF NEBRASKA, ET AL., APPELLANTS.

90 N. W. 2d 268

Filed May 23, 1958. No. 34346.

1. **Public Service Commissions: Appeal and Error.** On an appeal to the Supreme Court from an order of the Nebraska State Railway Commission granting a certificate of public convenience and necessity, the only questions to be determined are whether or not the commission acted within the scope of its authority, and whether or not the order complained of is reasonable and not arbitrarily made.
2. **Public Service Commissions: Motor Carriers.** In determining the issue of public convenience and necessity, controlling questions are whether or not the proposed operation will serve a useful purpose responsive to a present or future public need, whether or not this purpose can or will be served as well by existing common carriers, and whether or not it can be provided by the applicant in the manner specified without endangering or impairing the operations of existing common carriers contrary to the public interest.
3. ———: ———. It is not the purpose of commission control to establish an unbridled monopoly by the elimination of fair competition, nor is it intended to create unfair or destructive competition resulting in inadequate service to the public.
4. ———: ———. The issue as to public convenience and necessity is ordinarily one of fact, and where there is evidence to sus-

tain the finding of the commission, even if there be evidence in conflict therewith, this court cannot say that such finding is unreasonable and arbitrary.

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

Viren, Emmert, Hilmes & Gunderson and *Robert S. Stauffer,* for appellants.

Nelson & Harding, for appellee.

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

CARTER, J.

The Basin Truck Company filed its application with the Nebraska State Railway Commission on April 2, 1957, to obtain a certificate of public convenience and necessity authorizing it to transport crude oil and sand-frac oil in bulk in tank trucks between points and places in Nebraska. Formal protests were filed by three common carriers of these products, two of whom, Earl Houk and R. B. "Dick" Wilson, Inc. of Nebraska, are the appellants on this appeal. The commission granted the application on June 4, 1957, and overruled appellants' motions for a rehearing on September 23, 1957. This appeal was taken from the orders thus entered.

The Basin Truck Company, at the time its application was made, was operating in Colorado. It held a certificate to operate intrastate in Colorado and a certificate to operate interstate from the Interstate Commerce Commission. That it has the equipment, facilities, and necessary finances to render the proposed service of transporting crude oil and sand-frac oil in Nebraska is established by the record. The basic issue is whether or not the present and future public convenience and necessity require the service proposed by the Basin Truck Company and, as a corollary thereto, whether or not the order of the commission granting the application

was arbitrary and unreasonable under the evidence adduced at the hearing before the commission.

The certificate granted to Basin Truck Company authorized it to transport crude oil and sand-frac oil between points in Nebraska. The transportation of crude oil consists of hauling crude oil from producing wells to storage tanks at pipeline stations. The applicant produced several large purchasers of crude oil, each of whom was charged with the responsibility of moving from 1,300 to 7,500 barrels of crude oil per day to pipeline stations. Their evidence was to the effect that it was necessary to have two or more carriers available to move crude oil from wells to pipeline stations. It was pointed out that storage capacity at wells was limited and that a failure to promptly remove the crude oil purchased would cause a shut-down of pumping operations and a resulting loss to sellers of oil at the wells. It was further pointed out that bad roads and weather conditions were contributing factors in determining the number of carriers and the quantity and quality of equipment required to provide the necessary service.

The evidence further shows that the hauling of crude oil from the oil wells to pipeline stations was determined to be intrastate and not interstate commerce shortly before the instant application was filed. This had the effect of making the transportation of crude oil available to intrastate rather than interstate carriers as theretofore. The record shows also that the certificate of W. W. Beckley, a hauler of crude oil in the area, was recently revoked. This increased the volume of crude oil transportation available to other intrastate carriers. An additional fact properly to be considered by the commission is the expansion and development of oil fields in western Nebraska.

The evidence shows that Basin Truck Company is equipped to handle sand-frac oil. This operation is described as the hauling of crude oil, refined oil, or other oil products used under high pressure as a hydraulic

fluid to fracture underground formations to stimulate the oil flow into the wells. The number of wells requiring fracturing operations is on the increase due to more wells being drilled and the falling off of production in the older ones. It is estimated that there were 20 sand-fracing jobs per month in this area during the 6-months period prior to the hearing before the commission. The representative of the company performing this work testified that prompt deliveries of sand-frac oil are required in the prosecution of this type of work. It requires special equipment for the hauling of oil for this purpose. Refined sand-frac oil is available only at Scottsbluff in Nebraska and the evidence is that trucks have not always been available at that point to transport this commodity as needed. At times sand-frac oil has been hauled from without the state by interstate carriers to afford the needed service. The evidence further shows that the number of intrastate carriers engaged in hauling sand-frac oil is very limited and that a definite need exists for intrastate haulers of this commodity.

The evidence of the appellant, R. B. "Dick" Wilson, Inc. of Nebraska, whom we shall hereafter refer to as Wilson, is that it has operated in Colorado for several years under interstate and intrastate certificates. It obtained intrastate rights in Nebraska by purchase from one Ray Peake who is the manager of Wilson in Nebraska. The evidence shows that equipment is available to Wilson to transport crude oil and sand-frac oil in Nebraska by leasing equipment belonging to Wilson of Colorado and Peake in Nebraska. Wilson maintains terminals at Chester, Geneva, North Platte, and Sidney in Nebraska. Wilson has transported all commodities tendered to it in Nebraska. It has not transported any sand-frac oil since 1955. It was not transporting crude oil during the year 1957. No additional equipment was moved into the area where crude-oil hauling exists after it was determined to be intrastate in character. There is

no equipment at Sidney available which is suitable for handling crude oil. The testimony of Peake is that Wilson is ready, willing, and able to provide all necessary equipment to handle the business. It is apparent, however, that Wilson has no established business for hauling crude or sand-frac oil in western Nebraska.

The evidence of the appellant Houk is that he has been engaged in the transportation of petroleum and petroleum products in bulk in tank trucks at Scottsbluff since 1934. He holds state and interstate certificates authorizing the carrying on of this business under the name of Western Nebraska Transport Service. Since the beginning of oil production in western Nebraska he has engaged in hauling crude oil as a common carrier. He testified that he has more equipment than is presently necessary to handle the current volume of business. He stated that he is equipped to transport sand-frac oil and that he had been hauling this commodity whenever it was tendered to him. Houk is shown to be financially able to purchase any additional equipment that may be needed which he does not already possess.

The record shows that there are other common carriers in western Nebraska who are engaged in hauling crude oil who are not protesting the instant application. No complaint is made as to the service rendered by any common carrier of crude or sand-frac oil when it undertook to transport these products. The question is: Was there a public need for the service applied for and was the commission acting unreasonably and arbitrarily when it determined from the evidence that a public need existed.

The Nebraska State Railway Commission has original jurisdiction and sole power to grant common carrier certificates of public convenience and necessity. On an appeal to the Supreme Court from an order of the commission granting such a certificate the only questions to be determined are whether or not the commission acted within the scope of its authority, and whether or

not the order complained of is reasonable and not arbitrarily made. Houk v. Peake, 162 Neb. 717, 77 N. W. 2d 310. The jurisdiction of the commission is not questioned.

In determining the issue of public convenience and necessity, the controlling questions are whether or not the proposed operation will serve a useful purpose responsive to a present or future public need, whether or not this purpose can or will be served as well by existing common carriers, and whether or not it can be provided by the applicant in the manner specified without endangering or impairing the operations of existing common carriers contrary to the public interest. The primary purpose of commission control is to secure adequate sustained service for the public at a minimum cost and to protect and conserve investments already made for such purpose, and, in doing so, primary concern is that of the public rather than that of individuals. Houk v. Peake, *supra*.

It is not the purpose of commission control to establish an unbridled monopoly by the elimination of fair competition, nor is it intended to create unfair or destructive competition resulting in inadequate service to the public. It is a regulated competition, productive of efficient service at a minimum cost, operated for reasonable profit in the interest of public users of the service, without endangering or impairing the operations of certified common carriers in the field, that meets the objectives of commission control.

Included in the evidence before the commission is the testimony of representatives of eight large users of the common-carrier service here in question, to wit: British American Oil Producing Co., Toronto Pipeline Co., M & M Oil & Transportation, Inc., Pure Oil Co., Indiana Oil Purchasing Co., Ohio Oil Co., Dow, Incorporated, and Western Crude Marketers, Inc. The general tenor of this evidence is that several common carriers of crude oil and sand-frac oil are needed to meet

the requirements of the industry. They support the application of Basin Truck Company on the basis of public need. Each of these users of this common-carrier service moves from 1,300 to 7,500 barrels of crude oil each day, most of which is by tank trucks. The necessity for prompt, safe, and efficient service in the handling of these commodities is made apparent from their evidence. They constitute some, if not most, of the users of this common-carrier service. None of them complained of the manner of handling by any carrier in the field. They testified only that there are not enough carriers and equipment available to transport the crude and sand-frac oil with the dispatch and efficiency that their business requires.

We think the evidence before the commission in the instant case raised questions of fact that were for the commission to decide. The commission found that a public need for the common-carrier service applied for did exist. There is competent evidence in the record to sustain such a finding. While it is true that there is evidence on the part of the appellants in conflict with that of the applicant, such conflict is for the commission to resolve, and not this court. Since there is competent evidence in the record to sustain the commission's order, we cannot say that it is unreasonable and arbitrary. Dalton v. Kinney, 160 Neb. 516, 70 N. W. 2d 464; Johnson v. Peake, 163 Neb. 18, 77 N. W. 2d 670; and Ferguson Trucking Co., Inc. v. Rogers Truck Line, 164 Neb. 85, 81 N. W. 2d 915, appear to control the factual situation existing in the present case. In the last case cited this court used language particularly applicable to the present case. We there said:

"That finding is within the jurisdiction of the commission's power and duty. It made the finding. The record sustains it. It is not for us to set it aside.

"Finally, protestants contend that the order of the commission must be set aside for failure to give consideration to the effect of the grant of the application

upon the service of existing carriers. Such consideration is inherent in the order of the commission. Obviously the grant of the certificate to the applicant and its entry into competitive service might well be determined by the commission to be the cause of protestants improving a service which the commission could find from the evidence was not entirely satisfactory.

"The declared policy of section 75-222, R. R. S. 1943, is, in part, to regulate transportation 'in the public interest,' and to promote 'efficient service' without 'undue preferences or advantages, and unfair or destructive competitive practices.' "

The order of the commission is affirmed.

AFFIRMED.

ERVIN CLARK, APPELLANT, V. RAY OLDHAM, APPELLEE.
90 N. W. 2d 329

Filed May 31, 1958. No. 34262.

1. **Trial.** It is mandatory that the trial court, without request, correctly instruct the jury as to any issue in the case supported by evidence and the failure to do so is generally prejudicial.
2. **Replevin.** A verdict favorable to the defendant in a replevin case should conform to the requirements of section 25-10,103, R. R. S. 1943, because in the absence of the findings therein required there is no basis for the rendition of a judgment in the case.
3. ———. If property taken under a writ of replevin is delivered to the plaintiff and the verdict is in favor of defendant, the judgment must be in the alternative for the return of the property or for its value or for the value of the possession of defendant if it cannot be returned and for damages, if any, for illegal detention.
4. ———. The statutory provision for an alternative judgment in an action of replevin, if the verdict is for the defendant, is mandatory.
5. **Replevin: Appeal and Error.** A judgment in replevin for the defendant which is not alternative as the statute requires is

error without prejudice if the record in the case establishes that a return of the property cannot be had.

6. **Replevin.** If the property involved in a replevin case is delivered to the plaintiff, it will be presumed that it continues in his possession and is capable of being returned to the defendant until the contrary is established.

7. ———. The burden of showing that property taken on a writ of replevin and delivered to the plaintiff cannot be returned is on the defendant.

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

Burbridge & Burbridge and *James W. McGan,* for appellant.

Frost, Meyers & Farnham, for appellee.

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

BOSLAUGH, J.

Appellant, the owner of the property involved in this litigation, made an arrangement with appellee to care for, train, and feed four horses for appellant so that they would be suitable for competition in the 1955 Ak-Sar-Ben racing meet held in Omaha. Possession of two of the horses was delivered to appellee during the first part of January 1955, a third one at a later date, and the fourth March 11, 1955.

The agreement of the parties concerning the care, feeding, and training of the horses was oral. The evidence concerning it consists of the testimony of appellant and the testimony of appellee which in this respect is sharply conflicting. Appellant said his agreement with appellee was that he, appellant, would furnish the horses, the feed for them, and all necessary "tack" or equipment; would deposit with the racing secretary the amount required to guarantee payment of the compensation of the jockeys who rode the horses; and would pay one-half of the incidental expenses such as jockey

fees, shoeing the horses, and doctor and drug bills that might be required. He testified that appellee agreed to care for, feed, and train the horses; to attend to all matters incidental to having them engage in racing; and to pay one-half of the incidental expenses. Appellant testified the amount received as purses won by the horses was to be divided equally between him and appellee and he was to receive no other compensation. Appellant testified he performed the agreement and at the commencement of this litigation he owed appellee no amount.

The testimony of appellee was that he was employed by appellant to care for, feed, train, and race the horses for a certain amount for each horse for each day the horses were in the charge of appellee and that appellant was to furnish all feed and all incidental requirements. Appellee testified that he performed all of his obligations under his agreement with appellant; that he had possession of the horses until June 18, 1955, when they were taken from him by appellant; and that appellant owed appellee $1,989.50 for his care and training of the horses and the feed bought and furnished them.

Appellant brought this replevin action June 18, 1955. The horses and equipment given by him into the custody of appellee were taken on a writ of replevin and the property was by the officer delivered to appellant. Appellant in his petition alleged that he was the owner of the property, was entitled to the possession of it, and that appellee wrongfully detained the possession of the property from appellant. Appellee admitted the ownership of the property by appellant, denied all other claims of appellant in reference to the property, and alleged that appellee was entitled to the possession of it because he had an agistor's lien thereon in the amount of $1,989.50 because of the feed, care, and training furnished the horses of appellant in the amount aforesaid. Appellee asked for an adjudication that he was entitled to the possession of the horses on June 18,

1955, by reason of his lien; that the possession of the horses be restored to him; or, in the alternative, that he be awarded recovery of the aforesaid amount from appellant. The reply was a denial of the new material contained in the answer.

The verdict of the jury was for appellee for money only in the sum of $1,989.50. The motion of appellant for a new trial was denied and a judgment for money only was rendered on the verdict in the amount thereof in favor of appellee and against appellant.

The issue in this case was whether or not appellee had, at the commencement of this case, a lien on the property involved and, therefore, had the right of the possession of it; and if he had, what was the value of his right of possession of the property. The evidence made a question for the jury. It would have sustained a verdict for either of the parties.

Appellant assigns error and claims prejudice because the trial court gave instruction No. 13 to the jury which is as follows: "If you find for the plaintiff that he was entitled to the possession of the horses and equipment on June 18, 1955, your verdict will be for the plaintiff. If you find that the defendant was entitled to retain the possession of said horses and equipment until the plaintiff had fully paid him for training services, feeding and care of said horses, your verdict will be for the defendant for the amount, if any, you find is owing by the plaintiff to the defendant." The second sentence of this instruction was, under the circumstances of this case, an incorrect statement of the law. Replevin is a possessory action. A judgment for money only in the amount of the lien asserted by appellee was not justified by the law. The verdict was obedient to the last sentence of the quoted instruction. It states: "We, the jury duly impaneled and sworn in the above entitled cause, do find for the said defendant, and fix the amount of his recovery at $1989.50." The trial court rendered a judgment in favor of appellee for money

only, and nothing more, for the amount of the verdict, with interest. The verdict was for the amount appellee claimed appellant owed him for his services or, in other words, it complied with the requirement of the instruction that "* * * your verdict will be for the defendant for the amount, if any, you find is owing by the plaintiff to the defendant." It was not for the value of the possession of the property taken by appellant from appellee or for damages for withholding the property from appellee. There was no evidence of any damages for withholding the property and the instruction did not permit a finding as to the value of any right of possession appellee had to the property. The verdict and the judgment are each contrary to the law of replevin as it is written in this state. The contents of a verdict favorable to the defendant in a replevin case are specified by section 25-10,103, R. R. S. 1943: "In all cases, when the property has been delivered to the plaintiff, where the jury shall find upon issue joined for the defendant, they shall also find whether the defendant had the right of property or the right of possession only, at the commencement of the suit; and if they find either in his favor, they shall assess such damages as they think right and proper for the defendant; for which with costs of suit, the court shall render judgment for the defendant." The characteristics of a judgment in a replevin case are declared in section 25-10,104, R. R. S. 1943: "The judgment in the cases mentioned in sections 25-10,102, 25-10,103 and 27-1509 shall be for a return of the property or the value thereof in case a return cannot be had, or the value of the possession of the same, and for damages for withholding said property and costs of suit."

The act requiring judgment to be rendered for a return of the property or the value thereof in case a return cannot be had was passed in 1873. G. S. c. 57, § 1010, p. 713. It exists now as it was originally enacted. § 25-10,104, R. R. S. 1943. The object of an action of re-

plevin is to recover specific personal property, and liability for the value of the property accrues only if a return of the property cannot be had. Lee v. Hastings & McGintie, 13 Neb. 508, 14 N. W. 476; Barstow v. Wolff, 148 Neb. 14, 26 N. W. 2d 390, 170 A. L. R. 118.

The section of the act of 1873 referred to above was considered in Hooker v. Hammill, 7 Neb. 231, and this court therein concluded: "In replevin, where a verdict is returned in favor of the defendant, the judgment must be for a return of the property, or the value thereof in case a return cannot be had, or the value of the possession of the same, and for damages for withholding the property and costs of suit."

Singer Mfg. Co. v. Dunham, 33 Neb. 686, 50 N. W. 1122, approved the interpretation this court gave the provision requiring a judgment in replevin to be in the alternative when the finding is for the defendant: "In the case of Hooker v. Hammill, 7 Neb., 231, it was held that the provision of the statute requiring the judgment in cases like the one at bar, when in favor of the defendant to be in the alternative, is mandatory. This decision does not rest upon technical grounds only. But it is the right of plaintiff that the judgment should be in such form that he could discharge it by returning the property replevied."

The court has consistently maintained the doctrine of these cases concerning the necessity for an alternative judgment in replevin if the finding is favorable to the defendant and the circumstances of the case are essentially comparable to what they are in the present litigation. Securities Investment Corp. v. Krejci, 128 Neb. 763, 260 N. W. 396, affirms this doctrine: "Where property has been taken under a writ of replevin and delivered to plaintiff and the verdict is in favor of defendant, the judgment must be in the alternative for the return of the property or for its value, or for the value of defendant's possession, if it cannot be returned, and for damages for illegal detention. * * * The statu-

tory provision for an alternative judgment in an action of replevin, where the verdict is in favor of defendant, is mandatory." See, also, Alliance Loan & Investment Co. v. Morgan, 154 Neb. 745, 49 N. W. 2d 593; Landis Machine Co. v. Omaha Merchants Transfer Co., on rehearing, 142 Neb. 397, 9 N. W. 2d 198; Jackson v. Arndt-Snyder Motor Co., 122 Neb. 276, 240 N. W. 279; Martin v. Foltz, 54 Neb. 162, 74 N. W. 418; Foss v. Marr, 40 Neb. 559, 59 N. W. 122; Goodwin v. Potter, 40 Neb. 553, 58 N. W. 1128; Roberson v. Reiter, 38 Neb. 198, 56 N. W. 877; Manker v. Sine, 35 Neb. 746, 53 N. W. 734.

It is mandatory that the trial court, without request, correctly instruct the jury as to any issue in the case supported by evidence and a failure to do so is generally prejudicial. Benedict v. Eppley Hotel Co., 159 Neb. 23, 65 N. W. 2d 224; Platte Valley Public Power & Irr. Dist. v. Armstrong, 159 Neb. 609, 68 N. W. 2d 200; Zorinsky v. American Legion, 163 Neb. 212, 79 N. W. 2d 172. The trial court failed to perform this duty and its default requires that the judgment in this case be reversed.

Appellee argues that appellant cannot effectually complain of error committed at the trial because the record does not establish that the property taken on the writ of replevin was capable of being returned to appellee. He says the burden was on appellant to prove that the property involved was available and capable of being returned to appellee. The suggested authority for this is Goodman v. Kennedy, 10 Neb. 270, 4 N. W. 987, in which it is said: "The statute provides that judgments in replevin, when in favor of the defendant, shall be for a return of the property, or for the value, if a return cannot be had, and damages. * * * But, however this may be, before the plaintiff can complain of such omission he must show that the property is capable of being returned." The author of the quoted statement did not support it by citation of authority. It was

said in a later case, Lee v. Hastings & McGintie, *supra:* "A judgment in an action of replevin, under the act of 1873, must be in the alternative—for a return of the property, or in case a return cannot be had the value thereof, unless it is shown by the record that a return could not have been had." This decision made no mention of who is responsible for making the record show "that a return could not have been had." However, this was a departure from the dogmatic statement of the former case that the plaintiff must show that the property was capable of being returned.

Manker v. Sine, *supra,* recites: "The judgment is erroneous because it was rendered for money absolutely, and was not in the alternative, for a return of the property, or the value thereof in case a return could not be had, as required by section 191a of the Code. * * * It is argued by counsel for defendant that the statutory provision for alternative judgment is for the benefit of the defendant alone, and that he has the right to waive a return, and take judgment for the value. Even if this were the true interpretation of the statute, which we do not concede, the record does not disclose that the defendant waived in the court below a return of the property, while it appears that he did pray a return of the property in his answer. Having requested that, the plaintiff had a right to expect, in case the verdict was against him, that the judgment would be in the statutory form. It does not appear that the property replevied cannot be returned. We cannot say that the judgment in the case at bar was to plaintiff's benefit. For aught that appears it might be to his injury to pay for the property instead of returning it. We think the plaintiff has the right to insist that the judgment shall be in the alternative." Appellee by his answer asked that the possession of the property be returned to him and appellant had the right to expect that if there was a finding for appellee the judgment would be an alternative one as the statute requires.

In Field v. Lumbard, 53 Neb. 397, 73 N. W. 703, this court said: "It was further held in Goodman v. Kennedy that before the plaintiff can be heard to complain that the judgment was absolute, he must make it appear that a return is practicable. This case was cited on this point in the recent case of Eickhoff v. Eikenbary, 52 Neb. 332, but the point was not there considered necessary to a decision, and was guarded accordingly. In Manker v. Sine the burden of proof was otherwise stated, and it was made the duty of the defendant to show that a return could not be had."

Barstow v. Wolff, *supra,* speaking on this subject, states: "There is nothing in the record concerning the whereabouts of the calves. It must be presumed that they have remained in the possession of the plaintiffs since they were taken under the writ of replevin. Hutchinson Gin Co. v. Latimer County Nat. Bank, 106 Okla. 159, 233 P. 438."

It is concluded that the argument of appellee in this regard is without merit and that appellant was not required to establish at the trial that the property, the subject of the action, was available and capable of being returned to appellee. If appellee desired to avoid an alternative judgment, he had the burden of showing that the property could not be returned to him.

This court has determined in some instances that disregard of the statute concerning the rendition of an alternative judgment in replevin when the finding was for the defendant was error without prejudice. Jameson v. Kent, 42 Neb. 412, 60 N. W. 879, was such a case and therein it is said: "It will be observed that the trial court found the defendant had the right of possession only at the commencement of the suit; but it failed to assess the value of such possession. The court, therefore, could not, and did not, render judgment in any amount for the value of the right of possession. We fail to discover in what manner the plaintiff was prejudiced by the failure to render a judgment against him for

the value of the defendant's right of possession of the property. The error was in his favor. Kent (the defendant) is in no position to complain, since he introduced no evidence as to the value of his right of possession of the barn."

In Scott v. Burrill, 44 Neb. 755, 62 N. W. 1093, the complaint was that the judgment entered was not alternative for the return of the property or the value thereof if it could not be returned. It was disposed of in this manner: "No judgment was rendered for either the value or for a return of the property, but merely for damages for the withholding of the property, therefore the plaintiff was not prejudiced by the failure to render an alternative judgment. Had a judgment been entered in favor of the defendant for the value of the property, or the value of the possession of the same, without making provision for returning the property in lieu of the value, it would have been erroneous."

The claim of error made in Richardson Drug Co. v. Teasdall, 59 Neb. 150, 80 N. W. 488, based upon an omission to describe the part of the property which it was found defendant was entitled to have returned to him was held to be error without prejudice because it was disclosed that all of the property taken on the writ of replevin had been destroyed by fire.

Sullivan v. Hansen, 95 Neb. 779, 146 N. W. 983, was disposed of in this manner: "* * * If there is no alternative judgment for the value, and the property cannot be returned, such a judgment is very favorable to the plaintiff, and he cannot complain of the error. * * *."

Ulrich v. McConaughey, 63 Neb. 10, 88 N. W. 150, reviewed a considerable number of previous decisions of this court in replevin cases. It was shown therein that there was a stipulation of the parties that the property had been disposed of and could not be returned to the defendant. The syllabus contains the following: "A plaintiff in replevin who, by his own admission in open court, has disposed of the property delivered to him and

is not able to return it, will not be heard to complain that a judgment rendered against him is for the value of the property only, and not alternative, as prescribed by section 191a, Code of Civil Procedure. * * * The fact that plaintiff may have disposed of the property delivered to him under the writ, so that a return will not be possible, does not change the nature of the action so as to obviate the requirements of section 191, Code of Civil Procedure, as to the form of the verdict. * * * Such requirements should be complied with in every case, and failure to do so is ground of reversal wherever the findings required would be of benefit to any party in the cause or where the nature or amount of the interest of the prevailing party is in issue." The conclusion of the writer of the opinion is expressed therein in this manner: "* * * the cases where judgments have been reversed for failure to comply with the provisions of the Code as to the contents of the verdict are cases in which there was an issue as to the nature of the defendant's right. Moreover, in Richardson Drug Co. v. Teasdall, 59 Nebr., 150, this court treated the provisions as to form of the verdict and those as to form of the judgment as upon the same basis in this regard. * * * We do not wish to be understood as holding that the requirements of the section in question are nugatory and are not to be adhered to. As was said in Singer Mfg. Co. v. Dunham, 33 Nebr., 686, referring to said section, 'Such is the letter of the statute, and there is sufficient reason why it should be enforced.' Whenever the findings required by the Code can or may be of practical worth to any party in the cause, whenever the interest of the prevailing party is an issue, the findings there prescribed must be made."

The case last discussed does not conflict with what is here concluded concerning the present case. There was a definite issue as to the nature, extent, and amount of any interest of appellee. The claim of appellant was that he did not owe appellee any amount and that ap-

pellee had no interest in, lien upon, or right of possession of the property. The circumstances of this case made it mandatory that the relevant statutory requirements as to the findings in the verdict and the contents and form of the judgment be complied with. The defendant in a replevin action after judgment in his favor is required to accept a return of the property involved. The judgment is required to be in the alternative for the purpose of establishing the value of the interest of the defendant in the property or its possession to afford a measure of relief if the property cannot be returned. Defendant in such a situation is required to accept the return of the property which was taken from him on a writ of replevin as a satisfaction of the judgment for its return. A plaintiff is not obliged to permit a defendant to elect to demand payment of the judgment for the value of his interest in the property or its possession if he considers it advantageous to him or to require return of the property if he thinks its value is greater than the determination thereof made in the case. The right of a plaintiff to satisfy the judgment in a replevin case by a return of the property wrongfully taken on a writ of replevin is a valuable one. Barstow v. Wolff, *supra;* Manker v. Sine, *supra;* Lee v. Hastings & McGintie, *supra.* As was said in Singer Mfg. Co. v. Dunham, *supra*: "Such is the letter of the statute applicable to such cases, and there is sufficient reason why it should be enforced." Equally pertinent is the remark in Field v. Lumbard, *supra*: "It must now, therefore, be taken as established that the requirement is mandatory, and that either party may insist upon its observance." It cannot be said that compliance with the statutory requirements would not or could not have been of practical benefit to appellant.

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

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

SIMMONS, C. J., dissenting.

My disagreement with the court in this case goes to three matters. The opinion does not discuss or decide the principal error assigned and argued by the plaintiff in this appeal. It decides a matter argued and in my opinion does so erroneously.

There were three questions tried and submitted to the jury in this case. (1) What was the contract between the parties? On conflicting evidence the jury decided that question in favor of the defendant. (2) How much did the plaintiff owe the defendant? The jury decided that question in favor of the defendant. The amount is not here questioned. (3) Was the defendant entitled to a lien on the horses for the amount found due? The jury decided that question in favor of the defendant. Plaintiff contends that the instruction upon which the finding is based was erroneous in that it included an element of debt for which defendant was not entitled to a lien; i.e., it included lienable and nonlienable items.

The assignment goes to instruction No. 13 which the court quotes. It is in part: "If you find that the defendant was entitled to retain the possession of said horses and equipment until the plaintiff had fully paid him for *training services,* feeding and care of said horses, your verdict will be for the defendant for the amount, if any, you find is owing by the plaintiff to the defendant." (Emphasis supplied to point out the specific error claimed.)

Defendant claimed a lien for training, care, and feeding of the horses. Plaintiff contends that under the provisions of section 54-201, R. R. S. 1943, the lien is limited to proper charges for feed and care and that the alleged contract charges of defendant included the nonlienable item of training, and that defendant's charges not being apportioned between lienable and nonlienable items the claimed lien must fail.

Defendant claims that there was a common law lien

for training race horses. He contends also that "care" of a race horse includes training under section 54-201, R. R. S. 1943. He also claims that section 52-601, R. R. S. 1943, is broad enough to cover this claim. I do not determine the two latter contentions.

It appears that at common law an agister as such did not have a lien but that the trainer of race horses had a lien for training services. 3 C. J. S., Animals, § 21, p. 1118; 2 Am. Jur., Animals, § 22, p. 710. The decisions sustain the text. Forth v. Simpson, 66 E. C. L. 681; Bevan v. Waters, 14 E. C. L. 693; Chase v. Robinson, 86 Vt. 240, 84 A. 867; Scott v. Mercer, 98 Iowa 258, 67 N. W. 108, 60 Am. S. R. 188; Harris v. Woodruff, 124 Mass. 205, 26 Am. R. 658; Jackson, Cook & Co. v. Holland, 31 Ga. 339; Grinnell v. Cook, 3 Hill (N. Y.) 485, 38 Am. Dec. 663; Othoudt v. Addison Fur Corp., 262 Mich. 481, 247 N. W. 723.

One who keeps and trains another's horse at the owner's request has a statutory lien for the keep and a common law lien for the training. Towle v. Raymond, 58 N. H. 64. The common law lien and the statutory lien may exist together and operate in aid of each other. Hiltz v. Gould, 99 N. H. 85, 105 A. 2d 48.

Accordingly I would hold that the trial court did not err in submitting to the jury the question of the defendant having a lien for training, feed, and care.

The contention is here for determination as to the validity of the amount of the lien. It is directly presented. If this cause is to be remanded and retried, the issue here discussed will again be presented. The question should be decided—yet the court ignores it.

In this connection the court without discussion or citation of authority holds: "There was no evidence of any damages for withholding the property and the instruction did not permit a finding as to the value of any right of possession appellee (defendant) had to the property." This is a matter not involved in plaintiff's argument here. The evidence was specific as to the

amount of the lien which defendant claimed and which the jury found to be true. The jury was permitted to find the amount "owing by the plaintiff to the defendant." The failure to determine the value of the right of possession and to allow a recovery for it cannot be detrimental to the plaintiff. It might be detrimental to the defendant who is not complaining. In my view the holding above quoted, if correct, will require a retrial—a material matter, as will appear later herein—and it is not a correct statement when tested by the rule of law repeatedly declared by this court.

We have held: Where the defendant in an action of replevin claims a special interest only in the property in controversy by virtue of a mortgage or other lien, *his measure of damage,* in case the property cannot be returned, is the amount of his lien with interest and costs, within the value of the property. (Emphasis supplied.) Creighton v. Haythorn, 49 Neb. 526, 68 N. W. 934.

This decision was followed in Jackson v. Arndt-Snyder Motor Co., 122 Neb. 276, 240 N. W. 279; in Hickman-Williams Agency v. Haney, 152 Neb. 219, 40 N. W. 2d 813; and in Underwriters Acceptance Corp. v. Dunkin, 152 Neb. 550, 41 N. W. 2d 855.

Here the parties made no particular effort to establish the value of the property. "No point" was made of it in the trial court.

In Landis Machine Co. v. Omaha Merchants Transfer Co., on rehearing, 142 Neb. 397, 9 N. W. 2d 198, we held: "In an action to replevin property claimed unlawfully distrained for personal taxes, if there is no evidence of the value of the property taken but no point is made thereof in the trial court, it will be presumed on appeal to this court that the case was tried on the theory that the property was worth more than the amount of the taxes, and judgment for defendant will not be reversed on the ground that it might have been less."

We need only substitute "lien" for taxes to make the

rule read: "* * * it will be presumed on appeal to this court that the case was tried on the theory that the property was worth more than the amount of the lien, and judgment for defendant will not be reversed on the ground that it might have been less."

I now go to the other matter with which I disagree. It is not mentioned in the plaintiff's assignments of error but is discussed in the argument.

The court holds that a verdict favorable to the defendant in a replevin action should conform to the requirements of section 25-10,103, R. R. S. 1943, because in the absence of the findings therein required there is no basis for the rendition of a judgment. The section provides: (1) "In all cases, when the property has been delivered to the plaintiff, * * *." That happened here. (2) "* * * where the jury shall find upon issue joined for the defendant, * * *." That happened here. (3) "* * * they shall also find whether the defendant had the right of property or the right of possession only, at the commencement of the suit; * * *." Here the jury was instructed that if it found that the plaintiff was indebted to the defendant for training, feeding, and caring for the horses, the defendant had a lien on the horses and a right to legal possession until the claim was paid, and if it found that defendant was entitled to retain the possession of the horses until paid, then verdict would be for the defendant in the amount found to be owing. No error is claimed in this instruction as to that feature. There was, then, inherent in the jury's finding for the defendant, a finding that the defendant had the right of possession at the commencement of the suit—so that condition is met. (4) "* * * and if they find either in his favor, they shall assess such damages as they think right and proper for the defendant; * * *," which the jury did in this case. And (5) "* * * for which with costs of suit, the court shall render judgment for the defendant." That was done in this case. So there was full compliance with section 25-10,103, R. R. S. 1943,

in this case. The plaintiff by argument does not contend otherwise.

Section 25-10,102, R. R. S. 1943, is not directly applicable here. I mention it because it provides the same conditions as does section 25-10,103, R. R. S. 1943, if the jury "shall find that the defendant was entitled to the possession only * * * they shall assess such damages for the defendant as are right and proper; for which, with costs of suit, the court shall render judgment * * *."

Clearly the statutes require the verdict to determine the amount of the damages. There is no requirement that the verdict shall expressly find that the defendant was entitled to the possession.

I submit that the verdict is in full accord with the requirements of section 25-10,103, R. R. S. 1943. Whatever fault there may be in this matter relates to the *judgment* and not to the *verdict* under section 25-10,104, R. R. S. 1943. That is plaintiff's contention. Section 25-10,104, R. R. S. 1943, provides: "The judgment * * * shall be for a return of the property or the value thereof in case a return cannot be had, * * *." This clause clearly relates to the judgment in cases where the right of property has been found to be in the defendant. It does not apply here. The section further provides: "The judgment * * * shall be for a return of the property * * * or the value of the possession of the same, and for damages for withholding said property and costs of suit."

The judgment here did not provide for an alternative "return of the property."

Construing this provision the court lays down the rule that "the judgment must be in the alternative" and that the provision is "mandatory." The court then, contradicting the "must" and "mandatory" rule, states that a failure to do so may be "error without prejudice" and would not require a reversal, limiting, however, the rule to where the evidence establishes that "a return of the property cannot be had."

I now cite those decisions of ours relied upon by the court here, where we have repeatedly held that failure to follow the letter of the statute was not reversible error unless the error was prejudicial to the complaining party. Jameson v. Kent, 42 Neb. 412, 60 N. W. 879; Scott v. Burrill, 44 Neb. 755, 62 N. W. 1093; Richardson Drug Co. v. Teasdall, 59 Neb. 150, 80 N. W. 488; Ulrich v. McConaughey, 63 Neb. 10, 88 N. W. 150. I quote only from Ulrich v. McConaughey, *supra,* written by Commissioner Pound. The case involved an instruction that directed the jury to find *only* a money judgment and where the verdict was for a money recovery *only.* "In the analogous case of the alternative judgment required by section 191a of the Code (now section 25-10,104, R. R. S. 1943), after first holding that such requirement must be complied with absolutely in all cases, *this court* has come to the view that *a party who is in no way prejudiced by failure to enter the prescribed form of judgment can not complain thereof.*" (Emphasis supplied.)

The court then held that what is now section 25-10,103, R. R. S. 1943, did not require a different construction and it refused to hold "that the one (section 25-10,104, R. R. S. 1943) may be departed from with impunity, if no prejudice results, while the other must be adhered to absolutely in every case under pain of reversal of the judgment."

The court then held that what is now section 25-10,103, R. R. S. 1943, "or anything in the Code" did not require us "to reverse a judgment, otherwise right, at suit of one who is in no way prejudiced *by the informality.*" The court there held the instruction and the verdict, comparable to the ones here, to be free from reversible error. The instant decision of the court is directly contrary thereto. I would adhere to the reasoning and decision in Ulrich v. McConaughey, *supra.* In spite of the language above quoted, the court now holds that Ulrich v. McConaughey, *supra,* "does not

conflict with what is here concluded." I disagree.

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

I would follow the decisions of this court and the provision of the statute that before a reversal can be had in a case of this kind, error prejudicial to the plaintiff must be shown. It is not shown here. Prejudice to the defendant is shown. He is not complaining.

The court here states the "error without prejudice" rule but limits it to one situation. As the matter now stands defendant has a judgment against the plaintiff for the amount the jury found due and owing to him. That finding is not assailed. Defendant has lost possession of the horses upon which the jury found he had a lien and for which defendant was entitled to possession. Plaintiff has the horses. If he surrenders possession of them to the defendant he loses possession and gains nothing, for he will still be owing the debt to the defendant. The surrender of possession will not satisfy the judgment. It would merely place the defendant in a position to enforce his lien. I submit that plaintiff is in no wise prejudiced by the alleged error in the judgment. Under the "prejudice must be shown" rule this judgment should be affirmed.

Section 25-10,104, R. R. S. 1943, contains the only statutory provision with reference to the alternative of a return of the property. The right to return of the property, absolute or conditional, is a matter of law. The jury has nothing to decide with reference to it, and hence the Legislature properly did not include any reference to it in either section 25-10,102 or section 25-10,103, R. R. S. 1943, which relate to the jury's verdict. The only requirement is in section 25-10,104, R. R. S. 1943, which specifically and directly relates to the

"judgment." For that reason throughout I have emphasized the word judgment.

Here the court takes language, regarding an alternative *judgment,* out of the section relating thereto and reads it into the section relating to the verdict. It cites no authority or reason for doing so.

If, however, this judgment is to be reversed because of failure to comply with the alternative requirement of section 25-10,104, R. R. S. 1943, it is not required that there be a retrial. The requirement would then be to remand the cause with directions to render a proper judgment.

We have so held in three cases cited and relied on by the court here.

Manker v. Sine, 35 Neb. 746, 53 N. W. 734, is one of the early "imperative" "mandatory" decisions. The judgment was reversed with instructions to render a judgment in the alternative. Roberson v. Reiter, 38 Neb. 198, 56 N. W. 877, followed Manker v. Sine, *supra,* and reversed and remanded with instructions to render judgment in the alternative.

In Landis Machine Co. v. Omaha Merchants Transfer Co., *supra,* again following Manker v. Sine, *supra,* we held: "If the judgment of the trial court in a replevin action is not in proper alternative form, a new trial will not be granted, but the judgment will be reversed and the cause remanded with directions to render a proper judgment upon the verdict."

Accordingly I would decide the question of lienable items as stated herein and follow Ulrich v. McConaughey, *supra,* and our decisions of like import. Ulrich v. McConaughey, *supra,* has never been modified, criticized, or overruled on the questions here involved. As to those it has been directly approved. See Ulrich v. McConaughey, 69 Neb. 773, 96 N. W. 645.

However as above stated, if the judgment is to be held to be erroneous, I would reverse the judgment and remand the cause with directions to render a proper

alternative judgment, although to do so "in this particular would be but an idle ceremony." Goodman v. Kennedy, 10 Neb. 270, 4 N. W. 987.

RONALD H. PATTERSON ET AL., APPELLANTS, V. SPELTS LUMBER COMPANY OF GOTHENBURG, A CORPORATION, APPELLEE.
90 N. W. 2d 283

Filed May 31, 1958. No. 34315.

1. **Mechanics' Liens.** The mechanics' lien law does not enable a materialman or laborer to tack one contract to another by filing one statement which secures a lien for material and labor furnished under one contract and at the same time secure a lien for material and labor under another contract as to which he has not complied with the statute.
2. **Equity.** A court of equity which has obtained jurisdiction for any purpose will retain jurisdiction for the purpose of administering complete relief between the parties with respect to the subject matter.
3. **Mechanics' Liens.** Ordinarily a personal judgment in favor of a mechanic's lien claimant may be rendered although he fails to establish his alleged lien.
4. **Contracts: Work and Labor.** Where there is no contract to pay a definite sum for the erection of a building the amount the builder is entitled to recover for material and labor is their reasonable market value.
5. **Interest.** The provisions of section 45-103, R. R. S. 1943, as to interest on decrees and judgments for the payment of money refer to judgments or decrees for money which is immediately due and collectible where its nonpayment is a breach of duty on the part of the judgment debtor.
6. ———. A court of equity has a reasonable discretion to allow or withhold interest as is reasonable and just, except in cases where interest is recoverable as a matter of right.

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

William S. Padley, for appellants.

Arthur C. Mayer, for appellee.

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

SIMMONS, C. J.

This case originated as an action to quiet title against the cloud of a mechanic's lien. Defendant, resisting the action, cross-petitioned for the foreclosure of the lien. Issues were made and trial was had. The trial court denied the petition of the plaintiffs, granted the cross-petition of the defendant, and rendered a decree of foreclosure. Plaintiffs appeal.

We reverse the judgment of the trial court and remand the cause with directions.

The plaintiffs are husband and wife and owners of the property involved. Unless otherwise stated, they will be referred to as the plaintiffs.

The defendant is a corporation. We will refer to the defendant as such and, where necessary, to the officers of defendant.

The fact issues are here for trial de novo.

The first question presented is that of the validity of the lien. We state the facts necessary to a determination of that matter.

Plaintiffs entered into an oral contract with defendant whereby defendant agreed to build a house for plaintiffs. The contract included the cost of the lot, materials, and labor. The house was completed before January 1, 1956. Plaintiffs occupied it as a finished house before Thanksgiving of 1955. On the itemized account in the mechanic's lien there are items charged in January 1956. It appears, also without dispute, that the sidewalks were constructed in March 1956, and material and labor were charged for at that time.

The house was a split level, one-story house with a basement under the higher elevation. The contract did not provide for a finished basement. There was left in the foundation connecting the basement with the

unexcavated part under the house an opening described as a crawl hole. During the winter of 1955-56 cold air from the unexcavated area entered the basement. Mrs. Patterson desired to have it closed. In September 1956, Mr. Patterson went to the defendant and it, at his request, sent a carpenter with material to put a door in this opening. The total charge for this was $6.52 made on September 18, 1956.

On October 30, 1956, defendant filed a mechanic's lien for the sum of $4,626.20. So far as this claim is concerned, section 52-103, R. S. Supp., 1955, requires that it be filed within 4 months of the time of performing the labor or furnishing the material. It is patent that the validity of the lien depends, so far as the amount of $4,619.68 is concerned, upon the right of the defendant to tack the earlier large balance upon the small balance incurred in September 1956.

There is nothing in the evidence that the putting of a door on this opening was ever within the contemplation of the parties as a part of the contract. One of defendant's witnesses testifed that it was just one of those things that they never got around to doing. However, there were extended conferences in July 1956 as to what amount, if any, plaintiffs owed the defendant. There appears to have been nothing developed in those conferences relative to the fact that the construction had not been completed in this or any other regard. Defendant offered the evidence of a witness who had been its assistant manager during the time of the construction of this house. He testified that he had never been instructed to do this work before September 1956; that he did it then because Mr. Patterson ordered it done; and that it was just a little extra job that Mr. Patterson wanted and he did it. Under these circumstances, the rule as stated in Rivett Lumber & Coal Co. v. Linder, 113 Neb. 567, 204 N. W. 77, is applicable. It is: The mechanics' lien law does not enable a materialman or laborer to tack one contract to another by filing one

statement which secures a lien for material and labor furnished under one contract, and at the same time secure a lien for material and labor under another contract as to which he has not complied with the statute.

It necessarily follows that the mechanic's lien of the defendant is valid for only the sum of $6.52. The judgment of the trial court is reversed as to that and the cause remanded with directions to render a decree foreclosing the lien, if not paid, for the sum of $6.52 with interest at 6 percent from March 18, 1957.

The next question presented has to do with the decree of the district court which found that there was due the defendant from the plaintiffs the sum of $4,626.20 without interest; decreeing a sale of the property to pay the same; and providing for a deficiency judgment.

The question is: How much, if anything, do the plaintiffs owe the defendant in addition to the $6.52?

It is a long-established rule that a court of equity which has obtained jurisdiction for any purpose will retain jurisdiction for the purpose of administering complete relief between the parties with respect to the subject matter. Gibson v. Koutsky-Brennan-Vana Co., 143 Neb. 326, 9 N. W. 2d 298.

The rule is stated that ordinarily a personal judgment in favor of a mechanic's lien claimant may be rendered although he fails to establish his alleged lien. 57 C. J. S., Mechanics' Liens, § 329, p. 1014; 36 Am. Jur., Mechanics' Liens, § 283, p. 172.

Defendant alleged in its cross-petition that "plaintiffs and defendant entered into an oral agreement whereby defendant agreed to furnish plaintiffs a building lot and construct a certain dwelling house on said lot; that plaintiffs agreed to pay defendant upon completion of said dwelling the fair and reasonable cost of said lot and dwelling; that defendant constructed said dwelling and conveyed to plaintiffs title to said lot, and has performed all the conditions of said agreement on its part to be performed." Defendant further alleged

that the fair and reasonable value of the lot, labor, and materials furnished was $15,378.83, less materials returned of $296.85; and that plaintiffs had paid the sum of $10,455.78, leaving a balance due of $4,626.20 for which, with interest, it claimed judgment.

Plaintiffs in answer to the cross-petition alleged that they agreed to pay the amount of a loan of $11,000 and to pay for any extras which they required.

It will thus be seen that plaintiffs alleged a contract by which the completed house and lot was to cost them $11,000, plus extras. The defendant alleged a basis of recovery in quantum meruit.

What was the contract that was proven?

The evidence as to the contract provisions is not set out at any one place in the testimony. Taking the testimony as a whole we have concluded that the contract contained these elements:

Defendant had built a house similar to that contemplated by this agreement. The house was to be built similar to that house. There is no issue raised here as to that. There was discussion as to cost price, including the lot, which related it to the figure of $11,000 to $11,500. However, we find no evidence which is conclusive that sustains plaintiffs' contention that the house was to be built for a fixed price plus extras.

The evidence sustains defendant's contention that in addition to the price estimated, there would be added what the parties refer to as a "slop-over" or "overflow."

It appears that defendant was to secure for plaintiffs a building and loan association mortgage loan of $11,000 to $11,500 on the house and that the "slop-over" was to include the items of cost that would not be paid by the loan. The amount of such excess was an undetermined and, at the time, undeterminable amount.

The rule is that where there is no contract to pay a definite sum for the erection of a building the amount the builder is entitled to recover for material and labor

is their reasonable market value. Bates v. St. Anthony's Church, 111 Neb. 426, 196 N. W. 638.

What, then, was the reasonable value of the materials and labor furnished by the defendant?

We can and do determine certain of these matters from the facts which are in this record. As to other items we have concluded that equity requires a remand and retrial.

We consider first the determinable items.

Plaintiffs negotiated for the purchase of the lot at the price of $1,000. Plaintiffs paid $200 of the purchase price. Defendant paid $800 of the purchase price. There is no contention here but that defendant is entitled to credit for the $800 so paid. Defendant is entitled to recover that item.

Defendant subcontracted certain parts of the construction.

The contract price for carpenter work was $2,170. Defendant paid that amount to the subcontractor. Defendant, however, added a charge of 10 percent to this item and charged plaintiffs therefor the sum of $2,387. The subcontractor for carpeting and floor covering charged and was paid $1,590.10 by defendant. To this item the defendant added a charge of $114.90, making the total charge $1,705. The subcontractor for the heating, plumbing, and gutterwork was paid $1,826.88. Defendant added to this amount a charge of 10 percent, making the total charge $2,009.56. The subcontractor for the plastering charged and was paid $413.16. The defendant charged the plaintiffs $454.56.

Plaintiffs testified that they had no objection to the charges for the amounts paid to the subcontractors. They do object to the added charge over and above amounts paid for these items of work and materials. There is no evidence that the contract contemplated such a charge. It affirmatively appears in defendant's evidence that plaintiffs were not advised that the defendant would add these percentages to the subcon-

tractors' bills. Here defendant obviously attempted to change the obligation of the plaintiffs to pay the reasonable cost of this house to one to pay the reasonable cost plus a percentage of the cost as profit. There is no basis for such an allowance in this record. Defendant is not entitled to recover the percentages added. They are to be denied. Only the actual amounts paid the subcontractors are to be allowed. See Grothe v. Erickson, 157 Neb. 248, 59 N. W. 2d 368.

Defendant charged $556.48 to the plaintiffs for payments to the electrical subcontractor. The subcontractor testified that he was paid $457.57. Defendant testified that he was paid $524.47. No attempt was made to verify either statement by other proof. As to this item evidence should be taken to establish the amount actually paid by the defendant on this subcontract. That amount should be allowed. For the reasons above given the overcharge should be denied.

Defendant offered evidence that it charged the plaintiffs $772.71 for labor other than carpentering. No attempt was made to show any details of this charge. The court, over objection, permitted evidence that the total so stated was a fair and reasonable charge. Whether or not there was an overcharge made by the defendant for this labor is left in doubt by the evidence. As to this item the trial court should require evidence establishing the items of labor included in this total and the reasonable value thereof. The defendant should be permitted to recover any amount so established and paid by it. Here, for the reasons above given, the defendant is not entitled to recover any added charge.

Over objection defendant offered evidence that it charged to the plaintiffs for material furnished in the construction of this house a total of $6,694.26 and that there was a credit for merchandise returned of $296.85, leaving a balance which it claimed of $6,397.41 for materials furnished. The items making the above total were listed in the mechanic's lien which was admitted

in evidence. It affirmatively appears that all materials used in constructing the house were furnished by the defendant. However, defendant did not establish that the materials so charged were in fact delivered to and used in the construction of the house. Defendant undertook to show that the charges so made were fair and reasonable. However, on cross-examination defendant's manager testified that the prices were fair and reasonable "Because those were our prices." Just before the above answer was given on cross-examination, the trial court had sustained an objection to the question: "Were your prices competitive with the other lumber yards in Gothenburg?"

Defendant put on the stand a lumber dealer from Lexington, who was asked to state his opinion as to whether the prices charged were fair and reasonable. His answer, given over objection, was: "* * * they are within cents of what we would charge for the same thing." Prompted by the court, he said: "It is fair and reasonable, as near as I can tell." The trial court sustained an objection to a question as to whether the regular retail price would be different on one item than on an entire bill of material. The witness finally testified that there "are reasons for changing the price." Other evidence shows that it is customary in the lumber business that "any house job or any large bill would carry a discount."

In the light of this unsatisfactory condition of the evidence as to the reasonable value of the materials furnished by defendant, we have concluded that the issue is to be retried.

The issue as to the amount the defendant is entitled to recover for materials furnished is accordingly to be retried both as to the question of the materials furnished and the reasonable value thereof, taking into consideration that the sale here was for all the materials used and not a sale of individual items as such.

Any items not herein specifically mentioned are for retrial.

The defendant, under the issues here made, has the burden of proof.

One other matter requires specific mention. A mortgage for $11,000 was placed upon this property by the plaintiffs. The evidence shows that at various times the mortgagee issued checks payable to the defendant and the plaintiffs and that those checks were endorsed by the plaintiffs and delivered to the defendant. It appears that defendant received and gave the plaintiffs credit for $10,455.78 for payments so made. Plaintiffs are entitled to credit for that amount. However, there is no showing as to whether or not the defendant received any part of the remaining $544.22 of the mortgage funds. Evidence should be taken to determine if the defendant received any part of that remainder as payment on the contract and, if so, plaintiffs should be given credit therefor.

It is suggested that the questions herein remanded for a new trial may properly be the subject of a pretrial conference.

If upon retrial it is determined that defendant is entitled to receive additional payments from the plaintiffs, then the question of the time of payment and interest will arise. We deem it advisable to determine that matter now for the guidance of the trial court. The provisions of the contract between the parties require it.

It was agreed by the parties when this contract was entered into that the plaintiffs would not be required to make a down payment; that all of the costs of the house were to be paid for like rent is paid; and that whatever amount was charged for "slop-over" would be handled by monthly payments to the defendant and without interest.

There is no evidence that the number of monthly payments was mentioned. However, it is obvious that the payments flowing from the building and loan association mortgage fund were payable over a fixed number of months. There is only one debt to be paid in monthly installments. We think it equitable that the payment

of the overflow should be in the number of installments agreed upon for the payment of that part of the debt paid by the building and loan association fund. In the absence of an agreement to the contrary the same formula for repayment as to the number of installments should be followed.

Accordingly the trial court is directed to receive evidence and determine the number of months which the building and loan association contract provides for the repayment of the fund so secured.

The amount found to be due the defendant, if any, is to be divided by that number of months and the result becomes the monthly installment which the plaintiffs shall pay to the defendant until the full sum is so paid.

The trial court is likewise directed to receive evidence and determine the time when the first monthly payment was due and payable to the building and loan association. The monthly installments, payable by the plaintiffs to the defendant, shall be fixed as beginning as of that time. The total amount of the payments so determined as of the date of the decree shall be found to be then payable and the decree shall award defendant judgment therefor. The remainder of the installments shall be fixed as accruing and payable monthly thereafter so as to coincide with and be paid consistent with the building and loan association contract payments.

The evidence shows without dispute that plaintiffs, beginning with the time they accepted possession of the house, tried to secure a statement from the defendant as to the additional amount, if any, that was due the defendant. They were never advised of the exact total claimed until the mechanic's lien herein was filed. Efforts were made to negotiate a formula of settlement. Those efforts failed because the defendant refused to abide by the agreement that the "slop-over" balance should be paid without interest.

Section 45-103, R. R. S. 1943, provides that interest on all decrees and judgments for the payment of money

shall be from the date of the rendition thereof. However, we have held that this language refers to judgments on decrees for money which is immediately due and collectible where its nonpayment is a breach of duty on the part of the judgment debtor. See Dike v. Andrews, 80 Neb. 455, 114 N. W. 582. We there held that interest should be computed on installments from their date of maturity until paid.

Obviously the plaintiffs by the agreement should not be required to pay interest on the total amount of the "slop-over" from the date of the determination of the amount of the "slop-over." A court of equity has a reasonable discretion to allow or withhold interest as is reasonable and just, except in cases where interest is recoverable as a matter of right. 47 C. J. S., Interest, § 3, p. 13.

Accordingly the decree shall provide that plaintiffs shall pay interest at the legal rate on the amount decreed to be due and payable as provided herein from the date of the decree only; and plaintiffs shall pay interest at the legal rate on the remaining installments only in the event they become delinquent and then only from the date of the beginning of the delinquency.

All costs of this action, in this court down to and including the mandate filed as a result of this decision, are to be taxed to the defendant.

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

REVERSED AND REMANDED WITH DIRECTIONS.

LEONARD E. SMITH ET AL., APPELLANTS, V. MARION HORNKOHL, APPELLEE.
90 N. W. 2d 347

Filed May 31, 1958. No. 34362.

1. **Estates.** "Fee simple" means an absolute title or estate in

lands wholly unqualified by any reversion, reservation, condition, or limitation or possibility of any such thing, present or future, or precedent or subsequent.

2. **Pleading.** Where an allegation in the petition is admitted by the answer, the fact is established for the purpose of the case, and the court cannot disregard it.
3. **Specific Performance.** The doctrine is fundamental that either of the parties seeking a specific performance against the other must show, as a condition precedent to his obtaining the remedy, that he has done or offered to do, or is then ready and willing to do, all the essential and material acts required of him by the agreement at the time of commencing the suit, and also that he is ready and willing to do all such acts as shall be required of him in the specific execution of the contract according to its terms.
4. **Specific Performance: Vendor and Purchaser.** Where the vendor is unable to convey the property which he has agreed to convey because of a defect in the quality or quantity of the estate which he possesses and the vendee has entered into the contract without knowledge or notice of the deficiency or defect in the vendor's title, he may ordinarily have specific performance of the contract as to whatever interest the vendor has with such abatement of the purchase price as shall be proportionate to the diminution in value of the subject matter, to be determined by the court from competent evidence adduced with relation thereto.
5. ———: ———. On the other hand, specific performance with abatement will not be enforced where it would be productive of inequity or would have the effect of making a new contract between the parties, or it is patent that the nature of the subject matter, the terms of the contract, or the kind and extent of the defect are such that they furnish no basis upon which to ascertain the amount of the compensation or abatement with any degree of certainty, and the fixing thereof would therefore be a mere matter of speculation.
6. **Reformation of Instruments: Specific Performance.** Equity may reform a contract for the purchase of land so as to include terms upon which the parties definitely agreed and may also require specific performance of the contract as reformed.
7. **Vendor and Purchaser.** If the purchaser of real estate is aware of a defect in the vendor's interest or title, or deficiency in the subject matter, at the time of entering into a contract for the purchase thereof, he is ordinarily not entitled to any compensation or abatement of the purchase price because of that fact when suing for the specific performance thereof. However the foregoing rule is subject to an exception when the

parties, with full knowledge of such fact, enter into a written contract providing the vendor shall convey the premises to the purchaser in fee simple, free from encumbrance. In such a situation it becomes immaterial that the purchaser merely had notice thereof at the time the contract was entered into for the seller must protect himself by the terms of the contract he enters into with reference thereto. If he does not do so then the purchaser has a right to insist upon the terms of the contract as made.

8. **Evidence.** Generally, on cross-examination of a witness, any fact may be elicited from him which tends to show his bias or partiality, and considerable latitude should be allowed counsel in attempting to do so.

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

Halcomb, O'Brien, Knapp & Everson, for appellants.

Heaton & Heaton, 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 Lincoln County. It involves an action for specific performance of a real estate contract brought by Leonard E. and Eva Smith, husband and wife, against Marion Hornkohl and involves a half section of land located in Kimball County, Nebraska. Hornkohl answered and therein asked that plaintiffs be required to pay the balance of the purchase price. Trial was had and the court found generally for the defendant, granting him the relief for which he had prayed. Their motion for new trial having been overruled the plaintiffs brought the matter here from the trial court's ruling thereon.

The action was properly brought in Lincoln County. See § 25-403, R. R. S. 1943.

The principal question raised by the appeal is, are appellants, under the circumstances as disclosed by the

record, entitled to an abatement of a part of the purchase price in view of the fact that appellee sold them the land in fee simple when, in fact, he did not own the mineral estate therein? When referring to the appellants herein individually we shall refer to them as Mr. or Mrs. Smith.

As we said in State v. Alter, 80 Neb. 405, 114 N. W. 293: "There is no expression known to the law that is more unequivocal or completely free from any sort or kind of ambiguity or doubt than the phrase 'fee simple.' It means an absolute title or estate in lands wholly unqualified by any reversion, reservation, condition, or limitation or possibility of any such thing, present or future, or precedent or subsequent, * * *." See, also, Watson v. Dalton, on rehearing, 146 Neb. 86, 20 N. W. 2d 610.

The "Agreement for Warranty Deed" entered into by the parties provides, insofar as here material, as follows:

"ARTICLES OF AGREEMENT made this 16th day of March, 1956, between Marion Hornkohl, a single man of Route #1, North Platte Nebraska, party of the first part, and Leonard E Smith & Eva Smith, Husband & Wife, as Tenents by the entirety with rights of Survivorship to each other, party of the second part.

"WITNESSETH, That the said party of the first part hereby covenants and agrees that if the party of the second part shall first make the payments and perform the covenants hereinafter mentioned on Their part to be made and performed, the said party of the first part agrees to furnish to second party a good and sufficient abstract of title showing a good title of record to the premises hereinafter described in the party of the first part, and *will convey and assure to the party of the second part, in fee simple,* clear of all encumbrance whatsoever, *by good and sufficient Warranty Deed,* the following lot, piece and parcel of ground, viz: The North Half of the South Half and the South half of the North

Half of Section 28, Township 15 North, Range 57, West of the Sixth P M, in Kimball County Nebraska, together with all crops now growing on this land. *Possession will be given to Second party immediately on signing this contract.* This tract contains 320 acres, more or less according to the Government Survey thereof. The price is $32.50 an acre.

"And the said party of the second part hereby covenants and agrees to pay to said party of the first part the sum of Ten Thousand Four Hundred - - - DOLLARS in the manner following: One Hundred - - - Dollars, cash in hand paid, the receipt of which is hereby acknowledged, and the balance of $10,300.00 to be paid as Follows; The sum of $3300.00 will be paid as soon as second party has had an opportunity of having the Abstract of Title examined and approved, but not later than April First 1956; The balance of $7000.00 to be paid in five equal annual installments of $1400.00 each with interest at 5% from April First 1956, interest on all of the unpaid balance to be paid annually on April first with the principal payment, first principal payment will be due on April first 1957. All or any amount of the unpaid balance will be accepted by first party on the first of any month with interest at 5% to date of payment." (Emphasis ours.)

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

The appellee's answer admits paragraph No. 3 of the petition of appellants which alleges: "That immediately after March 16, 1956 the plaintiffs and their agents took possession of the real estate described above and caused agricultural and conservation work to be performed thereon." This was in accordance with the provisions of the parties' contract. Appellants were still in possession thereof when this action was filed on August 2, 1956, and at the time of trial on September 6, 1957. Ap-

pellants paid, and appellee accepted $3,400 of the purchase price. It is the balance of $7,000, with interest, which the court ordered appellants to pay and for which they were ordered to accept a warranty deed from appellee containing the following provisions: "It is understood by the parties that no mineral interests are conveyed by this instrument."

"The doctrine is fundamental that either of the parties seeking a specific performance against the other must show, as a condition precedent to his obtaining the remedy, that he has done or offered to do, or is then ready and willing to do, all the essential and material acts required of him by the agreement at the time of commencing the suit, and also that he is ready and willing to do all such acts as shall be required of him in the specific execution of the contract according to its terms." 4 Pomeroy's Equity Jurisprudence (5th Ed.), § 1407, p. 1050. See, also, Freeman v. Elder, 158 Neb. 364, 63 N. W. 2d 327.

Appellants had met these requirements. Both parties asked for specific performance by the form of relief prayed for and, in fact, the trial court granted appellee such relief.

In addition to praying for specific performance of the contract, as entered into by the parties, the appellants prayed: "That if the defendant be unable to convey all of the property contracted to be conveyed that the plaintiffs have and recover judgment against the defendant requiring him to convey so much of the property described by the aforementioned contract as he may own and that the purchase price set forth in the contract be abated to the extent of the fair and reasonable value of the mineral estate with reference to the land described in the aforementioned contract."

It is apparent that the trial judge was not aware of our holding in Freeman v. Elder, *supra*, for in his order overruling appellants' motion for new trial is the following statement: "The court being fully advised in

the premises finds that the rule in Nebraska is such that a purchaser of real estate by contract is not entitled to specific performance of such contract and at the same time to secure an abatement of a portion of the purchase price on account of difficulties or deficiencies in the title or quantity of property contracted for as a matter of law, and for that reason the plaintiffs are not entitled to prevail in the above identified action against the defendant insofar as they request an abatement of any portion of the purchase price."

We said in Freeman v. Elder, *supra,* that "Plaintiff brought this action against defendants seeking specific performance of the contract with abatement of the purchase price because, upon conveyance of the land to defendants, their grantor, the Federal Land Bank, had reserved to itself 'one half of minerals, oil and fissionable material until the year 1964' " and therein held: "Where the vendor is unable to convey the property which he has agreed to convey because of a defect in the quality or quantity of the estate which he possesses and the vendee has entered into the contract without knowledge or notice of the deficiency or defect in the vendor's title, he may ordinarily have specific performance of the contract as to whatever interest the vendor has with such abatement of the purchase price as shall be proportionate to the diminution in value of the subject matter, to be determined by the court from competent evidence adduced with relation thereto."

This is an equity action and therefore here on appeal for review de novo. See § 25-1925, R. R. S. 1943.

The evidence adduced at the trial shows that George N. Phillips, in association with his son Donald Phillips, operated a real estate and insurance business in Pine Bluffs, Wyoming, known as George N. Phillips & Son. Pine Bluffs is one-half mile across the state line in Wyoming and immediately to the west of Kimball County, Nebraska. The appellee orally listed his land in Kimball County for sale with George N. Phillips & Son. George

N. Phillips had been in this business for about 12 years. He was licensed to and did sell real estate in Nebraska, particularly in Kimball County. The firm advertised appellee's land for sale in several newspapers and although George N. Phillips admittedly knew appellee had no mineral estate therein he made no mention of that fact in the ads.

Mr. Smith of Cheyenne, Wyoming, saw one of these ads and, as a result thereof, called on the firm of George N. Phillips & Son in regard thereto. The negotiations leading up to the purchase of the land by the appellants were all between George N. Phillips and Mr. Smith although the son, Donald Phillips, testified he overheard part thereof and to that extent corroborated his father's testimony.

The father testified he knew that appellee had no mineral estate in the land because the abstract, which he then had in his possession, showed by entry No. 38 thereof that it had been reserved by a Margaret A. Maginnis in 1951 and that he informed Mr. Smith of that fact before he purchased the land, doing so by reading that fact from the abstract several times. In this he is corroborated by his son. On the other hand Mr. Smith says he was never so advised and in fact, when he asked in regard thereto, was given an answer from which the only reasonable inference to be drawn was that appellee did have the mineral estate therein. Ordinarily, under this situation, the following principle would be controlling: While the law requires this court, in determining an appeal in an equity action involving questions of fact, to reach an independent conclusion without reference to the findings of the district court, this court will, in determining the weight of the evidence, where there is an irreconcilable conflict therein on a material issue, consider the fact that the trial court observed the witnesses and their manner of testifying. See, McDermott v. Boman, 165 Neb. 429, 86 N. W. 2d 62; Eggert v. Schroeder, 158 Neb. 65, 62 N. W. 2d 266; Sop-

cich v. Tangeman, 153 Neb. 506, 45 N. W. 2d 478; Johnson v. Erickson, 110 Neb. 511, 194 N. W. 670.

However, the evidence shows that George N. Phillips was an experienced real estate broker, that he filled in the typewritten part of the contract, and that he failed to include therein any mention of the fact that appellee did not own and was not selling to appellants the mineral rights therein. In view of that fact we come to the conclusion that although George N. Phillips may have known of the fact that appellee did not own the mineral estate in the land that he was selling to Mr. Smith such fact was never made known to Mr. Smith and appellants were without knowledge of that fact when they signed the contract on March 16, 1956, in Pine Bluffs, Wyoming.

In Freeman v. Elder, *supra,* we went on to hold that: "On the other hand, specific performance with abatement will not be enforced where it would be productive of inequity or would have the effect of making a new contract between the parties, or it is patent that the nature of the subject matter, the terms of the contract, or the kind and extent of the defect are such that they furnish no basis upon which to ascertain the amount of the compensation or abatement with any degree of certainty, and the fixing thereof would therefore be a mere matter of speculation."

The appellee's answer admits paragraph No. 11 of the petition of appellants wherein they allege: "That the real estate heretofore described and which the defendant contracted to sell and the plaintiffs contracted to purchase is located in an oil and gas producing area of the State of Nebraska that the mineral estate in said land is valuable and that the mineral estate in said land constitutes an essential element of the total valuation of all land in Kimball County, Nebraska and the land heretofore described and the value of the mineral estate therein is ascertainable with a reasonable degree of certainty."

In view of the above admission we think appellants are entitled to an abatement of the purchase price to

the extent of the value of the mineral estate unless, for reasons contended by appellee, he is entitled to a reformation of the contract or appellants are estopped from claiming the right thereto. See Freeman v. Elder, *supra*.

"Equity may reform a contract for the purchase of land so as to include terms upon which the parties definitely agreed and may also require specific performance of the contract as reformed." Smoke v. Pope, 119 Neb. 432, 229 N. W. 330.

"In equity, the reformation of an instrument has the effect of making it express the real intent of the parties. The rights of the parties are measured by the instrument as originally intended, and the effect of the reformation, as a whole, should be to give all the parties all the rights to which they are equitably entitled under the instrument which they intended to execute." Beckius v. Hahn, 114 Neb. 371, 207 N. W. 515, 44 A. L. R. 73. See, also, Kear v. Hausmann, 152 Neb. 512, 41 N. W. 2d 850; 45 Am. Jur., Reformation of Instruments, § 45, p. 609. As stated in 76 C. J. S., Reformation of Instruments, § 4, p. 329: "Reformation is predicated on the equitable maxim that equity treats as done that which ought to be done. It presupposes that the instrument does not express the true intent of the parties, and contemplates a continuance of the contractual relations on what both parties really intended should be the stipulation. It proceeds on the theory that a valid contract was created by the negotiations of the parties, but by mistake is wanting in formal expression or execution so as to evince the actual intent of the parties. The purpose of reformation is to make an erroneous instrument express correctly the intention of, or the real agreement between, the parties, or, in other words, its purpose is not to make a new contract or instrument, but to give effect to the original intent of both parties."

In Paine-Fishburn Granite Co. v. Reynoldson, 115 Neb. 520, 213 N. W. 750, we held:

"In a proceeding to reform a contract on the ground

of mutual mistake, the burden of proof is on the party interposing that plea.

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

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

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

In view of what we have already said about the evidence adduced any reformation of the contract, so as to exclude the mineral rights from the estate therein sold to appellants and by appellee agreed to be conveyed to them by warranty deed would not be according to the terms which the parties thereto definitely agreed upon. Consequently reformation cannot be granted.

But even assuming the appellants knew, at the time they entered into the contract, that appellee did not then own the mineral estate that fact would not help appellee unless appellants had thereupon agreed to buy only the interest then owned by appellee, for as stated in Crahane v. Swan, — Or. —, 318 P. 2d 942:

"The appellant cites Wetherby v. Griswold, 75 Or. 468, 147 P. 388, 390, relying on the rule found at page 475 as quoted from 37 Cyc. 742 and reading:

" 'If the purchaser at the time of entering into the contract was aware of the defect in the vendor's interest or title, or deficiency in the subject-matter, he is not, on suing for specific performance, entitled to any compensation or abatement of price.'

"The foregoing rule is, however, subject to an exception: When the written contract between the parties provides that the vendor shall convey the premises free from encumbrances, it is immaterial that the purchaser had notice at the time of the contract that there was an encumbrance on the property. The purchaser has a right to insist upon the terms of his contract." As stated in Pillsbury v. Alexander, 40 Neb. 242, 58 N. W. 859:

"In an action brought by a vendor against a vendee to compel the latter to specifically perform his contract to purchase real estate, such vendee is estopped from alleging, as a defense to said action, a defect in his vendor's title; which defect was brought to the actual knowledge of the vendee at the time he entered into such contract of purchase, and where the evidence shows that he contracted to purchase such real estate incumbered with the alleged defect." As quoted from 55 Am. Jur., Vendor and Purchaser, § 154, p. 625, in Sofio v. Glissmann, 156 Neb. 610, 57 N. W. 2d 176: " 'Also, it has been held that where the vendee has knowledge of a lease of the premises which were in possession of the lessee, he is chargeable with notice of the conditions and options in the lease, and he cannot, because of these matters, refuse to take title. If the vendee enters into a contract with knowledge of a defect in the title, and he agrees not to object to the title upon this ground, he cannot rely upon his defect as an excuse for not performing the contract.' " As we have already said, we do not find that appellants contracted to purchase the real estate herein involved with a deficiency in the fee title of the mineral estate. In fact, the exact opposite is true.

Nor do we find the fact that appellants took possession of the land immediately after March 16, 1956, as they had a contractual right to do, and have held it ever since estop them from now claiming the right of abatement.

The evidence shows that appellants received the abstract to the property shortly after appellee signed the contract at North Platte, which was on March 17, 1956. Exactly when they received it is not shown by the evidence. As stated in Schlake v. Healey, 108 Neb. 35, 187 N. W. 427: "Appellant received the abstracts about the 20th day of February and was charged with knowledge of the condition of the record title disclosed by them, * * *." Thus appellants were charged with knowledge of the deficiency shortly after March 17, 1956, since the

abstract was certified on that date and apparently delivered to one of the appellants shortly thereafter.

It should be remembered that appellants are not denying appellee's title but merely claiming a deficiency therein of the mineral estate. If appellee could have supplied that deficiency at any time prior to trial then appellants would not have been in a position to complain thereof and say time was of the essence for, as stated in Schlake v. Healey, *supra*: "* * * since appellant had taken and retained possession of the real estate under the contract, he lost his right to have the title tested in the light of the record as disclosed by the abstract on April 1. Under the circumstances, appellant brought himself within the rule announced in Seaver v. Hall, 50 Neb. 878, and the rights of the parties are to be determined by the state of the title, not as the abstract showed it to be on April 1, but as it was, and as the court found it to be, at the time of the trial." See, also, Seaver v. Hall, 50 Neb. 878, 70 N. W. 373. As part of the same principle the vendee in possession is not estopped to claim such deficiency for to do so would destroy the principle of abatement in case of a defect in the quantity or quality of the estate bargained for. See Freeman v. Elder, *supra*. As therein stated by quoting from 49 Am. Jur., Specific Performance, § 105, p. 123: "'* * * The vendee, in other words, may waive full performance and accept such title as the vendor is able to give, and if he chooses to do so, he has a right to that and to an abatement, and the court will not hear the objection, by the vendor, that the purchaser cannot have the whole.'"

Appellants complain of the trial court's undue restriction in their cross-examination of George N. Phillips. In Johnson v. Griepenstroh, 150 Neb. 126, 33 N. W. 2d 549, we said: "'"Generally, on cross-examination of a witness, any fact may be elicited which tends to show bias or partiality, and if the witness denies the fact showing the bias or interest, the cross-examining party may call other witnesses to contradict the witness."

Cabel v. State, 18 Ala. App. 557. * * * And it is further held that considerable latitude should be allowed in eliciting from a witness, or in attempting to elicit and to establish, bias, hostility, corruption, or interest of the witness bearing upon his credibility. Glass v. State, 147 Ala. 50.' (Vassar v. Chicago, B. & Q. R. R. Co., 121 Neb. 140, 236 N. W. 189, 74 A. L. R. 1154.)" We find this complaint has merit but in view of our holding herein such error becomes immaterial.

In Freeman v. Elder, *supra,* we said: "* * * whether or not there was any basis upon which to ascertain the amount of the compensation or abatement with any reasonable degree of certainty is a question of fact dependent upon the character or quality of evidence which may be adduced by plaintiff with relation thereto upon the merits * * *." Here admittedly the mineral estate is valuable, constitutes an essential element of the land's valuation, and its value is ascertainable with a reasonable degree of certainty. However, we think the character and quality of the evidence adduced to show its value, particularly as presented by appellee, is insufficient for that purpose. In order to prevent a possible injustice we reverse the judgment and remand the cause to the district court solely for the purpose of permitting both sides to introduce additional evidence as to the value of the mineral estate with directions that the trial court determine the value thereof and deduct it from the balance of the purchase price owing from appellants to appellee and order specific performance of the contract accordingly. All costs are to be taxed to appellee.

REVERSED AND REMANDED WITH DIRECTIONS.

NEWELL STANLEY, APPELLEE, V. BENJAMIN EBMEIER ET AL., APPELLANTS.

90 N. W. 2d 290

Filed May 31, 1958. No. 34376.

1. **Appeal and Error.** It is not the province of this court in an appeal in an action at law to resolve conflicts in or weigh the evidence.
2. ———. It is presumed in such an action that controverted facts were decided by the jury in favor of the successful party and its findings based on conflicting evidence will not be disturbed unless they are clearly wrong.
3. **Trial.** If there is evidence which sustains a finding for the litigant who has the burden of proof in an action at law the trial court may not disregard it and decide the case as a matter of law.
4. **Automobiles.** The doctrine of sudden emergency may not be successfully invoked by a litigant unless there is evidence that such an emergency existed, that the party seeking the benefit of the doctrine did not cause the emergency, and that he used due care to avoid it.
5. ———. The operator of a motor vehicle is required to have his vehicle under such reasonable control as to be able to avoid collision with another vehicle whose driver exercises due care.
6. ———. Complete control which will prevent an accident by the anticipation of negligence on the part of another, in the absence of warning or knowledge, is not required.
7. **Automobiles: Negligence.** Reasonable control by the operator of a motor vehicle is such as will enable him to avoid an accident involving another motor vehicle operated without negligence or with a pedestrian who is exercising due care.
8. ———: ———. It is a general rule, subject to exceptions not applicable to this case, that it is negligence as a matter of law for a motorist to drive an automobile on a public highway at any time at a speed or in such manner that it cannot be stopped or its course changed in time to avoid a collision with an object or obstruction discernible within the range of vision in the direction he is traveling.
9. ———: ———. The basis of the foregoing rule is that the driver of an automobile is legally and mandatorily obligated to maintain such a lookout that he can see what is plainly visible before him and to operate his automobile in such a manner that he can stop it and avoid collision with any object in front of him.

APPEAL from the district court for Dixon County: JOHN E. NEWTON, JUDGE. *Affirmed.*

Philip H. Robinson and *Hutton & Hutton*, for appellants.

Sherman W. McKinley, Jr., and *McEntaffer & Fachman*, for appellee.

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

BOSLAUGH, J.

The causes of action asserted by appellee were in substance as follows: Benjamin Ebmeier conducted business as Home Oil Company. Gerald Dowling was at the times referred to an agent and employee of Benjamin Ebmeier, was engaged in the business of his principal and employer, and was acting within the course of his employment. Appellee was at about 9:30 a. m., April 25, 1955, operating a 1950 Chevrolet pick-up truck in a westerly direction on U. S. Highway No. 20, hereafter referred to as Highway No. 20, about 1 mile east of the intersection of Nebraska State Highway No. 116 with Highway No. 20 in Dixon County. He intended to make a left-hand turn on an intersecting road. He extended his left arm through and out from the left window of his vehicle as a left-hand turn signal and decreased the speed of his vehicle to accommodate and facilitate the turn he intended to make. The rate of the speed of the vehicle he was operating was about 10 miles per hour at the time of the collision of a truck owned by Benjamin Ebmeier and operated by Gerald Dowling with the pick-up truck driven by appellee. Gerald Dowling was operating a 1952 Chevrolet 2-ton truck of his employer on Highway No. 20 at the time and place aforesaid at a speed of about 60 miles per hour. As appellee was approaching the intersection upon which he intended to turn to the left or south but while he was still on his right or north side of Highway No. 20,

Gerald Dowling operated the truck he was driving across Highway No. 20, into and upon the south lane of it, and collided with a Buick automobile moving towards the east and driven by Joseph Carlson on Highway No. 20. Immediately thereafter the truck operated by Gerald Dowling collided with the rear of the pick-up truck in which appellee was traveling towards the west in and upon the north or right-hand lane of Highway No. 20. The highway was paved. The highway extended east and west. The pavement was dry, the weather was clear, and it was daylight. The collision of the 1952 Chevrolet truck with the pick-up truck of appellee was the proximate result of the negligence of appellants as follows: The operation of the truck was at an excessive rate of speed and at a greater speed than was reasonable under the circumstances then existing; failure to keep a proper lookout for traffic on the highway; failure to operate the vehicle in such a manner that it could be stopped within the assured clear distance ahead; and operating the vehicle on and in the left lane of the highway when there was traffic moving therein from the west and there was not time or distance sufficient to pass the vehicle of appellee. The collision of the vehicles caused severe injuries, permanent disability, and great damage in specified amounts to the appellee for which judgment was asked against appellants. The second cause of action was for the damage caused to the pick-up truck of appellee and judgment was sought against appellants for it.

The causes of action alleged by appellee were each denied by appellants and they asserted that the collision complained of by appellee and the damages alleged to have resulted therefrom were proximately caused by the negligence of appellee. The reply thereto was a denial of the new matter of the answer.

A trial of the issues resulted in a verdict for appellee on each of the causes of action and a judgment was rendered thereon for appellee and against appellants. The latter, at

the close of the evidence, requested the court to decide the case as a matter of law and to render a judgment for appellants. Appellants, after the entry of judgment upon the verdict, made a motion for a judgment notwithstanding the verdict or, in the alternative, for a new trial of the case. The motion was denied and appellants have pursued this appeal.

It is necessary to determine if the proof is sufficient to sustain the finding of the jury in favor of appellee. The evidence and reasonable inferences therefrom must be considered most favorably to him. Calvert v. Miller, 163 Neb. 501, 80 N. W. 2d 123. All disputed issues of fact must be considered resolved by the jury favorably to appellee. James v. Hogan, 154 Neb. 306, 47 N. W. 2d 847; Shields v. County of Buffalo, 161 Neb. 34, 71 N. W. 2d 701.

The accident which was the occasion of this litigation occurred about 9:30 a. m., April 25, 1955, on Highway No. 20 about 160 feet east of the intersection of Highway No. 20 and a north-and-south road about 4 miles from Dixon. Highway No. 20 was paved with concrete. It was 20 feet wide, in good condition, and extended east and west. It intersected a north-and-south road about 150 or 160 feet west of the place of the accident. It was a clear, dry day and during daylight when the collision took place. The parties were advised as to Highway No. 20, the intersecting roads, and the environment generally.

Appellee went to and upon Highway No. 20 from his farm 1,767 feet east of the intersection last mentioned. He was traveling in and operating a 1950 Chevrolet pick-up truck, hereafter referred to as the pick-up. His vehicle was in good mechanical condition. The rear stop-light lamps, activated by the use of the brakes of the vehicle, were in good operating condition and performed as they were intended to do. The highway from where he entered it was upgrade for 1,112 feet. The grade of it was 3 percent. When appellee stopped before

going upon the highway he saw an oil truck approaching on Highway No. 20 from the east about 1,000 feet from appellee. This was the truck which collided with appellee and it was owned by Benjamin Ebmeier, one of the appellants, hereafter called appellant, and operated by Gerald Dowling, one of the appellants and an employee of Benjamin Ebmeier. Gerald Dowling will be hereafter identified by the name Dowling. Appellee traveled west at a speed of 25 to 30 miles per hour up the hill to its top or crest, a distance of 1,112 feet west from where he entered Highway No. 20. As he was starting down the hill, which had a grade of 5.67 percent, he lightly pressed the brake pedal of his vehicle and reduced his speed moderately. He did this because he intended to turn to the left or south at the intersection he was traveling towards which was 655 feet west of the crest or top of the hill over which he had just traveled. His mail box was a short distance south of the intersection on the north-and-south road. He intended to stop there and get his mail.

Appellee met and passed a flat-bed truck, a bread truck, and a Buick automobile traveling towards the east. The flat-bed truck had a brooder house on it which was about 1 foot wider than the bed of the truck and extended over the center line of the highway. He met this truck near the top of the hill. The bread truck was about two-thirds of the way up the hill and the Buick automobile was about 200 feet east of the intersection. Appellee had just passed the Buick automobile when his vehicle received a terrific jar. He was jostled and thrown about in the cab of his truck and experienced a sensation of falling. The contact with the pick-up was at its left rear. Appellee was thrown from his pick-up through space and came to rest in the center of the north-and-south road approximately 20 feet north of the north line of Highway No. 20. He received serious and permanent injuries. Appellee at all times after he entered Highway No. 20 operated his truck on the north or right

half of the highway until it was in collision with the oil truck operated by Dowling. He did not at any time cross the center line of the highway with his pick-up. The speed of his vehicle immediately before it was collided with was 10 to 15 miles per hour. Appellee, before his pick-up was hit, gave a left-turn signal with his left hand and arm extended out of the left window of the cab of his vehicle. There was a clear, unobstructed view by any traveler on Highway No. 20 going west from the top of the hill to and beyond the first intersection a distance of more than 600 feet.

The Buick automobile going east, which appellee passed as he was going down the hill towards the intersection, was driven by Joseph Carlson. There was a bread truck in front of the Buick, a truck with a building on it preceded the bread truck, and these three vehicles were traveling about 15 miles per hour. When Carlson saw appellee the former was 125 to 150 feet up the hill from the intersection west of where the accident happened. He then saw a Home Oil Company truck, which will be spoken of as oil truck hereafter. It was about 230 feet east of the intersection. It was then in the north lane of Highway No. 20. It then swerved back and forth over the highway and moved towards the Buick automobile. Carlson accelerated the speed of the Buick and got to the south or right until the front wheel of it was off the pavement to the south. The oil truck collided with the Buick immediately back of its left front door. The Buick skidded or was pushed for a distance by the front bumper of the oil truck and then there was a second crash. The Buick was probably 150 feet or slightly more east of the intersection when the oil truck first collided with it. The oil truck was about 125 feet east of the pick-up of appellee when Carlson first saw it. He observed that Dowling, the operator of the oil truck, had applied its brakes and was attempting to decrease its speed before it collided with the Buick. The speed

of the oil truck when Carlson first saw it west of the top of the hill was 40 to 50 miles per hour.

The operator of the truck which was transporting the brooder house met and passed appellee as he came over the crest of the hill and he was, according to the trucker, traveling at 15 to 20 miles per hour. The operator of the truck met the oil truck 400 or 500 feet east from the crest of the hill and the speed of that truck was 40 to 50 miles per hour. The bread truck was west of the flat-bed truck. The driver of the bread truck first saw appellee when he was a short distance west of the crest of the hill proceeding west in the north lane of Highway No. 20 at a speed of 10 to 15 miles per hour. When the operator of the bread truck was about 50 feet east of the intersection he saw the oil truck traveling west come over the hill at a speed of between 40 and 45 miles per hour. The bread truck was about halfway up the hill east of the intersection when it met the oil truck and they passed. The oil truck swerved to the left or south in an attempt to avoid colliding with the pick-up and struck the Buick automobile which was following the bread truck while the oil truck was partly at least in the south lane of the highway. The oil truck then swerved back toward the north lane of the highway and collided with the back end of the pick-up. The Buick automobile was south of the center of the pavement when it was hit and the pick-up was in the north lane of the highway when it was struck by the oil truck. There were skid marks on the pavement made by the tires of the oil truck from a point 29 feet east of and extending west to the place where the oil truck collided with the pick-up. The oil truck came to rest 200 feet west of the situs of the accident.

A witness testified that Dowling told him at the scene of the accident that appellee had given a signal; that Dowling had taken his eyes from the road to look at the flat-bed truck; that when he turned back he realized that appellee had decreased his speed; that Dowling put

on the brakes of the oil truck but they did not seem to work just right; and that he, Dowling, could not avoid the truck he was operating from colliding with the pick-up of appellee.

Dowling testified he entered Highway No. 20 one-half mile east of where appellee went upon this highway the morning of the accident. The brakes of the truck he was using were then operating properly. When he was a considerable distance east of the home of appellee Dowling saw appellee drive down the lane of his farm and enter Highway No. 20. He proceeded westward at a speed of 10 to 12 miles per hour and increased it to 25 to 30 miles per hour. The speed of the oil truck Dowling was operating was 40 to 45 miles per hour. He saw the pick-up go over the hill to the west and it was 200 or 300 feet ahead of the oil truck. When the witness got to the top of the hill appellee was 200 feet to the west. The witness reduced the speed of the oil truck to 30 miles per hour. He saw and passed the truck on which the brooder house was being transported. As he approached the bread truck he observed that appellee had suddenly reduced his speed. Dowling attempted to go around the pick-up of appellee. He then saw the Buick automobile only 50 or 75 feet behind the bread truck. He thought he could drive the oil truck between the Buick and the pick-up but decided that he could not. He turned the oil truck back, obviously towards the north, sideswiped the Buick automobile, and he then collided with the rear of the pick-up. The contact with the Buick removed the chrome from the door, made a long dent in it, and took off the front part of the back fender. The right front of the oil truck hit the rear of the pick-up. Appellee gave no signal that he was slowing up or going to stop, according to Dowling. When Dowling attempted to pass appellee he could not see the south lane of the highway to the west or the traffic moving thereon towards the east. When he drove the oil truck into the south lane of the highway he then saw the Buick

automobile. When the oil truck was passing the bread truck appellee was about 100 feet west of it. Dowling said he saw appellee reduce his speed. Dowling then applied the brakes on the oil truck and attempted to pass the pick-up and avoid hitting it. He failed in both objectives.

The findings of the jury favorable to appellee are supported by the evidence. If there is evidence which will sustain a finding for the litigant who has the burden of proof in a cause, the trial court may not disregard it and decide the case as a matter of law. Long v. Whalen, 160 Neb. 813, 71 N. W. 2d 496; Barney v. Adcock, 162 Neb. 179, 75 N. W. 2d 683; Larsen v. Omaha Transit Co., 165 Neb. 530, 86 N. W. 2d 564.

The charge of appellants that appellee was guilty of contributory negligence which was the proximate cause of the collision of the oil truck with the pick-up of appellee is based on the failure of appellee to look back or to observe where the oil truck was behind him as the vehicles traveled down the hill to the place of the accident, and that appellee suddenly reduced the speed of his pick-up and failed to give a signal of his intention to stop or to suddenly reduce his speed. Dowling, the operator of the oil truck, saw the appellee enter Highway No. 20 when Dowling was a considerable distance east of that place. Appellee produced evidence the distance was about 1,000 feet and it was not disputed. Dowling had a clear, unobstructed view of appellee as he proceeded west to the top of the hill a distance of more than 1,100 feet from where appellee entered the highway. When Dowling passed the top of the hill he was about 200 feet behind appellee and Dowling had a clear view of appellee until his vehicle was collided with by the truck operated by Dowling, a distance of about 500 feet. The speed of appellee's vehicle when he reached the top of the hill was 25 to 30 miles per hour. This was decreased to 10 to 15 miles per hour at the time of the collision. Dowling was traveling 40 to 45 miles

per hour and he only claims he reduced his speed to 30 miles per hour. Appellee traveled only in the north or right lane of the highway. He did not stop his truck. He had no reason to do so. He was then 150 feet or more east of the intersection traveling at the moderate speed of 10 to 15 miles per hour and he did not intend to stop when he reached the intersection. His intention was to turn to the left and go south on the north-and-south road. He did not reduce the speed of the pick-up suddenly. He put the brakes on lightly and reduced the speed gradually and moderately from 25 to 30 miles per hour to 10 to 15 miles per hour. Dowling saw that the speed of the pick-up was being reduced by appellee when Dowling approached the bread truck going east and appellee was at that time at least 100 feet to the west of it. Dowling made no effort to reduce his speed and avoid an accident with either the Buick automobile or the pick-up or both of them which were west of him. He instead elected to pass appellee, drove his truck in the south lane of the highway, collided with the Buick automobile, and then turned his oil truck to the north and caused it to collide with the pick-up of appellee.

The statutory provision that the operator of a motor vehicle shall not stop or suddenly decrease the speed of the vehicle without giving an appropriate signal to the driver of any vehicle immediately to the rear has no application to this case. The charge of appellants that negligence of appellee was the proximate cause of the collision of the vehicles complained of by him and any injuries and damages resulting therefrom is wholly unsupported by proof. The trial court correctly denied the motion of appellants for a judgment notwithstanding the verdict or, in the alternative, for a new trial.

Instruction No. 1 was a statement in reference to the contents of the petition. The petition contained a statement that appellee was traveling on Highway No. 20 and intended "to make a left hand turn onto an intersecting dirt road." The instruction disregarded this

statement and appellants complain that it thereby "entirely kept from the jury a very important fact admitted in the pleadings—*that plaintiff was going to make a left hand turn.*" This instruction was not the expression of any rule of law. It was an informative summary of the petition. The uncontroverted evidence of appellee supplied the jury with the information that he intended to make a left-hand turn at the intersection: "I intended to make that lefthand turn." If there was error in the omission it was not prejudicial. The jury had the fact that appellee intended to turn left at the intersection and to go to his mail box.

The trial court gave by instruction No. 10 what it considered to be relevant rules of the road. These included the ones concerning a vehicle overtaking and passing another vehicle on a public highway. Appellants do not complain that there was any incorrect statement of law in the instruction. They object that the effect of it was to inform "the jury as a matter of fact that this was an overtaking and passing case" and deprived the jury of deciding whether the rear-end collision with the pick-up truck of appellee was due to sudden reduction of speed by him, excessive speed by appellants, or a passing case in which different rules of law would apply; and that the charge to the jury did not inform it that if this was not a passing case but an emergency situation then the requirements of law were that if Dowling demeaned himself as an ordinary, careful, and prudent person would have done under the circumstances, he was not negligent even though he committed an error of judgment.

If instruction No. 10 advised the jury that this was an "overtaking and passing" case it stated a fact abundantly shown by and confirmed in the record. Dowling, as he was following appellee down the hill towards the place of the collision, approached the bread truck and attempted to pass the pick-up driven by appellee. The exact words of Dowling are: "Then is when I attempted

to go around Mr. Stanley. As I attempted to go around there I saw there was a Buick car behind this bread truck." Dowling then thought he would go between the Buick and the pick-up of appellee but he desisted from this desperation undertaking and turned the oil truck towards the north lane of the highway, and collided with the Buick automobile and then with the pick-up of appellee. This is the testimony of Dowling, the driver of the oil truck. It is not disputed. This instruction did not deprive the jury of anything it could properly have considered or decided in the case. The cause of the collision ceased to be uncertain after Dowling testified. His testimony is in substance a confession of negligence on his part.

The instruction was wholly foreign to what appellants refer to as an "emergency situation." The record shows that any emergency that existed was created by the unwarranted conduct of Dowling and that his negligence existed throughout until the collision happened and the damage was done. There was no plea or mention of a sudden emergency by appellants before their brief suggested it. The doctrine of sudden emergency cannot be invoked in a negligence case unless there is competent evidence to support a conclusion that a sudden emergency actually existed and it cannot be successfully invoked by one who has brought that emergency upon himself by his acts or who has not used due care to avoid it. Roby v. Auker, 149 Neb. 734, 32 N. W. 2d 491; Greyhound Corp. v. Lyman-Richey Sand & Gravel Corp., 161 Neb. 152, 72 N. W. 2d 669; Dryer v. Malm, 163 Neb. 72, 77 N. W. 2d 804. Instruction No. 10 is not subject to the objections made to it by appellants.

The assault on instruction No. 12 that it directed the attention of the jury to Dowling and away from the acts of appellee; that it defined with meticulous care the duties of appellants; and that it gave slight mention or none at all of the obligations of appellee as the operator of a motor vehicle has no merit. The instruction was

general concerning duties of the operator of a motor vehicle and it applied to appellee and to Dowling alike. It made no mention of either of them and no distinction between them; in fact, it was quite universal as it spoke of the duties of a driver of a motor vehicle to keep a proper lookout etc. There is no claim that it contained any incorrect matter and appellants made no request for an enlargement of it. Its inclusion in the charge to the jury was not improper.

Appellants claim error because of instruction No. 13. The language of it is: "It is the duty of the driver of a motor vehicle to maintain 'reasonable control' of his automobile. Reasonable control is such as would enable him to avoid collisions with other vehicles, operated without negligence. 'Complete Control' such as will prevent collisions only by anticipating the negligence or illegal disregard of traffic regulations by others in the absence of notice, warning or knowledge thereof is not required." The instruction has in substance the approval of this court. Greyhound Corp. v. Lyman-Richey Sand & Gravel Corp., *supra.*

The oil truck was operated by Dowling on Highway No. 20 for about 2,600 feet before the collision of the vehicles with the knowledge that appellee was preceding him traveling in his pick-up in the right or north lane of the highway towards the west. The view of appellee and his pick-up by Dowling was complete and continuous except as temporarily cut off by the hill over which they traveled. When they were both on the west of the hill there were about 200 feet between them. They traveled for about 500 feet on the west of the hill. When Dowling decided to make an effort to pass appellee the pick-up of appellee was about 100 feet west of the oil truck operated by Dowling. Appellee was then traveling at a speed of 10 to 15 miles per hour. In Bramhall v. Adcock, 162 Neb. 198, 75 N. W. 2d 696, this court said: "It is a general rule, subject to exceptions not applicable to this case, that it is negligence as a matter of law for

a motorist to drive an automobile on a public highway, at any time, at a speed or in such manner that it cannot be stopped or its course changed in time to avoid a collision with an object or obstruction discernible within his range of vision in the direction he is traveling. * * * The basis of the foregoing general rule is that the driver of an automobile is legally and mandatorily obligated to keep such a lookout that he can see what is plainly visible before him and to operate his automobile in such a manner that he can stop it and avoid collision with any object in front of him." See, also, Greyhound Corp. v. Lyman-Richey Sand & Gravel Corp., *supra;* Guerin v. Forburger, 161 Neb. 824, 74 N. W. 2d 870; Dryer v. Malm, *supra.*

The judgment should be and it is affirmed.

AFFIRMED.

CHARLES J. ODEN, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.
90 N. W. 2d 356

Filed May 31, 1958. No. 34387.

Juries. The procedure relating to the voir dire examination of prospective jurors requires the trial court to give each of the parties the right, within reasonable limits, to put pertinent questions to each and all of the prospective jurors for the purpose of ascertaining whether or not there exists sufficient grounds for challenge for cause and also to aid each of the parties in the exercise of the statutory right of peremptory challenge. This right, when requested, must be granted and failure to do so is prejudicial error.

ERROR to the district court for Gage County: CLOYDE B. ELLIS, JUDGE. *Reversed and remanded.*

W. O. Baldwin, for plaintiff in error.

Clarence S. Beck, Attorney General, and *John E. Wenstrand,* for defendant in error.

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

WENKE, J.

This is an error proceeding brought here from the district court for Gage County by Charles J. Oden. Oden was charged in the district court with having unlawfully operated a motor vehicle upon a public street in Gage County on April 28, 1957, while under the influence of alcoholic liquor. A jury found Oden "guilty as charged." After his motion for new trial had been overruled and after the trial court had found it was his third such offense, Oden was sentenced to serve not less than 24 nor more than 30 months in the State Reformatory, his driver's license was revoked, and he was ordered not to operate a motor vehicle until after 1 year had elapsed following his final discharge from such sentence.

It should be stated that the charge made against Oden, who will hereinafter be referred to as defendant, contained a statement that it was his third offense of operating a motor vehicle while under the influence of alcoholic liquor and, after being convicted, defendant admitted to the trial court, before sentence was imposed, that that was true.

The principal question raised by defendant is, did he have a right to have his counsel personally conduct a voir dire examination of the prospective jurors? At the beginning of the trial defendant's counsel requested permission of the trial court to personally conduct the voir dire examination of the jury and to be permitted to personally ask questions of the individual jurors. This request the trial court refused. The trial judge did, however, examine the jurors, both individually and collectively, as to their qualifications to serve and permitted counsel for both sides, through him, to submit questions to them in regard thereto.

Apparently this court has never passed directly on this question but has often inferred that such right existed.

See, Basye v. State, 45 Neb. 261, 63 N. W. 811; Van Skike v. Potter, 53 Neb. 28, 73 N. W. 295; Wilson v. State, 87 Neb. 638, 128 N. W. 38; Stone v. State, 103 Neb. 712, 174 N. W. 303; Strong v. State, 106 Neb. 339, 183 N. W. 559; Nama v. Shada, 150 Neb. 362, 34 N. W. 2d 650; Trebelhorn v. Bartlett, 154 Neb. 113, 47 N. W. 2d 374. As stated in Van Skike v. Potter, *supra*: "It is true that a litigant has the right to examine a person called as a juror for the purpose of ascertaining whether or not there exists grounds for challenging such person for cause." And in Nama v. Shada, *supra,* we said: "The right of counsel to interrogate jurors on their voir dire examination, in order to determine whether or not it is expedient to challenge any of them peremptorily, within proper limits, cannot be denied."

Other state courts that have passed on this question are divided in regard thereto. As stated in 50 C. J. S., Juries, § 276, p. 1055: "While the statutory mode of examination must be followed where applicable, the conduct of the examination is under the supervision and direction of the court, and in some jurisdictions, but not in others, the court may assume exclusive conduct of the examination, without permitting counsel personally to examine the jurors." In many states the procedure relating thereto is specifically controlled by statute. That is not the situation in this state. However, in some states where it is not controlled by statute the courts have come to opposite conclusions. See, State v. Guidry, 160 La. 655, 107 So. 479; State v. King, 158 S. C. 251, 155 S. E. 409. As stated in State v. Guidry, *supra:* "There is a wide variance in American jurisdictions in the method adopted for the examination of jurors on their voir dire. In some of the jurisdictions, the statutes provide for certain specific questions to be propounded to the prospective jurors to test their qualifications. In other jurisdictions, the courts hold that counsel for the defendant cannot insist upon such an examination as a matter of right. Where this rule prevails, the practice is

for the judge, on his own initiative or upon the motion of either party, to interrogate the juror asking such questions as he shall deem necessary, or by propounding any question, which he considers proper, submitted to him by counsel on either side. The usual and better practice, however, is to permit counsel to conduct the examination under the direction and supervision of the court. 35 C. J. 397; 16 R. C. L. 246. That is the procedure followed in this state. While it has not been prescribed by statute, it has been the uniform and customary practice in our courts, so far as we are aware, since their organization. As a result of a long series of actions, constantly repeated, and by uninterrupted acquiescence, it has acquired the force and effect of a rule of law governing jury trials in this jurisdiction." In federal courts the procedure is controlled by Rule 47(a), 28 U. S. C. A. 480. See Paschen v. United States, 70 F. 2d 491.

Our Constitution provides, insofar as here material, that: "In all criminal prosecutions the accused shall have the right to appear and defend in person or by counsel * * * and a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed." Art. I, § 11, Constitution of Nebraska. As we said in Wilson v. State, *supra*: "It is unnecessary for us to repeat what is provided by our constitution, and so often declared by all the courts of the land, including this one, that in all criminal cases an accused is entitled to a fair and impartial trial by an impartial jury, and that it is the sworn duty of the courts to see that that right is scrupulously maintained."

To safeguard this constitutional right the Legislature has provided for peremptory challenges and challenges for cause. §§ 29-2005, 29-2006, 29-2007, 29-2008, 25-1609, 25-1636, R. R. S. 1943.

In Basye v. State, *supra*, we said: "One object of the voir dire examination is to ascertain whether the mind of the venireman is entirely free from bias, or prejudice, and whether he would make a competent juror. But the

purpose of such examination is not alone to ascertain whether sufficient grounds for challenge for cause exist, but as well to enable the accused to properly exercise his right to challenge peremptorily." And later, in Strong v. State, *supra,* we said: "The principal purpose of the voir dire examination is to ascertain whether the proposed juror is free from bias or prejudice, and whether he is in such attitude of mind with respect to the case in hand that he would be a fair and impartial juror. With this end in view, it is the policy of the law to give to the parties ample opportunity to question the venireman upon matters bearing upon his competency, and questions which tend to show his attitude of mind and feelings should not be unreasonably abridged. And as each party has the right to exercise a certain number of peremptory challenges, it is proper, within reasonable limits, to propound questions which, in the judgment of the respective parties, may assist them in the exercise of that right. The extent to which the examination may be carried rests in the sound discretion of the trial court, and its ruling will not be disturbed unless there has been an abuse of discretion to the prejudice of the party complaining."

We think the following from Donovan v. People, 139 Ill. 412, 28 N. E. 964, is here applicable: "By the laws of this State the right of peremptory challenge in criminal cases is given to the People equally with the defendant, and its exercise by the People, in the exclusion of improper persons from jury service, is frequently as important, and quite as necesasry to the due administration of justice, as it is to the defendant for his protection. In either case, it is often indispensable to an intelligent selection of a fair and impartial jury, that the occupation, habits, associations and predisposition of the juror should be known, so far as they might tend to bias or pervert his judgment. To deprive a party, whether the People or defendant, of an intelligent exercise of the right, is practically to take away the right. And every lawyer

experienced in the trial of causes knows that to its intelligent exercise a reasonable examination of the juror is frequently absolutely necessary. If this may not be done, the People and defendant alike must take all who are not subject to challenge for cause, or resort to peremptory challenge indiscriminately, and without that knowledge, easily within reach, if reasonable examination is permitted, which would enable them to exercise the right intelligently. The defendant is guaranteed, in every criminal case, a trial by a fair and impartial jury, and society is equally interested in the selection of none other; and in view of this object to be attained in impaneling the jury, the law-making power of the State has deemed it wise to give the right of peremptory challenge, to be exercised in the discretion of the party entitled, and the courts are not authorized to limit or restrict the right, or prescribe rules which shall render it unavailing. Such reasonable examination by counsel should always be allowed as will enable the court to see that the jurors stand indifferently between the parties and are possessed of the requisite qualifications, and also to enable counsel to challenge for cause, if cause exists, or to exercise the right of peremptory challenge when in their judgment it is deemed necessary or advisable. The court may also examine the jurors, if he sees fit to do so, and if not otherwise satisfied of their competency or impartiality, should always make such examination as will satisfy him thereof. Such has been the uniform practice in the courts of this State, so far as we are aware, since its organization, subject always to the restriction and limitation that the examination by counsel must be reasonable and confined to pertinent matters, inquiry into which will tend to enlighten court and counsel in respect of the fitness and competency of the juror." The court therein went on to say: "The examination should, in all cases, be confined to a legitimate inquiry into the particular matter under investigation, and taking range enough only to put the court

and counsel in possession of such material matters affecting the juror as will enable them to act intelligently in the selection of the jury. The nature and extent of the inquiry in each case is necessarily left to the sound judgment and judicial discretion of the presiding judge." As later stated by the same court in People v. DeLordo, 350 Ill. 148, 182 N. E. 726: "While a trial judge has a discretion to limit the extent to which attorneys may go in their examination of jurors, he has no right to deny a defendant the right to make all such reasonable inquiries of a juror as may enable him to determine whether or not such juror will be free from bias and prejudice in exercising his judgment in the case and as will enable the defendant to exercise his right of peremptory challenge intelligently."

We think the usual and better practice is to permit counsel for both sides to conduct the voir dire examination under the direction and supervision of the court. That is the procedure that has been uniformly and customarily practiced in our courts, as far as we are aware, since their organization and has been kept in force by section 25-1106, R. R. S. 1943, which provides: "The general mode of summoning, impaneling, challenging and swearing the jury is not changed by this code."

In view of the foregoing we think the procedure relating to the voir dire examination of prospective jurors requires the trial court to give each of the parties the right, within reasonable limits, to put pertinent questions to each and all of the prospective jurors for the purpose of ascertaining whether or not there exists sufficient grounds for challenge for cause and also to aid each of the parties in the exercise of the statutory right of peremptory challenge. The trial court's refusal to grant defendant this right was prejudicial error.

Since the cause must go back for retrial we find no need to discuss the facts or other questions raised.

REVERSED AND REMANDED.

CHARLES SEDLACEK, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.

90 N. W. 2d 340

Filed May 31, 1958. No. 34404.

1. **Criminal Law: Evidence.** The test by which to determine the sufficiency of circumstantial evidence in a criminal prosecution is whether the facts and circumstances tending to connect accused with the crime charged are of such conclusive nature as to exclude every reasonable hypothesis except that of his guilt.
2. ———: ———. It is the province of the jury to determine the circumstances surrounding and which shed light upon the alleged crime; and if, assuming as proved the facts which the evidence tends to establish, they cannot be accounted for upon any rational theory which does not include the guilt of the accused, the proof cannot, as a matter of law, be said to have failed.
3. **Criminal Law: Appeal and Error.** 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.
4. ———: ———. The credibility of witnesses and the weight of the evidence are for the jury to determine in a criminal case in which the evidence presents an issue of fact as to the guilt or innocence of the accused and the conclusion of the jury may not be disturbed by this court unless it is clearly wrong.

ERROR to the district court for Lancaster County: HARRY A. SPENCER, JUDGE. *Affirmed.*

J. A. Hayward, 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.

By petition in error Charles Sedlacek brings here for review the record of his conviction in the district court for Lancaster County for violation of section 28-533, R. R. S. 1943. The material part of section 28-533, R. R.

S. 1943, is as follows: "Whoever willfully and maliciously, either in the daytime or night season, enters any * * * shop, store, warehouse, * * * and attempts to * * * rob or steal * * * shall upon conviction thereof be sentenced to the penitentiary * * *."

The information in substance charged that Charles Sedlacek, on or about July 17, 1957, in the county of Lancaster, and State of Nebraska, did unlawfully, feloniously, and maliciously enter a store and warehouse building to wit: Port Huron Machinery & Supply Company, a partnership, located at 803 Q Street in the city of Lincoln, Lancaster County, Nebraska, and attempted to steal certain personal property of value contained therein.

The plaintiff in error will, for the purpose of convenience, be referred to as the defendant.

The principal question raised by the assignments of error is as follows: Is the evidence sufficient to support the verdict of guilty?

As stated in Kitts v. State, 153 Neb. 784, 46 N. W. 2d 158: "The sufficiency of the evidence must be determined in the light of well-established rules of law."

Concededly, as held in Morgan v. State, 51 Neb. 672, 71 N. W. 788: "The test by which to determine the sufficiency of circumstantial evidence in a criminal prosecution, is whether the facts and circumstances tending to connect the accused with the crime charged are of such conclusive nature as to exclude to a moral certainty every rational hypothesis except that of his guilt.

"It is the province of the jury to determine the circumstances surrounding, and which shed light upon, the alleged crime; and if, assuming as proved the facts which the evidence tends to establish, they can be accounted for upon no rational theory which does not include the guilt of the accused, the proof cannot, as a matter of law, be said to have failed. (Casey v. State, 20 Neb., 138.)" See, also, Maher v. State, 144 Neb. 463, 13 N. W. 2d 641.

As stated in Watson v. State, 141 Neb. 23, 2 N. W. 2d 589: "They do not, however, change the rule, long followed and stated by this court in Vinciquerra v. State, 127 Neb. 541, 256 N. W. 78, as follows: 'To justify conviction on circumstantial evidence, it is necessary that the facts and circumstances essential to the conclusion sought must be proved by competent evidence beyond a reasonable doubt, and, when taken together or as a whole, must be of such a character as to be consistent with each other, and with the hypothesis sought to be established thereby, and inconsistent with any reasonable hypothesis of innocence.'

" 'Where in a criminal case the evidence is circumstantial, the circumstances established, must, to warrant a conviction, be such as to exclude every reasonable hypothesis except that of the defendant's guilt. But this rule merely requires the exclusion of such hypotheses as are based on circumstances established by the evidence. It does not require the jury to acquit because of evidence which, if believed, would establish facts consistent with innocence, but which evidence the jury is justified in disbelieving.' Carleton v. State, 43 Neb. 373, 61 N. W. 699."

The ultimately applicable rule in the case at bar is that: "This court, in a criminal action, will not interfere with a verdict of guilty, based upon conflicting evidence, unless it is so lacking in probative force that we can say, as a matter of law, that it is insufficient to support a finding of guilt beyond a reasonable doubt." Williams v. State, 115 Neb. 277, 212 N. W. 606.

In Hoffman v. State, 162 Neb. 806, 77 N. W. 2d 592, the same test by which a jury shall determine the sufficiency of circumstantial evidence in a criminal prosecution is restated as hereinbefore set out. In the cited case the court held: "After a jury has considered the evidence in the light of this rule and returned a verdict of guilty the verdict on review may not, as a matter of law for

insufficiency of evidence, be set aside if the evidence sustains some rational theory of guilt."

With the foregoing rules of law in mind we summarize the evidence to determine whether or not it is sufficient to support the verdict.

The Port Huron Machinery & Supply Company, hereafter referred to as the company, occupies a building located at 801-803 Q Street in Lincoln, Nebraska. It consists of two floors and a basement and has a frontage of approximately 75 feet on Q Street. There is a front door that leads into the building from Q Street and a door that leads into the west side of the building on Eighth Street. Towards the south end of the west side of the building there is a double door that leads onto a loading dock. The main floor of the building consists of the general offices, a sales room or display room, supply room, and a shipping room. Stairs lead to the second floor and to the basement. There is a shop on the east side of the building. It has a south entrance and a north entrance. There are four rest rooms on the main floor of the building, three for men and one for women, and no rest rooms on the second floor or in the basement.

Janis Krauze works as a clean-up man for the company and cleans the building twice a month. He testified that on July 17, 1957, he went to work about 5:15 p. m.; and that he talked to John Edwards, one of the owners of the business, at that time. He left the building about 5:35 p. m., and no one else was there. After locking the door, he and his wife, who was outside the building, went down P Street and had their supper. They returned to the building about 6:30 p. m. He opened the west door and his wife said: "Somebody run in the back room." This witness ran into the building and saw a man running toward the back room. The man was dressed in blue overalls and a light shirt, and was pretty close to the stairs to the basement. He yelled to the man to stop, but the man kept on running. He was afraid there was someone else there, so he called the

police. The police came in a couple of minutes, and he let them into the building on the west side and told them where he had seen the man. Later he saw the police take a man out of the building. On cross-examination he testified that he did not know whether or not there was anyone in the upstairs or the basement when he left, but he looked in the toilets and knew there was no one in the toilets or the office when he left to go to supper.

A detective connected with the Lincoln police department testified that on July 17, 1957, he was detailed to go to the Port Huron Machinery & Supply Company. He arrived at the building shortly before 6:35 p. m. It was still daylight, and three police officers were there. When he arrived he had a conversation with Krauze on the dock on the Eighth Street side of the building. Afterwards he entered the building, searched the main floor, and found no one. He then started searching the basement with other officers. In the basement there were various types of machines which appeared to be farm machinery, also materials stacked in paper sacks, crates, and cartons. The officers started in the south end of the building and proceeded toward the front of the building, which is north, and found a person against the east wall of the basement on his hands and knees. It was difficult to see him. He was huddled down against the wall where there was a large stack of paper sacks. They went over to where the man was. It proved to be the defendant. He was asked to get up from his position, but did not do so. He was then assisted up from his huddled position and brought out of the hiding place to the center aisle where he was "frisked and patted down" to determine whether or not there were any weapons on his person. He was handcuffed and taken out of the building by Captain Paul Beave and from there to police headquarters.

On cross-examination this witness testified that Mr. Krauze, if he be considered an employee, and his wife were there, and Mr. Leacock, a part owner of the com-

pany, was also there. The defendant's automobile was found by an officer, and there were $10,000 in stocks or bonds in his car. The defendant's car was parked on the south side of Q Street east of the building approximately five or six parking stalls west of Ninth Street.

On re-direct examination he testified that he searched the remaining parts of the building and no other person was found in the place; and that all of the other doors to the building were locked and secured.

An officer at police headquarters who was on duty on July 17, 1957, testified that defendant was brought to headquarters by two police officers and booked by the desk sergeant. This witness went through the defendant's pockets to get his personal effects and put them in an envelope. He took from the defendant a wallet, $62.96, a watch, a reamer, a small screw driver, a 6-foot tape measure, and three books of matches. These items were identified as exhibits. The three books of matches had the Port Huron label on them. The small screw driver also had "Port Huron" written on the handle.

A detective who was off duty on July 17, 1957, contacted the defendant the next morning and took him to the office of the county attorney about 10:30 or 10:45 a. m. While they were waiting, he noticed that the defendant was holding a newspaper up between the witness and the defendant, and the defendant was fooling around with the pencil compartment in his overall bib. The officer noticed there was a paper clip there, and he removed it and took out of the pencil compartment a little reamer. The defendant was wearing blue striped overalls at that time. The defendant told this witness that he got the reamer from his brother's machine shop in Crete. Later he said that he got it in the dime store in Omaha the Saturday before.

Ted Leacock, a partner in the company, testified to the location and size of the various departments in the building, the different items handled by the company, and their location in the building. He further testified

that he left the building between 5:25 and 5:30 p. m., on July 17, 1957; and that when he left John Edwards, a partner of the firm, and Janis Krauze were there, and Glen Witt, who worked under John Edwards, could have been there. He further testified that he was called back to the building, and arrived there shortly after 6:30 p. m. Upon arriving, he was denied admittance by a police officer who informed him the building was being searched. In about 5 minutes two other police officers arrived and he went into the building with them. Later the officers brought the defendant up from the basement. This witness further testified that he asked the defendant how he got into the building. The defendant gestured toward the north door on the west side of the building and said that he did not come in the double doors, and that he came into the building about 3 p. m. that day. This witness remained at the building for about 20 minutes that night and then returned to his home. He arrived at work the following morning at about 10 minutes to 8 a. m. He testified that there is a pop machine in the building to the left as you enter the double doors on the west. He observed that the mechanism of this machine had been tampered with to the extent that bottles could be taken therefrom without depositing a coin in the machine. Near the pop machine there were some sandpaper, tools, and a couple of other items that had been assembled on a truck which was used to transfer articles in and out of the building. He further testified that six or seven employees took orders in the place of business and were there on July 17. He discovered the items on the truck about 8:15 in the morning of July 18. The items placed thereon were not to fill any orders that might have been received for those specific items. He was handed an exhibit consisting of sandpaper and metal cloth used for sanding metal, a type of item carried in stock, and testified that this sandpaper stock was located directly across the aisle from the pop machine on the first floor and in the stockroom.

He next identified three crescent-type wrenches known as "Herbrand" and "Diamond Calk" handled as a part of the business of the company. Two of these wrenches were new and one slightly used. These new wrenches were on display behind the counter in the show room toward the north end of the building. These items were on the truck the morning of July 18. He identified an exhibit which was a handle for a socket wrench, one-half inch drive-in size, and the type of handle used in the company's business. This item was kept on the same display board where the crescent wrenches were kept, and was one of the items that was on the truck on the morning of July 18. He was handed an exhibit, a pair of 6-inch pliers made by the Diamond Calk Company, handled by the company and part of its stock which was kept at two or three places in the building. He did not recall seeing this particular item on the truck. Another exhibit, containers for reamers, generally called taps for tapping out holes for threads and bolts, was identified by him. He testified that they were kept directly behind a partition that supports the display for the wrenches. He identified another exhibit, a fabric cement called Tehr-Greeze, used for repairing canvas or cementing wood and handled as a part of the stock in the business. It was one of the items found on the truck on the morning of July 18. He identified an exhibit, a belt lacing machine used for putting wire lacing on belts to splice them together to make them more or less endless, carried as a part of the stock. It was kept in stock in either the shipping room in the back of the building or on the deck. This witness testified that he did nothing with these items, but called the police and they came and took them. He then identified an exhibit consisting of book matches with the name "Port Huron Machinery & Supply Company" printed on them which are used as an advertising device by the company. A supply is carried on the display counter for the convenience of customers. He also identified a steel tape, 72 inches

long, with the name "Port Huron Machinery & Supply Company, Lincoln, Nebraska" on it. He testified that he personally had such a rule which he kept in the middle drawer of his desk. It was not there on the morning of July 18. He identified another exhibit called an "express tap" for threading a hole, a type of item the company kept in stock next to the wrenches. There was no other distributor of these items in this state that he knew of. He identified a small screw driver with the name "Port Huron" engraved or lettered on the handle, used as an advertising device for the company some time past. He testified that he had a screw driver such as this in his desk prior to and on July 17. There was more than one screw driver in his desk, but one was missing the morning of July 18. He identified another tap, to serve the same purpose as the previous one he had identified, and which was of the general type handled by the company and in stock. He testified that they did not supply these taps to dime stores. He further testified that the taps for threading a hole were valued at $1.10 each.

On cross-examination this witness testified that to the best of his knowledge all the doors of the building were locked except the front door which they use to leave the building; that at 3 p. m., on July 17, 1957, the company was open for business and the doors open to the public; that there was no evidence that any locks had been tampered with or broken; that he did not know how the items he spoke about were placed on the truck, he did not see them put there; and that with reference to the little screw driver, they bought about 250 of them 5 years ago for distribution.

On re-direct examination this witness testified that he did not see the defendant in the store at any time on July 17, 1957, and that he never saw the defendant until the officers brought him up from the basement.

A lieutenant of police testified that he made an investigation on July 18, 1957, at the company's place of business; and that, with reference to the items identi-

fied as exhibits and in evidence, he contacted the employees of the company with reference to the tools that were placed on the truck, as to whether any one of the employees made up an order for these articles and placed the same where they were found the next morning. He also checked the route to determine the various places from which these items were taken, and checked the general layout of the building, the exits, and the washrooms.

The assistant chief of police talked to the defendant in his office shortly before noon on July 18, 1957, in the presence of the county attorney, after making an investigation at the place of business of the company. He testified that he asked the defendant where he was the day previous and he stated that on the afternoon of July 17 he came to Lincoln and went to his attorney's office; that he then went to the courthouse with an attorney; that they were at the courthouse for a short time and then went back downtown, leaving the courthouse about 4 o'clock in the afternoon; that he stopped at the dime store and then went and had a glass or two of beer; that he then went to the Salvation Army to see Captain Kennedy, but he did not find him; and that he then picked up his car from where he had parked it, but he was unable to give the location where his car was parked. After he picked up his car, he drove to Q Street and parked his car in the block between Eighth and Ninth Streets. He got out of the car and walked to Ninth and Q Streets, then over to Ninth and P Streets, west on P Street to Eighth Street, and north on Eighth Street up to the loading dock of the Port Huron Machinery & Supply Company. After he got up on the loading dock, he came to the double doors on the west side of the building. He wanted to use the rest room, and he noticed a man standing there wearing a straw hat and a pair of overalls—he could give no better description of the man—and asked about using the rest room. This man pointed out the rest room, and he went into the rest room. He

came out of the rest room and laid down on the floor. He was asked where he had laid down on the floor, and he did not recall that, but he said it was not in the basement or on the second floor. He said he was never in the basement or second floor at any time while he was in the building; and that the next thing he remembered, after lying down on the cement floor, was when someone was "putting the irons on him." He was asked where he got the two taps, and he stated that he bought them in the dime store in Omaha on July 13, which was the Saturday previous to his arrest. As to the three books of matches, the defendant said that he picked them up at the Port Huron Machine Works when he was there on the first of July with his brother, and that he had put them into another suit at home. He said he did not smoke, he just picked up the matches. As to the steel tape measure, he stated that he purchased it in Omaha at the National Motor or Automobile Supply, on July 13. With reference to the souvenir screw driver, he stated that he purchased it in the dime store in Omaha at the same time he purchased the taps.

The defendant's brother testified that the bonds found in the defendant's automobile were part of the estate of defendant's wife which was recently settled, and that he was the guardian of the estate and person of the defendant.

It was stipulated that the defendant was confined to the Lincoln General Hospital the last week of July 1957, and was under observation by doctors.

Before the submission of the case to the jury, the defendant demurred to the evidence and moved for an order dismissing the information and discharging the defendant or, in the alternative, instructing the jury to return a verdict of not guilty in favor of the defendant. The foregoing motions were based on the proposition that the information failed to state a crime or facts sufficient to constitute a crime under the statute, and also to the

effect that the evidence was not sufficient to support the verdict. These motions were overruled.

After the verdict was returned, the defendant moved for an order to arrest the judgment, set aside and vacate the verdict, and grant the defendant a new trial, which motion was overruled. Thereafter the defendant was sentenced to be imprisoned in the Nebraska State Penitentiary.

In the light of all of the evidence, both direct and circumstantial and as heretofore set out, we conclude that the guilt or innocence of the defendant of the charge made against him was under the circumstances of this case a matter for the jury to decide. The credibility of the witnesses and the weight of the evidence were for the jury to consider and determine and its conclusion may not be disturbed by this court unless clearly wrong. See, Burnell v. State, 159 Neb. 349, 66 N. W. 2d 838; Larson v. State, 161 Neb. 339, 73 N. W. 2d 388.

The sentence and judgment of the district court should be and they are affirmed.

AFFIRMED.

RICHARD B. MARSTON ET AL., APPELLANTS, V. MARVIN DROBNY ET AL., APPELLEES.
90 N. W. 2d 408

Filed June 6, 1958. No. 34326.

1. **Appeal and Error.** Actions in equity, on appeal to this court, are triable de novo, subject, however, to the rule that when 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 adopted one version of the facts rather than the opposite.
2. **Contracts.** The general rule is that, in the absence of anything to indicate a contrary intention, instruments executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction, are, in the eyes of the law, one instrument, and will be read and construed together as if

they were as much one in form as they are in substance.

3. **Cancellation of Instruments.** Where it is sought to cancel an instrument for want of mental capacity of the grantor to make it, the burden of proof is on the one who alleges mental incapacity.
4. **Deeds: Contracts.** In determining the mental capacity of the grantor to execute an instrument, if it clearly appears that when the instrument was executed the grantor had the capacity to understand what he was doing, knew the nature and extent of the property dealt with and what he proposed to do with it, and had the capacity to decide intelligently whether or not he intended to make the conveyance, it cannot be said that he was incompetent to execute the instrument.
5. **Deeds.** To set aside a deed on the ground of want of mental capacity on the part of the grantor, it must be clearly established that the mind of the grantor was so weak or unbalanced at the time of the execution of the deed that he could not understand and comprehend the purport and effect of what he was then doing.
6. **Deeds: Contracts.** The question of mental competency of one who executes an instrument relates exclusively to the time when the instrument was executed. Although competent evidence of a condition of mind long before, closely approaching, and shortly after the time of its execution is admissible, it is received only to assist in revealing a state of mind at that time.
7. **Witnesses.** It must also appear that a witness, lay or expert, in giving his opinion as to mental competency to execute an instrument, had in mind the quality of mental capacity essential to the execution thereof.
8. **Trial.** Triers of fact are not compelled to accept as absolute verity every statement of a witness not contradicted by direct evidence. Circumstantial evidence is equally competent with direct testimony. The relative convincing powers of the two classes of evidence are for the determination of the triers of fact.
9. ———. Evidence not directly contradicted is not necessarily binding on the triers of fact, and may be given no weight where it is inherently improbable, unreasonable, self-contradictory, or inconsistent with facts or circumstances in evidence.
10. **Witnesses.** Triers of fact have the right to test the credibility of witnesses by their self-interest and to weigh undisputed parol testimony against facts and circumstances in evidence from which a conclusion may properly be drawn that the parol testimony is false.

11. ———. The value of the opinion of an expert witness is dependent on, and is no stronger than, the facts on which it is predicated. The opinion has no probative force unless the premises upon which it is based are shown to be true.
12. **Homesteads.** A contract for the sale of homestead property signed by both husband and wife, though not acknowledged, when made at the same time with a warranty deed to the property, which deed they both execute and duly acknowledge, and which is delivered in escrow, is a valid contract.
13. **Acknowledgments.** The certificate of an officer having authority to take acknowledgments cannot be impeached by showing merely that such officer's duty was irregularly performed.
14. ———. In proceedings which involve only the rights of the parties to the transaction or other persons having notice of the fact, parol evidence is admissible to contradict the recitals of a notary certificate and show them to be false.
15. ———. In that connection, however, a certificate of acknowledgment in proper form can only be impeached by clear, satisfactory, and convincing evidence that its recitals are false. The presumption is in favor of the certificate, and the burden is upon the party alleging such a defense to prove it.

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

Hutton & Hutton, for appellants.

William W. Griffin, for appellees.

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

CHAPPELL, J.

Plaintiffs, Richard B. Marston and Irene Marston, husband and wife, brought this action in equity against defendants, Marvin Drobny, Margaret Drobny, his wife, Otto Drobny, and Elkhorn Valley National Farm Loan Association, together with Lyle P. Dierks, its secretary-treasurer, and Ed Verzal, its assistant secretary-treasurer.

Plaintiffs' petition sought the cancellation of an agreement for a warranty deed to certain described farm lands; the cancellation of an escrow agreement providing for the holding and delivery of said deed; cancella-

tion of the deed itself, together with a quieting of title to the lands in plaintiffs; and the granting of equitable relief. Such relief was sought upon the alleged grounds that plaintiff, Richard B. Marston, was mentally incompetent at the time of the purported execution and delivery of the instruments and never acknowledged the agreement for a warranty deed although the land was plaintiffs' homestead; and that plaintiff, Irene Marston, was forced, by threats of her husband, to sign the agreement for a warranty deed and the deed itself, neither of which was ever acknowledged by her.

As far as important here, the answer and cross-petition of defendants, Marvin and Otto Drobny, denied generally and sought specific performance, together with equitable relief; and plaintiffs' reply was a general denial.

After a hearing on the merits, whereat voluminous evidence was adduced, a judgment was rendered which found and adjudged the issues generally against plaintiffs on their petition, and in favor of defendants Drobny upon their answer and cross-petition. It ordered plaintiffs to specifically perform and carry out the agreement for a warranty deed in all respects according to its terms. It ordered the other defendants to deliver the warranty deed held in escrow by them to defendants Drobny upon compliance by them with conditions of the escrow agreement, and ordered and required plaintiffs to account to defendants for the rents, income, and profits of the premises from January 2, 1957. Subsequently, plaintiffs' motion for new trial was overruled, and they appealed, assigning in substance that the judgment was not sustained by the evidence but was contrary thereto and contrary to law. We do not sustain the assignments.

Hereinafter Richard B. Marston will be called plaintiff. Irene Marston, his wife, will be called Irene, and when referring to both they will be called plaintiffs. Marvin and Otto Drobny will be respectively designated

by name or as defendants. The Elkhorn Valley National Farm Loan Association will be generally designated as such or called the association, and Lyle P. Dierks, its secretary-treasurer, and Ed Verzal, its assistant secretary-treasurer, will be so officially designated.

At the outset we point out that the pleadings do not raise any issue of fraud, undue influence, or overreaching by defendants, and no evidence was adduced which could directly or by inference support any such issues. In that connection also, any possible issue of inadequacy of consideration was eliminated from consideration by the court in conformity with a stipulation of the parties proposed by plaintiffs' attorneys.

There are well-established rules applicable and controlling in cases presenting issues such as that at bar. They are as follows: "Actions in equity, on appeal to this court, are triable de novo, subject, however, to the rule that when * * * 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 adopted one version of the facts rather than the opposite.

"The general rule is that, in the absence of anything to indicate a contrary intention, instruments executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, are, in the eyes of the law, one instrument, and will be read and construed together as if they were as much one in form as they are in substance." Pike v. Triska, 165 Neb. 104, 84 N. W. 2d 311.

In Keedick v. Brogan, 116 Neb. 339, 217 N. W. 583, citing Brugman v. Brugman, 93 Neb. 408, 140 N. W. 781, this court held: "Where it is sought to cancel an instrument for the want of mental capacity of the grantor to make it, the burden of proof is on the one who alleges the mental incapacity.

"In determining the mental capacity of the grantor to

execute an instrument, if it clearly appears that when the instrument was executed the grantor had the capacity to understand what he was doing, knew the nature and extent of the property dealt with and what he proposed to do with it, and had the capacity to decide intelligently whether or not he intended to make the conveyance, it cannot be said that he was incompetent to execute the instrument." See, also, John Hancock Mutual Life Ins. Co. v. Harrold, 130 Neb. 23, 263 N. W. 598.

In Kucaba v. Kucaba, 146 Neb. 116, 18 N. W. 2d 645, we also held: "To set aside a deed on the ground of want of mental capacity on the part of the grantor, it must be clearly established that the mind of the grantor was so weak or unbalanced at the time of the execution of the deed that he would not understand and comprehend the purport and effect of what he was then doing."

As said in that opinion: " 'It is not every weakness of mind arising from old age or sickness, or other causes, that will avoid a deed. There must be a total want of reason or understanding. * * * Mere mental weakness will not authorize a court of equity to set aside an executed contract. * * * In order to vacate a deed on the ground of mental incapacity of the grantor, it is necessary to show such a degree of mental weakness as renders the maker of the deed incapable of understanding and protecting his own interest. The mere circumstance that the mental powers have been somewhat impaired by age or disease is not sufficient, if the maker of the deed still retains a full comprehension of the meaning, design and effect of his act, * * *.' Brugman v. Brugman, 93 Neb. 408, 140 N. W. 781."

In Parkening v. Haffke, 153 Neb. 678, 46 N. W. 2d 117, we also held: "In order to invalidate a deed on the ground of mental incapacity on the part of the grantor it is necessary to show such a degree of mental weakness as renders the maker of the deed incapable of understanding and protecting his own interests." See,

also, Smith v. Black, 143 Neb. 244, 9 N. W. 2d 193.

In that connection, the question of mental competency of one who executes an instrument relates exclusively to the time when the instrument was executed. Although competent evidence of a condition of mind long before, closely approaching, and shortly after the time of its execution is admissible, it is received only to assist in revealing a state of mind at that time. It must also appear that a witness, lay or expert, in giving his opinion as to mental competency to execute an instrument had in mind the quality of mental capacity essential to the execution thereof. In re Estate of Inda, 146 Neb. 179, 19 N. W. 2d 37.

Also, as held in Teresi v. Filley, 146 Neb. 797, 21 N. W. 2d 699: "Triers of fact are not compelled to accept as absolute verity every statement of a witness not contradicted by direct evidence. Circumstantial evidence is equally competent with direct testimony. The relative convincing powers of the two classes of evidence are for the determination of the triers of fact.

"Evidence not directly contradicted is not necessarily binding on the triers of fact, and may be given no weight where it is inherently improbable, unreasonable, self-contradictory, or inconsistent with facts or circumstances in evidence.

"Triers of fact have the right to test the credibility of witnesses by their self-interest and to weigh undisputed parol testimony against facts and circumstances in evidence from which a conclusion may properly be drawn that the parol testimony is false."

This court also held in Williams v. Watson Bros. Transp. Co., 145 Neb. 466, 16 N. W. 2d 199: "The value of the opinion of an expert witness is dependent on, and is no stronger than, the facts on which it is predicated. The opinion has no probative force unless the premises upon which it is based are shown to be true." See, also, Hamilton v. Huebner, 146 Neb. 320, 19 N. W. 2d 552, 163 A. L. R. 1.

We turn then to the issue of alleged failure by plaintiff and Irene to acknowledge the contracts, and Irene's alleged failure to acknowledge the warranty deed. In Farmers Investment Co. v. O'Brien, 109 Neb. 19, 189 N. W. 291, thereafter cited with approval in Johnson v. Kelley, 112 Neb. 60, 198 N. W. 567, and Marodolac v. Uhe, 113 Neb. 450, 203 N. W. 547, this court held: "A contract for the sale of homestead property signed by both husband and wife, though not acknowledged, when made at the same time with a warranty deed to the property, which deed they both execute, and duly acknowledge, and which is delivered in escrow, held to be a valid contract."

In Bode v. Jussen, 93 Neb. 482, 140 N. W. 768, citing Council Bluffs Savings Bank v. Smith, 59 Neb. 90, 80 N. W. 270, 80 Am. S. R. 669, this court held: " 'The certificate of an officer having authority to take acknowledgments cannot be impeached by showing merely that such officer's duty was irregularly performed.' " Such rule was reaffirmed in Fisher v. Standard Investment Co., 145 Neb. 80, 15 N. W. 2d 355.

In Trowbridge v. Bisson, 153 Neb. 389, 44 N. W. 2d 810, this court held: "In proceedings which involve only the rights of the parties to the transaction or other persons having notice of the facts, parol evidence is admissible to contradict the recitals of a notary certificate and show them to be false.

"In that connection, however, a certificate of acknowledgment in proper form can only be impeached by clear, satisfactory, and convincing evidence that its recitals are false, and the burden is ordinarily upon the party alleging the same to so prove it."

Also, as held in Kucaba v. Kucaba, *supra*: "Public policy forbids that deeds and mortgages of real estate, duly authenticated in the mode pointed out by statute, should be set aside except upon clear and convincing proof that the certificate of acknowledgment is false. The presumption is in favor of the certificate, and the

burden is upon the party alleging such a defense to prove it."

In the light of the foregoing rules, we have examined the evidence which can only be summarized here. In doing so, we believe that it established the following: Plaintiffs, as husband and wife, were the owners of 880 acres of farm land near Dorsey. An improved 720 acres thereof had been their home for many years. They had a son, Charles, who at times here involved was married, had two children of his own, and lived in a separate house on plaintiffs' land. The family had planned that Charles should farm the land with his father and that eventually it would be a home belonging to Charles. In February 1955, Charles returned from service in the United States Air Force, moved into the separate house located about 200 feet from plaintiffs, and farmed with his father that year and until August 1956. As previously planned, he then left to attend the University of Nebraska to complete his engineering education under G. I. benefits, before the time to take advantage thereof under the law had expired. In the meantime, Charles had taken G. I. training at O'Neill, and during that period was at home only about 2 nights a week.

Prior to and at the time of the transactions involved, Charles and his father had a dry crop year, and plaintiff was indebted some $20,000. His land irrigation system was not working properly, his wife was ill with heart trouble, his son Charles was leaving to complete his education, plaintiff was growing older and not able to farm the place alone, so for such reasons as given by plaintiff repeatedly, he decided to sell the 720-acre farm and personal property, but retain the other quarter section of land. Therefore, on the morning of May 16, 1956, plaintiff drove his car over to defendant Marvin Drobny's home where he lived on an adjoining farm. Marvin and Otto Drobny were brothers who owned some land and worked together, but did not live on the same

place. They were both old friends and neighbors of plaintiffs and had changed work with them at numerous times. That morning plaintiff told Marvin that he wanted to sell his farm, and asked if defendants would be interested in purchasing it. Marvin told plaintiff he did not know, but he would see Otto about it. Such sale was discussed by plaintiff and both defendants on one or two other occasions, and again on May 22, 1956, at which time defendants were interested and wanted to inspect plaintiffs' farm. On that date, defendants and their father went to plaintiffs' home where, with the direction and assistance of plaintiff and his son Charles, they inspected the improvements and drove out over plaintiffs' farm. During that inspection plaintiff told defendants that insurance on the buildings would expire June 1, 1956, and they would have to take care of that, which was done thereafter with the assistance of plaintiffs and an insurance agent. During such inspection, plaintiff pointed out to defendants the land boundaries, described the types of soil, enumerated the kinds of crops generally raised thereon, and explained the operation of plaintiffs' irrigation system.

Then and there, after going over the matter at length, defendants offered plaintiff $29,000 for the land, including plaintiffs' irrigation equipment, and $24,000 without it, the latter offer being preferable, and plaintiff accepted it. Thereupon it was agreed that on the morning of May 24, 1956, they would meet in O'Neill and execute a written contract of sale.

On that date, plaintiff, Charles, and defendants drove to O'Neill together for that purpose. On the way they all talked over the terms which should be included in the contract and talked about other matters as well. Upon arrival in O'Neill they went to the office of one Thorin, a real estate broker known to plaintiff, but with whom defendants were not acquainted. Plaintiff introduced them to Thorin, told Thorin that he was selling his farm to defendants, and asked Thorin to prepare a

contract of sale. While they were all present, they discussed the terms together, informed Thorin of their agreement with regard thereto, and, as requested and directed by plaintiff, Thorin typed and prepared a written contract for sale of the land to defendants, which contract was not signed at that time. They then left Thorin's office, but soon returned, at the insistence of plaintiff, to request the addition of a provision in the contract for a reservation of plaintiff's irrigation pump house, which was part of plaintiff's irrigation equipment theretofore reserved by plaintiff, but which had not been as clearly reserved in the contract as plaintiff desired. Thereupon Thorin included such reservation in the contract.

While negotiations for the sale were pending, plaintiff conferred with an accountant concerning the income tax consequences of the sale of his farm, and discussed the sale with the manager of the O'Neill Production Credit Association, of which plaintiff was a member and from whom he had borrowed money since 1943. Plaintiff also called upon the secretary-treasurer of the Elkhorn Valley National Farm Loan Association, a member of the Federal Land Bank system, and discussed his plan to sell the farm. Plaintiff also conferred with the assistant secretary-treasurer of that association about the same, seeking to determine if the defendant purchasers could assume the existing land bank mortgage on the land, and whether or how plaintiff could have such land bank mortgage released on the quarter section which he was not selling.

On May 24, 1956, the parties, including plaintiff, his son Charles, and defendants, went from Thorin's office to the office of the Elkhorn Valley National Farm Loan Association, where they met its assistant secretary-treasurer, and further inquiry was made concerning assumption of the mortgage aforesaid by defendants and other details of the transaction, including a release of the mortgage on the quarter section not sold by plain-

tiffs. Upon being advised that such assumption and release were possible, plaintiff filed an application for such release. Plaintiff and defendants then signed the original contract, and defendants gave plaintiff a check for $5,000 down payment, as provided in the contract. Thereupon, plaintiff applied that money to pay off plaintiffs' indebtedness to the Production Credit Association. Plaintiff's wife Irene was not present at signing of those contracts, and never signed same because they were subsequently replaced by new contracts prepared at plaintiff's request by plaintiffs' attorney, Elven A. Butterfield, who by agreement destroyed the old contracts in the presence of plaintiffs and defendants.

In that connection, on May 28, 1956, plaintiff, accompanied by a close friend and advisor for many years, consulted with plaintiffs' attorney about the original contract he had made and about income tax consequences if he sold his farm and personal property in the same year. As a result of that meeting and the advice given him thereat by plaintiffs' attorney, plaintiff decided that it would be advantageous for him to change the terms of the original contract with regard to payment dates. As advised to do so by plaintiffs' attorney, plaintiff then consulted with defendants about the advisability of such changes, and on June 4, 1956, plaintiff took defendants to the office of plaintiffs' attorney to discuss and clarify the matter. Defendants had no attorney of their own and were not then acquainted with plaintiffs' attorney, who was a close friend of plaintiffs and a first cousin of plaintiff's wife Irene. There, after introductions by plaintiff to plaintiffs' attorney, and explanations of the matter, it was then agreed that plaintiffs' attorney should rewrite the contract of sale and change the final payment dates from June 15, 1956, to January 2, 1957, in order to remove plaintiffs from a higher income tax bracket in 1956.

It was then agreed in the office of plaintiffs' attorney that he would so rewrite the contracts and prepare a

warranty deed, after which the parties would all meet in the Elkhorn National Farm Loan Association office in O'Neill on June 7, 1956, to complete execution of the new contracts and warranty deed, and place the papers in escrow with the association in order to conclude the transaction. Thus, on June 7, 1956, plaintiff, accompanied by his wife Irene, went to O'Neill where they met their attorney, and, with the contracts and warranty deed prepared by their attorney and in their possession, they sat visiting in plaintiffs' car parked in front of the association office. Thereupon defendants came up and got in plaintiffs' car where the parties visited briefly, and defendants were handed the new contracts and warranty deed, which they read over several times. The contract of sale then bore the signatures of plaintiffs, Richard B. Marston and Irene Marston, his wife, which were admittedly thereafter witnessed by the signature of plaintiffs' attorney, although they were not acknowledged by plaintiffs. The warranty deed then bore the signatures of grantors, Richard B. Marston and Irene Marston, his wife, which were admittedly thereafter witnessed by the signature of plaintiffs' attorney. On the back of the warranty deed there appeared the typed certificate of acknowledgment thereof by "Richard B. Marston and Irene Marston, husband and wife," in proper form.

The defendants thereupon signified their approval of the contracts and warranty deed, whereupon plaintiffs' attorney told plaintiff's wife Irene that he was through with her, that she was not needed anymore, and she could go uptown and do her shopping. Thereupon she left, and plaintiffs' attorney, plaintiff, and defendants went into the association office. There defendants each signed the contracts and an employee of the association signed as a witness thereof. Thereupon plaintiffs' attorney placed his signature on the agreement for a warranty deed as a witness of the signatures placed thereon by plaintiffs, placed his signature as notary public upon

the acknowledgment of the warranty deed, and stamped his official seal on such certificate of acknowledgment. In that connection, the signature of plaintiffs' attorney as a witness to plaintiffs' signatures on the contract, and his signature as notary public on the warranty deed, were evidently written at the same time, by the same pen, with light green ink. When that was done, plaintiffs' attorney, as agreed and requested by plaintiffs, placed one of the contracts, the warranty deed, and an escrow agreement theretofore executed, in the hands of the association, with directions to hold them in escrow until after January 2, 1957, at which time, upon compliance with the contracts, the warranty deed was to be turned over by the association to defendants.

Plaintiffs' attorney, plaintiff, and defendants then stepped out of the association office together, where they again met plaintiff's wife Irene. After visiting briefly there together, Irene said: "* * * now that its all over with I will have to look for a new home, * * * Now we are like a boll weevil, we are looking for a home." There also, as requested, plaintiffs' attorney tore up the old contracts in the presence of all the parties thereto.

Again on June 14, 1956, defendants, as requested by plaintiff, accompanied him to the association office in O'Neill, where at plaintiff's request defendants gave plaintiff a check for $1,300, which was immediately turned over to the association by plaintiff to apply upon the land bank mortgage, and for which plaintiffs obtained a release from that mortgage so far as it covered the quarter section which was not sold to defendants.

As summarized, the agreement for a warranty deed executed and delivered to the escrow holder on June 7, 1956, described the 720 acres which plaintiffs agreed to sell to defendants for a consideration of $24,000, with $5,000 payable upon signing of the contract (which had been paid on May 24, 1956). Therein defendants agreed to assume and pay the Federal Land Bank mortgage indebtedness then on the premises, the amount of which

was to be determined June 15, 1956. Plaintiffs agreed to pay the interest thereon to that date, and defendants agreed to pay the interest thereon after that date and pay the balance of the consideration on or soon after January 2, 1957, at which time plaintiffs agreed to convey the premises to defendants by warranty deed with an abstract brought up to date showing merchantable title in plaintiffs, with taxes for the year 1955 and all previous years paid. It was also agreed that plaintiffs could live upon and have a lease of the premises for the year ending March 1, 1957, and pay to defendants therefor as crop rent one-third of all crops grown, including grain and alfalfa, and plaintiffs agreed to pasture only their own livestock on the premises. That was all complied with in due time before this action was filed on December 28, 1956. It was agreed also that one 1,000-bushel steel grain bin, one 10 x 14 foot brooder house, and one 8 x 9 foot wash house, both on skids, one 16 x 12 foot irrigation pump house, one 1,000-gallon propane tank, one described irrigation pump, and all of plaintiffs' irrigation pipe, should be reserved by plaintiffs as their own personal property. It was also agreed that plaintiffs were to have first chance to rent the building site on the land after March 1, 1957, and that plaintiffs had a right to have the use of all pasture land during the 1956 season. It was further agreed that on or about June 15, 1956, the parties would determine the amount of the balance due on the Federal Land Bank mortgage and determine the amount of the unpaid balance on the contract which would be paid on delivery of the deed on or after January 2, 1957. The escrow agreement delivered to the association escrow holder on June 7, 1956, contained material conditions comparable with those in the agreement for a warranty deed as heretofore set forth.

In that connection, on January 2, 1957, defendants tendered to the association full performance of the agreement for a warranty deed and the escrow agreement,

but delivery of the warranty deed to defendants was refused by the escrow holder because of this pending litigation.

In the latter part of June 1956, plaintiff and his son Charles visited with a well-known friend and dealer in irrigation equipment for some 30 minutes. There plaintiff told the dealer he had sold his farm to defendants but they had not purchased his irrigation system, therefore he wanted the dealer to inspect it and make plaintiffs an offer for purchase of it. Thereafter, on July 2, 1956, the dealer inspected said system in the presence of plaintiff, his son Charles, and plaintiffs' son-in-law. After negotiating for about 3 hours, plaintiff agreed to sell plaintiffs' irrigation system for $5,250, and the dealer paid plaintiff $2,000 down on the purchase price. Thereafter, on July 18, 1956, such dealer paid plaintiff the balance of $3,250, and with the assistance of plaintiff and Charles, spent most of that day loading and removing plaintiffs' irrigation equipment, except the pump house which was not removed at that time. It was still on plaintiffs' farm during the early winter of 1956, at which time Charles asked the dealer whether he was still going to stop and remove the pump house which belonged to the dealer.

Plaintiff Irene admittedly signed the agreement for a warranty deed and the deed itself, but testified that she was forced to do so by threats of plaintiff, and that she never acknowledged the warranty deed. Admittedly, the agreement for a warranty deed was not acknowledged by plaintiffs, but, as heretofore observed, that would not be of serious legal consequence if plaintiff Irene acknowledged the warranty deed before plaintiffs' attorney was permitted to and did place the contract and warranty deed in escrow as requested and agreed. In that connection, if plaintiff was mentally competent, as we conclude, there is no contention that he did not voluntarily sign the agreement or acknowledge the warranty deed.

Irene's testimony that she was forced to sign the instruments was not only equivocal, self-contradictory, inherently improbable, unreasonable, and without any corroboration, but also there were many facts and circumstances appearing in this record in connection with the contract which justified the trial court, as it evidently did, in rejecting her testimony as false with regard to signing the instruments. Irene's like testimony that she never acknowledged the warranty deed was equivocally corroborated by plaintiffs' attorney, her first cousin, who, as a witness called by defendants, admittedly witnessed plaintiffs' signatures on the agreement and warranty deed, signed the acknowledgment as notary public, and placed his official seal thereon. In that connection, we believe this record shows that plaintiffs' attorney laid the groundwork for this litigation, commenced the action, and assisted in the trial thereof, until after decree was rendered July 20, 1957, wherein he still appeared as an attorney for plaintiffs. However, thereafter, on July 29, 1957, plaintiffs' attorney filed with the clerk of the district court a withdrawal purportedly dated May 11, 1957, the last day of the trial.

There are facts and circumstances in this record which would and did justify the trial court in rejecting as false the testimony of plaintiff Irene and plaintiffs' attorney that she did not acknowledge the warranty deed. We conclude that Irene was familiar with the entire transaction; was present at its termination; that she voluntarily signed the agreement and warranty deed; and that she voluntarily acknowledged the warranty deed, although the notarial officer's duty was irregularly performed. We conclude that there is no clear, satisfactory, and convincing proof that the acknowledgment was false.

The evidence upon the issue of mental competency at the time of the transaction was conflicting in material respects. However, material and competent evidence, some of which appears in evidence adduced by plain-

tiffs, clearly established that at the time of the transaction, prior thereto, and subsequently as well, except during part of the period from September 23, 1956, to November 6, 1956, while plaintiff was in a hospital in Omaha, plaintiff had the mental capacity to understand what he was doing, knew the nature and extent of his property and what he proposed to do with it, and was able to decide intelligently whether or not he desired to make the contract and conveyance.

Plaintiff's bank ledger sheets, showing deposits, withdrawals, and balances in his account from January 1956 to January 1957, appear in this record. Also, numerous paid checks drawn by plaintiff, through which he carried on his business transactions from January 1956 to September 15, 1956, inclusive, and also through November and December 1956, inclusive, appear in this record. Reference to each one independently would serve no purpose here. It is sufficient to say that an examination of such ledger account and checks supported by other uncontradicted evidence establishes that during such periods plaintiff himself carried on all of his personal farm and family business of every kind and made all decisions with regard thereto as usual, without being influenced or assisted by his family, except that he talked with his wife Irene, and his son Charles, about some transactions at times.

In that connection, the record discloses that on February 13, 1956, plaintiff filled out his income tax return in his own handwriting. During that month, he circulated petitions and participated in establishing a brucellosis control district in his area. On March 8, 1956, plaintiff assisted in the assessment of his own and other personal property, and signed a schedule for himself, his wife Irene, and his son Charles. In July 1956, plaintiff placed a portion of his land in the soil bank program, signed the necessary papers for that purpose, and thereafter was paid benefits exceeding $1,000. During July, he transacted a rental of his hay land on the

quarter section not sold to defendants. Also, during that month he sold his irrigation equipment after consulting with three dealers therein about it. On August 29, 1957, plaintiff gave his son Charles, who had or was entering the university, a check for $36.67, payable to Huskerville Housing Ofc., as September rent on a housing project. On September 8, 1956, plaintiff gave the county treasurer a check for $150.03 in payment of real estate taxes. On September 15, 1956, plaintiff gave a check for $829.85, as payment in full of the balance on a combine. In August and September 1956, plaintiff made arrangements for an auction of his livestock and machinery. Also, he was justice of the peace for Steel Creek township during 1956, and as such signed and approved several claims against the township for January, February, June, July, and October 1956.

During such periods, several of plaintiff's business acquaintances who testified at the trial saw him, visited with him, and transacted business with him. Except defendants, they were disinterested witnesses. For example, the manager of the Production Credit Association, of which plaintiff was a member and from whom he had borrowed money, visited with plaintiff in the early spring of 1956 and again on May 23, 1956, about the sale of plaintiffs' farm. He testified that plaintiff seemed nervous and dissatisfied with the results of his irrigation venture, but he saw nothing which indicated that plaintiff was mentally unbalanced or incompetent to transact business.

The real estate broker who, at plaintiff's request and with his assistance and direction, typed and prepared the first contract of sale, which was identical in material respects with the one subsequently prepared by plaintiffs' attorney except with regard to payment dates, testified that plaintiff appeared nervous but that he knew what he was doing, wanted to make the sale, and knew and understood the entire transaction; and that he neither saw nor suspected that there was anything

mentally wrong with plaintiff at that time. Defendants testified that at all times during the transactions plaintiff acted as he always had and did not do or say anything which indicated or led them to suspect that there was anything wrong with him mentally.

The party who originally sold plaintiff his irrigation equipment, and was well acquainted with him, visited with plaintiff in the spring of 1956 and again in June and July 1956. He testified that plaintiff appeared nervous and unsettled, but that plaintiff carried on an intelligent conversation, appeared to understand everything without difficulty, and said nothing and did nothing which would indicate that he was suffering from any mental illness. As a matter of fact, at that time such witness offered plaintiff a position as salesman for his firm.

The secretary-treasurer and assistant secretary-treasurer of the Elkhorn National Farm Loan Association, a branch of the Federal Land Bank which held the mortgage on plaintiffs' land assumed by defendants, and which released that mortgage from plaintiffs' quarter section not sold, had extensive contacts and dealings with plaintiff during and prior to the transaction in question. They testified that plaintiff seemed irritable, nervous, and upset, but plaintiff told them why he felt that way, and they did not consider it unusual under the circumstances. The assistant secretary-treasurer testified that plaintiff knew and understood all of the details of the transaction except that he once had some difficulty in understanding some intricate computation of figures in connection with releasing the quarter section from the mortgage, but that difficulty was not unusual because other persons sometimes had the same difficulty. They both testified that plaintiff did not do or say anything at any time which indicated that he was mentally incompetent, but without question was capable of transacting the business at hand.

The party who counseled with plaintiff in June 1956

about the purchase of his irrigation equipment and who purchased it in July 1956, testified that he felt that plaintiff was rational and competent to do business at that time; and that plaintiff was a good bargainer and did business in the same way as he always had.

On May 26, 1956, a close friend and advisor of plaintiff took him to a hospital in Lynch. The reason for doing so is not clear. Be that as it may, on May 28, 1956, that friend and advisor, who knew all the details of the sale, accompanied plaintiff to the office of plaintiffs' attorney, where the first contract was produced, and plaintiff was directed by plaintiffs' attorney to contact defendants and get permission to change the payment dates in order to put plaintiff in a lower income tax bracket for 1956. In that connection, plaintiffs' attorney did not testify that plaintiff was mentally incompetent at that time, or when the transaction was consummated, and plaintiff's close friend and advisor was not called as a witness for plaintiffs.

On September 23, 1956, plaintiff was taken to a hospital in Omaha where he was examined by two psychiatrists who diagnosed that he was mentally ill, with a depressive psychosis of a variable progressive nature, which tends to become severe over a period of months, but responds to proper treatment, although there may be recurrent attacks over the years. They believed plaintiff's attack had been slowly progressing over the last 8 or 9 months or longer. That opinion was based partly on what plaintiff told them, or what friends and members of plaintiff's family told them, plus their observation of plaintiff and his condition. Their opinion was that from about March 1956 or prior thereto, plaintiff did not have normal judgment and sound thinking in business matters, and during May 1956 plaintiff was mentally incompetent and should not have entered into any contract involving the sale of his land. Admittedly, however, at that time he did understand and know partly the legal effect of the contract, but he would not

be able to evaluate the true nature or wisdom of the contract, although to some degree he might have good days on which he would be relatively lucid and free from influence of his disease. They admitted that on May 24, 1956, plaintiff could have understood and known the legal effect and operation of a contract; and admitted that plaintiff then knew the members of his family and their relationship to him, the amount of land he owned, where it was located and its kind, its approximate market value, and could have reached a decision on his own that he desired to dispose of his property. Their idea was that plaintiff's decision was influenced more by an impelling motive caused by the disease rather than that he did not know what he was doing at the time. They admitted that if plaintiff had been more or less normal and only in the early stages of the disease in May and June 1956, then brooding over the sale of his farm and his family affairs could have been a major factor in plaintiff's rapid decline and condition in September 1956. In other words, they admitted that the exact condition of plaintiff's mind in May and June 1956 would be a subject of considerable conjecture.

It will be noted that the weight of such testimony was lessened by the equivocal and conjectural quality of plaintiff's purported mental capacity in May and June 1956, and the fact that neither physician had ever seen plaintiff before September 23, 1956, which necessitated that their conclusions with regard to his then mental condition would be based partly upon assumed facts related to them by others. The weight of their testimony was also lessened by facts, gleaned from letters and other evidence appearing in this record, which indicate that such physicians were called into the case for the dual purpose of not only treating plaintiff but also to help lay a foundation for this action. For example, on September 26, one such physician, apparently as solicited by plaintiffs' attorney, wrote plaintiff Irene a letter, saying: " 'Mr. Marston is suffering from a definite mental

illness and I suspect has been in it for some time. I do hope that we can find out from the attorney whether or not legal action is possible before starting a definite treatment program. Mr. Marston is in need of electric treatments, but I would like to know more about the legal aspects of things before going ahead with these.' " Also, on September 23, 1956, that same physician told Irene what she should do to get this case started, and to talk to her lawyer and see that it was pushed right along. Thereupon, Irene talked to plaintiffs' attorney and told him to talk to the physician, which he did, and this action resulted.

In that connection, plaintiff testified as a witness for plaintiffs that he remembered nothing whatever of incidents that had occurred from the fall of 1955 until he returned from the hospital November 6, 1956. However, the physicians aforesaid testified that such loss of memory was caused entirely by 10 electro-shock treatments given by them to plaintiff, which had restored him to his present normal mental condition, but as usual obliterated any memory of past events for several months.

If plaintiff were mentally incompetent in May and June 1956, when the contracts and warranty deed were executed and delivered in escrow, as claimed, and if that condition was as readily apparent as some of his friends, relatives, and family testified, then the actions of those who permitted and assisted with the transaction are entirely inconsistent with their testimony. Plaintiff's family, friends, and legal advisors who so permitted and assisted him were adult, intelligent, and discerning people who knew the details of the transaction. Their actions and attitude during the transactions contradict their testimony that plaintiff was then mentally incompetent. Plaintiff's son Charles was one of those who accompanied his father, counseled with him during most of the transactions aforesaid, and knew every detail thereof. He testified that he did not fully realize his father's

condition, and that because his father wished to sell, he assisted in order to help and humor him.

Plaintiff Irene knowingly accompanied plaintiff to O'Neill and met their attorney there on June 7, 1956, for the very purpose of completing the transaction. At that time, and prior thereto, it would have been extremely simple for Irene or plaintiffs' attorney to have stopped the sale if there had been any serious reason for her or plaintiffs' attorney to doubt plaintiff's mental competency. They made no effort to do so and the conclusion is inescapable that plaintiff was mentally competent.

For reasons heretofore stated, we conclude that the judgment of the trial court should be and hereby is affirmed. All costs are taxed to plaintiffs.

AFFIRMED.

JAMES H. NELSON, APPELLANT, V. GENERAL CREDIT CORPORATION, A CORPORATION, ET AL., APPELLEES.
90 N. W. 2d 799

Filed June 6, 1958. No. 34356.

1. Usury. An automobile dealer may in good faith sell a car on time for a price in excess of the cash price without tainting the transaction with usury, though the difference in prices may exceed lawful interest for a loan.
2. ———. A time sale made in good faith at a price in excess of a cash price, even though the difference exceeds lawful interest for a loan, which price is arrived at by schedules furnished by a finance company which solicits contracts so entered into between a purchaser and a dealer, may not be regarded as being tainted with usury.
3. ———. In such cases, however, the transaction between the buyer and seller must be a completed bona fide time price sale agreement.
4. ———. These rules however do not apply where it is proved that the transaction was not made in good faith but that it was a scheme and a device pursued to evade the operation against it of the usury statute.

5. ———. In cases of this character courts will look through the form to the substance of the transaction in order to determine whether there was a bona fide time sale or a loan.
6. ———. The sale must be honestly and in good faith executed by the dealer and purchaser for an agreed credit price in excess of a cash price in order to constitute a bona fide time sale transaction, and if the transaction is in fact a loan for usury, the agreement is unlawful and void.
7. ———. In order to have the foregoing principles apply it must appear that the buyer actually was informed of and had the opportunity to choose between a time sale price and a cash sale price. It is not enough to merely show that the instruments signed evidencing the indebtedness refer to a time price or time differential when, in fact, the buyer was never quoted a time sale price as such.
8. ———. When a void contract is renewed by the giving of a renewal or substituted contract, the invalidity follows into and becomes a part of the latter contract, making it subject to the defense of invalidity to the same extent as was the original obligation.

APPEAL from the district court for Adams County: FRANK J. MUNDAY, JUDGE. *Reversed and remanded with directions.*

Whelan & Whelan, for appellant.

Conway & Irons, for appellees.

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

SIMMONS, C. J.

There are two causes of action involved in this litigation. Plaintiff sues to recover the sum of $1,150 and interest from the General Credit Corporation, that being the amount paid on a promissory note calling for 23 monthly payments of $50 each. The 24th payment was for the sum of $674. When that payment became due plaintiff, in order to pay that balance, executed to the General Credit Corporation his promissory note in the sum of $787.46, payable in monthly installments of $47.86. Plaintiff had paid thereon four installments when this action was brought. The note for $787.46 was

sold by General Credit Corporation to Peoples Loan Company and certain payments were made to it. Both corporations are defendants here.

Plaintiff prayed for a judgment declaring the notes to be null and void; for a recovery of the amount of the payments made, with interest; for the surrender of an automobile certificate of title; for a release of all liens on the automobile; and for equitable relief.

The original note resulted from the sale of an automobile by Worthing Motor Company to the plaintiff. For convenience we will refer herein to General Credit Corporation as General Credit; to Peoples Loan Company as Peoples Loan; and to Worthing Motor Company as Worthing. Unless otherwise pointed out, reference will be made to the testimony as that of each of these parties under the above designations.

At the times here involved applicable to each, General Credit and Peoples Loan held licenses under the Nebraska Installment Loan Act. Peoples Loan was organized in 1955 by the son of the president of General Credit. Prior to the organization of Peoples Loan he had been an officer of General Credit and active in its affairs.

Multiple issues were made and submitted to the trial court resulting in a judgment dismissing both causes of action.

Plaintiff appeals. The issue presented here is the contention of the plaintiff that the original transaction was a cash sale with a loan to pay the balance; and that the loan was in violation of the law and hence the note was void and plaintiff was entitled to recover the amounts paid thereon. As to the second note it is plaintiff's contention that the invalidity of the first note followed into and became a part of the second note and that it, too, was void.

The defendants contend that the first note was but the payment of a time sale price and hence was valid

and that the second note was within the terms of the Installment Loan Act and was valid.

There are additional assignments of error here as to the admission of evidence and the filing of amended pleadings by defendants. The questions presented are not material to a decision here and will not be further mentioned.

We reverse the judgment of the trial court and remand the causes with directions.

The action was tried as one in equity and is considered here as on trial de novo.

The facts are not in dispute on material matters save as are mentioned here.

Plaintiff on October 21, 1952, went to Worthing to have his car repaired. He then discussed the purchase of a new car and the trade-in of his old car. The parties agreed upon the cash price of the new car at the figure of $2,340. The credit for the used car was agreed upon at the figure of $1,020, leaving the cash price for the difference of $1,320. A car order was prepared and signed by plaintiff showing these facts. A copy was given to plaintiff. It made no reference to a time sale price; however, following the printed word "Payments" on the order form is written the words "General Credit," indicating that the car order was not signed until the matters hereinafter set out were discussed. The above reference to "General Credit" appears in carbon on the copy delivered to plaintiff on the day of the transaction. However, on the car order which defendant introduced purporting to be the original order the cash selling price appears as $2,351.40 and the used car allowance as $1,031.40. The figures are in lead pencil and erasures are apparent. These changes were obviously made to conform to a detailed "car invoice" calculating the transaction. The words "General Credit" which appear on plaintiff's copy of the order appear also on the original offered by defendant with the words "General Credit" heavily lined out in lead pencil. No explanation ap-

pears as to when or why the last alteration of the order was made.

Plaintiff informed Worthing that he could not pay $1,320 in cash and that it would be necessary to go to a loan company to secure the money.

Plaintiff had recently come to Nebraska from California. He there had financed the payment of the trade-in car by a deferred payment plan. He knew how such a plan operated and that a deferred payment plan cost more money than a cash payment did.

Worthing asked plaintiff if he had a loan company in mind and was told that he did not. Worthing then agreed to and did contact General Credit, with whom it had theretofore done business.

It was agreed that plaintiff could not pay more than $50 per month on a deferred payment plan. Worthing could not figure the total amount required for the deferred payment because of that restriction. Worthing asked General Credit to calculate the amount of the payment that would be required so as to sell the note to General Credit at an amount that would pay Worthing the cash price of $1,320. General Credit then calculated the amount at $1,824, payable $50 per month for 23 months and $674 on the 24th month.

General Credit also required time to check plaintiff's credit record in California and did so, and after some hours advised Worthing that they would purchase a note and mortgage given for the above purpose.

In the meantime, Worthing had accepted the figure of $1,824 fixed by General Credit. On forms which it had been furnished by General Credit, Worthing prepared a promissory note for $1,824 payable to Worthing Motors and a chattel mortgage on the car to secure the payment of the note. Plaintiff signed these papers.

Worthing testified that it "relayed" the time price to plaintiff. However, this evidence is weakened by other testimony that it was "assumed" and "apparently" plaintiff knew the time price. Plaintiff testified that he was

not given a time price. However, he testified that he knew the amount of $1,824 was the amount recited in the note and mortgage and the provision for payment of it before he signed it.

When General Credit received satisfactory credit reports on the plaintiff, it made out and delivered a check to Worthing for $1,340. Worthing then endorsed the note without recourse and assigned and delivered the mortgage to General Credit.

General Credit then discussed the entire matter as to payments, insurance, etc., with the plaintiff.

The certificate of title recites that plaintiff had acquired the title to the automobile from Worthing subject to a mortgage to General Credit for the sum of $1,824. The automobile was delivered to plaintiff the following day, although the certificate of title bears the date of October 24, 1952, 3 days after the note and mortgage were executed. Thereafter plaintiff made the payments to General Credit, later executed the new note and mortgage to General Credit, and made payments thereon to General Credit and Peoples Loan as above recited.

It is noted that General Credit paid Worthing for the purchase of the note and mortgage $20 in excess of the cash price fixed for the transaction. This is described in the evidence as a "reserve" or a payment for the privilege of buying the instruments involved.

Beginning with Grand Island Finance Co. v. Fowler, 124 Neb. 514, 247 N. W. 429, down to and including McNish v. Grand Island Finance Co., 164 Neb. 543, 83 N. W. 2d 13, we have stated and restated the applicable rules. We quote from the summary contained in McNish v. General Credit Corp., 164 Neb. 526, 83 N. W. 2d 1: " '* * * an automobile dealer may in good faith sell a car on time for a price in excess of the cash price without tainting the transaction with usury, though the difference in prices may exceed lawful interest for a loan. * * * a time sale made in good faith at a price in excess

of a cash price, even though the difference exceeds lawful interest for a loan, which price is arrived at by schedules furnished by a finance company which solicits contracts so entered into between a purchaser and a dealer, may not be regarded as being tainted with usury. * * * These rules however do not apply where it is proved that the transaction was not made in good faith but that it was a scheme and a device pursued to evade the operation against it of the usury statute. * * * In such cases, however, the transaction between the buyer and seller must be a completed bona fide time price sale agreement.' * * * In cases of this character courts will look through the form to the substance of the transaction in order to determine whether there was a bona fide time sale or a loan."

Many of the facts of the case here are substantially the same as those in Grand Island Finance Co. v. Fowler, *supra,* wherein we held that they established a valid time sale. However, in Powell v. Edwards, 162 Neb. 11, 75 N. W. 2d 122, we reviewed the Fowler case at length and refused to follow the fact conclusions of that case, although accepting in principle the rule of law there stated.

In State ex rel. Beck v. Associates Discount Corp., 162 Neb. 683, 77 N. W. 2d 215, we held: "In Grand Island Finance Co. v. Fowler, *supra,* our opinion makes clear that the sale must be honestly and in good faith executed by the dealer and purchaser for an agreed credit price in excess of a cash price in order to constitute a bona fide time sale transaction, and that if the transaction is in fact a loan for usury, the agreement is unlawful and void."

We went further in McNish v. General Credit Corp., *supra,* and held: "In order to have the foregoing principles apply it must appear that the buyer actually was informed of and had the opportunity to choose between a time sale price and a cash sale price. It is not enough to merely show that the instruments signed

evidencing the indebtedness refer to a time price or time differential when, in fact, the buyer was never quoted a time sale price as such."

It is well also to point out that Grand Island Finance Co. v. Fowler, *supra,* was decided in 1933 under the provisions of Comp. St. 1929, c. 45, art. I, and before the Legislature set out the public policy of this state by the enactment of Laws 1941, c. 90, p. 344.

Within the scope of the above rules each case must depend on its own facts and circumstances.

The facts and circumstances here point to the conclusion that this transaction originated as a loan by General Credit to the plaintiff. Plaintiff desired a loan. Worthing contacted General Credit, and gave it the base figures upon which to calculate the amount of the loan so that Worthing would receive its cash price. The transaction was thereafter the proceeding of General Credit in securing a credit report on plaintiff, in calculating the amount of the loan and the amount of the payments, and in determining insurance which General Credit required and its cost. It is clear that Worthing drafted the note and mortgage for General Credit so as to secure its cash price together with interest, insurance, and other charges exacted by General Credit.

It is clear, also, that Worthing had received its cash price from General Credit before the sale transaction was completed.

The facts and circumstances here do not bring this case within the scope of the rule last quoted from McNish v. General Credit Corp., *supra.* We conclude that this transaction was not a good faith sale at a time price by Worthing, but was in fact a loan by General Credit to plaintiff out of which Worthing received its cash price.

Section 45-138, R. R. S. 1943, provided: "Every loan contract shall provide for repayment of principal and charges in installments which shall be payable at approximately equal periodic intervals of time and so arranged that no installment is substantially greater in

amount than any preceding installment." The same section also provided: "Any contract of loan made in violation of this paragraph, either knowingly or without the exercise of due care to prevent the same, shall be void and the licensee shall have no right to collect or receive any principal, interest or charges on such loan."

In A-1 Finance Co., Inc. v. Nelson, 165 Neb. 296, 85 N. W. 2d 687, we held that any loan made by a licensee under the installment loan law which fails to conform to the above provision of the statute is a violation thereof and void.

The note given by the plaintiff to satisfy the last payment of $674 of the original note is likewise void. In State ex rel. Beck v. Associates Discount Corp., *supra,* we held: The usurious character of a transaction is determined as of the time of its inception, and if a contract is usurious in its inception, no subsequent transaction will cure it. Hence, when a usurious contract is renewed by the giving of a renewal or substituted contract, the usury follows into and becomes a part of the latter contract, making it subject to the defense of usury to the same extent as was the original obligation.

Consistent with this holding, it follows that the rule is: When a void contract is renewed by the giving of a renewal or substituted contract, the invalidity follows into and becomes a part of the latter contract, making it subject to the defense of invalidity to the same extent as was the original obligation.

It necessarily follows that both notes involved in this transaction were void as of the time of their inception.

We do not deem it necessary to consider other charges of illegality presented by this record.

The judgment of the trial court is accordingly reversed and the causes are remanded with directions to render a judgment in accord with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

RAY AINSWORTH ET AL., APPELLEES, V. COUNTY OF FILLMORE ET AL., APPELLANTS.

90 N. W. 2d 360

Filed June 6, 1958. No. 34372.

1. **Pleading.** A general demurrer admits all allegations of fact in the pleading to which it is addressed, which are issuable, relevant, material, and well pleaded; but does not admit the pleader's conclusions of law or fact.
2. **Taxation.** The levy, assessment, and collection of taxes which are demonstrably void for want of jurisdiction or authority to impose the same may be enjoined.
3. ———. The domicile of the owner is the taxable situs assigned to tangibles where an actual situs has not been acquired elsewhere.
4. ———. The state which is the domicile of the owner of tangibles is the situs of tangible personal property temporarily in another state but not permanently located there.
5. **Taxation: Injunction.** A fact necessary to entitle the plaintiffs to injunction against the assessment which was made was permanent absence of the wheat from the State of Nebraska.
6. **Pleading.** The absence of an allegation of this essential fact rendered the petition of plaintiffs vulnerable to an attack by general demurrer.
7. ———. A defendant has the right to insist that all of the facts essential to the existence of a cause of action against him and in favor of the plaintiff be stated in the petition.
8. **Taxation.** Ordinarily the valuation of a county assessor for tax purposes will be presumed to be correct, and when attacked the burden rests upon the taxpayer to overcome the presumption.

APPEAL from the district court for Fillmore County: STANLEY BARTOS, JUDGE. *Reversed and remanded with directions.*

Clarence S. Beck, Attorney General, *Homer G. Hamilton*, and *John C. Gewacke*, for appellants.

Keenan & Corbitt, for appellees.

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

YEAGER, J.

This is an action in equity wherein Ray Ainsworth

and 67 others, all of whom are residents and taxpayers, as plaintiffs, appellees here, by petition instituted this action in the district court for Fillmore County, Nebraska, against the County of Fillmore and Bert A. Lynn, treasurer of that county, defendants, appellants here, to enjoin the collection of a tax levied on wheat added to their tax schedules respectively which was grown by the plaintiffs in 1956 but which it was alleged was outside the State of Nebraska on March 1, 1957, and on account thereof the tax levied thereon was void and uncollectible. The paragraphs of the petition containing the allegations as to ownership, production, and situs of the wheat are the following:

"That the Defendant, the County of Fillmore, through its Board of Equalization and its Assessor, has added to each of the tax schedules of the Plaintiffs for the year 1957, certain wheat which was grown in 1956 but which wheat was outside the State of Nebraska on March 1, 1957."

"That said wheat being outside the State of Nebraska on March 1, 1957 is not taxable within the State of Nebraska or the County of Fillmore and the tax sought to be levied upon the same by the Defendants is void and uncollectable."

To the petition the defendants filed a general demurrer. The demurrer was overruled and the defendants elected to stand thereon and refused to plead further. A decree was thereupon rendered granting the injunctive relief prayed by the plaintiffs. From the decree the defendants have appealed.

The theory of the demurrer and also of the appeal is that the petition failed to state facts sufficient upon which to base a decree for the relief prayed by the plaintiffs; or in other words, the petition did not state a cause of action.

The general rule, about which there is no longer room for dispute, with regard to the office of a general demurrer is the following: "A general demurrer admits

all allegations of fact in the pleading to which it is addressed, which are issuable, relevant, material, and well pleaded; but does not admit the pleader's conclusions of law or fact." In re Estate of Halstead, 154 Neb. 31, 46 N. W. 2d 779. See, also, Freeman v. Elder, 158 Neb. 364, 63 N. W. 2d 327; Johnson v. Ruhl, 162 Neb. 330, 75 N. W. 2d 717; Boettcher v. County of Holt, 163 Neb. 231, 79 N. W. 2d 183.

The defendants urge that within the meaning of this rule the petition fails for two reasons to state a cause of action. One of these is, as we interpret, that, assuming the impropriety of the alleged addition of the wheat to the assessment rolls, injunction is not available for the reason that the plaintiffs had available to them a statutory remedy for the correction of the assessments.

If it be assumed that the tax assessed against the added grain was void, an action to enjoin its collection was available to the plaintiffs, notwithstanding an available statutory remedy, if there was one, which could have been employed for protection. In Offutt Housing Co. v. County of Sarpy, 160 Neb. 320, 70 N. W. 2d 382, affirmed 351 U. S. 253, 76 S. Ct. 814, 100 L. Ed. 1151, it was said: "The levy, assessment, and collection of taxes which are demonstrably void for want of jurisdiction or authority to impose the same may be enjoined." See, also, Earl v. Duras, 13 Neb. 234, 13 N. W. 206; Burlington & M. R. R. Co. v. Cass County, 16 Neb. 136, 19 N. W. 700; Touzalin v. City of Omaha, 25 Neb. 817, 41 N. W. 796; Bellevue Improvement Co. v. Village of Bellevue, 39 Neb. 876, 58 N. W. 446.

Accordingly if the plaintiffs have otherwise sufficiently pleaded that this added wheat was nontaxable in Fillmore County, Nebraska, this first proposition advanced by the defendants must be rejected.

The second reason why the defendants assert that the petition is vulnerable to general demurrer is that the facts stated, if proved to be true, would not under law render this wheat nontaxable in Fillmore County, Ne-

braska. At this point it should be said that in 1957 the date for the taxation of wheat was March 1. § 77-1201, R. R. S. 1943, as amended by Laws 1955, c. 288, § 10, p. 906.

As is observable from the petition it is not alleged that the plaintiffs were not residents of the State of Nebraska on March 1, 1957. It is not alleged that the wheat had acquired a permanent situs in some other state on March 1, 1957. It is not alleged that the ownership was not the same on March 1, 1957, as when produced in 1956, or that it was not owned on March 1, 1957, by the plaintiffs respectively. The implication of which the petition and the brief of plaintiffs is capable is that the wheat was on March 1, 1957, the property of the plaintiffs and that on that date the plaintiffs were residents of Fillmore County, Nebraska.

In order to have rendered this wheat nontaxable in Nebraska on March 1, 1957, it must not only have been on that date without the jurisdiction but also the situs must have had the character of permanency.

The rule is stated as follows in 51 Am. Jur., Taxation, § 457, p. 470, as follows: "The domicil of the owner is the taxable situs assigned to tangibles where an actual situs has not been acquired elsewhere. That state is the situs for the purposes of taxation of tangible personal property temporarily in another state, but not permanently located there."

This rule is discussed at length with approval in Brock & Co. v. Board of Supervisors, 8 Cal. 2d 286, 65 P. 2d 791, 110 A. L. R. 700. Other cases which hold to the same effect are the following: Sangamon & Morgan R. R. Co. v. County of Morgan, 14 Ill. 163, 56 Am. Dec. 497; Commonwealth v. R. G. Dun & Co., 126 Ky. 108, 102 S. W. 859, 10 L. R. A. N. S. 920; Reeves v. Island Creek Fuel & Trans. Co., 313 Ky. 400, 230 S. W. 2d 924; Johnson Oil Refining Co. v. State ex rel. Templeton, 172 Okl. 552, 46 P. 2d 546; Commonwealth v. American Dredging Co., 122 Pa. 386, 15 A. 443, 9 Am. S.

R. 116, 1 L. R. A. 237; Smith v. Ajax Pipe Line Co., 87 F. 2d 567; Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 26 S. Ct. 36, 50 L. Ed. 150; State ex rel. New York Central & Hudson River R. R. Co. v. Miller, 202 U. S. 584, 26 S. Ct. 714, 50 L. Ed. 1155; Southern Pacific Co. v. Commonwealth of Kentucky, 222 U. S. 63, 32 S. Ct. 13, 56 L. Ed. 96; Johnson Oil Refining Co. v. Oklahoma, 290 U. S. 158, 54 S. Ct. 152, 78 L. Ed. 238; Wheeling Steel Corp. v. Fox, 298 U. S. 193, 56 S. Ct. 773, 80 L. Ed. 1143.

Under this rule, as is pointed out by the cases which have been cited, on the trial of a case, unless the property has acquired a permanent situs in the state where it is located, it becomes the duty of the court to adjudicate unfavorably to a contention that tangible property outside the state of the residence of the owner is not taxable to the owner in the state of his residence.

In this light it becomes necessary to say that permanent situs outside the State of Nebraska on March 1, 1957, was a fact essential to the right of plaintiffs to the relief prayed in this action. This essential fact has not been pleaded directly or by reasonable inference in the petition. The allegation of this fact was essential to the statement of a good cause of action. The decisions of this court from early times down to the present make this clear.

In Bell v. Sherer, 12 Neb. 409, 11 N. W. 861, it was said: "A defendant has the right to insist that all of the facts essential to the existence of a cause of action against him and in favor of the plaintiff be stated in the petition. Such is the rule of the code."

In State ex rel. Beck v. Associates Discount Corp., 162 Neb. 683, 77 N. W. 2d 215, it was said: "Under the code system of pleading, it is not necessary for plaintiff to state a cause of action in any particular form. The facts are to be stated. All that the law requires is that there shall be a cause of action."

The plaintiffs have insisted agruendo that the question

of whether or not this property was taxable in Fillmore County, Nebraska, in view of the allegation that it was outside the State of Nebraska, was a matter of defense to be asserted by the defendants. The true rule is that the burden was on the plaintiffs to sustain or in other words to plead and to prove the right to the relief prayed against the defendants. Fitzsimons v. Frey, 153 Neb. 124, 43 N. W. 2d 531; Lincoln v. Knudsen, 163 Neb. 390, 79 N. W. 2d 716. This is especially true under the general rules in instances where a tax is being attacked.

In 51 Am. Jur., Taxation, § 655, p. 620, it is said: "All presumptions are in favor of the correctness of tax assessments. The good faith of tax assessors and the validity of their actions are presumed."

In 51 Am. Jur., Taxation, § 765, p. 696, it is said: "Questions as to presumptions and burden of proof in proceedings for the abatement of a tax assessment represent, for the most part, specific applications of the broad principle that all presumptions are in favor of the correctness of tax assessments. Thus, one claiming an abatement of taxes has the burden of showing his right thereto."

Again in 51 Am. Jur., Taxation, § 1252, p. 1066, it is said: "There are certain presumptions that are particularly applicable to taxation litigation. Thus, taxes are presumed to be just and legal and the burden rests upon one assailing the tax to show its invalidity."

This general rule obtains in this jurisdiction. In K-K Appliance Co. v. Board of Equalization, 165 Neb. 547, 86 N. W. 2d 381, it is said: "Ordinarily the valuation of a county assessor for tax purposes will be presumed to be correct. The burden of proof rests upon the taxpayer to prove that an assessment is excessive." See, also, Weller v. Valley County, 141 Neb. 69, 2 N. W. 2d 606; Watson Industries v. County of Dodge, 159 Neb. 311, 66 N. W. 2d 589.

In the light of what has been said herein the relief prayed by plaintiffs could not be granted to them on

proof of the facts alleged in the petition. Also no intendments or presumptions appear which are in aid of the allegations. It must be said therefore that the petition did not state a cause of action. Therefore the court erred in overruling the general demurrer of the defendants and in rendering its judgment in favor of the plaintiffs.

The judgment of the district court is reversed and the cause remanded with directions to sustain the demurrer and for further proceedings.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA EX REL. THE SCHOOL DISTRICT OF THE CITY OF GRAND ISLAND ET AL., APPELLEES, V. THE BOARD OF EQUALIZATION OF HALL COUNTY, NEBRASKA, ET AL., APPELLANTS.

90 N. W. 2d 421

Filed June 6, 1958. No. 34377.

1. **Schools and School Districts.** A school district in this state is a creature of statute and possesses no other powers than those granted by the Legislature.
2. **Schools and School Districts: Taxation.** The powers of a Class III school district to raise money for schoolhouses, buildings, and additions, are limited to the issuance of bonds as authorized by Chapter 10, article 7, R. R. S. 1943, and by the taxation of the property of the district as authorized by section 79-422, R. S. Supp., 1955.
3. **Schools and School Districts.** A Class III school district has no authority to transfer unused money in its general fund to the building fund for the construction of school buildings and additions thereto.
4. **Schools and School Districts: Taxation.** When a Class III school district has money in its treasury and from other sources available for general school purposes for the ensuing year, it is bound to take that fact into account in preparing its budget and estimate for the tax levy, and the levy should be made for no more than will raise the difference between the amount on hand and to be received from other sources over and above the authorized reserve, and the amount determined as necessary

to meet the expenses of the district for the ensuing school year.

5. **Mandamus.** Mandamus is a civil remedy and is a legal as distinguished from an equitable proceeding, although issuance of the writ is largely controlled by equitable principles.
6. ———. A writ of mandamus is not a writ of right. Before a court is warranted in granting a peremptory writ it must be made to appear that the relator has a clear legal right to the performance by the respondent of the duty which it is sought to enforce.
7. ———. A writ of mandamus will not issue to compel the doing of a substantial wrong or an unlawful act.

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

Gerald B. Buechler and *Rosemary L. Mara,* for appellants.

Harold A. Prince, for appellees.

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

CARTER, J.

This is an action for a writ of mandamus brought by the School District of the City of Grand Island against the County Board and Board of Equalization of Hall County to compel the restoration of a tax mill levy to provide $150,000 in additional funds for the school district to that which was provided by the board of equalization. The trial court granted the writ. The county board and the board of equalization have appealed.

On July 9, 1957, the school board filed with the county clerk its tax resolution in which it set out the total funds required for general school purposes at $1,298,242. The estimated income from miscellaneous sources and cash balances on hand was $249,129 over and above the necessary cash reserve and outstanding orders which had not been paid. This shows the amount of money to be raised by taxation to be $1,049,113.

The record shows that during the school year the

school board transferred $150,000 from the general fund to the building fund. It is the contention of the county board and board of equalization that this transfer of funds was unlawful and that the amount of funds to be raised by taxation was excessive in the amount of the $150,000. An error in the computation of the estimated income from miscellaneous sources in favor of the school district in the amount of $15,000 was admittedly made and no objection was raised to the correction of this item. The primary issue on appeal is the legality of the transfer of the $150,000 from the general to the building fund.

The school district does contend that the order of the board of equalization reducing the amount to be raised for general school purposes by $165,000 was void for the reason that such board had no jurisdiction to make such order at the time it purported to do so. On this question the record shows that the board of equalization failed to make a levy for school purposes on or before August 10, 1957, as required by section 77-1601, R. S. Supp., 1955. The levy was made on August 21, 1957, in the amount of 29.33 mills to raise the $1,049,113 requested. On September 3, 1957, the board of equalization reconvened and reduced the amount to be raised for general school purposes by $165,000, which resulted in a levy of 24.72 mills to raise the reduced amount of $884,113. It is the contention of the school board that the board of equalization was without jurisdiction to make the order of September 3, 1957, after adjourning sine die on August 21, 1957. Due to the conclusion at which we have arrived we do not deem this issue as material to the disposition of the case.

The school district is a Class III district. In this state a school district is a creature of statute and possesses no other powers than those granted by the Legislature. School Dist. of Omaha v. Adams, 151 Neb. 741, 39 N. W. 2d 550; Schulz v. Dixon County, 134 Neb. 549, 279 N.

W. 179, 119 A. L. R. 1294; American Surety Co. v. School Dist., 117 Neb. 6, 219 N. W. 583.

The power of a third-class school district to raise money for general school purposes is set forth in section 79-810, R. R. S. 1943, which in part states: "The board of education of a third class school district shall annually, during the month of June, report in writing to the county board the entire revenue raised by taxation and all other sources, and received by such board of education for the previous fiscal year, and an estimate for the ensuing fiscal year in form of a resolution broken down generally as follows: (1) The amount of funds required for the support of the schools during the fiscal year next ensuing; (2) the amount of funds required for the purpose of school sites; (3) the amount of funds required for the erection of school buildings; (4) the amount of funds required for the payment of interest upon all bonds issued for school purposes; and (5) the amount of funds required for the creation of a sinking fund for the payment of such indebtedness."

In 1955 the Legislature amended sections 79-431 and 79-435, R. R. S. 1943, to provide certain budgeting requirements by forms to be prescribed by the Commissioner of Education. Section 79-431, R. S. Supp., 1955, contains the following: "* * * such forms shall provide for showing the expenditures, the revenues received from taxation, and revenues available from sources other than taxation, separately stated, including the unencumbered balances available and the necessary cash reserve; * * *." Section 79-435, R. S. Supp., 1955, contains the following provision: "It shall be the duty of the county board of equalization to levy such taxes as are necessary to provide the amount of revenues from property taxes as indicated by all of the data contained in the budget and certificate herein prescribed, at the time and in the manner provided in section 77-1601."

It is provided by section 79-422, R. S. Supp., 1955, that whenever it shall be deemed necessary to erect a

schoolhouse or school buildings, or an addition or additions and improvements to any existing schoolhouse in any school district in this state, the school board or board of education may, and upon petition of not less than one-fourth of the legal voters of the district shall, submit to the people of the district at an election a proposition to vote a special annual tax for that purpose of not to exceed five mills on the dollar for a term not to exceed 10 years. A vote of 55 percent of the legal voters is required to carry such election. Bonds for the erection of school buildings are authorized as provided by Chapter 10, article 7, R. R. S. 1943.

We find nothing in the cited statutes, or any others that we have examined, which authorizes a school board to transfer money from the general fund to a building fund. The only authorization to raise funds for building purposes other than by the issuance of bonds appears to be contained in section 79-422, R. S. Supp., 1955. If, as contended by the school district, funds could be included in the general fund levy and transferred to a building fund at will, the limitations contained in section 79-422, R. S. Supp., 1955, could be completely circumvented and that section be rendered nugatory for all practical purposes. This is particularly important since the Legislature has removed all restrictions on the amount that may be levied by a Class III school district for general school purposes. See § 79-432, R. S. Supp., 1955. We think it is clear that the Legislature intended section 79-422 to be the exclusive method of raising funds for schoolhouses, school buildings, and additions, by taxing the property of the school district, except by the issuance of bonds and provisions relating thereto. By enacting section 79-422 with the limitation of the levy contained in it, the Legislature provided the maximum amount and the exclusive method of raising money for schoolhouses, buildings, and additions by direct levy on the property of the district. If this is not so, the legislation would be ineffective for any purpose, if the conten-

tions of the school district in the present case are correct. In this connection, the clause "(3) the amount of funds required for the erection of school buildings" contained in section 79-810, R. R. S. 1943, relates to the levy of taxes that has been authorized as provided in section 79-422.

It is argued that the history of the legislation dealing with this subject sustains its position. It is pointed out that section 6971, Rev. St. 1913, provided: "The aggregate school tax, exclusive of school bond taxes, shall in no one year exceed thirty-five mills." By section 79-2528, R. S. 1943, the foregoing section read in part: "The aggregate school tax, exclusive of school bond and special warrant taxes, shall in no year exceed such a sum or rate as shall be necessary to raise the sum provided for by the estimate returned in accordance with section 79-2527; Provided, that such levy shall in no event exceed twenty mills for maintenance and operation of the schools, except * * * the aggregate school tax shall not exceed twenty-two mills including not to exceed one mill for the establishment of a building fund for the repair and alteration of buildings." This section was consolidated in 1949 with other sections into section 79-432, R. R. S. 1943, and presently reads as follows insofar as applicable here: "(1) The aggregate school tax levied for general school purposes in Class I, II, III, and VI school districts shall be without restriction, except as provided in subsection (2) of this section." § 79-432, R. S. Supp., 1955. The subsection referred to has no application here. It will be noted that the provision authorizing a one-mill levy for the establishment of a building fund for the repair and alteration of buildings contained in section 79-2528, R. S. 1943, is not included in the 1955 statute. From this the district argues that the limitation of one mill being removed, the school board now has unlimited authority to use money from the general fund for building purposes.

We point out, however, that the one-mill levy referred

to was not established to raise money for the construction of schoolhouses and buildings, but for the repair and alteration of buildings. Even if such provision should be construed as a removal of the limitation for the repair and alteration of buildings, it would not relate itself to the construction of new schoolhouses, buildings, and additions. The maintenance of existing buildings is one thing, the construction of new buildings quite another.

It has been the general policy of the Legislature in recent years, as evidenced by the history of enacted legislation, to permit the issuance of bonds and the creation of building funds only by the affirmative vote of the electors of the school district as the means for raising revenue for the construction of schoolhouses, buildings, and additions. It seems clear to us that the maximum limit that could be levied for the support of schools was removed only after the general funds of the district were made unavailable for the construction of buildings and additions. No statute authorizes the transfer of money from the general to a building fund, an authorization that could easily have been provided if such had been the legislative intent. It is noteworthy that the Legislature saw fit to expressly authorize the transfer from a sinking fund to the school district any money remaining after all bonds, interest, and charges, with which the fund was charged, had been paid. § 10-715, R. R. S. 1943. The failure to make provision for a transfer of unused money in the general fund to the building fund indicates a legislative intent to withhold authority for such transfers. In fact, the clear legislative intent is that excess money in the general fund shall be applied in reduction of the amount that would otherwise be levied on the taxable property of the district for general school purposes.

We conclude that the transfer of the $150,000 from the general to the building fund was unauthorized and illegal. It should have been considered as a part of

the cash balance on hand in the general fund. Necessarily it should have been shown in the budget and estimate of the school district in reduction of the amount of money to be raised by taxation in accordance with the views expressed in Union Pacific R. R. Co. v. Troupe, 99 Neb. 73, 155 N. W. 230, and Kissinger v. School Dist. No. 49, 163 Neb. 33, 77 N. W. 2d 767. The effect of these holdings is that when a Class III school district has money in its treasury available for the support of the school during the ensuing school year, it is bound to take that fact into account in fixing the tax levy, and the levy should be made for no more than will approximately raise the difference between the amount on hand over and above the authorized reserve, and the amount determined as necessary to meet the expenses of the district for the ensuing school year. The contention that the county board is mandatorily required to make the levy to raise the amount of money requested by the school district, irrespective of a showing in the estimate and budget that such amount is not needed, appears to be dissipated by the provisions of section 79-435, R. S. Supp., 1955, wherein the county board of equalization is charged with the duty of levying such taxes as are necessary to provide the amount of revenues as indicated by all the data contained in the budget and estimate.

The school district relies heavily on Gaddis v. School Dist., 92 Neb. 701, 139 N. W. 280, to sustain its claimed authority to transfer money from the general to the building fund. The case is clearly distinguishable. As made clear in that case, the applicable statute authorized a gross levy to produce funds for the support of the schools and for sites and buildings. The holding that money in the general fund could be used for the construction of a school building is premised on the fact that the levy for general fund purposes included the cost of sites and buildings, as provided by the applicable statute at that time. Since money in the general fund was properly levied in part for sites and build-

ings by statutory authorization, the conclusion naturally follows that it could be properly applied to such purpose. But such a situation does not exist in the case before us. No statutory authority presently exists that warrants the conclusion reached in the Gaddis case.

The disposition of the issues raised by the appeal requires a consideration of the nature of an action for a writ of mandamus and the purposes for which such a writ will be granted. Mandamus is a civil remedy and is a legal as distinguished from an equitable proceeding, although issuance of the writ is largely controlled by equitable principles. The remedy of mandamus may be refused for reasons comparable to those which would lead a court of equity in the exercise of a sound discretion to withhold its protection of a strictly legal right. In other words, it will be issued ordinarily only to prevent injustice and not to promote it. It is not a writ of right. In determining whether or not the writ should issue, the court should consider the facts of the particular case, the nature of the exigency which calls for the exercise of the court's discretion, the consequences of a grant of the writ, and the nature and extent of the wrong or injury which would result from its refusal. The writ will not ordinarily be issued on mere technical grounds, and it may be granted or refused, depending on whether or not it promotes substantial justice. The writ may not properly issue to accomplish or promote a wrong or further an injustice.

The effect of the issuance of the writ of mandamus in the instant case is to compel the board of equalization to do an unlawful act. A writ of mandamus cannot be properly used to accomplish any such purpose. It would be anomalous indeed that a court should be required to issue a writ of mandamus to compel action which the court would be required to subsequently enjoin at the suit of an injured party.

"While the courts, in the exercise of a sound discretion, will not issue the writ of mandamus, even to vin-

dicate a technical right, where more harm than good will result through its interference with municipal administration, such considerations are addressed to the trial court. Only in a clear case of abuse of discretion would the granting of a mandamus be reversed for such a cause." Moores v. State ex rel. Dunn, 71 Neb. 522, 99 N. W. 249, 115 Am. S. R. 605. See, also, State ex rel. Cox v. McIlravy, 105 Neb. 651, 181 N. W. 554.

"Before the court is warranted in granting a peremptory writ of mandamus, it must be made to appear that the relator has a clear legal right to the performance by the respondent of the duty which it is sought to enforce. Nothing essential to that right will be taken by intendment." State ex rel. Niles v. Weston, 67 Neb. 175, 93 N. W. 182. See, also, Hess v. Taylor, 142 Neb. 184, 5 N. W. 2d 346; State ex rel. Evans v. Brown, 152 Neb. 612, 41 N. W. 2d 862.

In State ex rel. Long v. Barstler, 122 Neb. 167, 240 N. W. 273, this court cited with approval the following: " 'Where the issue of a writ would disturb official action, or create disorder or confusion, it may be denied; and this is so even where the petitioner has a clear legal right for which mandamus would be an appropriate remedy.' 38 C. J. 550. See, also, Merrill on Mandamus, secs. 71, 73; Ferris on Extraordinary Legal Remedies, sec. 202."

"In order to justify the issuance of a peremptory writ of mandamus against public officers it must appear that the duty is imposed by law, that the duty exists at the time the writ is applied for, and that the duty to act is clear." Kurth v. City of Lincoln, 162 Neb. 643, 76 N. W. 2d 924. See, also, State ex rel. Herbert v. Anderson, 122 Neb. 738, 241 N. W. 545.

This court has consistently held that a writ of mandamus will not issue to compel the doing of a substantial wrong or an unlawful act. State ex rel. Green v. Cowles, 90 Neb. 839, 134 N. W. 959; State ex rel. Read v. Farmers Irrigation Dist., 116 Neb. 373, 217 N.

W. 607; State ex rel. Heil v. Jakubowski, 151 Neb. 471, 38 N. W. 2d 26; State ex rel. League of Nebraska Municipalities v. Loup River Public Power Dist., 158 Neb. 160, 62 N. W. 2d 682.

We have determined in the instant case that the transfer of the $150,000 from the general fund to the building fund is unlawful under existing statutes. The grant of the writ of mandamus in the present case has the effect of compelling the county board of equalization to recognize the transfer as lawful; to compel it to do an unlawful act. It would have the effect of imposing an excessive levy of taxes for general school purposes upon property owners in the school district. The remedy of mandamus is not available to the school district to bring about any such result.

The grant of the writ of mandamus under the circumstances shown constitutes an abuse of discretion by the trial court and requires a reversal of the judgment. The judgment of the district court is therefore reversed and the cause remanded with directions to dismiss the petition of the school district.

REVERSED AND REMANDED WITH DIRECTIONS.

GERALD L. CRABLE, APPELLEE, V. GREAT WESTERN SUGAR COMPANY ET AL., APPELLANTS.
90 N. W. 2d 805

Filed June 6, 1958. No. 34383.

1. **Workmen's Compensation: Appeal and Error.** An appeal to this court in a workmen's compensation case is considered and determined de novo upon the record.
2. **Workmen's Compensation.** 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.
3. ———. An accident within the Workmen's Compensation Act is an unexpected and unforeseen event happening suddenly and violently and producing at the time objective symptoms of injury.

4. ———. In order to recover, the burden of proof is upon the claimant in a workmen's 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.
5. ———. An award of compensation under the Workmen's Compensation Act may not be based on possibilities, probabilities, or speculative evidence.
6. ———. The rule of liberal construction of the Workmen's Compensation Act applies to the law, not to the evidence offered to support a claim by virtue of the law. The rule does not dispense with the necessity that claimant shall prove his right to compensation within the rules above set forth nor does it permit a court to award compensation where the requisite proof is lacking.
7. ———. When an employee meets with an accident which accelerates or aggravates an existing impairment to a state of disability, such disability not being the result of a natural progression of the impairment, there may be an award of compensation therefor.
8. ———. For workmen's compensation purposes, "total disability" does not mean a state of absolute helplessness, but means disablement of an employee to earn wages in the same kind of work, or a work of a similar nature, that he was trained for, or accustomed to perform, or any other kind of work which a person of his mentality and attainments could do.
9. ———. An employee may be totally disabled for all practical purposes and yet be able to obtain trivial occasional employment under rare conditions at small remuneration. The claimant's status in such respect remains unaffected thereby unless the claimant is able to get, hold, or do any substantial amount of remunerative work either in his previous occupation or any other established field of employment for which he is fitted.

APPEAL from the district court for Scotts Bluff County: RICHARD VAN STEENBERG, JUDGE. *Affirmed.*

Wright, Simmons & Harris, for appellants.

Holtorf & Hansen, for appellee.

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

CHAPPELL, J.

This is a workmen's compensation case. After a hear-

ing before one judge of the Nebraska Workmen's Compensation Court, plaintiff, Gerald L. Crable, was awarded temporary total disability at $30 per week for 35 weeks from and including December 7, 1955, to and including August 7, 1956, and thereafter $16.38 per week for 265 weeks for 30 percent permanent partial disability to his body as a whole. Defendants, Great Western Sugar Company and London Guarantee & Accident Company, Ltd., the compensation carrier, were also ordered to pay for and on behalf of plaintiff $215 for medical services and $15 as reimbursement for expenses of a trip to Denver for medical examination, requested by defendants. Two certain claims for medical expenses were disallowed because incurred in preparation for trial and not for necessary medical treatment. Defendants having already paid same, they were given credit for $30 per week for 35 weeks for temporary total disability and for certain hospital and medical expenses.

After rehearing by the compensation court en banc, the award theretofore rendered was modified. In that respect, plaintiff was found to be totally disabled and was awarded $30 per week for 300 weeks from and after December 6, 1955, or until such disability sooner ceases, and if plaintiff should remain totally disabled after such period, defendants should pay him $25 per week for the balance of his lifetime, or until his total disability ends. Defendants were given credit for payments already made as allowed in the prior award, but were ordered to pay $209 for medical services by plaintiff's attending physician, $42.50 for X-rays taken by another physician, and $15 for travel expenses incurred on the trip to Denver by plaintiff.

Therefrom defendants appealed to the district court, whereat a judgment was rendered finding that plaintiff was totally disabled, and awarding him $30 per week for 300 weeks from and after December 6, 1955, and $25 per week thereafter for the balance of plaintiff's lifetime, or until disability ends. Defendants were given

credit for payments already made, and were ordered to pay certain medical and travel expenses as was done in the award from which defendants appealed, and ordered defendants to pay $100 attorneys' fees, taxed to defendants as costs.

Thereafter, defendants' motion for new trial was overruled and they appealed, assigning in substance that the trial court erred as follows: (1) In finding that plaintiff was totally disabled as a result of injuries caused by an accident on December 6, 1955, arising out of and in the course of his employment by defendant, Great Western Sugar Company, and in finding that plaintiff was entitled to an award upon such basis; (2) in ordering defendants to pay $209 for medical expenses rendered by Doctor Stewart P. Wiley, plaintiff's attending physician; and (3) in reimbursing plaintiff $15 for traveling expenses to Denver, which trip was made at defendants' request. We conclude that the assignments have no merit.

There are well-established rules of law which are applicable and controlling in the situation presented. In Feagins v. Carver, 162 Neb. 116, 75 N. W. 2d 379, we reaffirmed that: "An appeal to this court in a workmen's compensation case is considered and determined de novo upon the record."

In that connection, we said in Krajeski v. Beem, 157 Neb. 586, 60 N. W. 2d 651: "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."

Also, in Feagins v. Carver, *supra,* citing and quoting from Jones v. Yankee Hill Brick Manufacturing Co., 161 Neb. 404, 73 N. W. 2d 394, we held: "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.

"An accident within the Workmen's Compensation Act is an unexpected and unforeseen event happening suddenly and violently and producing at the time objective symptoms of injury.

"In order to recover, 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.

"An award of compensation under the Workmen's Compensation Act may not be based on possibilities, probabilities, or speculative evidence.

"The rule of liberal construction of the Workmen's Compensation Act applies to the law, not to the evidence offered to support a claim by virtue of the law. The rule does not dispense with the necessity that claimant shall prove his right to compensation within the rules above set forth nor does it permit a court to award compensation where the requisite proof is lacking."

In Turner v. Beatrice Foods Co., 165 Neb. 338, 85 N. W. 2d 721, we held: "When an employee meets with an accident which accelerates or aggravates an existing impairment to a state of disability, such disability not being the result of a natural progression of the impairment, there may be an award of compensation therefor."

As held in Anderson v. Cowger, 158 Neb. 772, 65 N. W. 2d 51: "For workmen's compensation purposes 'total disability' does not mean a state of absolute helplessness, but means disablement of an employee to earn wages in the same kind of work, or a work of a similar nature, that he was trained for, or accustomed to per-

form, or any other kind of work which a person of his mentality and attainments could do.

" 'Earning power,' as used in subdivision (2), section 48-121, R. R. S. 1943, is not synonymous with wages, but includes eligibility to procure employment generally, ability to hold a job obtained, and capacity to perform the tasks of the work, as well as the ability of the workman to earn wages in the employment in which he is engaged or for which he is fitted."

Further, as held in Elliott v. Gooch Feed Mill Co., 147 Neb. 612, 24 N. W. 2d 561, cited with approval in Haler v. Gering Bean Co., 163 Neb. 748, 81 N. W. 2d 152: "An employee may be totally disabled for all practical purposes and yet be able to obtain trivial occasional employment under rare conditions at small remuneration. The claimant's status in such respect remains unaffected thereby unless the claimant is able to get, hold, or do any substantial amount of remunerative work either in his previous occupation or any other established field of employment for which he is fitted." See, also, Elliott v. Gooch Feed Mill Co., 147 Neb. 309, 23 N. W. 2d 262.

In the light of such rules, we have examined the record, which as summarized discloses the following material facts: On December 6, 1955, plaintiff, a farmer and common laborer with an eighth-grade education, was an employee of defendant, Great Western Sugar Company, working the 4 p. m. to 12 midnight shift at said defendant's factory in Gering. At that time plaintiff was about 52 years of age, and was earning $81.92 per week. On December 6, 1955, at about 11:30 p. m. he was fluming frozen beets from a pile of beets outside defendant's factory. Plaintiff worked alone because it was a dangerous process. The beets, weighing an average of 3 or 4 pounds each, were piled about 20 feet high up from the bottom of the flume. Metal pallets covered the top of the water in the flume upon which they piled the beets to thaw them out, then carry them on into the factory. Plaintiff was down in the water about 2

feet deep in the flume removing the metal pallets. As he was doing so, the foreman, without plaintiff's knowledge, came up behind him, and, using a rod about 20 feet long, prodded some of the frozen beets down into the flume. As they came down, the foreman hollered, but his warning was too late, and plaintiff jumped back as far as he could, but was thrown and hit the back of his head on a heavy sill, which knocked plaintiff unconscious. When he regained consciousness, he was up on the bank about 100 feet along toward the tracks, where other employees of defendant had carried him.

When plaintiff became conscious, he was beat up all over. His neck and back pained him. His glasses had been knocked down and skinned his nose all the way down, and evidently one frozen beet had hit him in the face, which left a scar above his nose. He was then taken home, where he could not lie down or sleep, and the next morning his right ear started to drain a light blood-tinged fluid which so continued to drain for several days.

The next day, December 7, 1955, plaintiff got an order from defendant's superintendent in see Doctor Wiley, a physician and surgeon in Gering. Plaintiff reported for work that night and two following nights, but was unable to do any work, so the foreman told him that there was no use to come back if he couldn't work; to go home and stay there. On the afternoon of December 7, 1955, plaintiff's stepson took him to Doctor Wiley's office, where plaintiff was examined. At that time, he had the laceration aforesaid on his face and pains in his head, neck, and back, but examination showed no definite signs of fractures or dislocations. Plaintiff was then "still pretty hazy," and it was thought that he had a brain concussion and a sprained neck and back. He was given sedatives, sent home, and told to stay in bed, but to return the next day. Plaintiff did so, but continued to have considerable pain all up and down his head, neck, and back. He was given diathermy treatment and in-

travenous muscular relaxants. Doctor Wiley saw and treated plaintiff almost every day thereafter without obtaining any improvement.

On December 19, 1955, the doctor had complete X-rays taken of plaintiff's neck and back, which did not reveal any dislocation or fractures. Thereafter, plaintiff was regularly given physiotherapy treatments and medication, but showed no improvement. Rather, he continued to have pain in his back, neck, and head, and developed a ringing in his right ear, with diminished hearing. On February 16, 1956, Doctor Wiley placed plaintiff in a hospital with traction on his neck for several days, which produced no improvement. In that connection, contrary to defendants' contention, we find no evidence in this record which would support the conclusion that plaintiff was ever ordered to continue or resume such traction but refused to do so.

Before the accident, plaintiff had always been able to work regularly as a farmer and laborer without any pain or disability. Doctor Wiley had been plaintiff's family physician for several years. He had seen plaintiff in his office many times when plaintiff came with his children for their treatments, but plaintiff had never theretofore complained or required any medical attention. The X-rays had disclosed a minimal osteoarthritis, and another physician had reported that plaintiff had an elevated sedimentation rate. Thus, believing that plaintiff's trauma was associated with arthritis and that he might be benefited, Doctor Wiley started giving plaintiff steroids, a type of cortisone. In that connection, Doctor Wiley testified that trauma such as plaintiff had "aggravates an arthritic change—in fact, trauma causes osteoarthritis," which of itself is not very painful. However, the steroid treatment produced no improvement, so physiotherapy and other medication were tried again, but plaintiff continued to have a stiff neck, shoulder, and back, with demonstrable acute pain and muscle spasm on motion in all dimensions, and pain in the back

of his head which traveled upward to the front thereof, causing dizziness or blackouts. In the meantime, plaintiff was encouraged to try to work and he did try, but was physically unable to work except for short periods of time, and, knowing of plaintiff's condition, employers repeatedly refused to give him an opportunity to try to work. During the last 6 months plaintiff also developed a pain around his chest, a shakiness, difficulty in sleeping, and a pounding of his heart with no organic difficulty apparent therein.

Doctor Wiley saw and treated plaintiff on some 61 occasions for which charges were made, but he also saw and visited with plaintiff many times for which no charge was made. The evidence discloses that Doctor Wiley's charges, which totalled $209, were for necessary medical treatment, and that they were fair and reasonable, as was the charge of $42.50 for X-rays taken at Doctor Wiley's request by Doctor Sorensen, a radiologist. We conclude that the court properly and correctly ordered defendants to pay same, which disposes of defendants' second assignment of error.

Doctor Wiley was plaintiff's attending physician at all times since the accident, and he testified that plaintiff was totally disabled, which disability was caused by plaintiff's accident and injuries theretofore received on December 6, 1955.

Doctor Hilton, a neurologist in Denver, examined plaintiff on April 10, 1957, in the light of the history aforesaid. He found a tenderness to pressure over the muscles of plaintiff's upper back, shoulders, and neck. Flexion forward caused radiation of pain upward toward the back of plaintiff's head. Doctor Hilton's opinion was that plaintiff, as a result of the accident, had received a sprain of the muscles of his upper back and neck, and there was also a strong probability that plaintiff suffered a basal skull fracture because of the drainage of blood-tinged fluid from his right ear after the accident.

In that connection, plaintiff also had a nervous or emotional disturbance causing an anxiety reaction due to pain and his chronic condition, which accounted in part for plaintiff's heart palpitation, shakiness, and inability to sleep. The doctor's opinion was that as a laborer plaintiff had a total disability of the body as a whole which was caused by the accident.

Doctor Cowan, a surgeon at Scottsbluff, examined plaintiff on November 26 and 27, 1956, February 5, 1957, and July 16 and 22, 1957. In doing so, he also examined the X-rays heretofore mentioned, and considered the history heretofore recited. Doctor Cowan testified that from November 26, 1956, to July 22, 1957, plaintiff's condition remained about the same, and gave his opinion that plaintiff was totally disabled and that same was caused by his accident on December 6, 1955. In that connection, Doctor Cowan's examination disclosed a straightening of plaintiff's cervical spine; rigidity of the posterior muscle masses of his neck; a limitation of flexion, extension, and rotary motions of the cervical spine; and dizziness upon extension of plaintiff's neck. Pressure upon the top of plaintiff's head produced pain in his neck, and traction on plaintiff's head caused no change in his discomfort. The doctor concluded that plaintiff's total disability was traceable to pain; a bilateral muscle weakness in both upper extremities; an area of hypoesthesia in the skin of his upper right extremities related to the radial and ulnar nerves; a straightening of the lumbar spine; muscle spasm in the erectus spiny masses; positive straight leg raising on the right, but negative on the left; a diminished left ankle jerk with pronounced hypoesthesia in that area of skin intermated by the nerve root arising from defined inner spaces; and demonstrable muscle weakness of the anterior tibial muscle group on the right. One factor or element considered by Doctor Cowan in ascertaining the cause of plaintiff's total disability was that plaintiff had a watery, pink-tinged drainage from his right

ear for several days after the accident, and said: "If that fact is true (which is not denied) I feel that this individual may have very well sustained a skull fracture * * * Basal skull fracture." In that connection, he testified that he would anticipate that a basal skull fracture would show up in an X-ray, but some such fractures are not so discoverable, depending on the type of fracture and when the X-rays were taken after the accident.

Plaintiff was called as a witness for defendants, and as such testified that he had never had any injury to his neck, head, or back prior to December 6, 1955, and that some X-rays taken by Doctor Sorensen in 1951 of his neck area and all other parts of plaintiff's body, were taken to find out where a blood clot in his leg had come from, which was not contradicted. On cross-examination by plaintiff's counsel, plaintiff testified that after those X-rays were taken, he had always been able to do his normal work on the farm.

Doctor Newman, an orthopedist from Denver, was called as a witness for defendants. He examined plaintiff on May 18, 1956, and again on April 9, 1957. In doing so, he considered the history heretofore recited. He testified that at the first examination, plaintiff had a tenderness generally over his spine, from the neck down, and in the muscles on either side of his spine, with a limitation of motion in his neck about one-half or two-thirds from normal in all directions, and muscle spasm or tightness on either side of his neck and back, protecting against pain in his head, neck, and back; that plaintiff had some diminished sensation in the right upper extremity which did not demonstrate any specific nerve root irritation; and that plaintiff had some weakness of grip in his right hand. X-rays showed some increased density over the upper bony prominence of plaintiff's right shoulder, with two small areas of demineralization, which suggested some inflammatory change of low grade over a long period of time, explained

upon the basis of either a synovitis or a tendovaginitis, cousins more or less to arthritis. X-rays of plaintiff's neck appeared normal, but X-rays of plaintiff's lower back and dorsal spine, and a sedimentation test, showed or indicated some arthritic change. Doctor Newman's opinion from his first examination was that plaintiff was totally disabled for ordinary labor by an arthritic process along with an injury, probably a sprain of his neck and back, caused by the accident. In other words, that the two combined to give plaintiff such disability.

Doctor Newman's examination on April 9, 1957, produced physical findings very similar in material respects to those found in his first examination. X-rays taken again of plaintiff's neck region showed no material difference, but his sedimentation rate had slightly increased. His opinion was that plaintiff was still generally disabled from doing ordinary work. He thought plaintiff then had had time to recover from the sprain, and his disability then was "fundamentally from an arthritic process." Be that as it may, from the set of X-ray films available to Doctor Newman at the first examination, he reported: " 'There was no evidence of bone injury observed about the shoulder girdle. X-rays of the cervical spine showed excellent weight bearing allignment (sic), normal intervertebral spacing * * * No evidence of arthritic change.' " In that regard also, he testified: "I didn't observe any particular difference in the two sets of films, was my notation on the negative." With reference to the question of basal skull fracture, Doctor Newman testified that the only symptomatology thereof was that plaintiff was caused to be unconscious, which could be explained by a concussion caused by the accident. His periods of blackout could perhaps be explained on that basis, and his headaches could be an accompanying complication, but he thought they were from the muscle spasm in plaintiff's neck, with radiated pain that comes up over the back of plaintiff's head. Doctor Newman examined the

X-rays taken as aforesaid in 1951, and compared them with those subsequently taken by him. In doing so, he noticed a little difference. The comparison indicated a little narrowing of the joint cartilage from the fourth, fifth, and sixth vertebral levels, but admitted it was possible that such indication might be photographic only. He thought that plaintiff needed medical treatment, general medical management, and care, to try and find out if there were areas of low-grade infection which plaintiff might be absorbing; to see that plaintiff got proper rest and physical therapy; and to try treatment with steroids again if plaintiff's general medical physician thought best.

Doctor Riddell, a physician and surgeon of Scottsbluff, was called as a witness by defendants. Having in mind the history heretofore recited, he examined plaintiff on July 31, 1956, and February 15, 1957. He took X-rays of plaintiff's head and neck, which revealed "no evidence of any old fracture in the *frontal region,* but I thought there was a *slight thickening* or artefact in the *mid posterior part of the occipital bone,* that is back here (Indicating)" but "I did not feel that that had anything to do with his symptoms." (Italics supplied.) Plaintiff had about 50 percent loss of hearing in his right ear and 25 percent in his left ear. He had a stiffness and pain in his neck on rotation or flexion, and as subjective symptoms, complained of a ringing in his ears, and recurrent headaches, which the doctor testified could be caused by concussion at time of injury, or to a psychotic reaction, or could have something to do with his false teeth, which often caused headaches or deafness. The doctor could see no reason why plaintiff could not be doing some kind of work because he was unable to discover sufficient clinical findings to totally disable plaintiff.

At Doctor Riddell's examination of plaintiff on February 15, 1957, plaintiff complained of recurrent headaches, stiffness of neck and back, deafness more in his

right ear, pain in his lower back, and that he was unable to work. The doctor found that plaintiff had a spastic muscle rupture of the neck and muscle to support the head, and on circumduction plaintiff complained of pain. On special examination of the lower segments of plaintiff's spine, he found that plaintiff had limitation on flexion of the legs or thighs on the trunk, and there was some definite restriction in flexion of the cervical spine. X-rays of the cervical spine disclosed no evidence of any old or new injury or degenerative process, but there was an osteoarthritis of the third, fourth, and fifth lumbar vertebrae, with some calcification and some such changes in the eleventh and twelfth dorsal vertebrae, all of which had no connection with plaintiff's accident. His opinion was that plaintiff had recovered from his injury caused by the accident, but that he had some disablement of the body as a whole, caused by arthritis or other processes in his body. Doctor Riddell admitted that it was debatable whether or not plaintiff's deafness was attributable to the accident, and admitted that plaintiff's headaches could be the result of concussion or psychosomatic reaction.

We conclude that a preponderance of competent evidence established that plaintiff was totally disabled, and that such disability was caused by his accident while employed by defendant, Great Western Sugar Company, on December 6, 1955, as found and adjudged by the workmen's compensation court and the trial court.

It is admitted that defendants paid plaintiff for temporary total disability for 35 weeks from December 15, 1955, to August 15, 1956, and paid certain medical and hospital bills for which defendants were given credit. In addition, on May 18, 1956, during plaintiff's admitted temporary total disability, plaintiff took a trip to Denver at defendants' request for an examination by their witness, Doctor Newman, for the purpose of preparing their defense. For such trip defendants ad-

mittedly advanced $25 to plaintiff for expenses. At the trial, without any objection or contradiction or even cross-examination with regard thereto, plaintiff was permitted to testify that the trip cost him $40; that not being able to drive that far, he hired a driver of his car for $10; that it became necessary to stay there and pay for two nights' lodging; all of which cost plaintiff $15 more than the $25 defendants had advanced for such trip. Defendants assigned that the district court erred in ordering defendants to pay such $15, which in effect affirmed the orders of the workmen's compensation court.

Defendants relied upon Newberry v. Youngs, 163 Neb. 397, 80 N. W. 2d 165, wherein we held: "Section 48-120, R. R. S. 1943, making the employer liable for reasonable medical and hospital services, includes the cost of travel incident to and reasonably necessary for obtaining such services." However, such case is not decisive of the question.

Evidently defendants are in no position to dispute that the cost of such trip was incident to and reasonably necessary for obtaining a medical examination of plaintiff by their own witness, Doctor Newman. Defendants' contention here is based upon the fact that there was no direct, specific evidence that the cost of $40 was a reasonable cost. We think that under the circumstances presented here, evidence as to cost incurred at defendants' request and received without objection, together with a lack of any effort on the part of defendants to show in any manner that it was not the reasonable cost, was sufficient prima facie proof that it was reasonable.

In Nosky v. Farmers Union Cooperative Assn., 109 Neb. 489, 191 N. W. 846, cited with approval in Gilmore v. State, 146 Neb. 647, 20 N. W. 2d 918, this court held: "Where the evidence shows that certain hospital and nurse expenses have been incurred by the injured employee, a prima facie case is made out, and, in the

absence of any showing that the expenses so incurred were unreasonable, such proof will be held to be sufficient."

In that opinion, this court said: "Lastly, it is urged that the evidence does not support the judgment, particularly with reference to the allowance of the hospital and nurse expenses. With respect to these items, the plaintiff's evidence does not go beyond the point that they were incurred by him, and defendant does not show that they were unreasonable or unjust charges. Considering the somewhat informal manner in which cases of this character are tried, we are inclined to hold that the proof offered was sufficient to make out a prima facie case, and, in the absence of any attempt to show that the expenses so incurred were unreasonable or exorbitant, it will be held to be sufficient." See, also, Sorensen Construction Co. v. Broyhill, 165 Neb. 397, 85 N. W. 2d 898. Defendants' contention has no merit.

For reasons heretofore stated, we conclude that the judgment of the trial court should be and hereby is affirmed. Also, in conformity with the rule in Haler v. Gering Bean Co., *supra,* plaintiff is allowed $500 as attorneys' fees for services of his counsel in this court, taxable as costs, all of which are taxed to defendants.

AFFIRMED.

CLARENCE BODTKE ET AL., APPELLEES, V. JOSEPH BRATTEN, APPELLANT.
90 N. W. 2d 818

Filed June 13, 1958. No. 34283.

APPEAL from the district court for Lincoln County: ISAAC J. NISLEY, JUDGE. On motion for rehearing. See *ante* p. 36, 88 N. W. 2d 159, for original opinion. *Motion for rehearing overruled.*

Beatty, Clarke, Murphy & Morgan, Frank E. Piccolo, Jr., and *Donald W. Pederson,* for appellant.

Edward E. Carr and *Robert E. Roeder,* for appellees.

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

WENKE, J., dissenting.

I disagree with the ruling of the majority of the court denying appellant's motion for rehearing because, in my judgment, we should strike from our opinion, reported as Bodtke v. Bratten, *ante* p. 36, 88 N. W. 2d 159, the language hereinafter set forth, which can be found on page 48 of 166 Neb., because it improperly restricts and limits appellant's rights on retrial. It is as follows: "Also, contrary to defendant's contention, he would not be entitled, under the facts and circumstances appearing in this case, to mitigate plaintiffs' damages in the amount of $200 or any other amount alleged to have been received by plaintiffs for pasturage after October 1, 1956. Defendant has not cited any authority and we have found none which would sustain the allowance of such mitigation."

Appellant's original contention in this regard was as follows: "Now if Bratten had left his cattle with Bodtke until October 1, the jury could very will find under the evidence in this record that Bodtke and Summers would have had no pasture for rent to Beitman or to any other person after October 1 and that the reason they got $200.00 from that pasture after October 1 was because Bratten had removed his cattle before October 1, to wit, on August 8 and that it was necessary that Bodtke account to Bratten for the $200.00 he received that he would not have received had Bratten left his cattle there until October 1. It was, therefore, the court's duty to instruct the jury on his own motion that if Bodtke and Summers received $200.00 for pasture rent

after October 1 that he would not have received, had the Bratten cattle remained there until October 1, then Bratten was entitled to have the $200.00 deducted from any recovery that Bodtke and Summers were entitled to against Bratten."

Appellees brought this action to recover damages for breach of a pasturage contract. The following rules are applicable in such cases:

"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." Gallagher v. Vogel, 157 Neb. 670, 61 N. W. 2d 245. See, also, authorities cited therein in support thereof.

"In a suit for violation of a contract the courts will not, for the measure of the damages, apply a rule which would give plaintiff a greater compensation for a breach of the contract than he could receive had it been performed." Bates v. Diamond Crystal Salt Co., 36 Neb. 900, 55 N. W. 258.

However, it is the duty of the person so injured to exercise reasonable care to mitigate his damages. As stated in 25 C. J. S., Damages, § 71, p. 560: "* * * the measure of damages is such sum as will compensate the person injured for the loss sustained, with the least burden to the wrongdoer consistent with the idea of fair compensation, and with the duty upon the person injured to exercise reasonable care to mitigate the injury, according to the opportunities that may fairly be or appear to be within his reach, * * *." See, also, Colvin v. Powell & Co., Inc., 163 Neb. 112, 77 N. W. 2d 900, wherein the foregoing is cited with approval.

And, as stated in 25 C. J. S., Damages, § 97, p. 644: "In case of a breach of contract, the defendant, generally, may show any matters which go to reduce the amount of loss actually suffered by the plaintiff."

While the original opinion sets forth some of the

facts I think it best to set out in more detail those relating to this issue. Appellees, Clarence Bodtke and Edward Summers, brothers-in-law who were jointly interested in the business of pasturing and caring for cattle for others, brought this action against appellant, Joseph Bratten, seeking to recover $1,137.70 for breach of a pasturage and care contract allegedly running from June 18 to October 1, 1956.

The agreement to pasture and care for appellant's cattle at $5 per unit, a unit consisting of a cow and calf, was entered into by appellant and appellees in the forepart of June 1956. As a result appellant put 100 cows and 98 calves in appellees' pasture on either June 18 or 19, 1956. At that time Herman Bratten, appellant's brother, had 20 cows, 20 calves, 4 yearlings, and 1 bull in appellees' pasture, having taken them there on June 14, 1956. At the same time a man by the name of Lawrence Block also had 20 cows, 20 calves, and 2 yearlings in appellees' pasture.

Appellees had four tracts of irrigated pasture, totaling 313 acres, which they intended to use to pasture these cattle and so advised appellant at the time the agreement was entered into. They were numbered from 1 to 4 and are as follows: Tract No. 1 consisted of 50 acres of wheat grass; tract No. 2 consisted of 90 acres of wheat grass and sweet clover; tract No. 3 consisted of 105 acres of brome grass and alfalfa; and tract No. 4 consisted of 68 acres of sudan grass. The tracts were to be rotated to permit irrigating after they had been used.

The three herds of cattle, hereinbefore referred to, consisted of 285 head. They were pastured on tract No. 1 until either July 15 or 22, 1956, when they were moved onto tract No. 2. They remained on tract No. 2 until August 8, 1956, when appellant and his brother, for reasons which they thought sufficient, removed their cattle by taking them home. Doing so caused this action to be brought.

There was competent and relevant evidence adduced from which a jury could find that had the Bratten cattle remained in appellees' several pastures until October 1, 1956, which is after the growing season, they would have exhausted all available pasture therein. For instance appellees testified that in former years these four tracts had been able to carry from 145 to 150 head, for that was the number of their own cattle they testified had been pastured therein. In this respect they considered a cow with calf one head. On that basis appellees had contracted to pasture 147 head in 1956.

When appellant's cattle were removed on August 8, 1956, the evidence shows there was good pasture on tracts Nos. 3 and 4. Sometime prior to September 16, 1956, appellees sold the pasture available in tracts Nos. 2, 3, and 4 to a man by the name of K. C. Beitman for $350. Of this amount appellees voluntarily applied $95.94 on the amount they claim appellant owes. The effect of our holding is that any balance thereof cannot be considered by a jury in mitigation of appellees' recovery. It seems to me that if a jury should find that had Bratten's cattle remained until October 1, 1956, they would have completely used up all the pasture available on these four tracts, which appellees admittedly intended to use to pasture appellant's cattle, then appellant should be allowed to show what amount the appellees received therefor and to have the jury reduce the amount of appellees' recovery, if any, by that amount.

I can see no difference between the sale of the pasture on tracts Nos. 2, 3, and 4 to Bratten and that of the pasture on tract No. 1 to Allan Hall and others on September 5, 1956, for $400. Yet, by our opinion, we affirmed the trial court's submission of the latter to the jury. The trial court did so by its instruction No. 6a, which is as follows:

"The jury are instructed that if you should find the

defendant indebted to the plaintiffs for any amount whatever on the agreement between plaintiffs and defendant, then there is a matter of $400.00 which you must consider in your deliberations of this case. If you should find from a preponderance of the evidence that it would be necessary for the plaintiffs to use pasture No. 1 a second time in the pasturing of Joe Bratten's cattle before October 1, 1956, then you should deduct or give credit to the defendant for the $400.00 collected for said pasture.

"But on the other hand, if you find from a preponderance of the evidence in this case that it would not be necessary for the plaintiffs to use pasture No. 1 a second time in pasturing Bratten's cattle to October 1, 1956 in order to carry out the terms of the pasturing contract, then you are not to consider the $400.00 in your deliberations in arriving at a verdict of this case."

In fact, the jury actually reduced the appellees' recovery in the full amount thereof, recovery being had for $737.30 or $400 less than the amount prayed for.

In my opinion the appellant is entitled to have the question of mitigation properly submitted to a jury as to both transactions, that is, the sale of the pasturage on tract No. 1 to Hall and others for $400 and to K. C. Beitman on tracts Nos. 2, 3, and 4 for $350.

CARTER and BOSLAUGH, JJ., join in this dissent.

ROBERT (BOB) CURTIS, APPELLEE AND CROSS-APPELLANT, V. SECURITIES ACCEPTANCE CORPORATION, A CORPORATION, APPELLANT AND CROSS-APPELLEE, RAY MAHONEY, APPELLEE.
91 N. W. 2d 19

Filed June 13, 1958. No. 34349.

1. **Appeal and Error.** Actions in equity appealed to this court are triable de novo upon the record.
2. **Usury.** The permissive provisions of sections 45-114 to 45-158, R. R. S. 1943, apply to licensees, but every inhibitory provision

contained therein applies alike to licensees and nonlicensees and the officers and employees of either or both, and the violation thereof by such persons in connection with any indebtedness, however acquired by them, renders such indebtedness void and uncollectible.

3. ———. Since usury is generally accompanied by device, subterfuge, scheme, and circumvention of one kind or another to present the color of legality, it is the duty of the court to examine the substance of the transaction as well as its form, and the right to relief will not be denied because parol proof of the usurious character of the transaction contradicts a written instrument.

4. ———. A dealer in farm implements may in good faith sell same on time for a price in excess of the cash price without tainting the transaction with usury, though the difference in the two prices may exceed lawful interest for a loan.

5. ———. In such cases, however, the transaction between the buyer and the seller must be a completed bona fide time price sale agreement, and the foregoing rule does not apply where it is proved that the transaction was not made in good faith but was a device and subterfuge pursued to evade the operation against it of usury statutes.

6. ———. The usurious character of a transaction is determined as of the time of its inception, and if a contract is usurious in its inception, no subsequent transaction will cure it. Hence, when a usurious contract is renewed by the giving of a renewal or substituted contract, the usury follows into and becomes a part of the latter contract, making it subject to the defense of usury to the same extent as was the original obligation. Further, any compensation paid or to be paid for any extension or forbearance of a loan may not exceed the permissible statutory maximum.

7. ———. A borrower coming under the statutes relating to installment loans is not regarded as being in pari delicto but rather as being in vinculus to the lender, to whom he therefore owes no duty in equity.

8. ———. A time sale made in good faith at a price in excess of a cash price, which time price is arrived at by schedules furnished by a finance company which solicits contracts so entered into between a purchaser and a dealer, may not be regarded as being tainted with usury, even though the difference exceeds the lawful interest for a loan.

9. ———. In order to have the foregoing principles apply it must appear that the buyer actually was informed of and had the opportunity to choose between a time sale price and a cash sale

price. It is not enough to merely show that the instruments signed evidencing the indebtedness refer to a time price or time differential when, in fact, the buyer was never quoted a time sale price as such.

APPEAL from the district court for Boone County: ROBERT D. FLORY, JUDGE. *Affirmed.*

William Keeshan and *Mathews, Kelley & Stone,* for appellant.

Wagner, Wagner & Conrad, for appellee Curtis.

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

CHAPPELL, J.

Plaintiff, Robert Curtis, brought this action in equity against defendants, Securities Acceptance Corporation, and Ray Mahoney, its alleged agent who carried on a business of selling farm implements in the name of "Mahoney Sales & Service" in St. Edward. Plaintiff's action sought to have a certain promissory note and chattel mortgage upon a described tractor cancelled upon the ground that they were given for a loan which was null and void ab initio as usurious and in violation of sections 45-114 to 45-162, R. R. S. 1943, inclusive, which are known as the Installment Loan Act. Plaintiff also sought to recover from defendants all payments made on the note and mortgage with interest thereon, and equitable relief. As far as important here, the effect of defendant Ray Mahoney's answer was to deny generally, as was also the effect of defendant Securities Acceptance Corporation's answer. However, such defendant also filed a cross-petition, seeking an accounting of the amount due it from plaintiff upon the note and mortgage, together with a judgment therefor with interest at 9 percent; that in default of payment thereof by plaintiff for 20 days, the tractor should be ordered sold on execution as in foreclosure for satisfaction of the judgment; and the granting of equitable relief. As far

as important here, plaintiff's reply to defendant Mahoney's answer denied generally as did his reply and answer to the answer and cross-petition of defendant Securities Acceptance Corporation.

Hereinafter defendant Ray Mahoney will be called Mahoney, and defendant Securities Acceptance Corporation will be called defendant. In speaking of both, they will be called defendants.

On December 20, 1956, the issues were heard on the merits by the trial court at Columbus, Platte County, whereat the cause was taken under advisement, pending the filing of briefs by respective counsel, and it was stipulated that decree entered in Platte County should be transmitted by the court to the clerk of the district court for Boone County and such judgment should be binding on the parties as if the cause had been decided in Boone County.

Briefs were subsequently filed, and the trial court prepared a "memorandum opinion," reviewing therein some of the evidence and discussing and distinguishing certain cases upon which he intended to predicate his findings and conclusions in a judgment to be subsequently rendered. Evidently that opinion was sent to counsel for the parties, and on January 21, 1957, someone, the inference being that it was counsel for defendants, filed it with the clerk of the district court for Boone County, where it was journalized. Thereafter, on February 19, 1957, a stipulation signed by counsel for all the parties was entered into and filed in the district court for Boone County on February 25, 1957. Such stipulation provided in effect that the decree, bearing the approval as to form by counsel for the respective parties, might be signed and entered by the trial judge at chambers in the courthouse at Columbus, Platte County, without further notice to the parties, and then transmitted to the clerk of the district court for Boone County, together with such stipulation for filing and entry of record in that court.

Also, on February 25, 1957, there was filed in the dis-

trict court for Boone County a final judgment dated February 23, 1957, which found that defendant Mahoney sold the described tractor to plaintiff on September 24, 1954, for an agreed price of $2,950, whereupon plaintiff paid $1,180 thereon by cash and trade-in allowance upon an old tractor, leaving a balance of $1,770 unpaid upon the sale price. That on or about the same date, plaintiff executed and delivered to Mahoney a note and chattel mortgage on the new tractor for $2,161.84, payable in two amounts of $1,080.92, each respectively payable 1 and 2 years after date. That the amount by which the note exceeded the unpaid balance of $1,770 on the sale price of the tractor was the sum of $391.84, which represented interest charges exceeding the legal rate for forbearance of the unpaid balance of $1,770. That by reason thereof, plaintiff was entitled to have all payments made upon said note and mortgage credited against the unpaid balance of the purchase price of $1,770. That plaintiff had paid to defendant, after its purchase of the note and mortgage, the sum of $126.60 on or about September 29, 1955; $350 on or about November 30, 1955; and $12.60 on or about January 23, 1956. That after crediting such payments upon the unpaid balance of $1,770, there remained $1,280.80 still owing by plaintiff on such purchase price. That it was fair and equitable that plaintiff should pay to defendant said sum of $1,280.80 as a condition of cancellation of the note and mortgage in the principal amount of $2,161.84, and dated September 24, 1954.

Judgment accordingly was rendered in favor of defendant and against plaintiff for $1,280.80 upon payment of which the note and mortgage were ordered cancelled and released of record. It also ordered that upon failure of plaintiff to pay said judgment into the office of the clerk of the district court within 20 days, said farm tractor should be sold as upon execution to satisfy the judgment.

On February 25, 1957, plaintiff filed a motion for re-

hearing, and a motion to vacate the judgment and findings and render a judgment in favor of plaintiff and against defendants as prayed, and in favor of plaintiff and against defendant Mahoney for $50, an additional amount allegedly paid him by plaintiff.

By stipulation of counsel for all the parties, dated April 2, 1957, and filed in the district court for Boone County April 27, 1957, they agreed to the manner of submission of plaintiff's motions aforesaid to the trial court, and that the entry of an appropriate order thereon should be transmitted to the clerk of the district court for Boone County for filing and entry of record.

Thereafter, on August 24, 1957, the trial court sustained plaintiff's motions aforesaid and rendered a judgment which was filed in the district court for Boone County on August 26, 1957. Therein the court found that on or about September 24, 1954, Mahoney sold plaintiff the described farm tractor for an agreed sale price of $2,950, and plaintiff traded in his tractor as part-payment, receiving $1,180 credit therefor, thereby leaving a balance of $1,770 of the purchase price unpaid. That there was no time price noted or involved in said transaction, but Mahoney agreed to obtain a loan for the balance of the purchase price through defendant, and the tractor was delivered by Mahoney to plaintiff. That thereafter Mahoney procured a loan from defendant for said $1,770 balance due on the purchase price, and presented to plaintiff a note and chattel mortgage in the amount of $2,161.84, payable in two installments of $1,080.92, with one installment payable in 1 year and the other in 2 years from date. That said note and mortgage exceeded the $1,770 unpaid balance of the purchase price by $391.84, which reflected charges for making said loan, and exceeded the maximum legal rate of interest allowed to be charged thereon under sections 45-114 to 45-162, R. R. S. 1943, which applied to the transaction between plaintiff and defendants. (In that connection, sections 45-156 to 45-162, R. R. S. 1943, inclu-

sive, are not here directly involved.) That such installment loan violated said provisions, and rendered said transaction null and void from its beginning. That before said note and mortgage were accepted by defendant, Mahoney informed plaintiff that defendant refused to make the loan unless plaintiff paid $50 more, whereupon plaintiff paid Mahoney such an additional sum to get the loan.

It was also found that at request of defendant, plaintiff on designated dates had paid it certain sums for principal and interest payments on the loan, and there was due therefor from defendant to plaintiff the sum of $537.26, and that the note and mortgage should be cancelled. It further found that on or about October 1, 1954, plaintiff had paid Mahoney $50 which he demanded before the loan would be approved, and there was due plaintiff from Mahoney the sum of $50 with interest from October 1, 1954, a total of $58.50. Judgment was rendered in favor of plaintiff and against defendants respectively, in conformity with said findings aforesaid.

Thereafter, defendants each timely filed identical motions for rehearing and new trial, upon the grounds, insofar as important here: (1) That the trial court was without jurisdiction to render the judgment of August 24, 1957, and it was null and void because plaintiff's motions for rehearing and to vacate the judgment and render judgment for plaintiff, filed February 25, 1957, were not filed as required by section 25-1143, R. R. S. 1943, within 10 days after the trial court's findings and judgment had been rendered and filed in the district court for Boone County on January 21, 1957 (in such respect, defendants assumed that the "memorandum opinion" sent to counsel by the trial court and filed in the district court for Boone County by someone on January 21, 1957, was a final judgment); (2) that the judgment of August 24, 1957, was contrary to and in violation of L. B. 33, enacted by the Legislature in 1957, which was allegedly effective and controlling before

rendition of such judgment; (3) that the trial court erred by admitting in evidence, over objection, plaintiff's testimony that Mahoney told him he would procure a loan for plaintiff through the defendant; and (4) that the judgment of August 24, 1957, was not supported by the evidence but was contrary thereto and contrary to law.

Subsequently, on October 10, 1957, defendants' motions, and each of them, were overruled, "conditioned only that the plaintiff file a remittitur of the $50.00 paid by him to the defendant, Ray Mahoney, on or about October 1, 1954, together with the interest thereon, included in the decree now entered of record in the above entitled cause, said remittitur to be filed within ten days from date hereof." On that same date, plaintiff filed such a remittitur.

Thereupon, only defendant, Securities Acceptance Corporation, appealed, substantially assigning as error the grounds enumerated in its motions for rehearing and new trial heretofore set forth. In that connection, plaintiff cross-appealed, assigning that the trial court erred in denying plaintiff the right to recover from defendant the $50 paid to Mahoney, its alleged agent, and that judgment denying such relief was not sustained by the evidence but was contrary thereto and contrary to law. We do not sustain defendant's assignments, and we deny plaintiff's cross-appeal.

The first question presented is whether or not the "memorandum opinion," filed January 21, 1957, and heretofore referred to, was a final judgment which required plaintiff to file motions for rehearing and for judgment in favor of plaintiff and against defendants, within 10 days from January 21, 1957, in order to carry the matter over from the October 1956 term of court to the February 1957 term, thence to the May 1957 term, and give validity to the order and judgment of the trial court rendered at the subsequent term on August 24, 1957, in favor of plaintiff and against defendants.

In that connection, it is elementary that ordinarily a judgment is final for purposes of 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. An examination of the "memorandum opinion" discloses clearly that it was not a final judgment rendered by the trial court. Its language and form simply indicated the trial court's view of some of the evidence, and discussed and distinguished cases upon which he intended to predicate his findings and conclusions in a judgment which he intended to subsequently render. It was in form and substance of no more force and effect than a letter written to counsel for the parties by the court, which one of them subsequently filed in the district court, such as that sent to them on July 25, 1957, which was filed by someone on November 7, 1957, long after the judgment of August 24, 1957, had been rendered. The stipulation entered into by all the parties on February 19, 1957, and filed February 25, 1957, clearly indicated that they all recognized that the "memorandum opinion" was not a final judgment but that the judgment dated February 23, 1957, which was approved by counsel for the parties as to form, and filed February 25, 1957, in conformity with the stipulation of the parties aforesaid, was in effect the final judgment. In other words, that judgment was favorable to defendant in material respects, and, evidently assuming that the "memorandum opinion" was not a final judgment, defendant sought to take advantage of the judgment dated February 23, 1957, and filed February 25, 1957, by not filing any motion for rehearing or new trial. However, on February 25, 1957, after such final judgment was rendered and filed, plaintiff did timely file motions for rehearing and to vacate that judgment and render judgment for plaintiff. Also, thereafter, defendants again twice stipulated with plaintiff, on April 2 and April 6, 1957, the manner of sub-

mitting such motions and agreeing that the entry of appropriate orders thereon should be transmitted to the clerk of the district court for Boone County for filing and entry of record in said court. Defendant's first assignment of error has no merit.

Defendant also assigned and argued that the order and judgment of August 24, 1957, in favor of plaintiff, was rendered after L. B. 33, Laws of Nebraska 1957, c. 194, p. 688, became effective, amending section 45-155, R. R. S. 1943, and repealing said original section and also section 45-154, R. R. S. 1943, which changed the civil penalty, therefore the voiding and cancellation of the note and mortgage, and rendition of a judgment against defendant for the amount of payments made on the note and mortgage by plaintiff, was clearly erroneous. We do not agree.

In that connection, as said in Restatement, Contracts, § 609, p. 1128: "A bargain that is illegal when formed does not become legal * * * (b) by reason of a change of law, except where the Legislature manifests an intention to validate the bargain." See, also, Comment a and illustration 2, p. 1129. We find no legislative manifestation of any intention to retrospectively validate illegal bargains or contractual transactions such as here involved.

Also, as said in 23 Am. Jur., Forfeitures and Penalties, § 41, p. 634: "While constitutional provisions against impairing the obligation of contracts do not apply to the withdrawal of a right to recover ordinary statutory penalties, even after the penalties have been incurred, a penalty imposed by law as a sanction for the enforcement or protection of a contract right may not be constitutionally withdrawn where to do so directly lessens or impairs the legal value of the contract itself, to which the penalty is attached." See, also, Powell v. Edwards, 162 Neb. 11, 75 N. W. 2d 122.

We are dealing in the case at bar with a contractual transaction. In that connection, section 45-138, R. R.

S. 1943, provided that any contract of loan made in violation of that section, either knowingly or without the exercise of due care to prevent the same, shall be void, and the licensee shall have no right to collect or receive any principal, interest, or charges on such loan. Such a provision is still included in said section as amended in 1953 and 1957. Section 45-155, R. R. S. 1943, also provided that violation of sections 45-114 to 45-155, R. R. S. 1943, in connection with any indebtedness, however acquired, shall render such indebtedness void and uncollectible. Defendant's second assignment has no merit.

We have construed and applied the Installment Loan Act, sections 45-114 to 45-158, R. R. S. 1943, inclusive, in recent cases. In State ex rel. Beck v. Associates Discount Corp., 162 Neb. 683, 77 N. W. 2d 215, we held: "The permissive provisions of sections 45-114 to 45-158, R. R. S. 1943, apply to licensees, but every inhibitory provision contained therein applies alike to licensees and nonlicensees and the officers and employees of either or both, and the violation thereof by such persons in connection with any indebtedness, however acquired by them, renders such entire indebtedness void and uncollectible.

"Since usury is generally accompanied by device, subterfuge, scheme, and circumvention of one kind or another to present the color of legality, it is the duty of the court to examine the substance of the transaction as well as its form, and the right to relief will not be denied because parol proof of the usurious character of the transaction contradicts a written instrument.

"A dealer in automobiles may in good faith sell a car on time for a price in excess of the cash price without tainting the transaction with usury, though the difference in price may exceed lawful interest for a loan.

"In such cases, however, the transaction between the buyer and the seller must be a completed bona fide time price sale agreement, and the foregoing rule does not apply where it is proved that the transaction was

not made in good faith but was a device and subterfuge pursued to evade the operation against it of usury statutes.

"The usurious character of a transaction is determined as of the time of its inception, and if a contract is usurious in its inception, no subsequent transaction will cure it. Hence, when a usurious contract is renewed by the giving of a renewal or substituted contract, the usuary follows into and becomes a part of the latter contract, making it subject to the defense of usury to the same extent as was the original obligation. Further, any compensation paid or to be paid for any extension or forbearance of a loan may not exceed the permissible statutory maximum."

The opinion in such case also cited and quoted with approval from Powell v. Edwards, *supra,* wherein we discussed and distinguished Grand Island Finance Co. v. Fowler, 124 Neb. 514, 247 N. W. 429, relied upon by defendant herein, and the legal and factual distinction therein made has application in the case at bar.

As recently as McNish v. General Credit Corp., 164 Neb. 526, 83 N. W. 2d 1, citing and quoting with approval from Powell v. Edwards, *supra,* and State ex rel. Beck v. Associates Discount Corp., *supra,* we held: "Ordinarily courts of equity will refuse to aid in the enforcement of penalties and forfeitures and leave the parties to whatever remedies they may have at law. However, this is not an absolute or inflexible rule and should yield when good reason exists for doing so.

"A borrower coming under the statutes relating to installment loans is not regarded as being in pari delicto but rather as being in vinculus to the lender, to whom he therefore owes no duty in equity. Insofar as Grand Island Finance Co. v. Fowler, 124 Neb. 514, 247 N. W. 429, is in conflict herewith, it is overruled.

"A truck dealer may in good faith sell a truck on time for a price in excess of the cash price without tainting the transaction with usury, even though the

difference in the two prices may exceed lawful interest for a loan.

"A time sale made in good faith at a price in excess of a cash price, which time price is arrived at by schedules furnished by a finance company which solicits contracts so entered into between a purchaser and a dealer, may not be regarded as being tainted with usury, even though the difference exceeds the lawful interest for a loan.

"In order to have the foregoing principles apply it must appear that the buyer actually was informed of and had the opportunity to choose between a time sale price and a cash sale price. It is not enough to merely show that the instruments signed evidencing the indebtedness refer to a time price or time differential when, in fact, the buyer was never quoted a time sale price as such."

In that opinion, we reversed the judgment which dismissed plaintiff's action with directions to render a judgment cancelling the note as null and void from its inception, and to render a judgment against defendant for the full amount of the payments made to it with interest at 6 percent on the amount of each of such payments, from the date it was made. The authorities heretofore cited are controlling here.

This action being one in equity, we will consider the record de novo, and, in so considering it, apply the usual principles applicable in such cases. In so doing, the record as summarized discloses the following: At the times involved, plaintiff was farming and operating a cream station in Monroe. Mahoney operated a farm implement business in St. Edward in the name of Mahoney Sales & Service. Defendant, with offices at Norfolk and Omaha, was licensed to make loans in Nebraska. It also purchased and discounted paper from dealers in automobiles and other commodities, which was a highly competitive business of great volume.

About the first week in September 1954, plaintiff pur-

chased a 1954 Massey-Harris 44 tractor, serial No. 31137, from Mahoney at his place of business in St. Edward. The purchase price therefor as fixed by Mahoney was $2,950, but plaintiff was allowed $1,180 as down payment, leaving $1,770 of the purchase price unpaid, for which Mahoney told plaintiff he would obtain a loan for him through defendant. In that connection, contrary to defendant's contention, such last evidence aforesaid, as adduced in its various forms, was properly admitted over objection, which disposes of defendant's third assignment.

Thereupon, plaintiff took the tractor to Monroe, where, on September 7, 1954, for an advance assessment of $31.25, for a term of 3 years, plaintiff insured it for $2,500 against all direct loss by fire, lightning, windstorm, cyclone, or tornado, except as thereinafter provided, with the Farmers Mutual Insurance Company of Nebraska.

Thereafter, plaintiff was notified by Mahoney that the papers in connection with his loan were ready, so plaintiff appeared at Mahoney's office in St. Edward, on September 24, 1954. In that connection, defendant furnished Mahoney with its own approved forms of purchaser's statements, promissory notes, and chattel mortgages, together with a rate chart showing, in connection with purported time sales, the amount Mahoney was required to add to the cash price in order to sell the paper to defendant and receive the full cash price. Thus, Mahoney made out the forms for defendant and received 1 percent reserve credit commission on every such transaction. The evidence generally is in conflict upon the question of whether Mahoney ever quoted plaintiff both a cash price and a time price as such for the tractor. However, Mahoney's testimony was equivocal with regard to what he said to plaintiff, and other evidence clearly indicates that plaintiff was never quoted a time price as such by Mahoney or defendant, although plaintiff assumed that interest on a loan

of $1,770 would make him owe a little more than that sum.

On September 24, 1954, plaintiff signed one of defendant's forms, entitled "Securities Acceptance Corporation Purchaser's Agreement" which still has numerous blank spaces upon it. Plaintiff testified that it was all blank when he signed it, but Mahoney testified that he wrote in the filled blanks with pencil in the presence and at the direction of plaintiff. Some relevant information contained therein reads: "Purchaser Bob Curtiss (sic) * * * Checking Acc't with Monroe Nat'l Bank" when there was no such bank, and "Near Relatives: * * * Richard Curtiss (sic), St. Edw. Son-in-law," when such person was in fact plaintiff's son, which indicates that such blanks were not filled in by Mahoney upon information furnished by plaintiff when he signed the instrument. Be that as it may, as said under "Statement of Transaction" after describing the tractor: "1. Bona Fide Cash Selling Price Including Taxes and Extra Equipment $2950.00 * * * (A) Cash Down Payment $1180.00 * * * 3. Unpaid Balance (Amount Due Dealer) $1770.00 (Item 1 less Item 2) 4. Time Differential (Including Insurance) $391.84 5. Total Amount of Note (Item 3 plus Item 4) $2161.84 Note Payable as Follows: 2 Payments of $1080.92 each * * * Payable on the 1st day of every 12 month; First Payment Due Oct 1, 1955 * * * I appoint any person designated by any holder of my mortgage to apply for health, accident or life insurance for me and assign all benefits thereunder to said mortgage holder * * *."

In that connection, the manager of defendant's Norfolk office testified that "Time differential," which he thought any ordinary farmer ought to understand without explanation, was made up of cost of money for the amount and time involved, cost of insurance plus business expense, hazards, credit investigation, collection, skips in payments, and liquidation of the paper. He testified that a reserve credit given to Mahoney in a sepa-

rate account on defendant's books, to wit, 1 percent of $1,770, or $17.70, was in fact earned only if the contract was finally carried out, because Mahoney assumed part of the hazard through his endorsement or repurchase obligations by agreement with defendant.

On September 24, 1954, plaintiff also signed a promissory note for $2,161.84, wherein Mahoney Sales & Service of St. Edward, Nebraska, was payee. Such note read in part: "* * * in Two payments of $1080.92 each * * * payable on the 1st day of every 12th month Ffirst (sic) due 10/1/55) month, after date hereof, until the above principal sum together with interest on any unpaid balance thereof at the highest lawful contract rate after maturity is paid, all payable at the office of the Securities Acceptance Corporation, Omaha, Nebraska." On the back of the note appeared the printed endorsement: "Endorsement No. 1 For value received pay to the order of Securities Acceptance Corporation Demand, presentment for payment, protest, notice of protest and non-payment waived; payment guaranteed; renewal or extension authorized without notice." Such endorsement was signed by "Mahoney Sales & Serv (Name of Dealer) by Ray Mahoney (Signature and Title)."

On September 24, 1954, plaintiff also signed a chattel mortgage on the tractor with Mahoney Sales & Service, as mortgagee, to secure payment of the note as provided therein. Such chattel mortgage was never acknowledged or recorded, but Mahoney signed it as a witness, and immediately assigned it to defendant. Among other things, plaintiff agreed in the chattel mortgage that the mortgagee was "authorized to purchase fire, theft and such other insurance in such forms and amounts as Mortgagee may require relating to the respective interests in the chattel of the Mortgagor and Mortgagee, and to execute applications for such insurance if and when required, and upon request of Mortgagee, the Mortgagor shall procure such insurance." Other provisions are not important here.

It is important to note that by check dated September 25, 1954, defendant paid Mahoney $1,770 and gave him credit in a separate account on its books for $17.70, or 1 percent thereof, which percentage was allowed Mahoney in all such transactions.

Also, in violation of section 45-140, R. R. S. 1943, no statement concerning insurance was ever given plaintiff, and the evidence will not sustain any conclusion that either Mahoney or defendant ever delivered or executed a copy of an insurance policy or certificate of insurance to plaintiff. As a matter of fact, he had previously purchased his own insurance. Also, in violation of section 45-141, R. R. S. 1943, defendant required the purchase of insurance by plaintiff, and charged him for same (the amount so charged is not disclosed), as a condition precedent to making the loan. Also, in violation of section 45-143, R. R. S. 1943, defendant took the purchaser's statement, signed by plaintiff, as an instrument with blanks left therein to be filled out after execution, and gave plaintiff no statement at the time the loan was made, as required by section 45-145, R. R. S. 1943.

Further, on September 29, 1955, after the first installment was due, plaintiff personally paid defendant $126 and received a receipt reading: "Collected on note $100.00 $26.60 Total $126.60." The $26.60 was not receipted for as interest, and defendant's manager at Norfolk admitted that it was not either interest or principal, but was demanded and received by defendant from plaintiff as payment for an extension of the balance of the first installment during October and November 1955, which installment during that period after maturity October 1, 1955, also went right on earning 9 percent interest in addition to the $26.60 paid by plaintiff, which were clearly usurious charges, in violation of section 45-138, R. R. S. 1943. Thereafter, on November 30, 1955, plaintiff paid defendant $350 on the principal of the first installment, which at that time

made $450 received on the principal thereof by defendant. Nevertheless, on January 23, 1956, plaintiff paid defendant $12.60 for an extension of the balance of the first installment to January 1, 1956. Admittedly, likewise, that payment was not interest or principal, but was demanded and received by defendant from plaintiff while the balance of the first installment during that period after maturity went right on earning 9 percent interest in addition to the $12.60 paid by plaintiff for 1 month's extension, which were clearly usurious charges in violation of section 45-138, R. R. S. 1943.

When those demands and charges were made, plaintiff complained to and inquired of Mahoney about the situation. Thereupon he was given a statement written in pencil by Mahoney, which, with reference to the tractor transaction, read: "9-24-54 Date Purchase Cost 2950-allowed 1180.00 for Equip 2 — Payments 1080.92 bal of original deal $1770.00." Mahoney's books and records admittedly showed $2,950 as the selling price, with down payment $1,180, leaving a balance of $1,770 unpaid, with neither a cash nor a time price mentioned therein as such. He admittedly figured the time differential from defendant's chart furnished by it, which represented $391.84 more than the $1,770 owing by plaintiff and paid to Mahoney by defendant.

The evidence with regard to the down payment of $1,180 is conflicting. Plaintiff testified, and his son corroborated it in some respects, that Mahoney gave him $1,180 for his old tractor as the down payment, and that he later paid Mahoney $50 in addition to make the down payment 40 percent of the purchase price of $2,950, which payment defendant demanded before it would make the loan. Plaintiff sought in his cross-appeal to recover that $50 from defendant upon the premise that Mahoney was defendant's agent and collected it for defendant. It will be noted that $1,180 was exactly 40 percent of $2,950, but $1,180 plus $50 was of course more than 40 percent of $2,950. In that

connection, also, the record discloses that defendant never received any such $50 payment, and it never appeared upon Mahoney's books and records except and unless it was a part of the $1,180 down payment. Also, Mahoney testified that he allowed plaintiff $1,130 for his old tractor, and plaintiff paid him $50 cash in order to make the down payment $1,180, or 40 percent of the purchase price of the tractor, which, under the circumstances, is more convincing. The trial court, in its judgment of August 24, 1957, rendered judgment against Mahoney for the $50 payment, together with interest of $8.50, but upon reconsideration required plaintiff to remit same as a condition for overruling the respective motions of defendants for rehearing or new trial, and Mahoney did not appeal. The court doubtless did so upon the theory that the $50 payment by plaintiff to Mahoney was a part of the $1,180 down payment. In any event, we decided de novo that it was a part of the down payment, and that plaintiff's cross-appeal has no merit.

The record discloses that on December 10, 1956, plaintiff had deposited with the clerk of the district court $1,000 as a bond for a restraining order then issued. The judgment of August 24, 1957, made the restraining order permanent, and ordered the clerk to refund said $1,000 to plaintiff unless defendant executed a supersedeas bond to protect plaintiff against loss of said $1,000 and interest upon final disposition of this cause. Defendant did execute such a supersedeas bond. In that situation, upon affirmance of the judgment, plaintiff would be entitled to recover back his $1,000 deposit with interest, which interest defendant should be required to pay at 6 percent from August 24, 1957.

For reasons heretofore stated, we conclude that the transaction here involved was not made in good faith, but was a device and subterfuge pursued by Mahoney and defendant to avoid the operation against them of the usury statutes, and that the note and chattel mort-

gage were usurious and in violation of the Installment Loan Act, which made the note and chattel mortgage entirely null and void from their inception. The judgment of the trial court should be and hereby is affirmed. All costs are taxed to defendant, Securities Acceptance Corporation.

AFFIRMED.

C. A. ARNOLD, APPELLANT, V. GLENN R. LANCE ET AL., APPELLEES.

90 N. W. 2d 814
Filed June 20, 1958. No. 34331.

1. **Negligence: Trial.** Where contributory negligence is pleaded as a defense, but there is no evidence to support such defense, it is prejudicial error to submit that issue to the jury.
2. ———: ———. The giving of an instruction to the jury on contributory negligence, when there is no evidence to warrant its submission, is more favorable to the party pleading contributory negligence than he is entitled to, and it affords him no basis for error.
3. **Trial.** A verdict may be set aside as excessive only when it is so clearly exorbitant as to indicate that it was the result of passion, prejudice, mistake, or some means not apparent in the record, or that it is clear that the jury disregarded the evidence or controlling rules of law.
4. **Damages.** In an action for damages where the law furnishes no legal rule for measuring them, the amount to be awarded rests largely in the discretion of the jury, and the courts are reluctant to interfere with such a verdict.

APPEAL from the district court for Douglas County: JAMES M. FITZGERALD, JUDGE. *Reversed and remanded with directions.*

Albert Lustgarten, Schrempp & Lathrop, and *Henry C. Rosenthal, Jr.*, for appellant.

Fraser, Wenstrand, Stryker, Marshall & Veach, for appellees.

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

CARTER, J.

This is an action for damages for personal injuries sustained when plaintiff was struck by an automobile operated by one of the defendants. A verdict for the plaintiff was returned by the jury. The trial court set aside the verdict and granted a new trial. The plaintiff asserts that the trial court erred in setting aside the verdict. The correctness of the order setting aside the verdict and granting a new trial presents the only issue on this appeal.

The accident occurred at the intersection of Seventeenth and Douglas Streets in the city of Omaha, on Sunday, April 17, 1955. The plaintiff was a bus driver for the Omaha Transit Company. At the time in question he was driving a bus north on Seventeenth Street. There were four driving lanes and two parking lanes on this street. Traffic moved northward only, it being a one-way thoroughfare. Plaintiff moved his bus into the loading zone on the east side of Seventeenth Street about 37 feet short of Douglas Street to unload and take on passengers. He then pulled up to Douglas Street and over the cross-walk. The defendant Joseph G. Lance, the driver of defendants' automobile whom we shall hereafter refer to as Lance, with a companion in the car had stopped at the cross-walk in the second lane west of the east curb of Seventeenth Street to await a green light signal which would permit them to proceed north. Due to the encroachment of the automobile driven by Lance to or into the parking lane, the bus had barely room to pass between the curb and defendants' car. Defendants contend that the bus scraped the fender of the automobile, although the proof of that fact borders on pure speculation and conjecture. Lance became very angry, struck at the plaintiff, and cursed him with filthy and opprobrious language. Thereafter

the plaintiff left the bus and assumed a position about 6 feet in front of the bus and about 1 foot to the left of it, where he proceeded to take the license number of defendants' car. Lance started his car, proceeded north, turned to the right in front of the bus, struck the plaintiff, and proceeded down Douglas Street at a speed of approximately 30 miles an hour.

Plaintiff testified that he was standing at the left in front of the bus, writing down the license number of the automobile, when it suddenly started. He jumped back to gain the protection of the bus, but was struck in the back and thrown to the pavement. Lance stated that he swung out from the side of the bus and turned to the right around the front of it. He stated that he did not know his car struck the plaintiff; that he heard the money changer which plaintiff was holding hit the car or pavement; but that he did not stop to find out what had happened. The statements of the plaintiff were corroborated by several passengers in the bus. The jury believed the plaintiff and his witnesses, and returned a verdict for him. This was the province of the jury under the evidence in the case.

It is urged that a new trial was properly granted because of the failure of the trial court to properly instruct on the issue of contributory negligence. It is contended by the plaintiff that there was no evidence of contributory negligence on the part of the plaintiff, and that the issue should not have been submitted to the jury. The rule is: Where contributory negligence is pleaded as a defense, but there is no competent evidence to support such defense, it is prejudicial error to submit that issue to the jury. Anderson v. Nielsen, 162 Neb. 110, 75 N. W. 2d 372; Fries v. Goldsby, 163 Neb. 424, 80 N. W. 2d 171.

The evidence in this case shows that both the automobile and bus had been brought to a standstill before the altercation between Lance and the plaintiff. Plaintiff left the bus to investigate Lance's charge that the bus

had scraped his fender, and to get the license number of defendants' automobile. There is evidence also that plaintiff was looking about for a telephone to call the police. Immediately prior to the accident plaintiff was standing about 6 feet in front of the bus and about a foot to its left, in plain sight of Lance. The plaintiff was not guilty of negligence under the circumstances shown. He was not required to assume that Lance, for any reason, would drive his automobile in such a manner as to strike the plaintiff, whom he could plainly see. The plaintiff attempted to avoid injury by stepping into a place of safety in front of the bus. The evidence is clear that Lance turned sharply in front of the bus in making his turn onto Douglas Street, knowing that plaintiff was standing in his path. The evidence and circumstances reveal no act of contributory negligence on the part of plaintiff. The question of contributory negligence should not have been submitted to the jury. Consequently the instruction given on that subject was more favorable to defendants than they were entitled to, and it affords no basis for error.

The defendants assert that the verdict was properly set aside and a new trial ordered for the reason that the verdict was excessive. A verdict may be set aside as excessive only when it is so clearly exorbitant as to indicate that it was the result of passion, prejudice, mistake, or some means not apparent in the record, or that it is clear that the jury disregarded the evidence or controlling rules of law. Southwell v. DeBoer, 163 Neb. 646, 80 N. W. 2d 877.

The evidence as to the extent of plaintiff's injuries is substantially as follows: Plaintiff testified that his arms and shoulders were numb following the accident. He continued to drive a bus until August 1956, when he gave up his employment as a bus driver because of his inability to continue as such on account of the injuries he received in the accident. He took a position as maintenance man for a school district at a beginning

salary of $330 a month. At the time of the trial he was receiving $385 a month, the maximum salary paid for such service. He consulted a physician the day after the accident. The evidence shows that he was under the care of Dr. F. J. Schwertley, who saw him 53 times prior to May 25, 1957. Dr Schwertley described his injuries as follows: He had some soft tissue injuries to the low back region; he had a neuritis, a sore nerve in his right forearm and hand described as the ulnar nerve; and a whiplash injury to the soft tissues of the neck. His right arm appears to have been injured, particularly in the area of the elbow. He had suffered pain and discomfort since the accident and was suffering some pain and discomfort in the neck and low back areas at the time of trial. He is unable to lift heavy objects due to his low back condition, and appears to have a weakened right arm. Dr. Schwertley estimates a permanent partial disability to the right elbow of from 15 to 20 percent. Dr. Frank Iwersen, defendants' physician, was of the opinion that no permanent disability would result from his injuries.

Plaintiff was 44 years of age at the time of the trial, and had an expectancy in excess of 24 years. He has suffered some loss of earning capacity since the accident. The evidence is that he suffered pain and physical discomfort from the time of the accident to the time of trial. The verdict and judgment were for $10,000. No method of exact computation has been devised for measuring the damages in this type of case. The amount to be awarded rests largely in the discretion of the jury, and courts hesitate to interfere unless the verdict is demonstratively excessive. We think the verdict is within the range that a jury could return without interference on the part of the court on the ground of excessiveness.

The defendants complain that certain evidence as to the actions and conduct of Lance resulted in passion and prejudice. The evidence was admissible as tending to

show that Lance intentionally ran the plaintiff down, or at least took no precautions to avoid the accident. The claim of passion and prejudice would be as valid in a subsequent trial the same as here. We must assume that the jury considered the evidence fairly and impartially as it was instructed to do. Competent evidence must be admitted, even if it has some potential sources of prejudice in it.

We think the case was properly and fairly tried, and that the plaintiff is entitled to the benefit of the verdict he obtained. The trial court erred in vacating the verdict and judgment. The judgment is reversed and the cause remanded with instructions to reinstate the verdict and judgment for the plaintiff.

REVERSED AND REMANDED WITH DIRECTIONS.

MANLY RUMBEL ET AL., APPELLEES AND CROSS-APPELLANTS, V. L. N. RESS, STATE ENGINEER OF THE STATE OF NEBRASKA, APPELLEE AND CROSS-APPELLEE, IMPLEADED WITH VAUGHN A. HALL, APPELLANT AND CROSS-APPELLEE, SAFEWAY STORES, INCORPORATED, INTERVENER-APPELLEE AND CROSS-APPELLANT.

91 N. W. 2d 36

Filed June 20, 1958. No. 34351.

1. **New Trial.** A motion for new trial filed within 10 days, either within or without the term, after the decision was rendered, is filed in time.
2. **Judgments.** A judgment is the final determination of the rights of the parties in an action.
3. ———. A letter written by a trial judge to counsel of the respective parties as to the court's opinion with reference to the findings and judgment to be entered and requesting the preparation of a decree for that purpose is in no sense a judgment.
4. **Cancellation of Instruments: Parties.** All persons whose rights, interests, or relations with or through the subject matter of the suit would be affected by the cancellation or rescission are

proper and necessary parties in order that they may have an opportunity to be heard; and unless they are made parties the court is precluded from rendering a judgment or decree of cancellation.

5. ———: ———. All parties to the instrument sought to be canceled are necessary parties to the suit for cancellation, either as plaintiffs or as defendants, unless it is obvious that the one not joined has no interest whatever in the subject matter of the suit.
6. **Highways: Eminent Domain.** By section 39-603, R. R. S. 1943, any public highway or portion of a public highway, designated by law as a state or federal highway, may be relocated, altered, or widened when, in the opinion of the Department of Roads and Irrigation such is necessary for the public convenience and safety or for economy in construction of state or federal highways. For such purposes power is conferred upon the department to take, hold, and acquire by eminent domain so much real estate as may be necessary and convenient.
7. **Highways.** By section 39-603.01, R. R. S. 1943, whenever any real estate has been acquired by the State of Nebraska under the provisions of section 39-603, R. R. S. 1943, the State Engineer is authorized to sell and convey, with the approval of the Governor, any part thereof not needed for highway purposes and also any personal property acquired in connection therewith, when in his judgment the State of Nebraska will have no further beneficial use of the same.
8. ———. By section 39-603.02, R. R. S. 1943, for the purpose of executing and performing any of the powers and duties conferred upon him, the State Engineer may, for the Department of Roads and Irrigation and in the name of the State of Nebraska, execute, acknowledge, and deliver any and all deeds necessary and proper to effectuate any such sale of real property. Any deed executed pursuant to the authority given shall be valid and effectual for all purposes; provided, such deed shall state in writing that such real estate was acquired under the provisions of section 39-603, R. R. S. 1943, and shall have affixed thereto the seal of the Department of Roads and Irrigation.
9. **States: Parties.** By section 24-319, R. R. S. 1943, the several district courts of the judicial districts of the state have jurisdiction to hear and determine all cases where the State of Nebraska shall have a lien or any other interest, apparent or real, upon or in any real estate in said state, wherein any party may desire to have said lien or interest of the state fixed and determined or foreclosed and cut off; and permission is given to any party to join the state as a party in any such

actions or proceedings in such courts involving real estate in or upon which the state has, appears to have, or claims any interest or lien.

10. States: Process. By section 24-321, R. R. S. 1943, summons shall issue upon the filing of such petition, and shall be served upon the state by the sheriff of the county in which the petition may be filed, by serving the same upon the Governor and Attorney General; and in any action, the subject matter of which, in whole or in part, relates to or grew out of the conduct of any special department or institution of the government, summons shall also be served by such sheriff upon the chief officer of such department or institution, and the return day thereof shall be as provided by law in other actions in the district court; provided, that when action is brought under the provisions of subdivision (4) of section 24-319, R. R. S. 1943, service shall be had upon the State of Nebraska by serving a copy of the summons upon the Attorney General and a copy of the summons upon the county attorney of the county wherein the realty is situated, and the action brought as in other civil actions.
11. States: Parties. Statutes authorizing suits against the State of Nebraska are to be strictly construed, since they are in derogation of the state's sovereignty.
12. ———: ———. To make the State of Nebraska a party to an action to reform, set aside, or cancel a deed, it is necessary to comply with the provisions of section 24-321, R. R. S. 1943; and failure to do so when the state is a necessary party warrants a dismissal of the action.
13. ———: ———. Suit brought against the State Engineer by name in an action to reform, set aside, or cancel a deed is not sufficient to make the state a party to the action.

APPEAL from the district court for Douglas County: PATRICK W. LYNCH, JUDGE. *Reversed and remanded with directions.*

Joseph T. Votava and *John R. McCormack*, for appellant.

Frost, Meyers & Farnham and *Charles W. Peasinger*, for appellees Rumbel.

Kennedy, Holland, DeLacy & Svoboda and *Thomas R. Burke*, for appellee Safeway Stores, Inc.

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

MESSMORE, J.

This is an action in equity brought by Manly Rumbel and Lucinda Rumbel, husband and wife, plaintiffs, against L. N. Ress, State Engineer of the State of Nebraska, and Vaughn A. Hall, defendants, in the district court for Douglas County. The purpose of the action was to cancel a deed conveying a triangular tract of land comprising 0.0645 acres, more or less, which was acquired by the state for sight purposes at the intersection of Sixtieth Street and Ames Avenue in Omaha, that is, the land was acquired for highway purposes. The further purpose of the action was to reform the original deed wherein the plaintiffs conveyed to the State of Nebraska the triangular tract of land heretofore referred to, to express the true conveyance intended by the parties thereto, and to have declared null and void and of no force and effect the deed to the same triangular tract of land from the state to the defendant Vaughn A. Hall; also in the event the deed from L. N. Ress, State Engineer, to defendant Hall be declared not void, then suitable decree to be entered to reform said deed to express the purpose, intention, and consideration of the parties.

The Safeway Stores, Incorporated, intervened in the case, claiming an interest in the subject matter of the action.

The defendant L. N. Ress demurred to the plaintiffs' petition and supplemental petition for the reason that there was a defect of parties defendant as appears upon the face of said petition, the State of Nebraska being a necessary party to said action; and for the further reason that the petition and supplemental petition did not state facts sufficient to constitute a cause of action. This demurrer was overruled by the trial court. The defendant L. N. Ress, State Engineer, elected to stand upon his demurrer.

The defendant Vaughn A. Hall demurred to the plaintiffs' petition and supplemental petition for the reason

that the facts stated therein were not sufficient to constitute a cause of action in favor of the plaintiffs and against this defendant. This demurrer was overruled.

The trial court, after hearing the case on its merits, found generally in favor of the plaintiffs and the intervener and against the defendant Hall, setting forth certain findings and entering the decree in accordance therewith. We deem it unnecessary to set forth the subject matter thereof or the judgment of the trial court except as above noted.

The plaintiffs and intervener contend that the trial court erred in overruling their motion to quash the motion for new trial filed by the defendant Hall for the reason that the same was filed out of time from the date the trial court rendered its decision in a letter to counsel of the parties involved in this litigation.

On September 25, 1957, the trial court, by a letter to counsel representing the respective parties, set forth its opinion as to the proper findings to be made, and requested a decree be prepared in accordance therewith and submitted to the court for signature. On October 25, 1957, the trial court rendered its decree and judgment. A judgment is defined by section 25-1301, R. R. S. 1943, as "the final determination of the rights of the parties in an action."

On October 25, 1957, the defendant Hall filed his motion for new trial. Section 25-1143, R. R. S. 1943, provides in part: "The application for a new trial must be made, within ten days, either within or without the term, after the * * * decision was rendered, * * *." There are two exceptions to the above which need not be considered here. The letter sent by the trial judge heretofore referred to in no manner conformed to the definition of a judgment. This motion for new trial was overruled on October 25, 1957. The notice of appeal was filed on October 25, 1957. The trial court properly overruled the motion of the plaintiffs and intervener to quash the motion for new trial filed by Hall.

This motion for new trial was filed in time as provided for by section 25-1143, R. R. S. 1943. The plaintiffs' contention is without merit.

The record discloses that on May 23, 1949, Manly Rumbel and Lucinda Rumbel, husband and wife, for a consideration of $82.49, conveyed unto the State of Nebraska the following-described property in Douglas County: "A triangular tract of land located in the southwestern part of Lot 76, Benson Heights, in the Northwest Quarter of Section 6, Township 15 North, Range 13 East of the 6th P.M., Douglas County, Nebraska, described as follows: Beginning at the southwest corner of said Lot 76; thence easterly on the South line of said Lot 76 a distance of 75.0 feet; thence northwesterly 135 degrees 00 minutes left a distance of 106.1 feet to a point on the West line of said Lot 76; thence southerly on said West line a distance of 75.0 feet to the point of beginning, containing 0.0645 acre, more or less." This deed was recorded July 9, 1949. It will be observed that this deed contained no restrictions or reservations of any kind, therefore the plaintiffs herein conveyed to the state a fee simple title to the land described in the deed.

Section 76-104, R. R. S. 1943, reads in part as follows: "An otherwise effective conveyance of property transfers the entire interest which the conveyor has and has the power to convey, unless an intent to transfer a less interest is effectively manifested."

The record also discloses a deed dated July 6, 1955, and recorded July 7, 1955, in which L. N. Ress, State Engineer, in the name of the state and for the Department of Roads and Irrigation, for and in consideration of $500, conveyed to the defendant Hall the same land as described heretofore, deeded from the Rumbels to the State of Nebraska, except that a reservation was made for an easement for highway purposes over a triangular portion in the southwest corner having a base of 25 feet and a height of 25 feet. In all other respects this

deed was like the deed from the plaintiffs Rumbel to the state.

There also appears in the record a deed from the plaintiffs Rumbel conveying to the Safeway Stores, Incorporated, Lots 75 and 76 in Benson Heights, an addition in Douglas County, as surveyed, platted, and recorded, except a triangular strip in the southwest corner of said Lot 76, more particularly described as follows: "Commencing at a point 33 feet North of the original Southwest Corner of said Lot 76, as surveyed, platted and recorded, and running thence East 75 feet; thence Northwesterly to a point on the West Line of said Lot 76, which is 75 feet North of the place of beginning; thence South along the West Line of said Lot 76 a distance of 75 feet to the place of beginning, and except that part of said Lot 76 taken for street purposes, all in Douglas County, Nebraska." The date of this deed was October 14, 1955, and it was recorded on December 27, 1955.

There appears to be a variance in the description of the triangular tract of land here involved. In the deed from the plaintiffs to the State of Nebraska and the deed from the State of Nebraska to the defendant Hall, the description is the same, while in the deed from the plaintiffs to the Safeway Stores, Incorporated, wherein the triangular tract of land is excepted as not being a part of the conveyance, the description therein is different than appears in the other two deeds just mentioned. The trial court held that the description appearing in the original deed from the plaintiffs to the state and from the state to the defendant Hall was the correct description. The foregoing constitutes one of the issues involved in the case as to the reformation of the deeds hereinbefore mentioned. Insofar as determining this appeal, such issue is not before this court as will hereinafter appear in the opinion.

The defendant Hall contends that this case should be dismissed because the State of Nebraska was not made a party to this action, and that a suit against L. N. Ress,

State Engineer of the State of Nebraska, is not a sufficient designation of parties to bring the State of Nebraska into this action as a party. In determining the validity of this contention, certain rules of law and statutes become pertinent. We make reference to the following.

In the supplemental opinion in Cunningham v. Brewer, 144 Neb. 218, 16 N. W. 2d 533, it is said: "The general rule is that in suits for rescission or cancellation all persons whose rights, interests or relations with or through the subject matter of the suit would be affected by the cancellation or rescission should be brought before the court so that they can be heard in their own behalf.

"As stated in 12 C. J. S. 1027, sec. 52: '* * * All persons whose rights, interests, or relations with or through the subject matter of the suit would be affected by the cancellation or rescission are proper and necessary parties in order that they may have an opportunity to be heard; and unless they are made parties the court is precluded from rendering a judgment or decree of cancellation. * * * All parties to the instrument sought to be canceled are necessary parties to the suit for cancellation, either as plaintiffs or as defendants, unless it is obvious that the one not joined has no interest whatever in the subject matter of the suit.' See, also, 9 C. J. 1225. These principles find support in the decisions of Alabama, California, Florida, Georgia, Illinois, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Missouri, Montana, New York, North Carolina, Oklahoma, Oregon, Texas, Virginia, Washington, West Virginia, Wisconsin and Federal."

The record shows that on May 23, 1949, the plaintiffs conveyed the fee simple title to the land in controversy by a warranty deed without any restrictions or reservations to the State of Nebraska. In 1955, the State of Nebraska conveyed the same land in controversy by a warranty deed to the defendant Hall. The plaintiffs, in their petition and supplemental petition, prayed for a modifi-

cation, reformation, and in fact a cancellation of their deed of May 23, 1949, to the State of Nebraska, and also sought to cancel and set aside a warranty deed from the State of Nebraska to the defendant Hall. The trial court in its decree set aside the deed from the State of Nebraska to the defendant Hall.

Section 39-603, R. R. S. 1943, provides in part: "Any public highway or portion of a public highway, designated by law as a state or federal highway, may be relocated, altered, or widened, * * * when, in the opinion of the Department of Roads and Irrigation, such is necessary for the public convenience and safety or for economy in construction of state or federal highways. For such purposes power is hereby conferred upon the department to take, hold, and acquire by eminent domain so much real estate as may be necessary and convenient."

Section 39-603.01, R. R. S. 1943, provides: "Whenever any real estate has been acquired by the State of Nebraska under the provisions of section 39-603, the State Engineer is hereby authorized to sell and convey, with the approval of the Governor, any part thereof not needed for highway purposes and also any personal property acquired in connection therewith, when in his judgment the State of Nebraska will have no further beneficial use of the same."

Section 39-603.02, R. R. S. 1943, provides in part: "For the purpose of executing and performing any of the powers and duties hereby conferred upon him, the State Engineer may, for the Department of Roads and Irrigation and in the name of the State of Nebraska, execute, acknowledge and deliver any and all deeds, * * * necessary and proper to effectuate any such sale of real * * * property. Any deed, * * * executed pursuant to the authority hereby given, shall be valid and effectual for all purposes; Provided, such deed, * * * shall state in writing that such real estate * * * was acquired under the provisions of section 39-603, and shall have affixed

thereto the seal of the Department of Roads and Irrigation."

The foregoing sections of the statutes are indicative of the fact that the state may acquire land by fee simple title for highway purposes.

Section 24-319, R. R. S. 1943, provides in part: "The several district courts of the judicial districts of the state shall have jurisdiction to hear and determine * * * (4) all cases where the State of Nebraska shall have a lien or any other interest, apparent or real, upon or in any real estate in said state, wherein any party may desire to have said lien or interest of the state fixed and determined or foreclosed and cut off; and permission is hereby given to any party to join the state as a party in any such actions or proceedings in such courts involving real estate in or upon which the state has, appears to have, or claims any interest or lien; * * *."

The language of the foregoing statute is clear and unambiguous. It means that the state may be joined as a party to any litigation wherein the state has a lien or any other interest, apparent or real, upon or in any real estate in said state.

Section 24-321, R. R. S. 1943, provides in part: "Summons shall issue upon the filing of such petition, and shall be served upon the state by the sheriff of the county in which the petition may be filed, by serving the same upon the Governor and Attorney General; and in any action, the subject matter of which, in whole or in part, relates to or grew out of the conduct of any special department or institution of the government, summons shall also be served by such sheriff upon the chief officer of such department or institution, and the return day thereof shall be as provided by law in other actions in the district court; Provided, that when action is brought under the provisions of section 24-319, subdivision (4), service shall be had upon the State of Nebraska by serving a copy of the summons upon the Attorney General and a copy of the summons upon the county attorney of

the county wherein the realty is situated, and the action brought as in other civil actions; * * *."

The above statute designates the manner of service to bring the State of Nebraska into an action involving the subject matter under subdivision (4) of section 24-319, R. R. S. 1943.

In the case of Frye v. Sibbitt, 145 Neb. 600, 17 N. W. 2d 617, this court said: "Action to reform a deed of conveyance of real estate to the state of Nebraska is properly maintainable under authority of section 24-319, R. S. 1943 (now section 24-319, R. R. S. 1943)." The court also said: "The appellants contend that the court was without jurisdiction to reform the deed to the state of Nebraska and that notwithstanding the attempted reformation the state of Nebraska became and still is the owner of the directly affected lands. They contend that authority has never been granted by the legislature for the prosecution of any such action against the state.

"If such authority exists it must be found in the following from section 24-319, R. S. 1943, granting the right to bring action against the state: '* * * all cases where the State of Nebraska shall have a lien or any other interest, apparent or real, upon or in any real estate in said state, wherein any party may desire to have said lien or interest of the state fixed and determined or foreclosed and cut off; * * *.'

"Statutes authorizing suits against the state are to be strictly construed. In Anstine v. State 137 Neb. 148, 288 N. W. 525, this court quoted with approval the following from 59 C. J., sec. 460, p. 303: '* * * it is usually said that statutes authorizing suit against the state are to be strictly construed, since they are in derogation of the state's sovereignty. * * *.'"

In the instant case the suit was brought against the State Engineer by name. It was not brought against the State of Nebraska. Referring to section 24-321, R. R. S. 1943, again, this statute specifically provides how the state may be brought in as a party defendant, and

a failure to comply with these requirements, even though the State of Nebraska had been named a party defendant, would not have been sufficient.

The State Engineer demurred to the petition and supplemental petition of the plaintiffs filed herein, and participated no further in the lawsuit. In the light of the foregoing authorities it is obvious that the state was an indispensable party to this lawsuit. True, the State Engineer was a proper party, but the deed given by the plaintiffs was given to the State of Nebraska and the state, by virtue of the deed, became the fee simple owner of the property in controversy. This being true, the plaintiffs in no legal manner brought the state into this action as a party defendant which we deem it was necessary to do in order to determine the merits of the plaintiffs' case. Having failed to comply with the law in this respect, we conclude that the judgment of the trial court should be reversed and the cause remanded with directions to dismiss the plaintiffs' cause of action.

Other assignments of error appear which, under the circumstances, we deem unnecessary to determine in the light of our conclusion.

REVERSED AND REMANDED WITH DIRECTIONS.

H. DALE WHITAKER, APPELLANT, V. GILBERT G. STOUT ET AL., APPELLEES, MARVIN OLSON ET AL., INTERVENERS-APPELLEES.

91 N. W. 2d 44

Filed June 20, 1958. No. 34394.

1. **Estoppel.** "Estoppel" means the preclusion of a person from asserting a fact, by previous conduct inconsistent therewith, on his own part or the part of those under whom he claims, or by an adjudication upon his rights which he cannot be allowed to call in question.
2. ———. To constitute an estoppel, in the absence of false representations by the party sought to be estopped, he must have

been guilty of such conduct as to have given the person pleading the estoppel reason to believe that a state of facts existed inconsistent with those now asserted against him in reliance on which he acted.

3. ———. When a person knowing his rights takes no steps to enforce them until the condition of the other party has, in good faith, become so changed that he cannot be restored to his former state, if the right be then enforced, delay becomes inequitable and operates as an estoppel against the assertion of the right.

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

Dryden & Jensen, for appellant.

Hamer, Tye & Worlock and *James M. Knapp,* for appellees Stout.

Blackledge & Sidner, for appellees Olson.

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

SIMMONS, C. J.

This is an action in equity in which plaintiff prays for a dissolution of a partnership; for an accounting; for a finding that a corporation holds the assets of the partnership in trust; for a receiver; and for damages for breach of contract. Issues were made and trial was had on the questions of whether or not a partnership was created; whether a corporation was organized; and whether the plaintiff was estopped to assert the existence of a partnership.

Plaintiff appeals. We affirm the judgment of the trial court.

A petition in intervention was filed by Marvin and Florence Olson, vendors of a stock of hardware and furnishings, to defendant Gilbert Stout. The issues presented by the intervention were not tried nor determined and are not in issue here. No further mention need be made of that part of the litigation.

The individual defendants will herein be referred to

by name. The Kearney Hardware, Incorporated, will be referred to as the corporation.

The defendant Gilbert Stout desired to purchase a hardware store in order that he might go into business in association with his father, Clarence Stout. Plaintiff worked as a traveling salesman for a wholesale hardware firm. The firm instructed plaintiff to get in touch with Gilbert Stout and assist him. Ultimately the two men came to Kearney, Nebraska, and there investigated a stock of hardware which the Olsons desired to sell. Clarence Stout was there also.

Gilbert Stout purchased the stock and fixtures for an agreed consideration of $60,000. He made a substantial payment which gave him the right of possession. He entered into a lease on the building occupied by the business. This occurred on September 14, 1954. Evidently there was some discussion between plaintiff and Gilbert Stout about plaintiff working as manager and having an interest in the business. Plaintiff alleged that he and Gilbert Stout entered into an oral partnership agreement on that date. Plaintiff further alleged that it was agreed that he "would furnish the sum of $1600.00 immediately for the purchase of said hardware store"; that he was to operate and manage it for a salary of $100 weekly; that out of the first 20 percent of the net profits on a yearly operation this plaintiff would receive 10 percent; that out of the next 80 percent of the net profits plaintiff was to receive 50 percent; and that these shares of profits were to be paid to Gilbert Stout to be applied on plaintiff's purchase of a half interest in the store at which time the net profits were to be divided equally.

Plaintiff testified that the agreement was made while they were standing outside the store after the purchase had been completed; that he agreed to put up what money he could "raise at the moment"; and that he was to draw the percentages stated until his "half was paid off." He further testified that Gilbert Stout asked

him if he wanted a contract drawn up, that he assented, and that Gilbert Stout agreed to have one drawn up in Iowa and send it to plaintiff. Plaintiff makes no further reference to any discussion about or request for a contract of partnership. He testified that 3 or 4 weeks later he and his wife decided they could "raise approximately $5,000" although a few questions later he testified that he told Gilbert Stout on September 14, 1954, that he could raise approximately $5,000. He testified that in April 1955, he sold property on which he realized $2,750 but that was after this matter was concluded as recited later herein.

Plaintiff paid Gilbert Stout $500 on October 18, 1954; $1,000 on October 31, 1954; and $100 on January 30, 1955.

It is patent from this evidence of plaintiff that at best the parties discussed a contract of partnership that was later to be executed; that it was never done; that plaintiff's allegation that he would furnish "immediately" the sum of $1,600 for the purchase price was bottomed on not what was discussed, but what was later done by way of payment; and that plaintiff never was in a position to pay $5,000 on his alleged contract.

By contrast defendants in their answer alleged that Gilbert Stout employed plaintiff as manager; that plaintiff desired to purchase an interest in the business and was advised "that a partnership would be formed if and in the event" plaintiff would pay 10 percent of the total cost of the business; that the total cost was approximately $70,000; and that plaintiff contributed toward the purchase price only the sum of $1,600. Gilbert Stout, however, testified that he never discussed the matter of a partnership with plaintiff. His answer alleges the fact to be otherwise. However, it is patent that plaintiff did not establish the contract he alleged or any contract of partnership upon which to found his cause of action and that the trial court properly so found.

Some 3 or 4 weeks after September 14, 1954, Clarence Stout returned to Kearney and became active in the

business. Later, in October, Bernetha Rash, a sister of Gilbert Stout, and her husband came to Kearney and were employed in the store as saleswoman and bookkeeper, respectively. Both Clarence Stout and Bernetha Rash made substantial investments in the business on a permanent basis by payments to Gilbert Stout. It is inferable that plaintiff knew of those investments and plans. There is no evidence that plaintiff at any time told either of these parties of his claim of partnership and agreed division of profits that would substantially affect both the return on and the capital value which they had invested.

As above stated the property was purchased by Gilbert Stout for an agreed consideration of $60,000. The store fixtures were remodeled and general improvements were made which brought the total cost to $70,000.

Plaintiff testified that sometime in October Gilbert Stout talked with him about forming a corporation to run the business. Later he fixed this conversation as in the "fall" and in December.

Plaintiff testified that he agreed, provided it did not affect his partnership agreement with Gilbert Stout. He does not undertake to explain how the alleged partnership agreement could be carried out by Gilbert Stout consistent with the corporation that was later created and in which at all times plaintiff took an active part.

The date when the discussions about forming a corporation took place becomes material for this reason. The first payment of $500 to Gilbert Stout by plaintiff was by check dated October 18, 1954. It carried the notation "For Stock in Hardware Store." Obviously where used in this connection the word "stock" relates to an interest in a corporate entity. Plaintiff does not contend otherwise. The second payment of $1,000 to Gilbert Stout was dated October 31, 1954. The check carries the notation "For Hardware Store Stock." Clearly this payment was made after the first conversations to form a corporation if it occurred in October

as plaintiff first testified. The third payment of $100 was by check dated January 30, 1955. This check bears on the back the statement "this check is part payment for interest in Kearney Hdwe Co. Kearney Nebr." This payment was obviously after the organization of a corporation had been agreed upon.

Plaintiff's evidence in this regard coincides with that of Gilbert Stout. He testified that on October 31, 1954, he came to Kearney from his home in Iowa to make a payment to the Olsons; that on that day plaintiff made an appointment with a lawyer; and that plaintiff and Gilbert Stout then discussed with the lawyer the matter of forming a corporation. It was on that day that plaintiff paid Gilbert Stout the $1,000 "For Hardware Store Stock."

It accordingly is quite apparent that plaintiff made the payments to Gilbert Stout with full knowledge that he was investing in stock of a corporation to be later formed for this business venture.

In February 1955, proposed articles of incorporation and bylaws were prepared and submitted to the incorporators. Plaintiff was given copies of these documents and read and signed the articles along with the other named incorporators who were Bernetha Rash, Clarence C. Stout, Lazetta Stout, and Gilbert G. Stout. Here in some instances middle initials were used. The parties were the same. The articles of incorporation bearing, among others, plaintiff's signature were filed with the Secretary of State on February 23, 1955. The notice of incorporation was published in Kearney beginning February 25, 1955.

The bylaws were signed by the same parties who signed the articles of incorporation. Among other things the signed bylaws provided that the number of directors shall be "at least three" and in addition such number as the board of directors may determine from time to time.

The organization meeting was held on March 1, 1955.

Gilbert Stout did not attend. Plaintiff did attend and was present throughout. The minutes of the meeting of the stockholders recite that plaintiff made a motion to amend the bylaws "that the number of Directors shall be 4, namely Gilbert G. Stout, Clarence C. Stout, Bernetha Rash and H. Dale Whitaker. The motion was seconded and carried." Bernetha Rash, who acted as secretary, confirmed the correctness of the minutes. Plaintiff denied making the motion. The four directors named are four persons who are shown to have made investments in the business. The minutes of the meeting of the board of directors show Whitaker present and Gilbert G. Stout absent, and that Clarence C. Stout had authority by "proxy" to act for him. They show the election of officers including plaintiff as vice president. They show the carrying of a motion to purchase the "Kearney Hardware Co." by the corporation for $70,000. They also show the direction to issue stock "according to the interest" in the Kearney Hardware Co. and, among others, "16 shares" to plaintiff. The articles provided for stock at par value of $100 a share.

Plaintiff denies making the motion to amend the bylaws or participating in the other matters, and the knowledge that he was named as a director. He, however, admits that he knew he was elected vice president of the corporation.

We conclude that plaintiff entered into and remained in the incorporation proceedings with full knowledge that the corporation was to supplant the temporary investment arrangements theretofore existing. He acquiesced in everything that was done.

Beginning March 1, 1955, the corporation took over and handled and conducted the business—again with plaintiff's knowledge and acquiescence. The stock was issued dated March 1, 1955. Defendants' evidence is that it was delivered to the stockholders on March 2, 1955. Plaintiff, however, testifies that his stock was delivered to him on March 22, 1955, the date he was

notified of his discharge as manager. In either event he received the stock and has since retained it.

Plaintiff made no contention at that time that he had an interest in the business as a partner. Upon his discharge as manager, he immediately demanded that Gilbert Stout buy his stock for the amount he had paid for it. He subsequently made other direct and indirect efforts to persuade Gilbert Stout to purchase his stock. He filed his petition in this action July 25, 1956. He, in his petition, for the first time subsequent to the incorporation proceedings, advanced the partnership contention to the other incorporators. In the meantime the corporation had assumed ownership of the property and had conducted the business as that of a corporate entity.

The applicable rules are: "Estoppel" means the preclusion of a person from asserting a fact, by previous conduct inconsistent therewith, on his own part or the part of those under whom he claims, or by an adjudication upon his rights which he cannot be allowed to call in question. To constitute an estoppel, in the absence of false representations by the party sought to be estopped, he must have been guilty of such conduct as to have given the person pleading the estoppel reason to believe that a state of facts existed inconsistent with those now asserted against him in reliance on which he acted. When a person knowing his rights takes no steps to enforce them until the condition of the other party has, in good faith, become so changed that he cannot be restored to his former state, if the right be then enforced, delay becomes inequitable and operates as an estoppel against the assertion of the right. State v. Nielson, 163 Neb. 372, 79 N. W. 2d 721.

We conclude, as did the trial court, that plaintiff did not prove the existence of the partnership which he claims existed. We conclude also, as did the trial court, that his conduct in remaining silent as to partnership claims while others were investing in this busi-

ness; in remaining silent as to partnership claims and participating in the organization of the corporation; and remaining silent as to partnership claims thereafter for a period of over 16 months while others acted in full reliance on the corporate rights and while he retained his stock certificate and acted as owner thereof, all require that the plea of estoppel be sustained.

Plaintiff argues an assignment as to a matter that was merely suggested to the trial court; was not presented by any motion requiring a ruling by the trial court; and was apparently abandoned as soon as advanced. Nevertheless we have examined the record as to it and find it to be so without merit that we do not deem it worthy of discussion.

The judgment of the trial court is affirmed.

AFFIRMED.

GORDON DEAN PITTENGER, APPELLANT, V. SAFEWAY STORES, INC., A CORPORATION, APPELLEE.
91 N. W. 2d 31

Filed June 20, 1958. No. 34412.

1. **Workmen's Compensation: Appeal and Error.** An appeal to this court in a workmen's compensation case is considered and determined de novo on the record.
2. **Workmen's Compensation.** 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.
3. ———. An accident within the Workmen's Compensation Act is an unexpected and unforeseen event happening suddenly and violently and producing at the time objective symptoms of injury.
4. ———. An employee claiming the benefit of workmen's compensation must, to succeed, show by the greater weight of the evidence all the essential elements of an accident as that word is defined in the act.
5. ———. Symptoms of pain and anguish such as weakness or expressions of pain involuntarily made or any other symptoms indicating a deleterious change in bodily condition may constitute

objective symptoms within the requirements of the Workmen's Compensation Act.

6. ———. A recovery by an employee against an employer by virtue of the Workmen's Compensation Act may include the reasonable expenses incident to and necessary for obtaining medical and hospital services.

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

Smith Brothers, for appellant.

Stewart & Stewart, for appellee.

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

BOSLAUGH, J.

The authority for this litigation is the Nebraska Workmen's Compensation Act. Appellant made claim thereunder to the Nebraska Workmen's Compensation Court for alleged disability resulting from a claimed accident and injury arising out of and in the course of employment of appellant by appellee. One of the judges of the compensation court heard the claim of appellant and granted him an award. The parties each waived rehearing in the compensation court and an appeal was taken by appellee to the district court for Dawson County. The district court found for appellee, dismissed the case, and denied a motion for new trial. This appeal contests the legality of the adjudication adverse to appellant.

Appellant was employed by appellee on March 5, 1956, the time of the alleged accident, the cause of this litigation, to perform services for it in the operation of its place of business in the city of Lexington. Appellant was then acting in the course and scope of his employment. His weekly compensation was $57.50.

A duty assigned appellant by his employer and which was performed by him was assisting in unloading merchandise transported by truck to the place of business

of appellee and the placing of the merchandise in a warehouse provided by the employer. This operation was accomplished in this manner: A truck containing the cargo of merchandise was parked near the warehouse. A conveyor extended from the truck into the warehouse. The items of the cargo were contained in 200 to 300 cardboard cartons of various sizes and weights. The operator of the truck, while remaining therein, placed the cartons on the conveyor and it carried them into the warehouse. Generally two employees of appellee removed the cartons and stacked them in the warehouse. Appellant participated in this operation every Monday on alternate months. He was employed by appellee from September 20, 1954, until the time of the alleged accident except for about 2 weeks of October 1955, during which he was employed by Jewel Tea Company.

The cartons containing the merchandise were stacked to a height variously estimated as around 10 or 12 feet, though the appellant said this was only a guess, and the height of the stacks of cartons on the day of the claimed accident was no greater than it had been on other occasions. Appellant and another employee of appellee were on the day of the alleged accident taking the cartons from the conveyor and stacking them in the warehouse. Appellant was at about 10 o'clock on that forenoon in the act of placing a carton containing 24 No. 2½ cans on the stack of cartons. He was doing this in the manner and by the means he had frequently done it before under identical or substantially similar conditions. He had his right hand at about a level with his chin under the carton and his left hand was on the side of it. He was in the act of getting ready to push or was pushing the carton up on top of the stack when his right hand, from an unknown cause, slipped. He lost control of the carton and it fell to the floor and broke open. The hands of appellant as the carton dropped after he lost control of it were above his belt and below his chest as

he attempted to catch it and prevent its completing the descent to the floor. The weight of the carton and its contents was estimated at 50 to 60 pounds. It was approximately 2½ feet long and about 1½ feet in width and depth. Appellant claims when he exerted himself in an attempt to recover control of the falling carton he experienced an accident and thereby an injury was inflicted upon him. He immediately suffered pain in his left hip at about the hip joint and the pain extended downward in the rear of the leg almost to the knee joint. It was described as a "shooting" pain that continued without regard to the position of the leg. He continued to work at the place of business until the truck was unloaded and until the noon hour. He handled the lighter cartons thereafter until the unloading of the merchandise was completed. He told the workman with whom he was associated in the unloading and stacking of the cartons sometime between 11 o'clock in the forenoon and 1 o'clock in the afternoon on March 5, 1956, that appellant thought he hurt his back sometime during the unloading of the truck, that his leg hurt, and that he thought he would consult a doctor concerning it. His wife during lunch hour made an appointment for appellant to consult the doctor at 4 o'clock that afternoon. Appellant resumed and performed the duties of his employment until he left to keep the appointment with the doctor. Appellant testified that he told his superior at the place of business where he was employed immediately before he left for the appointment made with the doctor that he had hurt his leg and was going to the doctor. The version of the superior of appellant was that he said his leg ached and that he had to go to the doctor. He did not say when he was going to call on the doctor. He said nothing about an accident or injury. He only said he had a pain in his leg, it ached, and that he would like to consult a doctor. Appellant worked the following day but did not appear for work thereafter. He gave no information

or notice to appellee that he was leaving its employment. He simply left the place of business at the end of the business day on March 6, 1956, and did not return.

Appellant consulted Dr. Olsson, resident in Lexington, who was a practicing physician and surgeon there since 1939. The doctor examined and prescribed for appellant on the day of the happening complained of herein and the doctor has prescribed for and treated him since that time. Appellant was placed in a hospital on March 7, 1956, subjected to an examination in which X-ray was used, and underwent appropriate treatment. This did not result in permanent relief. The doctor ascertained that there was a difference in the space between the last lumbar vertebra and the sacrum compared with the space between the other lumbar vertebrae. The space was narrowed. The doctor also learned that there was a tendency for a stress factor or a jarring force in the region of the lumbo-sacral joint because of the tendency of the lumbar vertebra to shove forward. This is known as spondylolisthesis. This joint did not set horizontally but in a slantwise position. The last lumbar vertebra was not squarely in the line of the curvature of the other vertebrae and it showed a tendency to slide forward. This caused stress and strain, and produced irritation to the nerve leading to the sciatic nerve trunk. This also indicated pressure on the cushion between the last lumbar vertebra and the sacrum. The doctor was then convinced of the presence of a protruded intervertebral disc and he has not had occasion to change his diagnosis in that respect. He examined appellant with the aid of the X-ray November 18, 1957. The condition of appellant as he found it March 7, 1956, existed on the latter date. The doctor gave appellant a neurological examination to ascertain changes in the reflexes, the nerve trunk activity, and the extent of the function of the lower back area. There was limitation of all motion of the lower back region. Any attempt to go too far in any direction produced

pain in the back of appellant and twinges of pain down the sciatic nerve on the left side. This was an expected result because of the lessened space between the lumbo-sacral vertebra and the sacrum. The nerve impingement in the area resulted in pain in the back region of the left leg.

It was the opinion of the doctor that appellant has a 20 percent bodily disability and that the cause of it was the accident he experienced and the injury he suffered to his back, as described by the doctor, on March 5, 1956, when appellant attempted to recapture the falling carton in the warehouse of appellee. The disability of appellant is permanent, his medical advisor believes, unless corrective surgery is submitted to and proves to be successful. The degree of improvement surgery would produce cannot be certainly known but in any event appellant would have some permanent bodily disability estimated at not less than 5 percent because of the injury to his back. The doctor testified that appellant cannot do general labor which produces stress and strain on the back region such as lifting, bending, doubling, stooping, and that sort of requirement. Appellant was examined by Dr. Long incident to his application for employment by appellee in September 1954, by Dr. Olsson when Jewel Tea Company was considering engaging appellant as its employee in October 1955, and by Dr. McGee incident to the return of appellant to work for appellee in October 1955. There was no report by any of them of back injury, disability, or any abnormal condition affecting appellant. He was employed following each examination and he worked continuously until his injury on March 5, 1956. The other evidence corroborates the opinion of the doctor of appellant in this regard. Appellant was only 21 years of age at the time of trial. He was a high school graduate and an athlete, without history of disabling illness or injury. He participated in high school football as a player for 4 years.

Dr. Olsson conducted a course of office treatments for appellant after he was released from the hospital in Lexington. The doctor advised appellant if he had a recurrence of pain, which he did, he should have orthopedic consultation to verify the opinion of the doctor that the appellant had a disc condition. Appellant sought and obtained orthopedic consultation at the Mayo Clinic in Rochester, Minnesota, on March 22 or March 23, 1956, where he remained for 6 days. The Mayo Clinic fitted appellant with a brace to support his back which he wore for 3 or 4 months continuously and thereafter when he was or might be subjected to any condition which could result in stress or strain on his back. The advice he got at the Mayo Clinic was to go home and await the result of the lapse of time and if his condition did not improve he should return to the clinic for consideration of surgery. He was told that if his condition did not improve the clinic would advise surgery.

The record establishes that appellant was totally disabled and unemployed from March 5, 1956, until May 10, 1956. He engaged in the work of an insurance salesman for about a year from May 10, 1956. He was inexperienced and untrained in that field and not too successful in the undertaking. He earned less than half the compensation he received while he was employed by appellee. Thereafter he was employed doing limited work, of short duration, for about 6 months. Physical strain or stress was not required in either of these engagements. Thereafter until the time of trial he was without employment because of physical inability to perform the work for which he was fitted and in which he had experience. He has no trade or skill of any kind. The field in which he had training and experience is grocery store work which requires physical exertion and lifting, stooping, twisting, and bending, all of which are denied to him because of his back condition. He has not since March 5, 1956, been capable of physical labor involving lifting, bending, or twisting

under a load of more than minimum weight. He has sought employment and has been received favorably until it was disclosed that he was a victim of a back condition.

The issue in this case as it is presented in this court is whether or not there was an accident March 5, 1956, which caused appellant injury within the provisions of the Workmen's Compensation Act. A compensable injury within the provisions of the act is one caused by an accident arising out of and in the course of the employment. Seger v. Keating Implement Co., 157 Neb. 560, 60 N. W. 2d 598. An accident within the meaning of the act is an unexpected and unforeseen event happening suddenly and violently, producing at the time objective symptoms of injury. § 48-151, R. R. S. 1943; Ruderman v. Forman Bros., 157 Neb. 605, 60 N. W. 2d 658. Symptoms of pain and anguish such as weakness or expressions of pain clearly involuntary or any other symptoms indicating a deleterious change in bodily condition may constitute objective symptoms within the requirements of the Workmen's Compensation Act. Knudsen v. McNeely, 159 Neb. 227, 66 N. W. 2d 412. An employee claiming the benefit of the act must, to succeed, show by the greater weight of the evidence that an accident occurred. Ruderman v. Forman Bros., *supra*. An appeal to this court in a workmen's compensation case is considered and determined de novo upon the record. Myszkowski v. Wilson & Co., Inc., 155 Neb. 714, 53 N. W. 2d 203; Fidelity & Casualty Co. v. Kennard, 162 Neb. 220, 75 N. W. 2d 553.

Appellee insists that the proof fails to show an accident within the meaning of the Workmen's Compensation Act. That there was an unexpected or unforeseen event happening suddenly and violently may not be successfully challenged. The evidence that there was is substantial. There is convincing proof of objective symptoms of injury. An injury suffered by appellant

March 5, 1956, arose, as he claims, out of and in the course of his employment.

Appellant incurred reasonable and necessary expenses in connection with securing medical relief for his physical condition arising out of the accident as follows: Lexington Community Hospital, Lexington, Nebraska, $44.15; Mayo Clinic, Rochester, Minnesota, $125; correction belt, $20; Dr. Olsson, Lexington, Nebraska, $78; Dr. Patton, Arapahoe, Nebraska, $15; expense of trip from Lexington, Nebraska, to Mayo Clinic, Rochester, Minnesota, and return, $100; expense of 5 trips from Lexington, Nebraska, to Arapahoe, Nebraska, and return, $28.

Appellant is entitled to recover from appellee temporary total disability for 9 3/7 weeks at $30 per week and for permanent partial disability for 290 4/7 weeks at $7.66 per week. § 48-121, R. S. Supp., 1955; Peek v. Ayres Auto Supply, 155 Neb. 233, 51 N. W. 2d 387. Appellant is also entitled to recover from appellee the items of expense incurred by him as set out above. § 48-120, R. R. S. 1943; Newberry v. Youngs, 163 Neb. 397, 80 N. W. 2d 165.

The judgment should be and is reversed and the cause is remanded to the district court for Dawson County with directions to render and enter a judgment for appellant and against appellee in accordance with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

JOHN J. O'ROURKE, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.
90 N. W. 2d 820

Filed June 20, 1958. No. 34439.

1. **Criminal Law: Continuances.** An application for postponement of time of trial of a criminal case is addressed to the sound dis-

cretion of the trial court and, in the absence of abuse of discretion disclosed by the record, a denial thereof is not error.

2. **Criminal Law: Witnesses.** While it has been declared that the court has no discretion to refuse to enforce the accused's constitutional right to compulsory process, the court may, however, refuse to permit issuance of a subpoena which, it appears, may be an abuse of process, until the court has been informed of what testimony may be expected of the prospective witness.

3. ———: ———. A court is not required to issue compulsory process for any one whom accused may designate as a witness; the constitutional right to compulsory process requires such process for, and only for, competent, material, and resident witnesses whose expected testimony will be admissible.

ERROR to the district court for Lancaster County: HARRY A. SPENCER, JUDGE. *Affirmed.*

Donald N. Bykerk, 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, WENKE, and BOSLAUGH, JJ.

MESSMORE, J.

This is a criminal action brought in the district court for Lancaster County wherein the defendant John J. O'Rourke was charged in an information in substance as follows: That on or about November 1, 1957, while confined in the Nebraska State Penitentiary upon conviction of a felony, he did then and there unlawfully and feloniously break such custody and escape therefrom contrary to law. The defendant was duly tried and found guilty by the verdict of a jury. Following the overruling of his motion for new trial, the defendant was sentenced to serve a term of 5 years in the Nebraska State Penitentiary.

The defendant, as plaintiff in error, brings the case to this court for review and will hereafter be referred to as the defendant.

The information was filed in the district court for

Lancaster County on February 4, 1958, and served on the defendant at the penitentiary on February 5, 1958. On February 19, 1958, the defendant was arraigned in the district court and entered his plea of not guilty. He appeared without counsel, and after his plea was entered, he was ordered held for trial to be held March 3, 1958. Several motions were made by the defendant which were overruled. On March 3, 1958, the defendant filed a motion for continuance on the grounds that he had not had an adequate amount of time to prepare for trial, and had access to law books for a period of only 4 days. This motion was overruled.

The defendant assigns as error irregularities in the proceedings of the court and abuse of discretion by the court as a result of which the defendant was prevented from having a fair trial in the following particulars: (1) The refusal of the court to grant a continuance; and (2) the refusal of the court to call additional witnesses upon request by the accused.

The record discloses that on September 18, 1957, the defendant was committed to the Nebraska State Penitentiary under a commitment to that institution from the district court for Dawson County for a period of 10 years at hard labor. He was reported missing on November 1, 1957, while on a work detail in the cannery at the penitentiary. A security guard missed the defendant about 1 p.m. of that day. The defendant was apprehended in Iowa, and on November 2, 1957, was returned to the penitentiary by officers assigned for that purpose. He told officers, after he was apprehended, that he walked through an unlocked gate in the wire fence that encircles the inner wall of the penitentiary. After the defendant was returned to the penitentiary he was placed in maximum custody.

With reference to the assignment of error relating to the granting of a continuance of which the defendant complains, the rule is as stated in Hyslop v. State, 159 Neb. 802, 68 N. W. 2d 698, as follows: "An application

for postponement of time of trial of a criminal case is addressed to the sound discretion of the trial court and, in the absence of abuse of discretion disclosed by the record, a denial thereof is not error." See, also, Darlington v. State, 153 Neb. 274, 44 N. W. 2d 468; § 25-1148, R. R. S. 1943.

In the instant case 26 days intervened between the time of the filing of the information and the trial, and 11 days intervened between the time the defendant was arraigned and the trial. The defendant, at the time of trial, was offered every opportunity to have the services of counsel, which he declined, and elected to try his own case, as he had a right to do. The record is void of any showing that the defendant was in any manner prejudiced by a refusal to grant a continuance.

Defendant's assignment of error relating to his application for continuance of trial cannot be sustained.

Referring to the defendant's second assignment of error, Article I, section 11, of the Constitution of Nebraska provides: "In all criminal prosecutions the accused shall have the right to appear and defend in person or by counsel, to demand the nature and cause of accusation, and to have a copy thereof; to meet the witnesses against him face to face; to have process to compel the attendance of witnesses in his behalf; and a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed."

As heretofore set out, this is a criminal prosecution for the crime of escape. The defendant, during the course of the trial, persisted in attempting to show that during his incarceration in the penitentiary he was the victim of some violence by the officials or guards of the institution. The defendant requested the court for process for the attendance of additional witnesses for the purpose of showing that violence had been used against him. The court explained to the defendant that such testimony would be immaterial to the case and refused the request. The defendant then stated that there

was one witness that he wished to call. The following discourse ensued: "THE COURT: What would you expect to prove by him? MR. O'ROURKE: I don't want to give - to get up and argue my whole case. THE COURT: If it is something that is material and if the County Attorney will admit it, there is no need to call him. That is the reason I am asking it. We are making a record of it, putting it in the record. MR. O'ROURKE: I can't call these witnesses? THE COURT: Not for that purpose. That is, I am denying your request. I did direct that they call in all witnesses you asked for. And now you have asked for some more to impeach some of the testimony of your other witnesses that were brought in." The defendant informed the court that he would expect to prove that he was unlawfully confined in the penitentiary because he was given close confinement rather than hard labor. The court then explained to the defendant that such matters dealt with the administration of the penitentiary and were not proper or pertinent in this action.

Section 29-1903, R. R. S. 1943, provides in part: "Any person accused of crime amounting to felony shall have compulsory process to enforce the attendance of witnesses in his behalf, * * *."

In Garcia v. State, 159 Neb. 571, 68 N. W. 2d 151, the defendant, during the trial, filed an application for compulsory process and attendance of certain witnesses. A subpoena was issued for one of the witnesses, but was not served by the sheriff because the return date had passed before it was received by him. The defendant complained of the failure of the trial court to enforce the process further. This court said: "It is apparent that the purpose of requesting the attendance of this witness was to have him testify to the altercation he had with Gutierez while they were both being held in the county jail at Chadron. The trial court was of the opinion that the testimony of this witness was incompetent and so advised counsel. We have confirmed this ruling and

consequently the witness properly would not have been permitted to testify thereto if present. Therefore no prejudice resulted from his not being present."

As stated in 97 C. J. S., Witnesses, § 6, p. 354: "While it has been declared that the court has no discretion to refuse to enforce the accused's constitutional right to compulsory process, the court may, however, refuse to permit issuance of a subpoena which, it appears, may be an abuse of process, until the court has been informed of what testimony may be expected of the prospective witness."

In 97 C. J. S., Witnesses, § 9, p. 358, it is stated: "A court is not required to issue compulsory process for any one whom accused may designate as a witness; the constitutional right to compulsory process requires such process for, and only for, competent, material, and resident witnesses whose expected testimony will be admissible."

In the instant case it is obvious that the only purpose the defendant had in mind in requesting process for certain unnamed inmates of the penitentiary was as to the treatment he received while incarcerated therein. The type of evidence sought by the defendant was wholly immaterial and irrelevant to the crime herein charged.

Finding no prejudicial error in the record, we come to the conclusion that the defendant had a fair and impartial trial and therefore affirm the verdict of the jury and the sentence imposed on the defendant by the court in accordance therewith.

AFFIRMED.

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59. Upon appeal to the district court, the parties may waive filing of additional pleadings and try the case on transcript of the proceedings in inferior tri-

bunal. *Nebraska Conf. Assn. Seventh Day Adventists v. County of Hall* 588

60. On an appeal to the Supreme Court from an order of the railway commission granting a certificate of public convenience and necessity, the only questions to be determined are whether or not the commission acted within the scope of its authority, and whether or not the order complained of is reasonable and not arbitrarily made. *Basin Truck Co. v. R. B. "Dick" Wilson, Inc.* 665

61. A judgment in replevin for the defendant which is not alternative as the statute requires is error without prejudice if the record in the case establishes that a return of the property cannot be had. *Clark v. Oldham* 672

62. It is not the province of the Supreme Court in an appeal in an action at law to resolve conflicts in or weigh the evidence. *Stanley v. Ebmeier* 716

63. It is presumed on appeal in a law action that controverted facts were decided by the jury in favor of the successful party and its findings based on conflicting evidence will not be disturbed unless they are clearly wrong. *Stanley v. Ebmeier* 716

64. The Supreme Court in a criminal action will not interfere with a verdict of guilty based upon conflicting evidence, unless it is so lacking in probative force that the court can say, as a matter of law, that it is insufficient to support a finding of guilt beyond a reasonable doubt. *Sedlacek v. State* 736

65. The credibility of witnesses and the weight of the evidence are for the jury to determine in a criminal case. The conclusion of the jury may not be disturbed by the Supreme Court unless it is clearly wrong. *Sedlacek v. State* 736

66. Rule for trial of equity case de novo in Supreme Court stated. *Marston v. Drobny* 747

67. Actions in equity appealed to the Supreme Court are triable de novo upon the record. *Curtis v. Securities Acceptance Corp.* 815

Appearances.

1. If a defendant invokes the judgment of the court in any manner upon any question except that of the power of the court to hear and decide the controversy, his appearance is general. *O'Hara v. Frederickson Building Corp.* 206

2. Where a defendant files a cross-petition asking for affirmative relief, it constitutes a general appearance and gives the court jurisdiction of the person of the cross-petitioner. *O'Hara v. Frederickson Building Corp.* 206

Attachment.

1. The hearing of a motion to dissolve an attachment is a "trial" of the issues of law or fact or both in an action. *J. R. Watkins Co. v. Sorenson* 364
2. In a case where the facts stated in an affidavit for an attachment are denied by a motion to dissolve, the burden is cast upon plaintiff to sustain his charges by a preponderance of the evidence. *J. R. Watkins Co. v. Sorenson* 364
3. An order granting or denying a motion to discharge an attachment based upon conflicting evidence will not be reversed on appeal unless clearly wrong. *J. R. Watkins Co. v. Sorenson* 364
4. An attachment based on an affidavit alleging nonresidence of the debtor is wrongful and the proceedings are void if such allegations are untrue. *J. R. Watkins Co. v. Sorenson* 364
5. The question of residence in attachment proceedings is generally one of intention coupled with affirmative action, and is determined from the facts and circumstances in each particular case. *J. R. Watkins Co. v. Sorenson* 364
6. Mere temporary absence from the state for the purpose of business, pleasure, or health is not of itself such an abandonment of a party's place of abode as to authorize the issuance of an attachment against him on the ground of nonresidence. *J. R. Watkins Co. v. Sorenson* 364

Attorney and Client.

1. The Supreme Court possesses the inherent power to punish for contempt any person assuming to practice law within the state in violation of a valid order of disbarment. *State ex rel. Beck v. Niklaus* 94
2. The ethical standards relating to the practice of law in this state are the Canons of Professional Ethics of the American Bar Association and any others adopted by the Supreme Court. *State ex rel. Nebraska State Bar Assn. v. Conover* 132
3. Misconduct of a lawyer acting as a judge may

justify his disbarment as a member of the bar. A violation of his judicial oath aggravates the offense of disregarding his oath as a lawyer. *State ex rel. Nebraska State Bar Assn. v. Conover* 132

4. Money of a client or other trust property coming into the possession of a lawyer should be promptly reported and accounted for and should not under any circumstances be commingled with his own or used by him. *State ex rel. Nebraska State Bar Assn. v. Conover* 132

5. Restitution of money or property improperly detained by a lawyer until he is threatened with or involved in proceedings concerning his legal accountability therefor is not exoneration of his unprofessional conduct. *State ex rel. Nebraska State Bar Assn. v. Conover* 132

6. Implicit in an admission to the bar is an obligation that the licensee will inform himself of and will meticulously discharge his duties, uphold and obey the Constitution and laws of the state, honor the standards of professional ethics, and abjure all offensive practices. *State ex rel. Nebraska State Bar Assn. v. Conover* 132

7. Courts have a duty to maintain the integrity of the legal profession by excluding any member thereof whose conduct has a tendency to bring the courts or the profession of law into disrepute or to affect adversely the administration of justice. *State ex rel. Nebraska State Bar Assn. v. Conover* 132

8. The primary purpose of a disciplinary proceeding is not to punish the lawyer but to ascertain and determine in the public interest if he should be permitted to continue as a member of the bar. *State ex rel. Nebraska State Bar Assn. v. Conover* 132

9. The fee allowed for the service of an attorney for a wife in a divorce suit should be sufficient to adequately compensate for the service necessary to be performed. *Shomaker v. Shomaker* 164

10. On appeal in a divorce suit from the fee allowed to the wife for services rendered by her attorney, wherein there is no direct evidence of the value thereof other than the record of the proceedings, the Supreme Court will interfere only to correct a patent injustice resulting from an allowance which is clearly excessive or insufficient. *Shomaker v. Shomaker* 164

Automobiles.

1. Statutory provision that no person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions then existing is the basic speed rule. Other provisions following in the section are specific speed restrictions based on the existence of the fact situation or situations mentioned in the act. *Carlson v. Hanson* 96
2. The right half of the highway as that term is used in motor vehicle statute means the right half of the main-traveled portion of the highway available for traffic. *Carlson v. Hanson* 96
3. A driver of a vehicle about to enter a street or highway protected by stop signs must stop as directed, look in both directions, and permit all vehicles to pass which are at such a distance and traveling at such a speed that it would be obviously dangerous to proceed across the intersection. *Owen, Admr. v. Moore* 226
4. Duty of driver of automobile in crossing a street or highway protected by stop signs stated. *Owen, Admr. v. Moore* 226
5. The duties and obligations which attend a motorist when he approaches a stop sign erected pursuant to city ordinance are the same as those which attend when he approaches one erected pursuant to statute or statutory rules of the road. *Owen, Admr. v. Moore* 226
6. Where the negligence of the driver of a vehicle 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. *Owen, Admr. v. Moore* 226
7. A left turn across a public highway between intersections is fraught with danger. One making such a movement is required to exercise a degree of care commensurate with the danger. *Kruger v. Ervin Clark Constr. Co.* 252
8. When a driver of a motor vehicle turning across a highway between intersections fails to look to the front and rear for oncoming traffic at a time and place when to look would be effective, or looks and negligently fails to see that which is in plain sight, or is in a position where he cannot see, a question for the court is usually presented. *Kruger v. Ervin Clark Constr. Co.* 252
9. The giving of the statutory signal for a left turn

will not absolve the driver from negligence where he fails to exercise care for his own safety, and that of others, by failing to look to the front and rear for the approach of other vehicles using the highway. *Kruger v. Ervin Clark Constr. Co.* 252

10. The negligence of the operator of an automobile in which a child of 5 years is riding as a guest can not be imputed to such child. *Eden v. Klaas* 354

11. The negligence of a husband while driving an automobile with his wife as a guest is not imputable to her. *Morse v. Gray* 557

12. The doctrine of sudden emergency may not be successfully invoked by a litigant unless there is evidence that such an emergency existed, that the party seeking the benefit of the doctrine did not cause the emergency, and that he used due care to avoid it. *Stanley v. Ebmeier* 716

13. The operator of a motor vehicle is required to have his vehicle under such reasonable control as to be able to avoid collision with another vehicle whose driver exercises due care. *Stanley v. Ebmeier* 716

14. Complete control which will prevent an accident by the anticipation of negligence on the part of another, in the absence of warning or knowledge, is not required. *Stanley v. Ebmeier* 716

15. Reasonable control by the operator of a motor vehicle is such as will enable him to avoid an accident involving another motor vehicle operated without negligence or with a pedestrian who is exercising due care. *Stanley v. Ebmeier* 716

16. It is a general rule, subject to exceptions, that it is negligence as a matter of law for a motorist to drive an automobile on a public highway at any time at a speed or in such manner that it cannot be stopped or its course changed in time to avoid a collision with an object or obstruction discernible within the range of vision in the direction he is traveling. *Stanley v. Ebmeier* 716

17. The driver of an automobile is legally and mandatorily obligated to maintain such a lookout that he can see what is plainly visible before him and to operate his automobile in such a manner that he can stop it and avoid collision with any object in front of him. *Stanley v. Ebmeier* 716

Brokers.

When an owner lists his property with a real estate broker for sale, it is generally understood that the broker's duties are merely to find a purchaser. *Kobza v. Spath* 623

Cancellation of Instruments.

1. Where it is sought to cancel an instrument for want of mental capacity of the grantor to make it, the burden of proof is on the one who alleges mental incapacity. *Marston v. Drobny* 747
2. A court is precluded from rendering a judgment for cancellation of an instrument where all persons whose rights would be affected are not parties to the suit. *Rumbel v. Ress* 839
3. All parties to the instrument sought to be canceled are necessary parties to the suit for cancellation, either as plaintiffs or as defendants, unless it is obvious that the one not joined has no interest whatever in the subject matter of the suit. *Rumbel v. Ress* 839

Constitutional Law.

1. The right of an owner to dispose of property is substantial and valuable. It is incident to and inheres in the constitutional right to acquire and own title to every species of property recognized by law. It may not be impaired or defeated by legislation after the right is vested. *Pfeifer v. Ableidinger* 464
2. The object of specified legislative act was to provide a limitation on the raising of funds for county purposes for a period of 2 years. Its provisions were in addition and supplementary to the statutes already existing for such purposes. It did not contain the sections amended, nor repeal such sections. It was therefore a violation of the Constitution and void. *Chicago, B. & Q. R. R. Co. v. County of Box Butte* 603
3. Even though a legislative act is an independent act in form and does not purport to amend any prior act, yet if in fact it changes existing legislation and is amendatory in effect, it is within constitutional prohibition. *Chicago, B. & Q. R. R. Co. v. County of Box Butte* 603
4. Enactments against obscenity cannot transgress the boundaries fixed by the Constitution, and they should

not go beyond what is reasonably necessary to effect their objective. *State v. Pocras* 642

Contempt.

The Supreme Court possesses the inherent power to punish for contempt any person assuming to practice law within the state in violation of a valid order of disbarment. *State ex rel. Beck v. Niklaus* 94

Continuances.

An application for postponement of time of trial of a criminal case is addressed to the sound discretion of the trial court and, in the absence of abuse of discretion disclosed by the record, a denial thereof is not error. *O'Rourke v. State* 866

Contracts.

1. Generally, a party who has failed or refused to perform the terms and conditions imposed upon him by a contract, or has not been ready, willing, and able to perform same, cannot recover for a breach thereof by the other party. *Bodtke v. Bratten* 36
2. In order to prove an express contract, a definite offer and acceptance must be shown. *Wilkie v. Banse* 138
3. Mutuality of obligation is an essential element of the right to enforce a contract in a court of equity. Where the offer requires a promise on the part of the person to whom the offer is made, a communicated acceptance is essential. *Wilkie v. Banse* 138
4. An offer does not ripen into a contract unless accepted. If the person to whom the offer is made does not accept within a reasonable time it may be treated as rejected. *Wilkie v. Banse* 138
5. A party will not ordinarily be permitted to withhold acceptance of a contract until the risk of loss under the agreement has passed, and then to belatedly assert rights in it when its financial success appears to be assured. *Wilkie v. Banse* 138
6. If the agreement of a contractor is that he will perform a designated undertaking as required by prescribed plans and specifications, the contractor may not vary from them in completing the work even if he deems them improper or insufficient. *Fuchs v. Parsons Constr. Co.* 188
7. A contractor does not guarantee that the work performed as required by the plans and specifications

will be free from defects or that it will accomplish the purpose intended. *Fuchs v. Parsons Constr. Co.* 188
8. If the contract specifies what a contractor is to do and the manner and method of doing it and he does the work as the contract requires, his engagement is performed and satisfied. *Fuchs v. Parsons Constr. Co.* 188
9. A party who claims to have been damaged by a breach of a contract is required to prove the amount of his damage when that is an issue. *O'Hara v. Frederickson Building Corp.* 206
10. A party who claims to have been damaged by a breach of a contract is required to prove that the person sought to be charged is liable therefor when that is an issue. *O'Hara v. Frederickson Building Corp.* 206
11. A local usage is binding only upon persons who have knowledge of it and those who, because of the circumstances of the case, ought to have known of it. To be regarded as a part of a contract a usage must be actually or constructively known and must be consistent with the contract. *Frankel v. Pitlor* 219
12. Where there is a question as to the meaning of a contract, it is to be construed most strongly against the party preparing it. *Long v. Magnolia Petroleum Co.* 410
13. When a contract is optional in respect to one party, it is to be construed strictly in favor of the party that is bound and against the one who is not bound. *Long v. Magnolia Petroleum Co.* 410
14. In construing a written instrument for the purpose of ascertaining the intention of the parties, resort must be had to the instrument as a whole and, if possible, effect must be given to every part thereof. *Long v. Magnolia Petroleum Co.* 410
15. In construing a writing it is the duty of the court to give to words used their ordinary and popularly accepted meaning in the absence of explanation or qualification. *Long v. Magnolia Petroleum Co.* 410
16. A written contract expressed by clear and unambiguous language is not subject to interpretation or construction. *Long v. Magnolia Petroleum Co.* 410
Gerdes v. Omaha Home for Boys 574
17. Courts are not at liberty to rewrite the contract made by the parties, nor should the courts add language to that used by the parties and thus change the plain expressed intention of the parties as set

out in the contract. *Long v. Magnolia Petroleum Co.* 410

18. Every contract is made with reference to and subject to existing law, and every law affecting the contract is read into and becomes a part thereof. This is true between individuals dealing between themselves by contract, express or implied, and likewise true between individuals and the government. *Pfeifer v. Ableidinger* 464

19. If negotiations between parties result in an agreement which is reduced to writing, in the absence of fraud, mistake, or ambiguity, the writing is the only competent evidence of the contract. *Gerdes v. Omaha Home for Boys* 574

20. If the existence of a written contract has been induced by prior or contemporaneous oral agreement, parol evidence is not admissible to add to, contradict, or vary the terms of the written contract. *Gerdes v. Omaha Home for Boys* 574

21. Parol evidence is not admissible to supply an omission from a written contract that contains a complete obligation. *Gerdes v. Omaha Home for Boys* 574

22. Contemporaneous instruments will generally be construed together in order to determine the nature of the transaction and the intent of the parties but this is not true when the instruments, though both relating to the same transaction, concern separate subjects or provide for different things. *Gerdes v. Omaha Home for Boys* 574

23. Where there is no contract to pay a definite sum for the erection of a building, the amount the builder is entitled to recover for material and labor is their reasonable market value. *Patterson v. Spelts Lumber Co.* 692

24. Instruments executed at the same time by the same parties in the course of the same transaction will be read and construed together as one instrument. *Marston v. Drobny* 747

25. Rule for determination of mental capacity of grantor to execute a written instrument stated. *Marston v. Drobny* 747

26. The question of mental competency of one who executes an instrument relates exclusively to the time when the instrument was executed. Evidence of condition of mind at other times is received only to assist in revealing a state of mind at that time. *Marston v. Drobny* 747

Costs.

1. On appeal in a divorce suit from any allowance, other than attorney's fee, made to the wife for necessary expenses of investigation and carrying on the litigation, competent evidence in support thereof must appear in the bill of exceptions. *Shomaker v. Shomaker* 164
2. The cost of preparation of a bill of exceptions is fixed by statute, and an official court reporter may not charge in excess of that amount. *Pueppka v. Iowa Mutual Ins. Co.* 203
3. Rule of practice is promulgated that the certificate of the official court reporter shall include a statement of the cost of the bill of exceptions and an averment that such amount is one permitted to be charged by statute. *Pueppka v. Iowa Mutual Ins. Co.* 203

Counties.

1. A grant of authority to a county is strictly construed and enjoyment of the grant requires a compliance with any condition or restriction of the grant. *Clay County v. Bottorf* 262
2. In order to recover expense of care and maintenance in a state hospital, county must allege and prove that incompetent is possessed of an estate and income sufficient to meet such expense without depriving those dependent upon him of their necessary support. *Clay County v. Bottorf* 262

Courts.

1. A court may, on its own motion, recognize want of jurisdiction of the subject matter. It is its duty to act accordingly. *Lutcavish v. Eaton* 268
2. The rights of a residuary legatee to property constituting the residue of an estate which has been settled cannot be determined by filing a claim in the intestate estate of the principal beneficiary under the will. Where the pleadings of the respective parties disclose adverse and divergent contentions, the court having jurisdiction is the district court. *Lutcavish v. Eaton* 268
3. The doctrine of stare decisis is based on public policy. It should be adhered to unless the reasons therefor do not exist, are clearly erroneous or mischievous, or unless more harm than good will result

from doing so. *Nebraska Conf. Assn. Seventh Day Adventists v. County of Hall* 588

Criminal Law.

1. A motion to withdraw a plea of guilty, and to be allowed to enter a plea of not guilty, is addressed to the discretion of the trial judge before whom the plea is entered, and, in the absence of a clear abuse of that discretion, the Supreme Court will not interfere. *Jurgenson v. State* 111

2. Where the record shows that a defendant had full knowledge of the charge against him and the consequences of a plea of guilty, and entered his plea understandingly, the court may, without abusing its discretion, refuse to permit him to withdraw it. *Jurgenson v. State* 111

3. Upon examination of record, the facts proven established the commission of the offense of attempting to break jail. *Brown v. State* 215

4. Offense of assisting prisoner to escape does not apply to those cases where no escape is actually made. *Brown v. State* 215

5. A crime must be defined with sufficient definiteness and there must be ascertainable standards of guilt to inform those subject thereto as to what conduct will render them liable to punishment thereunder. *State v. Pocras* 642

6. Evidence that would justify a committing magistrate in finding that probable cause existed for the detention of a defendant need not necessarily be sufficient to sustain a verdict of guilty when he is placed on trial. *Neudeck v. Buettow* 649

7. The test by which to determine the sufficiency of circumstantial evidence in a criminal prosecution is whether the facts and circumstances tending to connect accused with the crime charged are of such conclusive nature as to exclude every reasonable hypothesis except that of his guilt. *Sedlacek v. State* 736

8. It is the province of the jury to determine the circumstances surrounding and which shed light upon an alleged crime; and if, assuming as proved the facts which the evidence tends to establish, they cannot be accounted for upon any rational theory which does not include the guilt of the

accused, the proof cannot, as a matter of law, be said to have failed. *Sedlacek v. State* 736

9. The Supreme Court in a criminal action will not interfere with a verdict of guilty based upon conflicting evidence, unless it is so lacking in probative force that the court can say, as a matter of law, that it is insufficient to support a finding of guilt beyond a reasonable doubt. *Sedlacek v. State* 736

10. The credibility of witnesses and the weight of the evidence are for the jury to determine in a criminal case. The conclusion of the jury may not be disturbed by the Supreme Court unless it is clearly wrong. *Sedlacek v. State* 736

11. An application for postponement of time of trial of a criminal case is addressed to the sound discretion of the trial court and, in the absence of abuse of discretion disclosed by the record, a denial thereof is not error. *O'Rourke v. State* 866

12. While it has been declared that the court has no discretion to refuse to enforce the accused's constitutional right to compulsory process, the court may, however, refuse to permit issuance of a subpoena which may be an abuse of process until the court has been informed of what testimony may be expected of the prospective witness. *O'Rourke v. State* 866

13. A court is not required to issue compulsory process for any one whom accused may designate as a witness. The constitutional right to compulsory process requires such process for, and only for, competent, material, and resident witnesses whose expected testimony will be admissible. *O'Rourke v. State* 866

Crops.

Unless reserved, crops standing upon the ground, matured or not, pass to the grantee named in a deed of conveyance. *Kobza v. Spath* 623

Customs and Usages.

A local usage is binding only upon persons who have knowledge of it and those who, because of the circumstances of the case, ought to have known of it. To be regarded as a part of a contract a usage must be actually or constructively known and must be consistent with the contract. *Frankel v. Pitlor* 219

Damages.

1. In an action based on fraudulent representations the measure of damages is generally the difference in value between the article or thing purchased if it had been as represented and its actual value. *Dargue v. Chaput* 69
2. A party who claims to have been damaged by a breach of a contract is required to prove the amount of his damage when that is an issue. *O'Hara v. Frederickson Building Corp.* 206
3. A party who claims to have been damaged by a breach of a contract is required to prove that the person sought to be charged is liable therefor when that is an issue. *O'Hara v. Frederickson Building Corp.* 206
4. The general rule is that damages, to be recoverable, must be direct and certain. *O'Hara v. Frederickson Building Corp.* 206
5. Damages which are uncertain, contingent, conjectural, or speculative, cannot be made the basis of a recovery, whether applied to the existence, nature, or proximate cause thereof. *O'Hara v. Frederickson Building Corp.* 206
6. In an action for damages where the law furnishes no legal rule for measuring them, the amount to be awarded rests largely in the discretion of the jury. *Eden v. Klaas* 354
   Arnold v. Lance 834

Deeds.

1. Rule for determination of mental capacity of grantor to execute a written instrument stated. *Marston v. Drobny* 747
2. To set aside a deed on the ground of want of mental capacity on the part of the grantor, it must be clearly established that the mind of the grantor was so weak or unbalanced at the time of the execution of the deed that he could not understand and comprehend the purport and effect of what he was then doing. *Marston v. Drobny* 747
3. The question of mental competency of one who executes an instrument relates exclusively to the time when the instrument was executed. Evidence of condition of mind at other times is received only to assist in revealing a state of mind at that time. *Marston v. Drobny* 747

Divorce.

1. Any unjustifiable conduct by either the husband or wife which destroys the legitimate ends and objects of matrimony constitutes extreme cruelty. *Shomaker v. Shomaker* 164
2. A decree of divorce cannot be granted solely on the declarations, confessions, or admissions of the parties. There must be corroborative evidence. *Shomaker v. Shomaker* 164
3. 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. *Shomaker v. Shomaker* 164
4. In a divorce suit where the court has jurisdiction of the parties, it has power to adjust all their respective property interests. *Shomaker v. Shomaker* 164
5. In a divorce action, the division of property and the allowance of alimony and support money are to be determined by the facts in each case in accordance with legal principles heretofore announced by the Supreme Court. *Shomaker v. Shomaker* 164
6. Nature and effect of a divorce from bed and board stated. *Shomaker v. Shomaker* 164
7. Where a party has prayed for a divorce from bed and board and has adduced sufficient proof duly corroborated in support thereof, and the other party has prayed for an absolute divorce but has not adduced sufficient proof duly corroborated in support thereof, the trial court has no discretion in granting the remedy, but must grant a divorce from bed and board as prayed. *Shomaker v. Shomaker* 164
8. Where the evidence in a divorce suit sustains a finding of cruelty on the part of the husband towards the wife, and is corroborated, the action of the district court in granting a divorce to the wife is proper and ordinarily will not be interfered with by the Supreme Court on appeal. *Shomaker v. Shomaker* 164
9. The fee allowed for the service of an attorney for a wife in a divorce suit should be sufficient to adequately compensate for the service necessary to be performed. *Shomaker v. Shomaker* 164
10. On appeal in a divorce suit from the fee allowed to the wife for services rendered by her attorney, wherein there is no direct evidence of the value thereof other than the record of the proceedings, the Supreme Court will interfere only to correct a

patent injustice resulting from an allowance which is clearly excessive or insufficient. *Shomaker v. Shomaker* 164

11. On appeal in a divorce suit from any allowance, other than attorney's fee, made to the wife for necessary expenses of investigation and carrying on the litigation, competent evidence in support thereof must appear in the bill of exceptions. *Shomaker v. Shomaker* 164

12. Divorce cases are triable de novo upon appeal. The amount of alimony and support money awarded the wife will be increased or diminished by the Supreme Court on appeal when all the facts and circumstances establish that the amount awarded by the trial court is not just and reasonable. *Hefti v. Hefti* 181

13. In rendering a decree for alimony, the court may take into account all of the property owned by the parties at the time of rendering the decree, whether accumulated by their joint efforts or acquired by inheritance, and make such award as is proper under all the circumstances disclosed by the record. *Hefti v. Hefti* 181

14. The granting of alimony and the allowance of support money in divorce actions are always determined by the facts and circumstances in each case relating to and in accord with the many factors and elements heretofore announced by the Supreme Court. *Hefti v. Hefti* 181

15. Where the evidence in a divorce action establishes adultery on the part of one of the parties thereto, the court is required to grant the prayer of the other party seeking a divorce on that ground unless prevented from doing so by applicable statutory provisions. *Baker v. Baker* 306

16. Where a wife is found to be guilty of adultery, she is ordinarily an unfit person to have the care and custody of her minor children as against the husband she has wronged. *Baker v. Baker* 306

17. Where adultery by a wife is established, she is not entitled to an award of alimony and ordinarily will not be allowed an attorney's fee or an award of costs. *Baker v. Baker* 306

18. Prior opinions on effect of adultery in a divorce action are modified to the extent that they are in conflict with the opinion in this case. *Baker v. Baker* 306

19. An application for a change with respect to care

and custody of minor children, which has been provided for in a decree of divorce, must be founded upon new facts and circumstances which have arisen subsequent to the entry of the decree. In the absence of such facts and circumstances the matter will be deemed res judicata. *Young v. Young* 532

20. Court may modify decree as it concerns care, custody, and maintenance of children where circumstances of parties have changed or best interests of the children may require such modification. *Young v. Young* 532

21. A parent may not be deprived of the custody of his child by the court until it is established that the parent is unfit to perform the duties of a parent or has forfeited the right to the custody of the child. *Young v. Young* 532

22. The unfitness which deprives a parent of the right to the custody of his child must be positive and not comparative, and the mere fact that the children would be better nurtured or cared for by a stranger is not sufficient to deprive a parent of his right to their custody. *Young v. Young* 532

23. In a divorce case it is generally the best policy to keep minor children within the jurisdiction of the court. *Young v. Young* 532

Easements.

1. Rule with respect to creation of an easement by prescription is substantially the same as acquisition of real estate by adverse possession. *Kuhlmann v. Platte Valley Irr. Dist.* 493

2. To establish a prescriptive right to an easement all of the elements of a prescriptive use and enjoyment must be established by clear, convincing, and satisfactory evidence. *Kuhlmann v. Platte Valley Irr. Dist.* 493

3. If an easement is acquired by prescription, the extent of the right is fixed and determined by the user in which it originated. To establish an easement by prescription the evidence must show the extent of the adverse user for a period of 10 years. *Kuhlmann v. Platte Valley Irr. Dist.* 493

4. An alleged easement that is too indefinite for a determinate description cannot be established and protected by a court of equity. *Kuhlmann v. Platte Valley Irr. Dist.* 493

Eminent Domain.

By statute, the Department of Roads and Irrigation may acquire real estate by eminent domain, for relocating, altering, or widening a state or federal highway. *Rumbel v. Ress* 839

Equity.

A court of equity which has obtained jurisdiction for any purpose will retain jurisdiction for the purpose of administering complete relief between the parties with respect to the subject matter. *Patterson v. Spelts Lumber Co.* 692

Escape.

1. Upon examination of record, the facts proven established the commission of the offense of attempting to break jail. *Brown v. State* 215
2. Offense of assisting prisoner to escape does not apply to those cases where no escape is actually made. *Brown v. State* 215

Estates.

1. A partition action may be maintained where a tenant in common or a joint tenant in remainder commences it and the life tenant who has the possession or the right of possession defaults or fails to object to partition of the premises. *Hartman v. Drake* 87
2. The purpose of a partition action is to divide a jointly-owned interest in property so that each owner may enjoy and possess in severalty. *Hartman v. Drake* 87
3. An estate of freehold is an estate of indeterminate duration other than an estate at will or by sufferance. *Hartman v. Drake* 87
4. An estate for a term of years is less than a freehold. *Hartman v. Drake* 87
5. "Fee simple" means an absolute title or estate in lands wholly unqualified by any reversion, reservation, condition, or limitation or possibility of any such thing, present or future, or precedent or subsequent. *Smith v. Hornkohl* 702

Estoppel.

1. Estoppel is defined. *Whitaker v. Stout* 850
2. Acts necessary to constitute an estoppel, in the ab-

sence of false representations, stated. *Whitaker v. Stout* 850

3. When a person knowing his rights takes no steps to enforce them until the condition of the other party has, in good faith, become so changed that he cannot be restored to his former state, if the right be then enforced, delay becomes inequitable and operates as an estoppel against the assertion of the right. *Whitaker v. Stout*..... 850

Evidence.

1. The admissibility of expert testimony to interpret, explain, or draw conclusions from a photograph depends mainly upon whether such testimony will be of appreciable aid to the jury. If there is no need of expert testimony in order for the jury to understand and interpret the photograph, such testimony will not be permitted. *Bodtke v. Bratten* 36
2. If a photograph cannot be relied upon as proof in itself of the objects represented or the relative proportion of such objects except through evidence of personal knowledge or scientific experience accurately to demonstrate the facts sought to be established, testimony of experts in the interpretation of the photograph is admissible. *Bodtke v. Bratten* 36
3. A litigant should not be permitted to cross-examine a witness on a matter foreign to the scope of his direct examination. *Grosse v. Grosse* 55
4. A ruling of the trial court in regard to the scope of cross-examination will be sustained unless there is an abuse of discretion. *Grosse v. Grosse* 55
5. The reception in evidence of a copy of an instrument as secondary evidence is erroneous in the absence of proof that the original was in fact executed, that it is not available, and that the offered instrument is a true copy thereof. *Grosse v. Grosse* 55
6. While a municipal court may take notice of a city ordinance, proof of its existence is ordinarily required in courts of general jurisdiction. *Owen, Admr. v. Moore* 226
7. A party is entitled on cross-examination to show the interest of a witness in the litigation as affecting his credibility, but the limits of such cross-examination are ordinarily subject to the discretion of the trial judge, and, unless abused, its exercise is not error. *Eden v. Klaas* 354

8. A party calling a witness vouches for his credibility and is ordinarily bound by any evidence he gives which is not contradicted or shown to be unreliable by evidence which would justify the trier of facts in arriving at a different conclusion. *Edgar v. Omaha Public Power Dist.* 452
9. A party may at any time invoke the language of the pleading of his adversary on which the case is tried, on a particular issue, as rendering certain facts indisputable. In so doing he is neither required nor permitted to offer the pleading in evidence. *Kuhlmann v. Platte Valley Irr. Dist.* 493
10. An admission made in a pleading on which the trial is had is more than an ordinary admission. It is a judicial admission and constitutes a waiver of all controversy so far as the adverse party desires to take advantage of it and is therefore a limitation of the issues. *Kuhlmann v. Platte Valley Irr. Dist.* 493
11. A judicial admission is a formal act done in the course of judicial proceedings which is a substitute for evidence, thereby waiving or dispensing with the production of evidence by conceding for the purpose of litigation that the subject of the admission is true. *Kuhlmann v. Platte Valley Irr. Dist.* 493
12. A judicial admission is ordinarily final and conclusive upon the party by whom it is made unless the trial court, in the exercise of judicial discretion, timely relieves him from that consequence. *Kuhlmann v. Platte Valley Irr. Dist.* 493
13. In a trial de novo in the Supreme Court, incompetent and irrelevant evidence admitted over proper objections will be disregarded. *Young v. Young* 532
14. The relation of parent and child should not be severed or disturbed unless the facts justify it. The interests of all parties concerned require that these facts be shown by evidence whose verity has been carefully and legally tested. *Young v. Young* 532
15. The findings of fact with respect to custody of minor children must rest on a preponderance of evidence adduced. Hearsay, gossip, bias, prejudice, trends of hostile neighborhood feeling, and the hopes and fears of social workers are all sources of error and have no place in any court. *Young v. Young* 532
16. If negotiations between parties result in an agreement which is reduced to writing, in the absence

of fraud, mistake, or ambiguity, the writing is the only competent evidence of the contract. *Gerdes v. Omaha Home for Boys* 574

17. If the existence of a written contract has been induced by prior or contemporaneous oral agreement, parol evidence is not admissible to add to, contradict, or vary the terms of the written contract. *Gerdes v. Omaha Home for Boys* 574

18. Parol evidence is not admissible to supply an omission from a written contract that contains a complete obligation. *Gerdes v. Omaha Home for Boys* 574

19. The parol evidence rule is not merely one of evidence but is a rule of substantive law which declares that certain kinds of facts are legally ineffective and forbids them to be proved. *Gerdes v. Omaha Home for Boys* 574

20. Generally, on cross-examination of a witness, any fact may be elicited from him which tends to show his bias or partiality, and considerable latitude should be allowed counsel in attempting to do so. *Smith v. Hornkohl* 702

21. The test by which to determine the sufficiency of circumstantial evidence in a criminal prosecution is whether the facts and circumstances tending to connect accused with the crime charged are of such conclusive nature as to exclude every reasonable hypothesis except that of his guilt. *Sedlacek v. State* 736

22. It is the province of the jury to determine the circumstances surrounding and which shed light upon an alleged crime; and if, assuming as proved the facts which the evidence tends to establish, they cannot be accounted for upon any rational theory which does not include the guilt of the accused, the proof cannot, as a matter of law, be said to have failed. *Sedlacek v. State* 736

Executors and Administrators.

1. The construction of a will in probate court is for the information and benefit of the executor or administrator only. It adjudicates nothing beyond his rights and liabilities in the execution of his office. *Lutcavish v. Eaton* 268
Brown v. Applegate 432

2. The power to construe a will in controversies between an executor or administrator and one claiming

adversely to the estate, or between claimants under the will, is in the district court. *Brown v. Applegate* 432

False Imprisonment.

1. One who merely states to an officer what he knows of a supposed offense or gives information to an officer tending to show that a crime has been committed, without making any charge or requesting an arrest, does not thereby make himself liable for false arrest and imprisonment. *Edgar v. Omaha Public Power Dist.* 452
2. An informer is not liable for false arrest and imprisonment by merely accompanying an officer to identify one suspected of an offense or to identify property involved therein. *Edgar v. Omaha Public Power Dist.* 452

Forfeitures.

1. Forfeitures are looked upon by courts with ill favor and will be enforced only when the strict letter of the contract requires it. *Long v. Magnolia Petroleum Co.* 410
2. When a lease terminates by its own terms the equitable rule as to relieving against forfeitures is not applicable thereto. *Long v. Magnolia Petroleum Co.* 410

Fraud.

1. When a person obtains the legal title to an interest in real estate belonging to another by means of fraud, actual or constructive, the law creates a trust in favor of the party upon whom the fraud or imposition has been practiced. A court of equity will enforce such a trust for the benefit of the grantor or those claiming under him. *Wecker v. Wecker* 19
2. The existence of an intent to defraud at the time a promise was made may be inferred from the failure to comply with the promise. The promisor may be presumed to have intended, when he made the promise, to do what he finally did do with respect thereto. *Wecker v. Wecker* 19
3. Fraud is never presumed, but must be clearly proved in order to entitle a party to relief on the ground that it has been practiced on him. *Dargue v. Chaput* 69
4. Direct evidence is not essential to establish fraud.

It may be inferred from circumstances; but such inference must not be guesswork or conjecture, but the rational and logical deduction from the circumstances proved. *Dargue v. Chaput* 69

5. The intent or good faith of the person making false statements is not in issue in such a case. *Dargue v. Chaput* 69

6. A vendor is bound to disclose facts known to him and not within reach of a reasonably diligent purchaser. *Dargue v. Chaput* 69

7. Liability of principal for fraudulent representations of agent stated. *Dargue v. Chaput* 69

8. In an action based on fraudulent representations the measure of damages is generally the difference in value between the article or thing purchased if it had been as represented and its actual value. *Dargue v. Chaput* 69

9. A right of action for fraud may be waived. Thus, while the defrauded party may retain what he received, stand to his bargain, and recover for the loss occasioned by the fraud, he cannot do so where, having full knowledge, he does an act indicating his intention to waive the fraud. *Dargue v. Chaput* 69

10. It is difficult to formulate or to apply general rules as to what will constitute a waiver of fraud. Each case in which the question arises must be considered and disposed of on its own special facts, the underlying question being one of intent. *Dargue v. Chaput* 69

11. Acts in affirmance of a contract amount to a waiver of the fraud only where they are done with full knowledge of the fraud and all material facts and with the intention clearly manifested of abiding by the contract and waiving all right to recover for the deception. *Dargue v. Chaput* 69

Frauds, Statute of.

1. Trusts arising by operation of law are excepted from the operation of the statute of frauds. Resulting and constructive trusts therefore fall within the exception. *Wecker v. Wecker* 19

2. Rule stated as to sufficiency of proof to make a prima facie case in action to quiet title. *Blohme v. Blohme* 369

3. The making of a will by which all property of a

testator is given to a named beneficiary is not of itself evidence of the existence or part performance of a contract in reference thereto between the testator and the beneficiary. *Gerdes v. Omaha Home for Boys* 574
4. The evidence must be clear, satisfactory, and convincing to sustain a claim of a person to the estate of a deceased person by virtue of an alleged oral contract. *Gerdes v. Omaha Home for Boys* 574

Habeas Corpus.
1. Habeas corpus is a special proceeding, civil in character, providing a summary remedy open to persons illegally detained. *Neudeck v. Buettow* 649
2. The sufficiency of evidence adduced at a preliminary hearing to hold an accused to answer for a crime with which he is charged may be raised and tried in habeas corpus proceedings. *Neudeck v. Buettow* 649
3. In a habeas corpus proceeding instituted for the purpose of testing the sufficiency of evidence taken at a preliminary examination to require a person to be tried on a criminal charge, the court will not weigh the evidence but will only inquire as to the existence of evidence to sustain the charge. *Neudeck v. Buettow* 649
4. Where the testimony shows that an offense has been committed and there is testimony tending to show that the accused committed the offense, the court will not discharge him on a writ of habeas corpus. *Neudeck v. Buettow* 649

Highways.
1. The right half of the highway as that term is used in motor vehicle statute means the right half of the main-traveled portion of the highway available for traffic. *Carlson v. Hanson* 96
2. A driver of a vehicle about to enter a street or highway protected by stop signs must stop as directed, look in both directions, and permit all vehicles to pass which are at such a distance and traveling at such a speed that it would be obviously dangerous to proceed across the intersection. *Owen, Admr. v. Moore* 226
3. Duty of driver of automobile in crossing a street or highway protected by stop signs stated. *Owen, Admr. v. Moore* 226

4. A left turn across a public highway between intersections is fraught with danger. One making such a movement is required to exercise a degree of care commensurate with the danger. *Kruger v. Ervin Clark Constr. Co.* 252

5. When the driver of a motor vehicle turning across a highway between intersections fails to look to the front and rear for oncoming traffic at a time and place when to look would be effective, or looks and negligently fails to see that which is in plain sight, or is in a position where he cannot see, a question for the court is usually presented. *Kruger v. Ervin Clark Constr. Co.* 252

6. The giving of the statutory signal for a left turn will not absolve the driver from negligence where he fails to exercise care for his own safety, and that of others, by failing to look to the front and rear for the approach of other vehicles using the highway. *Kruger v. Ervin Clark Constr. Co.* 252

7. By statute, the Department of Roads and Irrigation may acquire real estate by eminent domain for relocating, altering, or widening a state or federal highway. *Rumbel v. Ress* 839

8. By statute, the State Engineer may sell and convey, with the approval of the Governor, real estate acquired for highway purposes when the state has no further beneficial use for the same. *Rumbel v. Ress* 839

9. By statute, State Engineer may execute deed to real estate acquired for highway and no longer needed for that purpose. *Rumbel v. Ress* 839

Homesteads.

A contract for the sale of homestead property signed by both husband and wife, though not acknowledged, when made at the same time with a warranty deed to the property, which deed they both execute and duly acknowledge, and which is delivered in escrow, is a valid contract. *Marston v. Drobny* 747

Husband and Wife.

The negligence of a husband while driving an automobile with his wife as a guest is not imputable to her. *Morse v. Gray* 557

Indictments and Informations.

1. The statute directing the entry of the prisoner's plea on the back of the indictment is not mandatory but directory, and the failure to so enter it is no ground for a reversal of the judgment. *Jurgenson v. State* 111
2. An information must inform the accused, with reasonable certainty, of the charge being made against him in order that he may prepare his defense thereto and also be able to plead the judgment rendered thereon as a bar to a later prosecution for the same offense. *Benedict v. State* 295
3. An information must expressly and directly state each fact that is an essential element of the crime intended to be charged so that the accused will not be required to go beyond the information to learn the nature of the charge against him or the issue he must meet. It cannot be aided by intendment, by anything stated therein by way of mere recital, or by inference or implication. *Benedict v. State* 295
4. In charging the commission of an offense in an information, it is not necessary that the exact words of the statute be used, provided the words employed are the equivalent in meaning of those contained in the statute. *Benedict v. State* 295
5. It is sufficient in any information, where it is necessary to allege an intent to defraud, to allege that the party accused did the act with intent to defraud without alleging an intent to defraud any particular person or body corporate. *Benedict v. State* 295

Infants.

1. A child, 5 years of age, may not properly be charged with contributory negligence. *Eden v. Klaas* 354
2. In this state the action of an infant must be brought by his guardian or next friend, who alone is liable for the costs. *Fincham v. Mueller* 376

Injunction.

1. The owner of real estate has the legal right to use and operate it free from repeated acts of trespass. An injunction will be granted to restrain such acts especially where committed under a claim which indicates a continuance of the trespass. *Kuhlmann*

v. Platte Valley Irr. Dist. 493

2. Equity looks to the nature of the injury inflicted and the fact of its constant repetition rather than to the magnitude of the damage inflicted as the ground for granting relief. *Kuhlmann v. Platte Valley Irr. Dist.* 493

3. A fact necessary to entitle the plaintiffs to injunction against the assessment of a tax was permanent absence of property from the State of Nebraska. *Ainsworth v. County of Fillmore* 779

Insane Persons.

1. The generally accepted view is that at common law public authorities could not recover from an incompetent person or his estate any expense incurred on his account. *Clay County v. Bottorf* 262

2. A statute creating an obligation upon the part of an incompetent and containing requirements relative to determining and enforcing the obligation is exclusive and must be strictly complied with. *Clay County v. Bottorf* 262

3. In order to recover expense of care and maintenance in a state hospital, county must allege and prove that incompetent is possessed of an estate and income sufficient to meet such expense without depriving those dependent upon him of their necessary support. *Clay County v. Bottorf* 262

Interest.

1. The statutory provisions as to interest on decrees and judgments for the payment of money refer to money which is immediately due and collectible and where its nonpayment is a breach of duty on the part of the judgment debtor. *Patterson v. Spelts Lumber Co.* 692

2. A court of equity has discretion to allow or withhold interest as is reasonable and just, except in cases where interest is recoverable as a matter of right. *Patterson v. Spelts Lumber Co.* 692

Judges.

A county judge is prohibited by the Constitution from practicing law in any court in a matter rising in or growing out of any proceeding in his court. *State ex rel. Nebraska State Bar Assn. v. Conover* 132

Judgments.

1. The function of a nunc pro tunc order stated. *State ex rel. Coulter v. McFarland* 242
2. The doctrine of res judicata ordinarily includes not only the things which were determined in the former action but also any other matter properly involved which might have been raised and determined therein. *Niklaus v. Phoenix Indemnity Co.* 438
3. Material facts or questions which were in issue in a former action, and were there admitted or judicially determined, are conclusively settled by a judgment rendered therein. Such facts or questions become res judicata and may not again be litigated in a subsequent action. *Niklaus v. Phoenix Indemnity Co.* 438
4. The conclusiveness of a judicial determination is not affected by the kind of proceeding or by a difference in form or object of the litigation in which the adjudication was made and that in which res judicata is pleaded. *Niklaus v. Phoenix Indemnity Co.* 438
5. A judgment is the final determination of the rights of the parties in an action. *Rumbel v. Ress* 839
6. A letter written by a trial judge to counsel of the respective parties as to the court's opinion with reference to the findings and judgment to be entered and requesting the preparation of a decree for that purpose is in no sense a judgment. *Rumbel v. Ress* 839

Juries.

1. In a law action a party is entitled to a jury trial as a matter of right. *Long v. Magnolia Petroleum Co.* 410
2. The procedure relating to the voir dire examination of prospective jurors requires the trial court to give each of the parties the right, within reasonable limits, to put pertinent questions to each and all of the prospective jurors. This right, when requested, must be granted and failure to do so is prejudicial error. *Oden v. State* 729

Landlord and Tenant.

1. Generally, a leasehold for a term of years is a chattel real, falling within the classification of personal property. *Hartman v. Drake* 87
2. An encumbrance includes all interest in the land

which may subsist in a third person to the diminution of the value of the land, but consistent with the passing of the fee by conveyance. An outstanding lease for a period of years is an encumbrance. *Hartman v. Drake* 87

3. A printed provision in a lease providing for its termination at the end of any calendar month after 6 months' notice is not defeated by the typewritten provision of the lease fixing the term of the lease at 1 year when such provisions are not ambiguous or inconsistent. *Frankel v. Pitlor* 219

Licenses.

In the absence of statute so providing, performance of a single act or isolated acts does not constitute engaging in a business or occupation within this state. *Neudeck v. Buettow* 649

Life Estates.

1. When there is an outstanding estate for life vested in another to the whole of the premises of which partition is sought, a remainderman cannot maintain an action in partition over the objection of the holder of such life estate. *Hartman v. Drake* 87
2. A life estate is a freehold interest in lands. *Hartman v. Drake* 87

Limitations of Actions.

Where there is a running account between the parties consisting of unsettled items of debit and credit, and the dealing between the parties was continuous and not interrupted for a sufficient length of time for the running of the statute, such items are not barred by the statute of limitations. *Lewis v. Hiskey* 402

Mandamus.

1. An alias writ of mandamus is a duplicate of the original and a substitute therefor. The command of the alias writ should be the same as the original. *State ex rel. Coulter v. McFarland* 242
2. Mandamus is a civil remedy and is a legal as distinguished from an equitable proceeding, although issuance of the writ is largely controlled by equitable principles. *State ex rel. School Dist. v. Board of Equalization* 785
3. A writ of mandamus is not a writ of right. Before a court is warranted in granting a peremptory writ

it must be made to appear that the relator has a clear legal right to the performance by the respondent of the duty which it is sought to enforce. *State ex rel. School Dist. v. Board of Equalization* 785

4. A writ of mandamus will not issue to compel the doing of a substantial wrong or an unlawful act. *State ex rel. School Dist. v. Board of Equalization* 785

Mechanics' Liens.

1. The mechanics' lien law does not enable a materialman or laborer to tack one contract to another by filing one statement which secures a lien for material and labor furnished under one contract and at the same time secure a lien for material and labor under another contract as to which he has not complied with the statute. *Patterson v. Spelts Lumber Co.* 692

2. Ordinarily a personal judgment in favor of a mechanic's lien claimant may be rendered although he fails to establish his alleged lien. *Patterson v. Spelts Lumber Co.* 692

Mines and Minerals.

1. An oil and gas lease containing the "unless" clause confers an optional right upon the lessee, and should be strictly construed in favor of the lessor and against the lessee. A failure on the part of the lessee to commence the drilling of a well or to pay the rental as stipulated automatically terminates the lease contract. *Long v. Magnolia Petroleum Co.* 410

2. A delay rental clause is a special limitation. Failure of the lessee or his assigns to tender or pay rentals within the specified time automatically terminates the lease without any affirmative action by the lessor, or anyone else, for that purpose. *Long v. Magnolia Petroleum Co.* 410

3. When a lease terminates by its own terms the equitable rule as to relieving against forfeitures is not applicable thereto. *Long v. Magnolia Petroleum Co.* 410

4. The general test of production in paying quantities is whether it is reasonably possible to market or use oil producible at date of completion of the well and thereafter with some pecuniary profit, excluding from consideration expenses and liabilities incurred in bringing the well to completion. *Long v. Magnolia Petroleum Co.* 410

5. When there is nothing in an oil lease providing for a forfeiture or termination thereof for failure of the lessee to produce oil and gas in paying quantities during the primary term of the lease, the failure of lessee to produce oil or gas in paying quantities during such term will not, by itself, result in a defeasance ipso facto. *Long v. Magnolia Petroleum Co.* 410

Motor Carriers.

1. Relevant factors for determination of the issue of public convenience and necessity stated. *Basin Truck Co. v. R. B. "Dick" Wilson, Inc.* 665
2. It is not the purpose of the railway commission control to establish an unbridled monopoly by the elimination of fair competition, nor is it intended to create unfair or destructive competition resulting in inadequate service to the public. *Basin Truck Co. v. R. B. "Dick" Wilson, Inc.* 665
3. The issue as to public convenience and necessity is ordinarily one of fact, and where there is evidence to sustain the finding of the railway commission, even if there be evidence in conflict therewith, the Supreme Court cannot say that such finding is unreasonable and arbitrary. *Basin Truck Co. v. R. B. "Dick" Wilson, Inc.* 665

Municipal Corporations.

1. The legislative power and authority delegated to a city to construct local improvements and levy assessments for payment thereof is to be strictly construed. Every reasonable doubt as to the extent or limitation of such power and authority is resolved against the city and in favor of the taxpayer. *Chicago & N. W. Ry. Co. v. City of Seward* 123
2. The word intersections as used in statute with reference to paving streets is not limited by the language thereof and therefor includes all types thereof, which would include "T" intersections. *Chicago & N. W. Ry. Co. v. City of Seward* 123
3. The only foundation for a local assessment lies in the special benefits conferred upon the property assessed. *Chicago & N. W. Ry. Co. v. City of Seward* 123
4. When a party attacks a paving assessment for the reason that it is illegal or for an unauthorized purpose, the burden rests on him to prove the invalidity of the assessment, or that it was for an

unauthorized purpose. *Chicago & N. W. Ry. Co. v. City of Seward* 123

5. The fact that a particular enterprise is for a public purpose does not determine whether the municipality is subject to liability in tort. *Brasier v. Cribbett* 145
6. The distinction between a governmental and proprietary function of a municipal corporation is a judicial and not a legislative question, and legislative declaration as to the nature of the authority delegated by the statute is not controlling. *Brasier v. Cribbett* 145
7. A municipality and its agents may be held liable in tort for negligence in the operation of a municipal airport or other air navigation facility. *Brasier v. Cribbett* 145
8. The duties and obligations which attend a motorist when he approaches a stop sign erected pursuant to city ordinance are the same as those which attend when he approaches one erected pursuant to statute or statutory rules of the road. *Owen, Admr. v. Moore* 226
9. While a municipal court may take notice of a city ordinance, proof of its existence is ordinarily required in courts of general jurisdiction. *Owen, Admr. v. Moore* 226
10. The preservation of order, the enforcement of law, the protection of life and property, and the suppression of crime are attributes of state sovereignty and matters of state-wide concern. When the Legislature enacts a general law upon any of these subjects with respect to cities of a particular class, such law applies to all cities of the class, including home rule cities. *Simpson v. City of Grand Island* 393
11. An act creating civil service rights for members of paid police departments in cities of a specified class is a matter of state-wide concern and applicable to all cities of such class, including home rule cities. *Simpson v. City of Grand Island* 393
12. Under the civil service statute, cities may, in good faith by appropriate action, abolish positions because of financial necessity or the dictates of sound business management. *Simpson v. City of Grand Island* 393
13. While the rights accruing under the civil service statute are not property rights within the ordinary meaning of that term, they are rights which are

entitled to the protection of the law. *Simpson v. City of Grand Island* 393
14. The statutory provision for the organization of a civil service commission contained in the civil service act is mandatory. A failure to comply therewith suspends the power to discharge an employee within the act where the city has failed to establish the commission to which the power to discharge was delegated by the Legislature. *Simpson v. City of Grand Island* 393
15. A city has jurisdiction under its police power to protect its citizens against obscenity in its various forms. *State v. Pocras* 642
16. Where the language defining an offense is so general and indefinite that it may embrace not only acts commonly recognized as reprehensible but also others which it is unreasonable to presume were intended to be made criminal, the enactment will be declared void for uncertainty. *State v. Pocras* 642

Negligence.

1. An "unavoidable accident" means when an unexpected catastrophe occurs without any of the parties thereto being to blame for it. *Owen, Admr. v. Moore* 226
2. The negligence of a parent cannot be imputed to an infant who is injured through the carelessness of another party. *Owen, Admr. v. Moore* 226
3. The issues of negligence and contributory negligence must be submitted to the jury where there is a conflict in the evidence or where different minds may reasonably draw different conclusions from the evidence. *Owen v. Moore* 239
Cox v. Babington 609
4. Where a jury found the defendant to be free from negligence in a personal injury action, an error in the instruction stating the measure of damages is necessarily harmless. *Owen v. Moore* 239
5. A child, 5 years of age, may not properly be charged with contributory negligence. *Eden v. Klaas* 354
6. The negligence of the operator of an automobile in which a child of 5 years is riding as a guest can not be imputed to such child. *Eden v. Klaas* 354
7. Negligence is a question of fact and may be proved by circumstantial evidence. All that the law requires is that the facts and circumstances proved, together with the inferences that may be legiti-

mately drawn from them, shall indicate, with reasonable certainty, the negligent act of which complaint is made. *Fincham v. Mueller* 376
Cox v. Babington 609

8. Negligence is never presumed. The burden of proving negligence is on the party alleging it and merely establishing that an accident happened does not prove it. *Fincham v. Mueller* 376

9. In an action for damages for negligence the burden is on the plaintiff to show by direct or circumstantial evidence that there was a negligent act or omission by the defendant and that it was the proximate cause of plaintiff's injury or a cause which proximately contributed to it. *Morse v. Gray* 557

10. Invitees are those who are expressly or impliedly invited as a customer to a store. The duty of the owner toward an invitee is to exercise reasonable care to keep the premises in a safe condition. *Morse v. Gray* 557

11. A possessor of land is subject to liability for personal injuries to business visitors by a natural or artificial condition thereon if he knows, or by exercise of reasonable care could discover, the condition which, if known to him, he should realize as involving an unreasonable risk to them. *Morse v. Gray* 557

12. 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. *Morse v. Gray* 557

13. Proximate cause is that cause which in a natural and continuous sequence, unbroken by an efficient intervening cause, produces the injury, and without which it would not have occurred. *Morse v. Gray* 557

14. It is a general rule, subject to exceptions, that it is negligence as a matter of law for a motorist to drive an automobile on a public highway at any time at a speed or in such manner that it cannot be stopped or its course changed in time to avoid a collision with an object or obstruction discernible within the range of vision in the direction he is traveling. *Stanley v. Ebmeier* 716

15. The driver of an automobile is legally and mandatorily obligated to maintain such a lookout that he can see what is plainly visible before him and to

operate his automobile in such a manner that he can stop it and avoid collision with an object in front of him. *Stanley v. Ebmeier* 716
16. Where contributory negligence is pleaded but there is no evidence to support such defense, it is prejudicial error to submit that issue to the jury. *Arnold v. Lance* 834
17. A party pleading contributory negligence is not prejudiced by the giving of an instruction thereon where there is no evidence to warrant submission of that issue. *Arnold v. Lance* 834

New Trial.
1. Rule stated as to procedure on appeal where trial court grants new trial and gives reasons for doing so. *Owen, Admr. v. Moore* 226
2. A motion for new trial is a statutory remedy. A new trial can be granted by a district court only upon the grounds, or some of them, provided by statute. *Owen, Admr. v. Moore* 226
3. Errors sufficient to cause the granting of a new trial must be errors prejudicial to the rights of the unsuccessful party. *Owen, Admr. v. Moore* 226
Owen v. Moore 239
Bryant v. Greene 520
4. The district court is required to consider and determine motions for a new trial by the exercise of its judicial discretion. *Bryant v. Greene* 520
5. 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. *Bryant v. Greene* 520
6. Procedure for review outlined where trial court grants a new trial and gives no reason for its decision. *Bryant v. Greene* 520
7. 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. *Bryant v. Greene* 520
8. Where evidence on retrial of a case is substantially the same as that adduced at a former trial, the rule of the law of the case will be applied. If the evidence is substantially different on the retrial, the rule will not be applied. *Bryant v. Greene* 520

9. The time for filing a motion for new trial begins to run from the time the decision is rendered. With certain exceptions, such requirement is mandatory. *Neudeck v. Buettow* 649
10. A motion for a new trial which is not filed within the time specified by statute is a nullity and of no force and effect. *Neudeck v. Buettow* 649
11. A motion for new trial filed within 10 days, either within or without the term, after the decision was rendered, is filed in time. *Rumbel v. Ress* 839

Obscenity.

1. A city has jurisdiction under its police power to protect its citizens against obscenity in its various forms. *State v. Pocras* 642
2. Enactments against obscenity cannot transgress the boundaries fixed by the Constitution, and they should not go beyond what is reasonably necessary to effect their objective. *State v. Pocras* 642

Officers.

1. If a matter of public interest in the proper administration of the duties of a public office is involved, a public official occupying such office, who is being mandamused in regard thereto, has such an interest therein that he can appeal therefrom. *State ex rel. Coulter v. McFarland* 242
2. In matters of a private nature in which the public officer merely seeks to vindicate what he has done in regard thereto, an appealable interest on the part of the officer does not exist. *State ex rel. Coulter v. McFarland* 242

Parent and Child.

1. The negligence of a parent cannot be imputed to an infant who is injured through the carelessness of another party. *Owen, Admr. v. Moore* 226
2. Rule with respect to change of custody of minor children as between the parties to a divorce action does not apply to a different proceeding where the parties are not the same or where the interest of the state as parens patriae is directly involved. *Young v. Young* 532
3. The relation of parent and child should not be severed or disturbed unless the facts justify it. The interests of all parties concerned require that

these facts be shown by evidence whose verity has been carefully and legally tested. *Young v. Young* 532

4. The findings of fact with respect to custody of minor children must rest on a preponderance of evidence adduced. Hearsay, gossip, bias, prejudice, trends of hostile neighborhood feeling, and the hopes and fears of social workers are all sources of error and have no place in any court. *Young v. Young* 532

Parties.

1. A court is precluded from rendering a judgment for cancellation of an instrument where all persons whose rights would be affected are not parties to the suit. *Rumbel v. Ress* 839
2. All parties to the instruments sought to be canceled are necessary parties to the suit for cancellation, either as plaintiffs or as defendants, unless it is obvious that the one not joined has no interest whatever in the subject matter of the suit. *Rumbel v. Ress* 839
3. By statute, the district courts of the state have jurisdiction of actions against the state seeking to have a lien or interest on real estate determined or foreclosed. *Rumbel v. Ress* 839
4. Statutes authorizing suits against the State of Nebraska are to be strictly construed, since they are in derogation of the state's sovereignty. *Rumbel v. Ress* 839
5. To make the State of Nebraska a party to an action to reform, set aside, or cancel a deed, it is necessary to comply with statute authorizing suits against the state. A failure to do so when the state is a necessary party warrants a dismissal of the action. *Rumbel v. Ress* 839
6. Suit brought against the State Engineer by name in an action to reform, set aside, or cancel a deed is not sufficient to make the state a party to the action. *Rumbel v. Ress* 839

Partition.

1. When there is an outstanding estate for life vested in another to the whole of the premises of which partition is sought, a remainderman cannot maintain an action in partition over the objection of the holder of such life estate. *Hartman v. Drake* 87
2. A partition action may be maintained where a

tenant in common or a joint tenant in remainder commences it and the life tenant who has the possession or the right of possession defaults or fails to object to partition of the premises. *Hartman v. Drake* 87

3. The purpose of a partition action is to divide a jointly-owned interest in property so that each owner may enjoy and possess in severalty. *Hartman v. Drake* 87

4. The purpose of partition at common law was to obtain a division of the freehold, i.e., a division of the seisin. *Hartman v. Drake* 87

5. A section of statute governing partition proceedings provides that one claiming to be an encumbrancer may, in default of the owner, appear and act as his representative. This provision means that an encumbrancer can assert the rights of an owner of the encumbered property who is in default so as to protect the encumbrancer in his rights. *Hartman v. Drake* 87

Pleading.

1. The essential character of the cause of action and the remedy or relief it seeks, as shown by the allegations of the petition, determine whether a particular action is one at law or in equity. *Long v. Magnolia Petroleum Co.* 410

2. A general demurrer admits all allegations of fact in the pleading to which it is addressed, which are issuable, relevant, material, and well pleaded; but does not admit the pleader's conclusions of law or fact. *Pfeifer v. Ableidinger* 464
Ainsworth v. County of Fillmore 779

3. A general demurrer tests the substantive legal rights of parties upon admitted facts, including proper and reasonable inferences of law and fact which may be drawn from facts which are well pleaded. *Pfeifer v. Ableidinger* 464

4. If the petition states facts which entitle the plaintiff to relief, whether legal or equitable, it is not demurrable upon the ground that it does not state facts sufficient to constitute a cause of action. *Pfeifer v. Ableidinger* 464

5. A party may at any time invoke the language of the pleading of his adversary on which the case is tried, on a particular issue, as rendering certain facts indisputable. In so doing he is neither re-

quired nor permitted to offer the pleading in evidence. *Kuhlmann v. Platte Valley Irr. Dist.* 493
6. An admission made in a pleading on which the trial is had is more than an ordinary admission. It is a judicial admission and constitutes a waiver of all controversy so far as the adverse party desires to take advantage of it and is therefore a limitation of the issues. *Kuhlmann v. Platte Valley Irr. Dist.* 493
7. A judicial admission is a formal act done in the course of judicial proceedings which is a substitute for evidence, thereby waiving or dispensing with the production of evidence by conceding for the purpose of litigation that the subject of the admission is true. *Kuhlmann v. Platte Valley Irr. Dist.* 493
8. A judicial admission is ordinarily final and conclusive upon the party by whom it is made unless the trial court, in the exercise of judicial discretion, timely relieves him from that consequence. *Kuhlmann v. Platte Valley Irr. Dist.* 493
9. Where an allegation in the petition is admitted by the answer, the fact is established for the purpose of the case, and the court cannot disregard it. *Smith v. Hornkohl* 702
10. The absence of an allegation of permanent absence of property subject to taxation from the state rendered the petition of plaintiffs vulnerable to an attack by general demurrer. *Ainsworth v. County of Fillmore* 779
11. A defendant has the right to insist that all of the facts essential to the existence of a cause of action against him in favor of the plaintiff be stated in the petition. *Ainsworth v. County of Fillmore* 779

Principal and Agent.

1. Liability of principal for fraudulent representations of agent stated. *Dargue v. Chaput* 69
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 the relationship is called. *Brasier v. Cribbett* 145
3. Agency is the relationship which results from the manifestation of consent by one person that another person shall act on his behalf and subject to

his control, and consent by the other so to act. *Brasier v. Cribbett* 145

Principal and Surety.

1. Suretyship is a contractual relation resulting from an agreement whereby one person, the surety, engages to be answerable for the debt, default, or miscarriage of another, the principal. *Niklaus v. Phoenix Indemnity Co.* 438
2. The surety's obligation is not an original and direct one for the performance of his own act, but is accessory or collateral to the obligation contracted by the principal. *Niklaus v. Phoenix Indemnity Co.* 438
3. The liability of the surety for the debt of the holder of the obligation is no greater and no less than that of the principal. *Niklaus v. Phoenix Indemnity Co.* 438

Process.

By statute, summons in a suit against the state is authorized to be served upon the Governor and Attorney General, and when a department or institution is involved a summons should also be served upon the chief officer of such department or institution. *Rumbel v. Ress* 839

Public Lands.

The rights of a lessee of school land are determined by the law as it existed at the time the lease was made and the lessee may not be deprived of any substantial right resulting from the lease in his favor by subsequent legislation. *Pfeifer v. Ableidinger* 464

Public Service Commissions.

1. An application by a railroad company to discontinue the operation of specified trains in passenger service, for the reason that no public need exists for the service they afford, is a matter within the scope of the powers of the railway commission. *Chicago, B. & Q. R. R. Co. v. Burgess* 29
   Chicago, R. I. & P. R. R. Co. v. Farmers Union Creamery 32
2. On appeal to the Supreme Court from an order of the railway commission, while acting within its jurisdiction, the question for determination is whether the order is arbitrary and unreasonable.

Chicago, B. & Q. R. R. Co. v. Burgess 29
Chicago, R. I. & P. R. R. Co. v. Farmers Union Creamery 32

3. In determining the necessity for continued operation of motor passenger trains on a branch line of railroad, consideration should be given to the public rather than to individuals. *Chicago, B. & Q. R. R. Co. v. Burgess* 29
Chicago, R. I. & P. R. R. Co. v. Farmers Union Creamery 32
4. A final order of the railway commission, denying a railroad company permission to discontinue motor passenger trains operated at a loss and for the operation of which no public need exists, is unreasonable and arbitrary. *Chicago, B. & Q. R. R. Co. v. Burgess* 29
Chicago, R. I. & P. R. R. Co. v. Farmers Union Creamery 32
5. Where some inconvenience will result from the discontinuance of specified passenger trains operated at a loss, but other existent services can absorb the business handled by such trains, it is unreasonable and arbitrary for the railway commission to deny an application to discontinue such trains. *Chicago, R. I. & P. R. R. Co. v. Farmers Union Creamery* 32
6. The railway commission has the duty to give full, adequate, and fair consideration to the claims of an applicant for rate increases. The applicant has the right to require that this be done. *Skeedee Independent Tel. Co. v. Farm Bureau* 49
7. On appeal to the Supreme Court from an order of the 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. *Skeedee Independent Tel. Co. v. Farm Bureau* 49
8. 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, B. & Q. R. R. Co. v. City of Alliance* 567
9. 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, B. & Q. R. R. Co. v. City of Alliance* 567
10. A final order of the 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. *Chicago, B. & Q. R. R. Co. v. City of Alliance* 567

11. On appeal to the Supreme Court from an order of the 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. *Chicago, B. & Q. R. R. Co. v. City of Alliance* 567

12. On an appeal to the Supreme Court from an order of the railway commission granting a certificate of public convenience and necessity, the only questions to be determined are whether or not the commission acted within the scope of its authority, and whether or not the order complained of is reasonable and not arbitrarily made. *Basin Truck Co. v. R. B. "Dick" Wilson, Inc.* 665

13. Relevant factors for determination of the issue of public convenience and necessity stated. *Basin Truck Co. v. R. B. "Dick" Wilson, Inc.* 665

14. It is not the purpose of the railway commission control to establish an unbridled monopoly by the elimination of fair competition, nor is it intended to create unfair or destructive competition resulting in inadequate service to the public. *Basin Truck Co. v. R. B. "Dick" Wilson, Inc.* 665

15. The issue as to public convenience and necessity is ordinarily one of fact, and where there is evidence to sustain the finding of the railway commission, even if there be evidence in conflict therewith, the Supreme Court cannot say that such finding is unreasonable and arbitrary. *Basin Truck Co. v. R. B. "Dick" Wilson, Inc.* 665

Public Utilities.

1. While the state may regulate with a view to enforcing reasonable rates and charges, it is not the owner of the property of public utility companies and is not clothed with the general power of management incident to ownership. *Skeedee Independent Tel. Co. v. Farm Bureau* 49

2. A public utility is entitled to rates for its service that may normally be expected to yield a fair return upon the reasonable value of the property

that is being used for the public convenience. *Skeedee Independent Tel. Co. v. Farm Bureau* 49

Quieting Title.

Rule stated as to sufficiency of proof to make a prima facie case in action to quiet title. *Blohme v. Blohme* 369

Railroads.

1. An application by a railroad company to discontinue the operation of specified trains in passenger service, for the reason that no public need exists for service they afford, is a matter within the scope of the powers of the railway commission. *Chicago, B. & Q. R. R. Co. v. Burgess* 29
Chicago, R. I. & P. R. R. Co. v. Farmers Union Creamery 32
2. In determining the necessity for continued operation of motor passenger trains on a branch line of railroad, consideration should be given to the public rather than to individuals. *Chicago, B. & Q. R. R. Co. v. Burgess* 29
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5. A railroad company's right-of-way and other real property specially benefited by a public improvement is liable for special assessments in the same manner and upon the same basis as other property owners in a public improvement district. *Chicago & N. W. Ry. Co. v. City of Seward* 123
6. It is the duty of a carrier to seek, and of regulatory agencies to permit, the elimination of those serv-

ices and facilities that are no longer needed or used by the public to any substantial extent. *Chicago, B. & Q. R. R. Co. v. City of Alliance* 567
7. 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, B. & Q. R. R. Co. v. City of Alliance* 567
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Reformation of Instruments.

Equity may reform a contract for the purchase of land so as to include terms upon which the parties definitely agreed and may also require specific performance of the contract as reformed. *Smith v. Hornkohl* 702

Replevin.

1. A verdict favorable to the defendant in a replevin case should conform to the requirements of statute because in the absence of the findings therein required there is no basis for the rendition of a judgment in the case. *Clark v. Oldham* 672
2. If property taken under a writ of replevin is delivered to the plaintiff and the verdict is in favor of defendant, the judgment must be in the alternative for the return of the property or for its value or for the value of the possession of defendant if it cannot be returned and for damages, if any, for illegal detention. *Clark v. Oldham* 672
3. The statutory provision for an alternative judgment in an action of replevin, if the verdict is for the defendant, is mandatory. *Clark v. Oldham* 672
4. A judgment in replevin for the defendant which is not alternative as the statute requires is error without prejudice if the record in the case establishes that a return of the property cannot be had. *Clark v. Oldham* 672
5. If the property involved in a replevin case is delivered to the plaintiff, it will be presumed that it continues in his possession and is capable of being

returned to the defendant until the contrary is established. *Clark v. Oldham* 672
6. The burden of showing that property taken on a writ of replevin and delivered to the plaintiff cannot be returned is on the defendant. *Clark v. Oldham* 672

Schools and School Districts.
1. In a proceeding for reorganization of school districts, concurrence of petitions by the several districts is required. In the absence thereof, the county superintendent of schools is without jurisdiction. *Dovel v. School Dist. No. 23* 548
2. A school district in this state is a creature of statute and possesses no other powers than those granted by the Legislature. *State ex rel. School Dist. v. Board of Equalization* 785
3. The powers of a Class III school district to raise money for schoolhouses, buildings, and additions, are limited to the issuance of bonds and to a special building fund levy. *State ex rel. School Dist. v. Board of Equalization* 785
4. A Class III school district has no authority to transfer unused money in its general fund to the building fund for the construction of school buildings and additions thereto. *State ex rel. School Dist. v. Board of Equalization* 785
5. The levy of a Class III school district should be made for no more than will raise the difference between the amount on hand and to be received from other sources over and above the authorized reserve, and the amount determined as necessary to meet the expenses of the district for the ensuing school year. *State ex rel. School Dist. v. Board of Equalization* 785

Social Security and Public Welfare.
1. The disqualification of an employee exists under the Employment Security Law when the unemployment is due to a stoppage of work because of a labor dispute as set out in the act. *A. Borchman Sons v. Carpenter* 322
2. The provisos of a section of the Employment Security Law set out the conditions under which disqualification for benefits may be removed. *A. Borchman Sons v. Carpenter* 322
3. Where a disqualification for benefits exists, the

burden of proof rests on claimant to establish that he as an individual was not within any of the alternatives of proviso (1) and that he did not belong to a grade or class of workers within any of the alternatives of proviso (2) of specified section of the Employment Security Law. *A. Borchman Sons v. Carpenter* 322

4. A labor dispute that affects the wages, the hours of work, and general conditions of employment causes all employees concerned to be directly interested. *A. Borchman Sons v. Carpenter* 322
5. A labor dispute affecting wages is not a contingent, remote, or speculative interest, but rather must be regarded as directly within the meaning of the statute. *A. Borchman Sons v. Carpenter* 322
6. Disqualification for benefits may apply to members of unions who do not strike and to nonunion employees. *A. Borchman Sons v. Carpenter* 322

Specific Performance.

1. Party seeking specific performance of contract and an accounting has the burden of proof. *Wilkie v. Banse* 138
2. The evidence must be clear, satisfactory, and convincing to sustain a claim of a person to the estate of a deceased person by virtue of an alleged oral contract. *Gerdes v. Omaha Home for Boys* 574
3. Where time is of the essence of a contract for the sale of real estate, a court of equity will refuse to enforce specific performance in favor of a party who is in default, unless strict performance has been waived or excused. *Kobza v. Spath* 623
4. Specific performance of a contract is not generally demandable or awarded as a matter of absolute legal right but is directed to and governed by the sound legal discretion of the court, dependent upon the facts and circumstances of each particular case. It will not be granted where enforcement would be unjust, and may be denied where the party seeking it has failed to perform. *Kobza v. Spath* 623
5. Where failure to convey land under an executory contract of sale is due solely to the refusal of the purchaser to pay or tender the stipulated purchase price according to the terms of his agreement, he is not entitled to specific performance or to damages for breach of contract. *Kobza v. Spath* 623

6. Requirements for obtaining specific performance of a contract for the sale of real estate stated. *Kobza v. Spath* 623
7. Conditions precedent to obtaining specific performance stated. *Smith v. Hornkohl* 702
8. Vendee may have specific performance of contract with abatement of purchase price on account of defect in quality or quantity of estate. *Smith v. Hornkohl* 702
9. Specific performance with abatement will not be enforced where it would be productive of inequity or would have the effect of making a new contract between the parties. *Smith v. Hornkohl* 702
10. Equity may reform a contract for the purchase of land so as to include terms upon which the parties definitely agreed and may also require specific performance of the contract as reformed. *Smith v. Hornkohl* 702

States.

1. The state by entering into a contract abandons its attributes of sovereignty and binds itself, to the extent of its power to contract, substantially as an individual does who becomes a party to a contract. *Pfeifer v. Ableidinger* 464
2. By statute, the district courts of the state have jurisdiction of actions against the state seeking to have a lien or interest on real estate determined or foreclosed. *Rumbel v. Ress* 839
3. By statute, summons in a suit against the state is authorized to be served upon the Governor and Attorney General, and when a department or institution is involved a summons should also be served upon the chief officer of such department or institution. *Rumbel v. Ress* 839
4. Statutes authorizing suits against the State of Nebraska are to be strictly construed, since they are in derogation of the state's sovereignty. *Rumbel v. Ress* 839
5. To make the State of Nebraska a party to an action to reform, set aside, or cancel a deed, it is necessary to comply with statute authorizing suits against the state. A failure to do so when the state is a necessary party warrants a dismissal of the action. *Rumbel v. Ress* 839
6. Suit brought against the State Engineer by name in an action to reform, set aside, or cancel a deed

is not sufficient to make the state a party to the action. *Rumbel v. Ress* 839

Statutes.

1. The fundamental principle of statutory construction is to ascertain the intent of the Legislature, and to discover that intent from the language of the act itself. It is not the court's duty nor within its province to read a meaning into a statute that is not warranted by legislative language. *Chicago & N. W. Ry. Co. v. City of Seward* 123
2. All statutes in pari materia must be taken together and construed as if they were one enactment, and, if possible, effect given to every provision. *Chicago & N. W. Ry. Co. v. City of Seward* 123
3. Statutes should be so construed as to give effect to the intention of the Legislature, and, if a statute is plain and unambiguous, there is no room for construction or interpretation. *Chicago & N. W. Ry. Co. v. City of Seward* 123
4. If a right is created by statute which did not exist at common law, the Legislature may impose a condition thereon. Such condition is an integral part of the statute and must be complied with in the manner therein prescribed. *Clay County v. Bottorf* 262
5. When a statute creates a new right and provides the remedy for its violation, the mode prescribed by the statute must be followed ordinarily to secure the benefits emanating from such statute. *Simpson v. City of Grand Island* 393
6. Every contract is made with reference to and subject to existing law, and every law affecting the contract is read into and becomes a part thereof. This is true between individuals dealing between themselves by contract, express or implied, and likewise true between individuals and the government. *Pfeifer v. Ableidinger* 464
7. Statutes increasing the amounts payable under the Workmen's Compensation Act, enacted subsequent to the time of the injury, are not applicable retroactively to the time of the injury or prospectively from the time of the enactment of the act. *Chadd v. Western Cas. & Sur. Co.* 483
8. The object of specified legislative act was to provide a limitation on the raising of funds for county purposes for a period of 2 years. Its provisions were in addition and supplementary to the statutes

already existing for such purposes. It did not contain the sections amended, nor repeal such sections. It was therefore a violation of the Constitution and void. *Chicago, B. & Q. R. R. Co. v. County of Box Butte* 603

9. Even though a legislative act is an independent act in form and does not purport to amend any prior act, yet if in fact it changes existing legislation and is amendatory in effect, it is within constitutional prohibition. *Chicago, B. & Q. R. R. Co. v. County of Box Butte* 603

10. It is not within the province of the Supreme Court to deal with the policy of the law, nor to attempt to extend it, even though an extension should be considered desirable; but its duty is to go so far only as to interpret the law as it stands, and determine what the Legislature, at the time of the enactment, intended by it. *Neudeck v. Buettow* 649

Stipulations.

1. A stipulation in writing of attorneys concerning the manner of the trial of the case, approved by and made an order of the court, is binding upon the parties and the court and a judgment rendered in the case contrary to the stipulation is prejudicially erroneous. *Kuhlmann v. Platte Valley Irr. Dist.* 493

2. Stipulations in writing voluntarily entered into between the parties to a cause or their attorneys for the government of their conduct and the control of their rights during the trial or the progress of the cause will generally be respected and enforced by the courts if such stipulations are not contrary to good morals or sound public policy. *Kuhlmann v. Platte Valley Irr. Dist.* 493

3. Courts should enforce a valid stipulation unless good cause is shown for declining to do so, especially where the stipulation has been acted upon and the parties can not be placed in status quo. *Kuhlmann v. Platte Valley Irr. Dist.* 493

Taxation.

1. The legislative power and authority delegated to a city to construct local improvements and levy assessments for payment thereof is to be strictly construed. Every reasonable doubt as to the extent or limitation of such power and authority is resolved

against the city and in favor of the taxpayer. *Chicago & N. W. Ry. Co. v. City of Seward* 123

2. The word intersections as used in statute with reference to paving streets is not limited by the language thereof and therefor includes all types thereof, which would include "T" intersections. *Chicago & N. W. Ry. Co. v. City of Seward* 123

3. The only foundation for a local assessment lies in the special benefits conferred upon the property assessed. *Chicago & N. W. Ry. Co. v. City of Seward* 123

4. When a party attacks a paving assessment for the reason that it is illegal or for an unauthorized purpose, the burden rests on him to prove the invalidity of the assessment, or that it was for an unauthorized purpose. *Chicago & N. W. Ry. Co. v. City of Seward* 123

5. A railroad company's right-of-way and other real property specially benefited by a public improvement is liable for special assessments in the same manner and upon the same basis as other property owners in a public improvement district. *Chicago & N. W. Ry. Co. v. City of Seward* 123

6. The exclusive use of property determines its exempt character from taxation. *Nebraska Conf. Assn. Seventh Day Adventists v. County of Hall* 588

7. Test for determination of exemption from taxation of a religious or educational institution stated. *Nebraska Conf. Assn. Seventh Day Adventists v. County of Hall* 588

8. Any change in the established doctrine of exemption from taxation of an educational, religious, or charitable institution should be accomplished by means other than action of the Supreme Court. *Nebraska Conf. Assn. Seventh Day Adventists v. County of Hall* 588

9. The words "any levy," used in tax statute, mean the levy for each particular fund that a political subdivision is authorized to make, and not the one maximum levy authorized. *Chicago, B. & Q. R. R. Co. v. County of Box Butte* 603

10. General statute providing for listing and assessment of property brought into state after assessment date has no application to the listing and assessment of motor vehicles. *Peterson v. Hancock* 637

11. The levy, assessment, and collection of taxes which are demonstrably void for want of jurisdiction or

authority to impose the same may be enjoined. *Ainsworth v. County of Fillmore* 779

12. The domicile of the owner is the taxable situs assigned to tangibles where an actual situs has not been acquired elsewhere. *Ainsworth v. County of Fillmore* 779

13. The state which is the domicile of the owner of tangibles is the situs of tangible personal property temporarily in another state but not permanently located there. *Ainsworth v. County of Fillmore* 779

14. A fact necessary to entitle the plaintiffs to injunction against the assessment of a tax was permanent absence of the property from the State of Nebraska. *Ainsworth v. County of Fillmore* 779

15. Ordinarily the valuation of a county assessor for tax purposes will be presumed to be correct, and when attacked the burden rests upon the taxpayer to overcome the presumption. *Ainsworth v. County of Fillmore* 779

16. The powers of a Class III school district to raise money for schoolhouses, buildings, and additions are limited to the issuance of bonds and to a special building fund levy. *State ex rel. School Dist. v. Board of Equalization* 785

17. The levy of a Class III school district should be made for no more than will raise the difference between the amount on hand and to be received from other sources over and above the authorized reserve, and the amount determined as necessary to meet the expenses of the district for the ensuing school year. *State ex rel. School Dist. v. Board of Equalization* 785

Tender.

Unless waived or excused, a tender of performance under a contract for the sale of real estate must be upon conditions for which there is a foundation in the contractual relation between the parties. *Kobza v. Spath* 623

Torts.

Where independent tortuous acts of two persons combine to produce an injury indivisible in its nature, either or both tort-feasors may be held for the entire damage, not because each is responsible for the act of the other, but because his own act is

regarded in law as a cause of the injury. *Eden v. Klaas* 354

Trespass.

1. The owner of real estate has the legal right to use and operate it free from repeated acts of trespass. An injunction will be granted to restrain such acts especially where committed under a claim which indicates a continuance of the trespass. *Kuhlmann v. Platte Valley Irr. Dist.* 493
2. Equity looks to the nature of the injury inflicted and the fact of its constant repetition rather than to the magnitude of the damage inflicted as the ground for granting relief. *Kuhlmann v. Platte Valley Irr. Dist.* 493

Trial.

1. The purpose of an instruction is to furnish guidance to the jury in its deliberations and to aid it in arriving at a proper verdict. It should state clearly and concisely the issues of fact and the principles of law which are necessary to enable it to accomplish the purpose desired. *Bodtke v. Bratten* 36
2. Where an instruction assumes to define the whole law of the case, but omits a material element therefrom, it is reversible error although no proper instruction has been requested by the party seeking to take advantage of the defect. *Bodtke v. Bratten* 36
3. An instruction which conflicts with 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. *Bodtke v. Bratten* 36
4. Where a party has produced proof tending to sustain his theory of the case, he is entitled to have such theory submitted to the jury by suitable instructions without qualifying words calculated to mislead the jury. *Bodtke v. Bratten* 36
5. An error in an instruction is not cured by the giving of other instructions, where such error consists, not of an omission of some material fact, but of an affirmative statement by the court which, when considered with the other instructions, tends to confuse the jury. *Bodtke v. Bratten* 36

6. A trial court may not make the success of a party to the case dependent upon a hypothesis foreign to the litigation. Hence an instruction should be clear and concise, and should not go beyond any issue or issues of fact in the case as made by the pleadings of the parties. *Bodtke v. Bratten* 36
7. A litigant is obligated to prepare for the trial of his case and to meet the issues thereof at the trial. If he fails in this respect he cannot be heard to complain. *Grosse v. Grosse* 55
8. The law will not intervene to assist a litigant who has not exercised due diligence to prevent the result of which he complains and which is attributable to his own neglect. *Grosse v. Grosse* 55
9. It is the policy of the law to afford a litigant an opportunity to prosecute or defend his case in court. If he has had this privilege and deliberately or negligently does not avail himself of it he cannot have another or further trial of the case. *Grosse v. Grosse* 55
10. Instructions to a jury should be considered as a whole and if they fairly submit the case that is all the law requires. *Carlson v. Hanson* 96
Bryant v. Greene 520
11. Where a jury renders a special verdict finding the negligence attributable to plaintiff to be more than slight and the negligence attributable to defendant to be less than gross, and the evidence is sufficient to support the verdict, it is the duty of the court to render judgment on the special verdict dismissing the plaintiff's petition. *Carlson v. Hanson* 96
12. A motion by plaintiff for judgment on the pleadings admits facts well pleaded or admitted in the answer in the cause. *State ex rel. Nebraska State Bar Assn. v. Conover* 132
13. If statements contained in the pleadings legally entitle a litigant to judgment in his favor, the court should render judgment in the cause accordingly. *State ex rel. Nebraska State Bar Assn. v. Conover* 132
14. Duty of a judge of district court to give instructions to the jury in writing stated. *Owen, Admr. v. Moore* 226
15. Oral explanation of any instruction is not allowed. The giving of any oral instruction or explanation thereof is reversible error. *Owen, Admr. v. Moore* 226
16. The charge of the trial court to the jury should be

confined to the issues presented by the pleadings and supported by evidence. *Owen, Admr. v. Moore* 226

17. 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. *Owen, Admr. v. Moore* 226

18. The issues of negligence and contributory negligence should be submitted to the jury where there is a conflict in the evidence or where different minds may reasonably draw different conclusions from the evidence. *Owen v. Moore* 239
Cox v. Babington 609

19. Where different minds may draw different conclusions from the evidence in regard to negligence, the question should be submitted to a jury. *Eden v. Klaas* 354

20. In testing the sufficiency of evidence to support a verdict it must be considered in the light most favorable to the successful party, that is, every controverted fact must be resolved in his favor and he should have the benefit of every inference that can reasonably be deduced therefrom. *Eden v. Klaas* 354

21. A trial court is not required to give instructions in the form presented. It is sufficient in that respect if the trial court fairly and correctly instructs the jury on all the issues. *Eden v. Klaas* 354

22. The trial court should refuse a requested instruction that is not applicable to any issue of fact submitted to the jury. *Eden v. Klaas* 354

23. Where a party charged with negligence suffered a complete loss of memory due to injuries sustained in an accident, it is not prejudicial error for the trial court to refuse to instruct that a presumption exists that he was free from negligence where there is evidence tending to establish negligent conduct on his part. *Eden v. Klaas* 354

24. The hearing of a motion to dissolve an attachment is a "trial" of the issues of law or fact or both in an action. *J. R. Watkins Co. v. Sorenson* 364

25. In a case where the facts stated in an affidavit for an attachment are denied by a motion to dissolve, the burden is cast upon plaintiff to sustain his

charges by a preponderance of the evidence. *J. R. Watkins Co. v. Sorenson* 364
26. Negligence is never presumed. The burden of proving negligence is on the party alleging it and merely establishing that an accident happened does not prove it. *Fincham v. Mueller* 376
27. The findings of a court in a law action in which a jury is waived have the effect of a verdict of a jury and will not be disturbed on appeal unless clearly wrong. *Lewis v. Hiskey* 402
28. The purposes of a pretrial conference are to simplify the issues, to amend the pleadings when necessary, and to avoid unnecessary proof of facts at the trial. *Long v. Magnolia Petroleum Co.* 410
29. The participants in a pretrial conference must adhere to the spirit of that procedure and are held to have waived questions not there presented. *Long v. Magnolia Petroleum Co.* 410
30. Modification of a pretrial order may be had at the trial to prevent manifest injustice, but the modification should be by direction and not by indirection. Modification must be attended by a degree of directness and formality such as is appropriate to a court order of such magnitude. *Long v. Magnolia Petroleum Co.* 410
31. The subsequent course of an action is controlled by the agreements made at pretrial conference so long as they remain unmodified. That would be true on appeal. *Long v. Magnolia Petroleum Co.* 410
32. Rule for consideration of motion for directed verdict or for judgment notwithstanding the verdict stated. *Edgar v. Omaha Public Power Dist.* 452
Cox v. Babington 609
33. Where the facts adduced to sustain an issue are such that reasonable minds can draw but one conclusion therefrom, it is the duty of the court to decide the question, as a matter of law, rather than submit it to a jury for determination. *Edgar v. Omaha Public Power Dist.* 452
34. In an equity case, the Supreme Court may give proper consideration to the fact that the trial court made an inspection of the premises. *Kuhlmann v. Platte Valley Irr. Dist.* 493
35. While the trial court need not give its reasons for reaching a decision, the justification of the decision must be one that can be established from the record. *Bryant v. Greene* 520

36. In deciding whether or not there is error in a sentence or phrase of an instruction, it will be considered with the remainder of the charge to the jury. The meaning thereof will be determined not from the sentence or phrase alone but by consideration of all that is said upon the subject. *Bryant v. Greene* 520

37. In every case, before the evidence is submitted to the jury, there is a preliminary question for the court to decide, when properly raised, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed. *Morse v. Gray* 557
Cox v. Babington 609

38. Where there is a reasonable dispute as to what the physical facts show and the conclusions to be drawn therefrom, and when the evidence of the witnesses is in sharp conflict, the credibility of each witness, the probative weight to be given to testimony, and any proper inferences therefrom are questions lying clearly within the sole province of the jury. *Cox v. Babington* 609

39. It is mandatory that the trial court, without request, correctly instruct the jury as to any issue in the case supported by evidence and the failure to do so is generally prejudicial. *Clark v. Oldham* 672

40. If there is evidence which sustains a finding for the litigant who has the burden of proof in an action at law, the trial court may not disregard it and decide the case as a matter of law. *Stanley v. Ebmeier* 716

41. Triers of fact are not compelled to accept as absolute verity every statement of a witness not contradicted by direct evidence. Circumstantial evidence is equally competent with direct testimony. The relative convincing powers of the two classes of evidence are for the determination of the triers of fact. *Marston v. Drobny* 747

42. Evidence not directly contradicted is not necessarily binding on the triers of fact, and may be given no weight where it is inherently improbable, unreasonable, self-contradictory, or inconsistent with facts or circumstances in evidence. *Marston v. Drobny* 747

43. Where contributory negligence is pleaded but there

is no evidence to support such defense, it is prejudicial error to submit that issue to the jury. *Arnold v. Lance* 834

44. A party pleading contributory negligence is not prejudiced by the giving of an instruction thereon where there is no evidence to warrant submission of that issue. *Arnold v. Lance* 834

45. A verdict may be set aside as excessive only when it is so clearly exorbitant as to indicate that it was the result of passion, prejudice, mistake, or some means not apparent in the record, or that it is clear that the jury disregarded the evidence or controlling rules of law. *Arnold v. Lance* 834

Trusts.

1. The burden of proof is upon one seeking to establish the existence of a constructive trust to do so by evidence which is clear, satisfactory, and convincing in character. *Wecker v. Wecker* 19

2. Trusts arising by operation of law are excepted from the operation of the statute of frauds. Resulting and constructive trusts therefore fall within the exception. *Wecker v. Wecker* 19

3. When a person obtains the legal title to an interest in real estate belonging to another by means of fraud, actual or constructive, the law creates a trust in favor of the party upon whom the fraud or imposition has been practiced. A court of equity will enforce such a trust for the benefit of the grantor or those claiming under him. *Wecker v. Wecker* 19

Usury.

1. The plea of usury as a defense is personal to the borrower and his sureties and privies. *Commonwealth Trailer Sales, Inc. v. Bradt* 1

2. As a general rule, in the absence of an intent to defraud, general creditors are not allowed to set up usury exacted from a debtor in order to defeat or reduce liens on the debtor's assets. *Commonwealth Trailer Sales, Inc. v. Bradt* 1

3. The rule as to who, besides the borrower, can avail themselves of the plea of usury includes the heirs, legal representatives, and devisees of the borrower or debtor and those who stand in relation of sureties, guarantors, or accommodation indorsers, with

respect to the tainted obligation. *Commonwealth Trailer Sales, Inc. v. Bradt* 1

4. An automobile dealer may in good faith sell a car on time for a price in excess of the cash price without tainting the transaction with usury, though the difference in prices may exceed lawful interest for a loan. *Nelson v. General Credit Corp.* 770

5. A time sale made in good faith at a price in excess of a cash price, even though the difference exceeds lawful interest for a loan, which price is arrived at by schedules furnished by a finance company which solicits contracts so entered into between a purchaser and a dealer, may not be regarded as being tainted with usury. *Nelson v. General Credit Corp.* 770
Curtis v. Securities Acceptance Corp. 815

6. To constitute a valid contract, the transaction between the buyer and seller must be a completed bona fide time price sale agreement. *Nelson v. General Credit Corp.* 770

7. The rules upholding a bona fide time sale do not apply where it is proved that the transaction was not made in good faith but that it was a scheme and a device pursued to evade the operation against it of the usury statute. *Nelson v. General Credit Corp.* 770
Curtis v. Securities Acceptance Corp. 815

8. Courts will look through the form to the substance of the transaction in order to determine whether there was a bona fide time sale or a loan. *Nelson v. General Credit Corp.* 770

9. A sale must be honestly and in good faith executed by the dealer and purchaser for an agreed credit price in excess of a cash price in order to constitute a bona fide time sale transaction, and if the transaction is in fact a loan for usury, the agreement is unlawful and void. *Nelson v. General Credit Corp.* 770

10. To sustain the validity of a time sale price agreement it must appear that the buyer actually was informed of and had the opportunity to choose between a time sale price and a cash sale price. It is not enough to merely show that the instruments signed evidencing the indebtedness refer to a time price or time differential when, in fact, the buyer was never quoted a time sale price as such. *Nelson v. General Credit Corp.* 770
Curtis v. Securities Acceptance Corp. 815

11. When a void contract is renewed by the giving of a renewal or substituted contract, the invalidity follows into and becomes a part of the latter contract, making it subject to the defense of invalidity to the same extent as was the original obligation. *Nelson v. General Credit Corp.* 770

12. The permissive provisions of the Installment Loan Act apply to licensees, but every inhibitory provision contained therein applies alike to licensees and nonlicensees and the officers and employees of either or both. The violation thereof by such persons in connection with any indebtedness, however acquired by them, renders such indebtedness void and uncollectible. *Curtis v. Securities Acceptance Corp.* 815

13. Since usury is generally accompanied by device, subterfuge, scheme, and circumvention of one kind or another to present the color of legality, it is the duty of the court to examine the substance of the transaction as well as its form. The right to relief will not be denied because parol proof of the usurious character of the transaction contradicts a written instrument. *Curtis v. Securities Acceptance Corp.* 815

14. A dealer in farm implements may in good faith sell same on time for a price in excess of the cash price without tainting the transaction with usury, though the difference in the two prices may exceed lawful interest for a loan. *Curtis v. Securities Acceptance Corp.* 815

15. The usurious character of a transaction is determined as of the time of its inception, and if a contract is usurious in its inception, no subsequent transaction will cure it. When a usurious contract is renewed by the giving of a renewal or substituted contract, the usury follows into and becomes a part of the latter contract, making it subject to the defense of usury to the same extent as was the original obligation. *Curtis v. Securities Acceptance Corp.* 815

16. A borrower coming under the statutes relating to installment loans is not regarded as being in pari delicto but rather as being in vinculus to the lender, to whom he therefore owes no duty in equity. *Curtis v. Securities Acceptance Corp.* 815

Vendor and Purchaser.

1. A vendor is bound to disclose facts known to him and not within reach of a reasonably diligent purchaser. *Dargue v. Chaput* 69
2. In the ordinary contract for the sale of real estate, equity will not regard time as of the essence. It may be made such where so expressly stipulated or an intention that it shall be such is clearly manifested by the agreement as a whole, construed in the light of the surrounding circumstances. *Kobza v. Spath* 623
3. Where time is of the essence of a contract for the sale of real estate, a court of equity will refuse to enforce specific performance in favor of a party who is in default, unless strict performance has been waived or excused. *Kobza v. Spath* 623
4. Where failure to convey land under an executory contract of sale is due solely to the refusal of the purchaser to pay or tender the stipulated purchase price according to the terms of his agreement, he is not entitled to specific performance or to damages for breach of contract. *Kobza v. Spath* 623
5. Vendee may have specific performance of contract with abatement of purchase price on account of defect in quality or quantity of estate. *Smith v. Hornkohl* 702
6. Specific performance with abatement will not be enforced where it would be productive of inequity or would have the effect of making a new contract between the parties. *Smith v. Hornkohl* 702
7. Where parties, with full knowledge of the facts, enter into contract that vendor shall convey premises to purchaser in fee simple free from encumbrance, rule disallowing abatement of purchase price, where purchaser is aware of defect in title, is not applicable in action for specific performance. *Smith v. Hornkohl* 702

Wills.

1. The construction of a will in probate court is for the information and benefit of the executor or administrator only. It adjudicates nothing beyond his rights and liabilities in the execution of his office. *Lutcavish v. Eaton* 268
2. The rights of a residuary legatee to property constituting the residue of an estate which has been settled cannot be determined by filing a claim in the intestate estate of the principal beneficiary

under the will. Where the pleadings of the respective parties disclose adverse and divergent contentions, the court having jurisdiction is the district court. *Lutcavish v. Eaton* 268

3. A patent ambiguity is one which appears upon the face of the instrument. *Dunlap v. Lynn* 342
4. A patent ambiguity in a will must be removed by interpretation according to legal principles and the intention of the testator must be found within the will. *Dunlap v. Lynn* 342
5. The intention of the testator as determined from the will must be given effect if it is not inconsistent with any rule of law. *Dunlap v. Lynn* 342
6. The intention of the testator is that expressed by the language of the will and not an entertained but unexpressed intention. *Dunlap v. Lynn* 342
7. In searching for the intention of the testator the court must examine the entire will, consider each of its provisions, give words their generally accepted literal and grammatical meaning, and indulge the presumption that the testator understood the meaning of the words used. *Dunlap v. Lynn* 342
8. Generally a gift in a will to the heirs of a person will be construed as a gift to such heirs determined as of the time of the death of the testator. *Dunlap v. Lynn* 342
9. The general rule in this regard will yield where it appears that the testator used the word "heirs" in an inaccurate sense to denote a hypothetical and artificial class composed of those who would have become his heirs had their ancestor lived until some then future time. *Dunlap v. Lynn* 342
10. In the absence of anything in a will to the contrary, the presumption is that the ancestor intended that his property should go where the law carries it in the channel of natural descent. *Dunlap v. Lynn* 342
11. The channel of natural descent is recognized by statute directing that where a devisee, being a child or other relation of the testator, dies before the testator, such issue if any surviving the testator take the estate devised to the ancestor unless a different disposition shall be made or directed by the will. *Dunlap v. Lynn* 342
12. There is a presumption that the testator intended to dispose of his entire estate and not to die intestate either as to the whole or any part thereof.

Where a provision of a will is fairly open to more than one construction, a construction resulting in an intestacy as to any part of the estate will not be adopted if, by reasonable construction, it can be avoided. *Dunlap v. Lynn* 342

13. The probate of a will is the proof before the county court that the instrument offered as the last will and testament of a deceased person was signed by the testator as his will and witnessed in the manner required by statute, and that the testator, at the time of its execution, was of sound mind. *Brown v. Applegate* 432

14. The construction of a will is generally for the courts to determine after the instrument has been admitted to probate. *Brown v. Applegate* 432

15. Unless it appears from the will itself, without the necessity of applying rules of construction, that a purported will is completely abortive as a will, it should be admitted to probate. *Brown v. Applegate* 432

16. Ordinarily a probate court is without jurisdiction in determining whether or not a will should be admitted to probate to consider its legal effect. *Brown v. Applegate* 432

17. The part of the rule announced in prior cases providing that a legatee or devisee petitioning for the probate of a will must allege and prove that such legatee or devisee, under the law as well as under the will, is entitled to the legacy or devise, is disapproved. *Brown v. Applegate* 432

18. A probate court may properly construe a will for the purpose of advising an executor or administrator in order to expedite the administration of the estate of the testator. It adjudicates nothing other than the rights and liabilities of the executor or administrator. *Brown v. Applegate* 432

19. The power to construe a will in controversies between an executor or administrator and one claiming adversely to the estate, or between claimants under the will, is in the district court. *Brown v. Applegate* 432

20. The making of a will by which all property of a testator is given to a named beneficiary is not of itself evidence of the existence or part performance of a contract in reference thereto between the testator and the beneficiary. *Gerdes v. Omaha Home for Boys* 574

Witnesses.

1. A witness who testifies as an expert on a subject requiring special knowledge and skill is, in the absence of a special contract, entitled only to the statutory fee. *Hefti v. Hefti* 181
2. A wife is incompetent as a witness against a husband, over objection of the husband, as to a transaction between the husband and wife relating to the acquisition of real estate, which transaction took place during the existence of the marriage relation. *Blohme v. Blohme* 369
3. One who has a direct legal interest in the result of a cause, in which the adverse party is the representative of a deceased person, is not, in certain situations, a competent witness therein. Liability for the costs of the action is such a direct legal interest. *Fincham v. Mueller* 376
4. A direct legal interest in the result of an action disqualifies a witness from testifying to any transaction or conversation with the deceased, whether such interest be great or small. *Fincham v. Mueller* 376
5. The word "transaction," as used in statute excluding testimony against representative of deceased person, embraces every variety of affairs, the subject of negotiations, actions, or contracts between the parties. *Fincham v. Mueller* 376
6. Statute excluding testimony against representative of deceased person makes no distinction between actions based on contract and actions based on tort. In torts, as in contracts, all the parties ordinarily are cognizant of the circumstances attending the tort. And if by reason of death some of them cannot testify, the others should not. That is the policy of the statute. *Fincham v. Mueller* 376
7. A transaction or conversation, within the statute excluding testimony against representative of deceased person, is an action participated in by witness and decedent and to which the decedent could testify of his own personal knowledge, if alive. *Fincham v. Mueller* 376
8. An automobile accident is a "transaction" and the disqualification provided for by statute has application when the factual situation brings it within the scope thereof. *Fincham v. Mueller* 376
9. A party calling a witness vouches for his credibility and is ordinarily bound by any evidence he

gives which is not contradicted or shown to be unreliable by evidence which would justify the trier of facts in arriving at a different conclusion. *Edgar v. Omaha Public Power Dist.* 452

10. A witness, lay or expert, in giving his opinion as to mental competency of grantor to execute an instrument, must have in mind the quality of mental capacity essential to the execution thereof. *Marston v. Drobny* 747

11. Triers of fact have the right to test the credibility of witnesses by their self-interest and to weigh undisputed parol testimony against facts and circumstances in evidence from which a conclusion may properly be drawn that the parol testimony is false. *Marston v. Drobny* 747

12. The value of the opinion of an expert witness is dependent on the facts on which it is predicated. The opinion has no probative force unless the premises upon which it is based are shown to be true. *Marston v. Drobny* 747

13. While it has been declared that the court has no discretion to refuse to enforce the accused's constitutional right to compulsory process, the court may, however, refuse to permit issuance of a subpoena which, it appears, may be an abuse of process, until the court has been informed of what testimony may be expected of the prospective witness. *O'Rourke v. State* 866

14. A court is not required to issue compulsory process for any one whom accused may designate as a witness. The constitutional right to compulsory process requires such process for, and only for, competent, material, and resident witnesses whose expected testimony will be admissible. *O'Rourke v. State* 866

Work and Labor.

Where there is no contract to pay a definite sum for the erection of a building, the amount the builder is entitled to recover for material and labor is their reasonable market value. *Patterson v. Spelts Lumber Co.* 692

Workmen's Compensation.

1. An appeal to the Supreme Court in a workmen's compensation case is considered and determined de novo upon the record. *Snodgrass v. City of Holdrege* 329
Crable v. Great Western Sugar Co. 795

Pittenger v. Safeway Stores, Inc. 858
2. In order to recover, the burden of proof is upon the claimant in a workmen's 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. *Snodgrass v. City of Holdrege* 329
Crable v. Great Western Sugar Co. 795
3. The contract under which service is performed, and the performance thereunder, determine the relationship between the contracting parties. *Snodgrass v. City of Holdrege* 329
4. An independent contractor is generally distinguished from an employee as being an independent workman who contracts to do a particular piece of work for a specific price according to his own method and is not subject to control of his employer except as to the results of the work. *Snodgrass v. City of Holdrege* 329
5. On the issue of whether a workman is an employee as distinguished from an independent contractor, his relationship to his employer should be determined from all the facts and circumstances rather than from any particular feature of the employment or service. *Snodgrass v. City of Holdrege* 329
6. The act of the employer in giving such directions as may be found necessary to secure compliance with the contract according to the plan adopted by him and agreed upon between the parties is not necessarily inconsistent with the existence of the status of his workman as an independent contractor. *Snodgrass v. City of Holdrege* 329
7. The incapacity into which the courts may inquire and use as a basis for the modification of an award is that of increase or decrease of incapacity which is due solely and only to that violence to the physical structure of plaintiff's body which resulted from his accident, and which increase or decrease has occurred since the award was rendered. *Chadd v. Western Cas. & Sur. Co.* 483
8. Before recovery may be had for an increase of incapacity due solely to the injury, the plaintiff must prove by a preponderance of the evidence that his incapacity has been increased; that is, that there exists a material and substantial change for the worse in the plaintiff's condition. *Chadd v. Western Cas. & Sur. Co.* 483

9. 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. *Chadd v. Western Cas. & Sur. Co.* 483
10. Where any increase or decrease in incapacity of the claimant is not caused by the injury received in an accident, the basis of a previous award, modification of the award is not justified. *Chadd v. Western Cas. & Sur. Co.* 483
11. All calculations to be made under the provisions of the Workmen's Compensation Act have reference to wages, percentages, and results as of the time of the injury. *Chadd v. Western Cas. & Sur. Co.* 483
12. Statutes increasing the amounts payable under the Workmen's Compensation Act, enacted subsequent to the time of the injury, are not applicable retroactively to the time of the injury or prospectively from the time of the enactment of the act. *Chadd v. Western Cas. & Sur. Co.* 483
13. Where a defendant is not liable for a physical disability under the Workmen's Compensation act, he is not liable for medical fees based on that specific liability. *Chadd v. Western Cas. & Sur. Co.* 483
14. The right of either party to a workmen's compensation proceeding to waive a rehearing and appeal to the district court is an optional right and does not negative the right of the opposing party to a rehearing before the workmen's compensation court en banc. *Light v. Nebraska Workmen's Compensation Court* 540
15. The right of either party to a workmen's compensation proceeding before one judge to secure a rehearing by the compensation court and a determination by a majority of the members thereof is paramount to and exclusive of the right of appeal from the original decision. *Light v. Nebraska Workmen's Compensation Court* 540
16. It is the failure to make application for rehearing in the manner provided by statute that defeats the right to a rehearing. *Light v. Nebraska Workmen's Compensation Court* 540
17. The workmen's compensation act confers power on

the workmen's compensation court to correct ambiguity or clerical error on its own motion within 10 days after order or award. *Light v. Nebraska Workmen's Compensation Court* 540

18. 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. *Crable v. Great Western Sugar Co.* 795
Pittenger v. Safeway Stores, Inc. 858

19. An accident within the Workmen's Compensation Act is an unexpected and unforeseen event happening suddenly and violently and producing at the time objective symptoms of injury. *Crable v. Great Western Sugar Co.* 795
Pittenger v. Safeway Stores, Inc. 858

20. An award of compensation under the Workmen's Compensation Act may not be based on possibilities, probabilities, or speculative evidence. *Crable v. Great Western Sugar Co.* 795

21. The rule of liberal construction of the Workmen's Compensation Act applies to the law, not to the evidence offered to support a claim by virtue of the law. The rule does not dispense with the necessity that claimant shall prove his right to compensation nor does it permit a court to award compensation where the requisite proof is lacking. *Crable v. Great Western Sugar Co.* 795

22. When an employee meets with an accident which accelerates or aggravates an existing impairment to a state of disability that is not the result of a natural progression of the impairment, there may be an award of compensation therefor. *Crable v. Great Western Sugar Co.* 795

23. For workmen's compensation purposes, total disability does not mean a state of absolute helplessness, but means disablement of an employee to earn wages in the same kind of work, or work of a similar nature, that he was trained for, or accustomed to perform, or any other kind of work which a person of his mentality and attainments could do. *Crable v. Great Western Sugar Co.* 795

24. The test of when an employee is totally disabled stated. *Crable v. Great Western Sugar Co* 795

25. In order to recover, an employee claiming the benefit of workmen's compensation must show by the greater weight of the evidence all the essential

elements of an accident as that word is defined in the act. *Pittenger v. Safeway Stores, Inc.* 858

26. Symptoms of pain and anguish such as weakness or expressions of pain involuntarily made or any other symptoms indicating a deleterious change in bodily condition may constitute objective symptoms within the requirements of the Workmen's Compensation Act. *Pittenger v. Safeway Stores, Inc.* 858

27. A recovery by an employee against an employer by virtue of the Workmen's Compensation Act may include the reasonable expenses incident to and necessary for obtaining medical and hospital services. *Pittenger v. Safeway Stores, Inc.* 858