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ANGELINE MIMICK, APPELLEE, V. BEATRICE FOODS COMPANY, A CORPORATION, APPELLANT, IMPLEADED WITH THE TRAVELERS INSURANCE COMPANY, A CORPORATION, ET AL., APPELLEES.

93 N. W. 2d 627

Filed December 19, 1958. No. 34466.

1. **New Trial: Appeal and Error.** An appeal from an order of the district court granting or denying a motion for a judgment notwithstanding the verdict requires this court to consider the entire record and to determine whether it does or does not justify the action of the trial court.
2. **Trial.** 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.
3. **Negligence: Trial.** The burden of proving a cause of action is not sustained by evidence from which negligence can only be surmised or conjectured.
4. **Bailments.** The term "bailment" is comprehensively defined as a delivery of personalty for some particular purpose, or on mere deposit, upon a contract, express or implied, that after the purpose has been fulfilled it shall be redelivered to the person who delivered it or otherwise dealt with according to his directions, or kept until he reclaims it, as the case may be.
5. ———. The general rule is that a bailor is not liable to third persons for their injuries resulting from the bailee's negligent use of the property bailed.
6. ———. In the absence of special agreement, a bailor is under no duty or obligation to inspect or repair the property bailed while it is in possession of the bailee, and if there is a contract to repair upon notice that repairs are necessary, a duty to repair does not arise until notice is given.

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

Chambers, Holland, Dudgeon & Hastings and *Byron Reed,* for appellant.

Cleo F. Robak and *Wagner, Wagner & Conrad,* for appellee Mimick.

Walter, Albert & Leininger and *Frederick M. Deutsch,* for appellees The Travelers Ins. Co. et al.

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

CHAPPELL, J.

Plaintiff, Angeline Mimick, brought this action against defendant, Beatrice Foods Company, and others, seeking recovery of damages for personal injuries received when a milk dispenser, owned by and alleged to have been negligently installed and maintained on top of a bun warmer by defendant Beatrice Foods Company, fell therefrom down upon plaintiff while she was an employee of defendant, Lewis Frieze, in a cafe owned and operated by him. Lewis Frieze was made defendant as required by the workmen's compensation law.

For answer, Beatrice Foods Company, hereinafter called defendant, denied generally and specifically denied that it installed or maintained said milk dispenser. Defendant then admitted that plaintiff was employed by Frieze as alleged, and admitted that defendant owned the dispenser which it had delivered to the premises of Frieze, but alleged that the dispenser was in the exclusive custody and control of and was installed and maintained by Frieze or Pegler & Company, or both of them; and that if same were negligently installed and maintained, it was due to their negligence. Plaintiff's reply was a general denial.

A jury trial was had, and at conclusion of all the evidence defendant moved for a directed verdict or dismissal of plaintiff's action because the evidence was insufficient to sustain a cause of action in favor of plaintiff, and because there was want of any proof that defendant was negligent in any respect as alleged by plaintiff. However, defendant's motion was overruled, and upon submission to a jury, it returned a verdict awarding plaintiff damages against defendant, and judgment was rendered accordingly. Thereafter, defendant's motion for new trial or in the alternative for judgment notwithstanding the verdict and judgment was over-

ruled, and defendant, Beatrice Foods Company, appealed. In doing so, defendant assigned: (1) That the verdict and judgment were contrary to the evidence and law; and (2) that the trial court erred in overruling defendant's motion for directed verdict or dismissal, and in overruling defendant's motion for judgment notwithstanding the verdict and judgment. We sustain the assignments.

In Edgar v. Omaha Public Power Dist., 166 Neb. 452, 89 N. W. 2d 238, we recently reaffirmed that: "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.

"An appeal from an order of the district court granting (or denying) a motion for a judgment notwithstanding the verdict requires this court to consider the entire record and to determine whether it does or does not justify the action of the trial court.

"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."

We also reaffirmed in Wolcott v. Drake, 162 Neb. 56, 75 N. W. 2d 107, that: "The burden of proving negligence is on the party alleging it.

"Negligence is not presumed; the mere happening of an accident does not prove negligence.

"The burden of proving a cause of action is not sustained by evidence from which negligence can only be surmised or conjectured."

When considered in such light, the pertinent evidence as summarized, discloses the following: Frieze had

operated a new highway cafe at Columbus since March 9, 1955. His floor plans therefor had been provided by Pegler & Company, from whom he had purchased all his fixtures and equipment except a milk dispenser. When that company installed such fixtures and equipment, an electrically-heated bun warmer was purchased from it by Frieze and placed on the floor against the kitchen wall, according to plans. The bun warmer was a large, square, stainless steel cabinet, about 3 feet high, which, having adjustable legs, stood on the floor and contained three drawers which operated on some kind of bearings, but a flick, or quick opening or closing thereof, would cause some jar or vibration of the cabinet.

Frieze had made arrangements with defendant's general manager to buy, pay for, and use its dairy products, but defendant owned and agreed to deliver and furnish Frieze a milk dispenser for use in his cafe. Such dispenser was a large stainless steel cabinet which stood on four stainless steel cone-shaped legs about 1½ inches high. Such legs had plastic buttons about the size of a nickel on the bottoms thereof. The dispenser had room for two cans of milk and was equipped with faucets from which milk could be and was drawn by employees of Frieze and served to customers of his cafe. The cans of milk were placed in the dispenser daily except Sundays by an employee of defendant after the empty cans had been removed. The dispenser had been delivered to the cafe by employees of defendant during the time that other fixtures and equipment were being delivered and installed by Pegler & Company.

At the time the dispenser was delivered by defendant's employees, they asked Frieze where to locate it, whereupon an argument arose with regard thereto between Frieze and the representative of Pegler & Company. In that connection, Pegler & Company wanted the dispenser to be installed on top of the bun warmer as a perfect location, but Frieze did not agree thereto at that time, so, as directed, defendant's employees simply

placed the dispenser on the kitchen floor and left. However, subsequently the dispenser was placed on top of the bun warmer and against the kitchen wall by someone. The record does not show who so located it, but it is clear that no employee of defendant ever did so, and that Frieze and his employees knew at all times that it had been so placed. In that connection, milk dispensers in other cafes usually were located on top of tables or other comparable equipment.

When defendant's employee first delivered milk to the cafe, he found the dispenser located on the stainless steel top of the bun warmer, and thereafter no one ever noticed that there was anything unusual or wrong with its placement, although it was the daily duty of employees of Frieze not only to repeatedly take buns from the bun warmer but also to draw milk from the dispenser faucets, which were located about waist high. Employees of Frieze were also required to keep the dispenser clean and clean up around it. As a matter of fact, Frieze knew that the dispenser so placed was not fastened to the kitchen wall, and no average person would have noticed such fact or the fact that the bun warmer sloped slightly forward. It took careful examination by a person who was experienced with such installations to discover the latter fact. There were no defects in the dispenser itself, or in its location which would render it dangerous for the purpose for which it was furnished, and it was generally in the exclusive custody, possession, and control of Frieze, his agents and employees.

In that situation, plaintiff began her employment by Frieze as a waitress on March 9, 1955, although she had worked in his cafe 3 or 4 days previously while the fixtures and equipment were being installed. From March 9, 1955, until Sunday, April 17, 1955, plaintiff had worked as a waitress, and upon many occasions each day during that period she and other employees of Frieze as well had taken buns from the bun warmer

drawers and drawn milk from the dispenser to serve customers of the cafe. On April 17, 1955, during the noon hour, plaintiff opened a bun warmer drawer, took out some buns, then pushed the drawer shut, and thereafter, as she turned to leave, the dispenser slid off the bun warmer, knocked plaintiff down, and fell upon her. In that connection, when plaintiff was first examined by her physician at a hospital in Columbus, she told him that: "* * * she had been working at Louie's Cafe and she opened the door of a bun-warmer to take some rolls out, and, as she opened the door, there was enough apparent vibration or movement that the milk-dispenser, which was standing on the top of this bun-warmer, fell off of the bun-warmer onto the floor; and she attempted to get away from the falling object, but it struck her on the outer aspect of her lower right leg. She also fell with some force onto the floor of the room * * *." As a result she was injured, and this action against defendants followed.

In this court plaintiff argued that since defendant brought the dispenser to the cafe, it must have been negligently placed on the bun warmer by its agents or by agents of Frieze, the owner of the cafe; that the legal relation of defendant and Frieze was principal and factor; and that since defendant was principal and Frieze, as a factor, was defendant's agent, it became immaterial which one of them so placed the dispenser on the bun warmer. In that connection, there is no competent evidence whatever that any agent or employee of defendant ever placed the dispenser on the bun warmer. Rather, the only logical inference is that Frieze or Pegler & Company did so. Also, under the circumstances in this case, no relation of principal and factor ever existed between defendant and Frieze. In that respect, authorities relied upon by plaintiff are entirely distinguishable and not controlling here. To discuss them at length would serve no purpose.

Rather, as argued by defendant, this case involves a

typical bailment for mutual benefit. In other words, defendant owned the dispenser and delivered it to Frieze for his particular purpose to use in the sale of milk purchased from defendant. In that situation, defendant was simply a bailor of the dispenser, and Frieze was bailee thereof.

As stated in 8 C. J. S., Bailments, § 1, p. 222, citing numerous authorities: "The term 'bailment' has been variously defined. It may be comprehensively defined as a delivery of personalty for some particular purpose, or on mere deposit, upon a contract, express or implied, that after the purpose has been fulfilled it shall be redelivered to the person who delivered it, or otherwise dealt with according to his directions, or kept until he reclaims it, as the case may be."

As held in Yost v. State, 149 Neb. 584, 31 N. W. 2d 538: "The term bailment may be said to import the delivery of personal property by one person to another in trust for a specific purpose, with a contract, express or implied, that the trust shall be faithfully executed and the property returned or duly accounted for when the special purpose is accomplished."

In Nagaki v. Stockfleth, 141 Neb. 676, 4 N. W. 2d 766, we adopted the general rule that: " 'When a bailment is reciprocally beneficial to both parties, the law requires ordinary diligence on the part of the bailee, and makes him responsible for negligence.' Mattern v. McCarthy, 73 Neb. 228, 102 N. W. 468."

The universal general rule is that a bailor is not liable to third persons for their injuries resulting from the bailee's negligent use of the property bailed. See McWilliams v. Griffin, 132 Neb. 753, 273 N. W. 209, 110 A. L. R. 1039. See, also, 8 C. J. S., Bailments, § 40, p. 318, citing numerous authorities, which not only adhere to the foregoing general rule but point out exceptions thereto, which have no application here and require no repetition. Such section also, at page 320, states, citing authorities: "In the absence of special

agreement, the lender is under no duty or obligation to inspect or repair the property while it is in the possession of the borrower, and if there is a contract to repair upon notice that repairs are necessary, a duty to repair does not arise until notice is given." Herein we find no evidence of any such agreement. Rather, the only inference is that Frieze had the right to exclusive custody, possession, and control of the milk dispenser for the purpose for which it was furnished by defendant, without any obligation of defendant to install, inspect, maintain, or repair the property.

We find no competent evidence in the record from which it could be reasonably concluded that the milk dispenser involved was under the control of defendant or that same was negligently installed or maintained by it in any manner which proximately caused or contributed to plaintiff's injuries.

For reasons heretofore stated, we conclude that the trial court erred in overruling defendant's motion for directed verdict or dismissal at conclusion of all the evidence, and erred in overruling defendant's motion for judgment notwithstanding the verdict. Therefore, the judgment should be and hereby is reversed and the cause is remanded with directions to sustain defendant's motion for judgment notwithstanding the verdict and to render judgment for defendant, Beatrice Foods Company. All costs are taxed to plaintiff.

REVERSED AND REMANDED.

WENKE, J., participating on briefs.

CHARLES R. STARKWEATHER, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.

73 N. W. 2d 619

Filed December 19, 1958. No. 34498.

1. **Homicide.** To make the act of killing a person murder in the first degree, it is necessary that the killing be unlawful and

malicious and also that it be purposely done with deliberate and premeditated malice. When there is evidence of those facts, the jury's verdict in finding the act to be murder in the first degree is conclusive, in the absence of prejudicial error otherwise.

2. **Criminal Law: Trial.** 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.
3. ———: ———. It is not error to refuse instructions requested by defendant where the court on its own motion has given the substance of such requests. The trial court is not required to instruct in the exact language of a requested instruction. If the point is covered by an instruction couched in proper terms, it meets all the requirements of the law.
4. ———: ———. Ordinarily, error cannot be predicated on an instruction given at the request of the complaining party.
5. **Homicide.** When once guilt of murder in the first degree is determined the primary duty to fix the penalty rests upon the jury.

ERROR to the district court for Lancaster County: HARRY A. SPENCER, JUDGE. *Affirmed.*

T. Clement Gaughan and *William F. Matschullat,* for plaintiff in error.

Clarence S. Beck, Attorney General, and *Cecil S. Brubaker,* for defendant in error.

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

SIMMONS, C. J.

By information, the plaintiff in error was charged in one count with unlawfully, feloniously, purposely, and of his own deliberate and premeditated malice killing Robert William Jensen; and in a second count with unlawfully, feloniously, and purposely in the perpetration of a robbery killing Robert William Jensen.

We herein refer to the plaintiff in error as the defendant, and to the defendant in error as the State.

Defendant pleaded not guilty, and not guilty by reason of insanity to both counts.

Trial was had to a jury. The jury found the defendant guilty of murder in the first degree on counts I and II and fixed the penalty at death.

A motion for a new trial was made and overruled. Sentence was pronounced in accord with the verdict.

The defendant's assignments of error here are:

"1. The Court erred in refusing to give Instruction No. 6 requested by the defendant and by restricting the jury's consideration to the defendant's feebleness of mind or will in determining whether the homicide had been committed with a deliberate and premeditated design to kill, thus preventing the jury from considering whether the defendant was suffering from such insanity or impairment of the mind that would, if present, eliminate capital punishment from the sentence for the perpetration of a homicide.

"2. The Court erred in refusing to give Instruction No. 10 requested by the defendant.

"3. The verdict is contrary to the evidence."

We affirm the judgment of the trial court.

The third assignment of error is that the verdict is contrary to the evidence. We determine that assignment first. The contention is that the evidence is insufficient to establish the existence of deliberation and premeditation as essential elements to the crime of murder in the first degree. Here the defendant would have us reject all of the State's evidence and material parts of evidence of defendant's witnesses going to that issue.

As the case developed, it became evident that the ultimate issue of fact for the jury to decide was the mental competency of the defendant in the above respects. The assignment of error goes to those questions.

Defendant was 19 years old. He had been keeping company for about a year and a half with a 14-year-old girl named Caril Fugate. It becomes necessary to

mention her from time to time in this recital. We refer to her as Caril.

After the commission of the offenses here involved, defendant gave the State a series of signed confessions. They are in evidence, in large part offered by the defendant. The State did not introduce evidence as to the other killings hereinafter recited. That evidence came from the lips of the defendant and from his confessions which he offered. The recital of facts here contained comes from those sources, reinforced by circumstances and evidence otherwise.

We begin at the home of Caril. She lived in Lincoln with her stepfather, mother, and baby half sister. On the afternoon of January 21, 1958, defendant there killed the stepfather, mother, and half sister. The evidence does not preclude a finding of deliberation and premeditation in the killing of the stepfather. Defendant wrapped the bodies in paper, rugs, and blankets, each separately. He deposited the body of the mother and baby in an unused outhouse, and the stepfather's body in a chicken house.

Whether Caril was present then is denied in one confession and affirmed in another. Defendant and Caril lived in the house until January 27, 1958. Relatives and others repeatedly came to the house seeking information about defendant and the other three persons. Caril, using excuses, turned them away.

On the morning of January 27, 1958, some of them left with a statement that they were coming back with the police. Defendant and Caril then decided to flee, and did so shortly before noon in defendant's car. Among other things, defendant took with him a .410 gauge shotgun belonging to the stepfather, a revolver (for which he had no ammunition), and a hunting knife. Before leaving defendant had sawed off a part of the shotgun barrel to cause it to "spread." They changed a tire and bought gasoline in Lincoln. They drove south about 8 miles to a filling station on the

highway where they bought gasoline, had a tire repaired, and bought food and ammunition for the shotgun and a .22 gauge rifle, although defendant did not then have such a rifle. They also got Kansas, Missouri, and Nebraska road maps. Defendant then drove south, east, north, and then east through the town of Bennet to a farm where a Mr. Meyer lived alone. Defendant had hunted there. Near the Meyer home was an abandoned schoolhouse site. All buildings had been torn down. A cave remained with the door torn from its hinges. During the afternoon defendant and Caril visited the cave near the Meyer house. Later defendant shot and killed Mr. Meyer and robbed him of money, some articles of clothing, and a .22 gauge rifle. They again visited the cave.

Defendant then again drove to the filling station south of Lincoln where he bought more ammunition, secured more maps, returned to Bennet, and went back to the Meyer farm. He became fearful that some one had been there and discovered that crime. They then started away from the Meyer farm and schoolhouse vicinity. Defendant's car became stuck in the snow and finally was abandoned.

Carrying the guns, the knife, and other articles defendant and Caril then started walking along the road. They met up with a young man named Robert Jensen and a Miss King from Bennet who were riding in an automobile. Defendant asked for "a lift into Bennet," and Jensen offered them a ride. Defendant stated that Jensen recognized him, basing it upon questions asked by Jensen.

Defendant and Caril were in the rear seat, each with one of the guns in their hands. Defendant ordered Jensen to drive to Bennet, which he did. He then ordered him to drive toward Lincoln, which he did. After going a few miles defendant ordered Jensen to turn around and drive back to the schoolhouse cave location, which Jensen did. During this drive defendant

robbed Jensen of his money and told him he was going to take the Jensen car.

When they got to the cave site, Jensen and Miss King were ordered out of the car and told to go into the cave. Jensen started down, turned, and was coming out when defendant shot and killed him. The bullets all entered the right side of the head near the ear. Jensen fell head forward into the cave, his body resting in part on the steps. Miss King screamed. Defendant then shot her and shoved her body into the cave.

Defendant remained there for some time. Before leaving he placed the door over the opening to the cave and covered it otherwise with boards and rubbish.

Defendant and Caril left in Jensen's car. They drove toward Hastings, then returned to Lincoln where they slept the remaining early morning hours in the car. On the early forenoon defendant drove into the Ward home yard and gained admission to the home. Mrs. Ward and a maid, Miss Fencil, were present. Defendant took control of the house. Caril came in later. Shortly after noon defendant said Mrs. Ward tried to shoot him and fled. He threw the knife at her, where it struck her in the back. She died from that wound. Mr. Ward returned home. Defendant shot and killed him. Later Miss Fencil was tied up on a bed. She was also killed. Defendant does not admit that killing. Defendant then left the Jensen car in the Ward garage. He took food, clothing, and money from the Ward home. Defendant undertook to dye his hair black by the use of shoe polish.

In the Ward car defendant and Caril then drove from Lincoln to Grand Island to Alliance and on into Wyoming. About noon near the city of Douglas, Wyoming, defendant sought to secure a different car. He shot and killed the owner. Officers appeared. Defendant, alone, fled in the Ward car and shortly thereafter was captured.

From this recital it is quite apparent that the jury

could properly find that defendant intended to rob Jensen and did rob him. It is also quite apparent that the jury could properly find that beginning at least at the time Jensen was ordered to turn and drive back toward the cave, defendant deliberated and premeditated the murder which occurred there. The jury could properly find that what the defendant did do, he could do.

Defendant offered evidence, from many sources, that he was constantly in trouble in school and in fights with his classmates, and that he was quick tempered. Defendant's witnesses classed his intelligence at a dull normal. He is small of size and is nearsighted, a defect that does not appear to have been discovered until the last few years. Glasses were fitted and the handicap largely corrected. Defendant left school at the end of the ninth grade, and worked as a common laborer with apparent ability to retain jobs that he was suited to do. He liked guns, knives, and cars. He owned or had access to guns. He owned the knife involved, and had owned two or more cars.

Defendant offered expert witnesses in psychology and psychiatry. These witnesses testified after they had visited with defendant at length and had knowledge of his confessions and other available information about him. The effect of the testimony of one witness was that defendant was not able to premeditate any of these crimes; that he was not capable of premeditating or deliberating such an act; that he was not mentally capable of premeditating a robbery; that defendant had the mental ability to plan to avoid detection and to saw off the shotgun barrel; that he did not have the capacity to plan a robbery so far as premeditation was concerned; that he had the mental capacity to execute a robbery and to purchase ammunition and gasoline, to pick up road maps, and to get tires repaired; and that he had no capacity for normal control.

A psychiatrist, testifying for the defense, concluded

that defendant did not have the mental capacity to deliberate and premeditate the killing of Jensen; that he did not, could not, premeditate the robbery; that he was mentally capable of forming the intent to commit the robbery; and that right and wrong does not mean to the defendant what it does to an ordinary person as applied to murder. His major finding was that defendant did not think, act, or feel like other people, and there was a possibility that there was something wrong in his brain.

Another psychiatrist testified that defendant was not of a normally healthy mind; that he had a diseased or sick mind; that his mind went directly from impulse to action without any chance for deliberation or hesitation; that he was not capable of premeditation or deliberation; that "in the sense of if we think of premeditation and deliberation as considering an act, its possible consequences, various alternatives, that he was not capable of that; in the sense of proceeding from an impulse to an action, in which the action is broken down into separate stages, it is possible that he did that. * * * I believe when he decides to do something, he goes ahead and does it. He may plan it; it may be an act which takes a certain amount of time, requires certain stages. In taking his car, he has to think, 'Well, where can we stop and let them off?' This is part of the planning. I don't think he thinks of all these things at once, but as he goes along he thinks of what he has to do next in order to accomplish his intent"; that defendant calculated "to avoid detection, to escape, and so on"; and that he formed an intent to rob Jensen, acted on it, and executed it.

The State in rebuttal offered the evidence of three witnesses. A clinical psychologist testified as to his examination of the defendant; that he was of average intelligence, was emotionally immature, and was legally sane.

A neuropsychiatrist testified as to his examination

of the defendant; that he was legally sane; that he knew the difference between right and wrong and the nature and quality of his acts; that defendant had a personality disorder which is "a type of personality that is other than an entirely normal adult personality, or even different from a person, say, nineteen years of age. It has certain variations from what is accepted as the range of standard behavior"; that he had no mental disease or defective mind; and that he was not a fit subject for commitment to a mental institution.

Another psychiatrist testified that psychiatry meant the diagnosis and treatment of nervous and mental diseases. He testified as to his examination of defendant; that he found no evidence of brain disease; that defendant was not suffering from any type of psychotic disorder; that his diagnosis of defendant was that he "had a personality disorder characterized by emotional instability, considerable emotional insecurity, and impulsiveness; that this would fit into a category under the antisocial type of personality disorder; that he was legally sane"; that he did not find any indication of brain damage; that defendant knew the difference between right and wrong and had the mental ability to know the nature and quality of his acts; that he had normal intelligence; that he was medically sane; that he had the mental capacity to form the intent to rob Jensen and to carry out that intent; and that he had the mental capacity to deliberate and premeditate the intent to murder Jensen and to carry out that intention.

All of these witnesses were examined and cross-examined as to their qualifications, their information of the offenses, their knowledge of the defendant, and the facts and scientific basis for their conclusions. No question of foundation is presented. We can here only set out the broad area of the choice that was put to the jury. It is patent that its verdict is amply sustained by the evidence.

The long established and often followed rules are:

"And in addition to being unlawful and malicious, to make the act of killing murder in the first degree, it is only necessary to establish that it was done with deliberation and premeditation, of which there being some evidence before the jury, their verdict fixing that as the degree of criminality is conclusive on that point." Schlencker v. State, 9 Neb. 241, 1 N. W. 857. (This case was reversed and remanded for reasons not involved in the above rule of law. See 9 Neb. 300, 2 N. W. 710. However, it has been cited as authority for the above-quoted rule in Bartlett v. State, 115 Neb. 148, 211 N. W. 994.)

"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." Sedlacek v. State, 166 Neb. 736, 90 N. W. 2d 340.

Defendant's requested instruction No. 6 is as follows: "You are instructed that although you find, beyond a reasonable doubt, that defendant was capable of knowing the nature and quality of his act and of distinguishing between right and wrong with respect to the killing of Robert William Jensen, nevertheless, if you should further find that at the time of the killing of said Robert William Jensen by the defendant, said defendant did not then have the mental capacity or ability to deliberate and premeditate said killing, said defendant, in that event, would not be guilty of murder in the first degree." Defendant considers this requested instruction in relationship to an instruction given to which we shall refer presently.

The court instructed the jury that "the burden is upon the State to prove beyond a reasonable doubt each and every one of the elements necessary for a conviction, together with the defendant's sanity."

The court further instructed the jury that it could

find the defendant guilty, under either or both counts, of murder in the first degree, murder in the second degree, manslaughter, not guilty by reason of insanity, or not guilty. The court by its instructions defined terms used. It instructed the jury that: "To constitute murder in the first degree under this first count there must have been an unlawful killing, done purposely and with deliberate and premeditated malice."

The court then instructed the jury that it should first determine whether or not defendant killed Jensen in Lancaster County on or about January 27, 1958. If it found that he did, it should then consider whether defendant was not insane at the time of the killing: "If you are not satisfied beyond a reasonable doubt that the defendant was then not insane, or, in other words, if you have a reasonable doubt as to whether the defendant possessed the necessary mental capacity, as hereafter explained, then your verdict must be not guilty by reason of insanity, * * *. If, however, you are satisfied by the evidence beyond a reasonable doubt of the truth of all four of the above material elements, you will then proceed to determine whether the defendant is guilty of murder in the first degree."

The court then again instructed that the material element of murder in the first degree was that the defendant killed Jensen "purposely and of his deliberate and premeditated malice. * * * If, however, the evidence does not satisfy you beyond a reasonable doubt of the truth of the above material element of this count, then your verdict as to this count should be not guilty."

As it indicated it would do "hereafter" in the instructions, the court then instructed the jury that: "* * * a person may be suffering from some form of insanity or impairment of the mind, yet if he has the mental capacity to understand what he is doing and to know it is wrong and deserves punishment, he is criminally responsible for his acts. In this case if, from all of the evidence, you are convinced beyond a reasonable doubt

that the defendant committed the crime charged, or one of the lesser degrees, and at the time of the commission of such crime was of sufficient mental capacity to understand what he was doing, and was of such mental capacity as to know that such act was wrong and deserved punishment, the defendant would be legally responsible for his acts and you should return a verdict of guilty although you might find that at the time he was suffering from some insanity or impairment of the mind."

The defendant makes no contention of error in the above instructions. It is patent that the trial court related the subject of mental capacity to the element of deliberation and premeditation. No other rational construction can be placed on the ordered sequence of the instructions in that regard.

The established rule is: "It is not error to refuse instructions requested by defendant where the court on its own motion has given the substance of such requests. The trial court is not required to instruct in the exact language of a requested instruction. If the point is covered by an instruction couched in proper terms, it meets all the requirements of the law." Grandsinger v. State, 161 Neb. 419, 73 N. W. 2d 632.

The trial court did not err in refusing to give the requested instruction.

We have included herein quotations of only a part of the trial court's instructions as to mental capacity. With one exception the instructions are not assigned as error.

Within the instruction and near its close, the trial court included this sentence: "In this respect, feebleness of the mind or will, if such you find, even though not so extreme as to justify your finding that the defendant is irresponsible, may nevertheless be properly considered by you in determining whether a homicide has been committed with a deliberate and premeditated design to kill where the grade of the offense requires those lements (sic)."

Defendant's complaint by way of argument is directed largely at the inclusion of the above last-quoted language. It is contended that it refers to only "one factor of deliberation and premeditation for the purpose of determining the degree of the offense, and not whether one has been committed."

Defendant contends that the trial court by this language excluded from the consideration of the jury all evidence of the mental condition of the defendant, except that which could be classified as "feebleness of the mind or will" in determining whether there was present a deliberate and premeditated design to kill.

We do not so read the instruction. There was evidence offered which the defendant claimed went directly to the question of feebleness of the mind or will of the defendant. Specifically the court directed the jury's attention to that evidence and by the use of the phrase "In this respect" tied that evidence into the general evidence of mental capacity that could be considered by the jury to determine whether the offense had been committed with "a deliberate and premeditated design to kill." By so doing the trial court included the evidence of feebleness of mind or will in the evidence on the broad issue of deliberate and premeditated design to kill. It had done so earlier in defining the crime of murder in the first degree. It was done here a second time. The trial court did not restrict the issue of criminal responsibility to the evidence of feebleness of mind or will.

The defendant requested the court to give this instruction: "Feebleness of mind or will, even though not so extreme as to justify a finding that the defendant is irresponsible, may nevertheless be properly considered by you in determining whether a homicide has been committed with a deliberate and premeditated design to kill, and may thus be effective to reduce the grade of the offense." This obviously rests upon our holding in Washington v. State, 165 Neb. 275, 85 N. W. 2d 509.

It will be noted that the court gave the substance of this requested instruction as above set out.

The rule is: "Ordinarily, error cannot be predicated on an instruction given at the request of the complaining party. Bell v. State, 114 Neb. 17." Torske v. State, 123 Neb. 161, 242 N. W. 408.

We find no merit in the error assigned and above discussed.

The defendant requested the court to instruct the jury as follows: "A felonious intent to steal the same is an essential ingredient of the crime of robbery and if you find that the defendant did not have the mental capacity for forming and entertaining such a felonious intent at the time of the alleged perpetration of a robbery as charged in Count II, you are to find him not guilty of that crime as charged." The court refused the request. Defendant assigns it as error.

The court in defining robbery included in the definition the clause "with the intent to rob or steal." In its instruction as to count II the court included "intent to rob" as an element to be proven.

Further the court instructed the jury that one of the essential elements of the crime charged in count II was "the intent to rob or steal." The court instructed that the jury must also consider the material element to the State's case that the defendant "was not insane." The court set out, as hereinbefore stated, the requirements placed upon the State to prove the sanity of the defendant. The court further stated that "intent" was a necessary element to prove the crime charged against the defendant and instructed as to how that could be determined.

The assignment is predicated on the proposition that the forming and entertaining of a criminal intent is a question for the jury's consideration in determining whether the accused is guilty of the crime charged.

It appears obvious that the question was submitted

to the jury by instructions with which defendant finds no fault.

The established rule is quoted above from Grandsinger v. State, *supra.*

The assignment is not sustained.

The theory of the defendant, as stated in the assignment of error, seems to be that we can reduce the sentence from death to life imprisonment based on the claimed weakness of the evidence as to deliberation and premeditation. Either the evidence is sufficient to sustain the verdict and judgment, or it is insufficient. As stated above we have considered the evidence that went to the jury and deem it quite sufficient to sustain the verdict. When once guilt of murder in the first degree is determined the primary duty to fix the penalty rests upon the jury. See, § 28-401, R. R. S. 1943; Sundahl v. State, 154 Neb. 550, 48 N. W. 2d 689. It is a duty of the jury separate and apart and subsequent to the determination of guilt of murder in the first degree.

We discussed section 29-2308, R. R. S. 1943, in Sundahl v. State, *supra.* We see no reason to repeat here the conclusions there reached. They are in principle applicable here.

We have examined the entire cause and consider that no substantial miscarriage of justice has actually occurred.

The judgment of the trial court is affirmed.

Friday, the 27th day of March 1959, between the hours of 6 a.m. and 6 p.m. of said day is fixed as the date for carrying into effect the sentence of the district court.

AFFIRMED.

WENKE, J., participating on briefs.

GEORGE SMITH, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.

93 N. W. 2d 499

Filed December 19, 1958. No. 34517.

Criminal Law: New Trial. In a case where there has been a conviction of a criminal offense in the district court and proceedings have been instituted for review by petition in error in the Supreme Court, and thereafter a timely motion for new trial on the ground of newly discovered evidence has been filed, the district court has jurisdiction to hear and make a determination upon such motion without permission of the Supreme Court and without suspension of the writ of error.

ERROR to the district court for Keith County: JOHN H. KUNS, JUDGE. *On motion to suspend writ of error. Motion overruled.*

Reddish & Fiebig, 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.

YEAGER, J.

In this action in this court George Smith is plaintiff in error and the State of Nebraska is defendant in error. The defendant in error will be hereinafter referred to as the State and the plaintiff in error as the defendant.

To the extent necessary to relate here, the defendant was charged with the criminal offense of burglary in an information filed in the district court for Keith County, Nebraska, containing five counts, each count of which contained a separate charge. He was duly tried to a jury and was convicted of the several offenses. A motion for new trial was duly filed. This motion was not ruled upon during the term at which the trial was had, which was the March 1958 term.

Thereafter and within the May term of court it appears that a hearing was had on the motion for new

trial and affidavits in support thereof. The motion was overruled and the defendant was sentenced to serve a term of not less than 2 nor more than 5 years on each count, the terms to be served consecutively and not concurrently. This was on July 18, 1958.

Thereafter the defendant brought the case to this court for review by petition in error the purpose of which was to seek a reversal of the conviction and sentences. A writ of error was duly issued.

On November 26, 1958, the defendant filed a motion in this court the declared purpose of which is to suspend the writ of error. In the motion it is recited that after sentence newly discovered evidence was obtained which entitles the defendant to a new trial. This second motion for new trial does not appear in the record here. By recital in the motion filed in this court it is declared that a hearing was had in the district court on the second motion for new trial on November 20, 1958, but that the court found that jurisdiction to consider it was suspended during the pendency of this error proceeding unless leave to consider it is given by this court.

The motion by its terms goes beyond the question of whether or not the district court has jurisdiction to hear and pass upon a motion for new trial based upon newly discovered evidence after a criminal conviction has been taken to the Supreme Court for review by petition in error. This question of jurisdiction to hear and make an adjudication upon a motion for new trial during the pendency of a proceeding in the Supreme Court, however, is the only one which may properly be considered herein.

The statutes of this state permit the filing of motions for new trial and the granting thereof on the ground of newly discovered evidence in criminal cases within 3 years of the date of the verdict in the case. § 29-2103, R. R. S. 1943. The motion filed in this case was therefore filed in time. The question of whether or not it is sufficient in substance is a matter not prop-

erly to be considered by this court at this time. That is a matter for consideration by the district court.

There is nothing in the statutes stating or indicating that consideration shall be delayed until after the decision on review by the Supreme Court of a conviction of a criminal offense on petition in error, unless permission to hear and determine is granted by this court. No decisions have been cited or found indicating that there should be any such delay. Reason appears to indicate that the legislative intent was that the two proceedings as such should be conducted separately and independently of each other, and that such independent conduct by the district court could not be regarded as an invasion of the jurisdiction of the Supreme Court.

It is to be observed of course that a motion for new trial is directed to the trial court. § 29-2101, R. R. S. 1943. There is no provision for filing such a motion elsewhere. As pointed out the only restriction on the right to file is that it shall be filed within 3 years after verdict. At no point is the right to file or to have an original adjudication upon it related to a proceeding for review. Specifically the statute relating to the filing of a motion for new trial on the ground of newly discovered evidence (§ 29-2103, R. R. S. 1943) contains no restrictions upon the jurisdiction of that court to hear and make an adjudication on the sufficiency or merits of the motion at any time after it has been filed.

Undoubtedly in a case where there had been a conviction and a review on petition in error by the Supreme Court resulting in affirmance a motion, if filed within 3 years, would be proper. If the district court properly sustained the motion the conviction and its affirmance would be nullified and a new trial would become necessary. Reasonably therefore it may not well be said that the exercise of this original jurisdiction of the trial court must be delayed and required to depend upon final disposition of the proceeding for review or upon consent of the reviewing court, when no such restric-

tion of power is declared. If there are valid grounds for re-examination on the basis of newly discovered evidence to ascertain whether or not a person has been wrongfully convicted the steps provided for such re-examination should be taken timely and without undue delay.

The conclusion reached is that the district court was not deprived of jurisdiction to hear and make a determination upon the motion filed in that court for a new trial based on alleged newly discovered evidence, but on the contrary was fully clothed with jurisdiction so to do.

The motion filed in this court to suspend the writ of error herein is therefore overruled.

MOTION OVERRULED.

ROY WEMMER, APPELLANT, V. RALPH I. YOUNG ET AL., APPELLEES.

93 N. W. 2d 837

Filed December 26, 1958. No. 34365.

1. **Waters.** If by gradual erosion a river becomes the boundary of land, the owner thereof is a riparian owner and is entitled to any accretion thereto.
2. ———. If by process of accretion and reliction the water of a stream gradually recedes, changes the channel of the stream, and leaves the land dry that was previously submerged by water, the land is the property of the riparian owner.
3. ———. The erosion of a river which cuts across riparian land and into the land of an adjoining owner destroys the title of him whose land was originally riparian and he may not reassert his title if the river reverses its movement and new land is formed within what were his original boundaries.
4. **Easements: Adverse Possession.** The use and enjoyment which will create title by prescription to an easement are 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, and 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.

5. ———: ———. To establish a prescriptive right to an easement, all the elements of a prescriptive use and enjoyment must be established by clear, convincing, and satisfactory evidence.

6. **Easements.** 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 user for a period of 10 years.

7. ———. An alleged easement that is too indefinite for a determinate description cannot be established and protected by a court of equity.

8. **Waters.** Accretion must be expressly excluded from a conveyance to avoid a transfer of it.

9. **Judgments.** A judgment rendered in an action does not affect or bind a person who was not a party to the action.

10. **New Trial.** Newly discovered evidence is not sufficient reason for a new trial of a cause if diligence before the trial would have produced notice or knowledge of the alleged recently discovered evidence.

11. **Trial.** 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 inattention.

12. **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 in the cause 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, if there is other competent evidence in the record to sustain the findings.

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

Theodore L. Richling and *Joseph C. Hranac,* for appellant.

Frederic J. Coufal, Cassem, Tierney, Adams, Kennedy & Henatsch, and *Lloyd L. Pospishil,* for appellees.

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

BOSLAUGH, J.

This litigation was instituted by appellant to quiet title to the land he claimed to own described as Lot 5 of Section 12, Township 17 North, Range 4 East of the 6th P. M., Butler County, and all accretions north thereof to the center of the channel of the Platte River as against appellees and to have an easement in favor of appellant established across the land of Ralph I. Young and Anna M. Young, appellees, from the highway west thereof along the north line of the Young land to the property claimed to be owned by appellant. The easement has existed, as he asserted, for as much as 40 years as a means of ingress and egress to and from the property of appellant. He asked to have Ralph I. Young and Anna M. Young enjoined from in any manner interfering with the easement or its use as a way to and from the property of appellant and to recover from Ralph I. Young and Anna M. Young $900 which appellant claimed they, without authority or right, had collected and retained as rental from Harry A. Koch for the use by him of land which belonged to appellant.

Ralph I. Young and Anna M. Young, Albin Peltz and Ann Peltz, and Harry A. Koch, appellees, denied the claims made by appellant as a basis for the relief he demanded and they respectively by cross-petition alleged facts sufficient to entitle them to an adjudication quieting title in them respectively to the land they claimed to own as herein specified. Ralph I. Young and Anna M. Young will be hereafter designated as Young, Albin Peltz and Ann Peltz will be referred to as Peltz, and Harry A. Koch will be hereafter spoken of as Koch.

Young in his answer and cross-petition alleged that: He and his wife were the owners as joint tenants and in possession of Lots 1 and 2 and all accretions thereto, the south half of the northwest quarter and the north half of the northeast quarter including all accretions thereto, and the southwest quarter of the northeast

quarter of Section 13, Township 17 North, Range 4 East of the 6th P. M. in Butler County, including all islands and the bed of the Platte River lying north of the accretions to Lots 1 and 2 and the north half of the northeast quarter of Section 13 to the thread of the stream of the river except the part thereof sold to Harry A. Koch which was the north half of the north half of the northeast quarter of the northeast quarter of said Section 13 and the accretions thereto. W. A. Malovec and wife purported to convey by quitclaim deed to Koch the land lying and being between the north line of Lots 1 and 2 and the north half of the northeast quarter of Section 13 and the Platte River, said lands being accreted to said Lots 1 and 2 and the north half of the northeast quarter of said Section 13. At the time of the execution of the deed W. A. Malovec had no right, title, or interest in the lands involved in this litigation but the deed and the record thereof are a cloud on the real estate owned by Young as above described. At the time of the government survey of said Section 13 there existed between the north boundary thereof and the Platte River an area described in the survey as Lot 5. It commenced at a point on the north boundary of Lot 1 and extended eastward therefrom to the east line of Section 13. After the survey but many years prior to 1930 the Platte River by slow and imperceptible erosion of its south bank washed the bank to the south until it was entirely south of the original northern boundary of Lots 1 and 2 and was south of virtually all of the northern boundary of the north half of the northeast quarter of Section 13. Lot 5 as it existed north of Lot 1 was entirely washed away by the river and the part of Lot 5 north of the northeast quarter of Section 13 was virtually all washed away. Subsequent to the southernmost erosion of the south bank of the Platte River along the north edge of Section 13 the river began slowly to wash particles of soil against the said south bank where they adhered and by process of accretion began to

extend toward the north until said bank reached the location it now occupies. The district court for Butler County in an action therein brought and prosecuted by Frank W. Barcal, who was then the owner of the real estate now owned by Young, against Milo Evans, in which it was alleged that Milo Evans was claiming a part of said property, found and adjudicated that the title to the property involved therein should be and was quieted in Frank W. Barcal and that all the land that had existed between Lots 1 and 2 and the north half of the northeast quarter of Section 13 and the Platte River at the time of the government survey had long since washed away and was no longer in existence and no part of the land now lying north of Lots 1 and 2 and the north half of the northeast quarter of Section 13 was land that had existed at the time of the government survey. Island No. 1 divides the Platte River into two channels, one to the north and one to the south of it. Lying to the south and west of island No. 1 is another island the eastern end of which lies immediately south of the west end of island No. 1. The second island mentioned above has been for convenience identified as island No. 2. The thread of the stream of the Platte River west of island No. 1 is and had been before island No. 2 was formed north of island No. 2. The thread of the channel of the Platte River south of island No. 1 is and had been since before the formation of island No. 2 north of it. Young is the owner of the mainland south of island No. 2 and by virtue of such ownership Young owns to the thread of the stream of the Platte River including island No. 2. Young and his predecessors in title have for more than 40 years last past been in the open, notorious, actual, hostile, exclusive, and adverse possession under color of title of the property owned by Young as above stated. Young asked the court to quiet title to the property owned by him and to bar the plaintiff and the codefendants from asserting any claim therein or right thereto; to cancel the deed from W. A. Mal-

ovec and wife to Harry A. Koch; and to enjoin the appellant from asserting any right-of-way or easement in, to, or over the property of Young.

The cross-petition of Peltz asserted he owned Lots 2 and 3 south of the Union Pacific right-of-way and the accretion to Lot 1 in Section 12, Township 17 North, Range 4 East of the 6th P. M., Colfax County. He asserted ownership of island No. 1 by patent and mesne conveyances and the ownership of islands described in the record as Nos. 2, 3, and 4. Island No. 2 was described as south of Lots 2, 3, and 4 of Section 12 and south and west of island No. 1. Islands Nos. 3 and 4 were described as immediately west of or on the Colfax-Dodge County line and immediately south of island No. 1. He asserted that he derived his original title from the United States and is entitled to all the accretion to the real estate for the reason that he and his predecessors in title have at all times been riparian owners and are entitled to all of the real estate over which the Platte River flows with reference to the banks and the thread of the stream as they then existed; that he or his predecessors have not surrendered or lost any of their right to the real estate to the center or thread of the stream of the Platte River as it existed in the year 1857 when it was orginally surveyed, laid out, and recorded; that since that survey and more than 16 years ago islands Nos. 2, 3, and 4 to which he claims title were created from the bed of the river; that the real estate owned by him was during the year 1857 and has since been located north of the center or thread of the Platte River; that the principal portion of the stream of the river then flowed and now flows south of all the real estate above described and claimed by the cross-petitioner and he is entitled to have the title thereto quieted and confirmed in him; and that he and his predecessors in title have had continuous, notorious, and exclusive adverse possession of islands Nos. 2, 3, and 4 under claim of title for more than 10 years last past and for this addi-

tional reason he is entitled to have the title to the real estate quieted in him. He prayed for an appropriate adjudication by the court.

The substance of the answer and cross-petition of Koch was the assertion that he was the owner of the north half of the north half of the northeast quarter of the northeast quarter of Section 13 and the accretion thereto. The accretion is described as beginning at the northeast corner of Section 13, thence west along the north line of that section 1,440 feet, thence north at right angles to said north line to the center of the Platte River, thence east along the center line of the Platte River to the east line of said section as extended, and thence south along the east line of Section 13 to the point of beginning. Koch asserts that he made a lease with Young for the premises described in the lease, entered into possession and occupancy thereof, and paid to Young the rental as required by the terms of the lease until Koch obtained title to the premises by deed from Young and deed from W. A. Malovec and wife; that the adjudication made by the district court for Butler County in the case of Frank W. Barcal v. Milo Evans on September 6, 1930, was and is res judicata of all issues with respect to the lands between the Platte River and the north line of said Section 13; that the judgment in that case adjudicated the question of all lands between the north line of said Section 13 and the Platte River as being accretion land to said Section 13 and therefore plaintiff (appellant) has no valid right or claim to any of said land; that any claim asserted by him thereto is subject to and barred by the adjudication aforesaid; and that Koch and his grantors have had and maintained actual, open, continuous, and exclusive adverse possession of all said accretion lands, claiming title thereto for a period of 50 years last past. A judgment quieting title to the lands was the relief the cross-petitioner sought. Issue was joined by appropriate pleadings to the answers and cross-petitions.

The findings and judgment of the district court may be summarized as follows: That the judgment in the case of Frank W. Barcal v. Milo Evans in the district court for Butler County was not binding upon appellant; that the deed from W. A. Malovec and wife to Koch describing lands in Section 13 was ineffective for the reason that the grantors at the time of the conveyance had no right or title to the real estate described in the deed; that subsequent to the 1857 survey the Platte River moved southward so that all that part of Lot 5 east of a point 1,558.2 feet west of the southeast corner of Section 12 and all that part west of a point 2,690.2 feet west of the southeast corner of Section 12 washed away; that subsequent thereto accretion added to the south bank so that now all the river bank is north of the north line of Section 13; that the accretion attached to and became the property of the owners of the south bank; that the accretion that attached to the south bank west of a point 2,690.2 feet west of the southeast corner of Section 12 became the property of predecessors in title of Young; that all the accretion that attached to the bank between a point 1,558.2 feet west of the southeast corner of Section 12 and a point 2,690.2 feet west of the southeast corner of Section 12 became the property of the predecessors in title of appellant; that all the accretion that attached to the south bank for a distance of 1,440 feet west of the southeast corner of Section 12 became the property of the predecessors in title of Koch; that all the accretion to the south bank between points 1,440 feet and 1,558.2 feet, respectively, west of the southeast corner of Section 12 became the property of the predecessors in title of Young; that at the time of the formation of island No. 2, island No. 1 extended 500 feet westerly of its present position and at that time the thread of the river was north of island No. 2 but that the thread of the river between island No. 1 and the south bank of the river was south of islands Nos. 1 and 2; that plaintiff (appellant) failed to prove a right-

of-way or easement across the land of Young and plaintiff likewise failed to establish any right to a money judgment against Young; and that it was stipulated by the parties to the litigation that boundaries between the various tracts of accretion should be parallel to the east line of Section 12.

The judgment rendered by the district court quieted title to the accretion lands south of the river and north of Section 13 as follows: The east 1,440 feet of the accretion in Koch, the next 118.2 feet of the accretion in Young, the next 1,132 feet of the accretion in plaintiff, and the remaining accretion to the west line of Section 12 in Young. Title to island No. 2 was quieted in Young except for the part thereof east of a north-and-south line drawn 500 feet west of the west tip of island No. 2 and that part of the island was quieted in Peltz. Motions for a new trial were each denied and appellant has prosecuted this appeal.

The government survey of 1857 located Section 13, Township 17 North, Range 4 East of the 6th P. M., as what is now the northeast section in Butler County. The Platte River at that place was about a half mile in width and made a curve toward the east in its immediately previous northeasterly course. Section 12 was immediately north of Section 13 above described and was to a very considerable extent the bed of the river. The northwest portion of Section 13 was at the time of the survey riparian. The south bank of the river, because it was coursing to the north and east, crossed the north line of Section 13 more than one-fourth of a mile east from the northwest corner of Section 13. There was a wedgelike area of land between the north line of Section 13 and the south bank of the Platte River. It was surveyed and designated Lot 5 of Section 12, Township 17 North, Range 4 East of the 6th P. M. in Nebraska. It extended along less than the east three-quarters of the north section line of Section 13. The west point of it was where the river intersected the north line of Sec-

tion 13 and the east side was the east line of said Section 12. The survey represented the length of the lot from east to west as 52.48 chains. Frank W. Barcal became the owner of a part of Section 13 which was later transferred by his trustees to Young.

Appellant alleged he was the owner of Lot 5 of Section 12 including accretions thereto to the thread of the stream of the Platte River and was entitled to have the title thereto quieted. He offered as proof of his assertions in this respect a United States land grant or patent for Lot 5 dated June 28, 1937, issued to Henry M. Fleek; a deed from the patentee to Roy Wemmer and Joseph Zacek for Lot 5 dated December 13, 1945; and a deed from Joseph Zacek and his wife to Roy Wemmer for an undivided one-half interest in Lot 5 dated August 1, 1950. There were no restrictions as to accretions in these conveyances. Appellant refers to this evidence as a prima facie case as to the ownership by him of Lot 5 and the accretion thereto.

Appellant disputes the correctness of the findings of the trial court that the Platte River, by washing, eroded and obliterated large parts of Lot 5, thereby making considerable portions of Section 13 riparian, and that subsequent accretion attached to them became the property of the riparian owners. Appellant argues that there was insufficient evidence to establish southern encroachment of the Platte River to the high bank. The high bank of the Platte River was the location where the southern encroachment of the river ceased in the area involved in this case and the change in the elevation from the high bank to the lower ground to the north of it was estimated to be an average of about 5 to 6 feet. The high bank is somewhat discernible on a photostatic copy of an aerial map made in 1938 and it is definitely exhibited on the map of the Backlund survey which is a part of the evidence in this case. Appellees produced substantial evidence of the fact that the Platte River in the early part of the present century flowed

along and against the high bank. Louis Barcal, a witness produced and examined on behalf of appellees, said he was born in 1888 and was 68 years of age. His father bought the river farm in 1903 when witness was 15 years of age from William Husenetter. This land was later sold to Young and is involved in this case. Witness said he helped his father with the work on the farm for about 9 years and he visited it at various times thereafter until he moved to and lived on the land commencing in 1933. He was familiar with the high bank of the Platte River, part of which was on the farm and which extended from east to west about 200 feet north of the buildings thereon. The hay meadow on the farm extended to the edge of the high bank. North of the high bank in 1903 was water of the river all along the north end of the farm. The witness said, "In other words, the Platte River ran along the high bank in 1903." He moved off the land in 1946 and he said he had been there once or twice since. He stated that the high bank is some distance farther south now than it was in 1903. The water of the river flowed along it in 1903 and it did not in 1956. In the former year the water was "undermounting" the bank and it was falling in the river. Later the river started to move away from the high bank and it increased from the south toward the north, starting to leave sand there and working toward the north and also growing brush and trees along where the water had been. Witness said the high bank now is where the river left it.

Another witness, William Mallovec, also named in the record as W. A. Malovec, stated he was nearly 72 years of age, was a son-in-law of Frank Barcal, and had been familiar with what is referred to in the record as the Barcal farm in Section 13, Platte Township, Butler County, since 1908 and with the high bank of the Platte River, a part of which was on that farm. The high bank as it presently exists was, in his judgment, 400 feet farther south on the east half of the section than

it was in 1908. The water of the river in 1908 was along the high bank on the northeast part and a little off of the bank on the northwest corner. There was a little accretion between the high bank on the northwest corner and the river in 1908. It was not much. He could not estimate the quantity of the accretion. The water of the river was up against the high bank as it now exists until in the 20's the river left the high bank in that area approximately as it is now located.

A third witness, Joe Walla, testified that he was 70 years old, knew the location of Section 13, and was acquainted with the area and the part of the Platte River concerned in this case. He said he first visited the river and the area about the year 1900 and he last visited it in the summer of 1956. The south bank of the river washed away and most of the erosion was done in the "teens somewheres." The worst stage was then and the south bank was hit very hard. Later on the water receded and formed a bar and vegetation caught on and formed accretion. That was gradual. His best knowledge was that that was around the 20's. The high bank along there at Koch's place is about the same today as it was when the water left it. He said it seemed it about all came the same year gradually but at the west end a few years sooner.

Another witness, Frank Shavlik, related that his age was 70 years and that he lived all his life in Saunders County. He had knowledge of Section 13 described above, the location of the Koch cabin, and the location of the Young farm. He had been since he was a young man familiar with the Platte River in that area. He went to the river about every week from about the year 1915. During the early years of his experience there the water was from the south bank to island No. 1. In about 1916 and 1917 the river started to undermine the south bank and this continued, as he remembered it, until about 1920 when the water started to recede north from the high bank. He was married in

1922 and in June of that year he took a group to the river to swim opposite the Koch shack. They walked about 400 yards out to where the water was so they could swim. During those years there was a gradual receding of the river, a filling in, and sand bars formed and became visible.

The testimony of these long-time residents of the area of the fact of the encroachment of the Platte River to the high bank as it exists and has existed since about 1920 is substantially in agreement in all material and important aspects. There has been no attack made upon it by the production of other testimony of witnesses to dispute or disprove it notwithstanding about 6 years elapsed between the commencement of the case and the time of the trial. It is only said concerning these witnesses that their testimony is unreliable because there were some discrepancies as to dates of events related by them. They were elderly men who testified to events during their respective youths. Such variations as to events of at least 30 and up to more than 50 years ago may not destroy testimony which in its most important aspects is harmonious. This is especially true since it is not contradicted by other testimony. Appellant in this respect relied upon what he refers to as his prima facie case.

There is other evidence that the area north of the high bank was submerged by water more than 30 years ago as the witnesses produced by appellees asserted. Frank Pipal is an educated and experienced forester. He has a Bachelor's and a Master's Degree in that subject. He has practiced for more than half a century in that field. He was for more than 10 years the city forester for the city of Omaha. He testified he wrote his Master's thesis concerning cottonwood trees. That effort encompassed about 9 months. He said he could learn the age of trees, and especially cottonwood trees, by a ring-counting method. He walked through about two-thirds of the mile north of Section 13 and he watched while

driving in an automobile for the largest tree in the area. He found a 37-year-old tree near the Novak cabins on the Young land and a 31-year-old tree at or near the Koch cabin. These were the largest trees he could find. He explained the probable yearly growth of such trees in that area as indicating also the age and size of the trees on the accretion land. This evidence is undisputed and corroborates the testimony of the witnesses who testified concerning the encroachment of the Platte River to the south, its subsequent recession, and the later formation of accretion extending north from the high bank. Appellant comments on some uncertainty of the witness Pipal as to geographic orientation when he was at the river, but appellant furnished nothing in the case reflecting in any manner on his knowledge of trees or his ability to determine the age of them. Appellant made no appropriate attempt to weaken or overcome the significant information furnished by Pipal.

Appellant argues that appellees did not establish that the encroachment of the Platte River to the south to the location of the high bank was slow and gradual. He says this was a requirement if appellees are to prevail in the litigation. The record yields evidence to this effect: In 1903 the water of the river was undermining the south bank and it was falling in the river. There was an area of government land and the water took all of that away except a strip where Mat Fleek was located in about the middle of the section from east to west. The present location of the high bank is farther south than it existed in 1911 or 1912 because the bank was "undermounted" and fell in the river. (The word "undermounted" probably was intended to be "undermined.") The high bank at the time of the trial was where the river had washed it. Since 1908 the river had washed back over the east part of the section about 400 feet. The water quit cutting the bank after 1920. During the first World War the water along the south bank toward the east was about 8 feet deep. In the

years 1916 and 1917 the river was undermining and washing away the south bank of the river. It was then cutting over a distance estimated at 80 rods. About the year 1900 there was not a tree on the south bank or north of there to Murphy Island, described in the record as island No. 1. The water of the river was continuous from its south bank to its north bank. The worst stage of the washing of the south bank of the river was in the period of 1913 to 1920. The water hit the south bank hard in that period. Later the water receded and formed a great bar. Vegetation caught on and formed that accretion. The south bank of the river along Section 13 all receded to the south about the same time and the encroachment to the south discontinued after 1920. This evidence is substantially without contradiction. The language of the witness as to "undermounting" by the river, the bank being undermined by the river resulting in the soil being washed into the river, and the river receding until about the early 20's does not admit of uncertainty that the south bank of the river was destroyed by wearing or erosion by the water of the river slowly and gradually and not by an avulsion or a swift change in the course of the river. It is certain that when the Platte River by gradual process of wearing and washing of its south bank encroached upon Section 13, the owners of the land affected because thereof became riparian owners and the accretion thereto became the property of the then owners and their successors in title. The small part of Lot 5 of Section 12 which survived the encroachment of the river to the south commenced 1,558.2 feet west of the northeast corner of Section 13 and extended west 1,132 feet to a point on the north line of said section which is 2,690.2 feet west of the southeast corner of Section 13. The part of the lot which remained was at its widest point 67 feet from north to south and it commenced at a point on the east and extended to a point on the west.

The patent for Lot 5 was issued to Henry M. Fleek

June 28, 1937. The patentee is generally named in the record in this case as Mat Fleek. He lived down at the river as early as 1936. The Barcal land, afterwards conveyed to Young, was occupied and used by Louis Barcal at that time. The accretion north of substantially all of the west half of Section 13 was pasture and Louis Barcal ran cattle in the pasture which was fenced each of the years of 1933 through 1946. Mat Fleek made no objection thereto or assertion of right of ownership or possession of the land. He made no claim to the Barcal pasture. Barcal leased a part of the accretion land during that time to Novaks and four others for hunting and fishing purposes and they used it as the lease authorized. It is convincingly significant that the patentee was contented with the part of Lot 5 left after the encroachment of the river and that he made no assertion of right in him to the land which he apparently knew rightfully belonged to Barcal. It is more than slightly significant that Mat Fleek must have watched Novak and his associates use the lease, build a cabin on the accretion, install a well, and fish and hunt on the land without objection, protest, or resistance from him. It is a permissible, if not a necessary, conclusion that Mat Fleek knew he did not own the accretion and that it belonged to the Barcal land to which it was attached.

The evidence is not disputed that the accretion north of approximately all the west half of Section 13 was fenced and used by Barcal in the year 1933 and thereafter continuously through 1946 as a pasture for cattle. This use was continued until 1956 by Young, the purchaser of the land. A part of the accretion land was leased for hunting and fishing purposes for the period from August 23, 1933, to the time of the trial of this case to Novaks and four others. The accretion land was occupied and used by Young and his predecessors in title and those holding under them for the purposes for which it was adapted. Their possession was open, notorious, continuous, exclusive, and adverse under claim of right

and title for more than 10 years after the issuance of the Fleek patent. Title to land by adverse possession must be proved by actual, open, exclusive, and continuous possession under a claim of ownership for a period of 10 years. The possession is sufficient if the land is used continuously for the purpose to which it is in its nature adapted. Cassens v. Wisner, 122 Neb. 408, 240 N. W. 526; Worm v. Crowell, 165 Neb. 713, 87 N. W. 2d 384.

There is no issue concerning the ownership of Lots 2 and 3 and the accretion to Lot 1 of Section 12, Township 17 North, Range 4 East of the 6th P. M. in Colfax County by Peltz. This land is on the north of the Platte River and extends from the east line of Section 12 three-fourths of a mile west. It is riparian to the river. Peltz is the only party to this litigation who owns real estate along the north bank of the river. The claim of ownership of real estate in the Platte River by appellant and appellees other than Peltz is based on their ownership of the fee title to the south bank of the river. Likewise the ownership by Peltz of Murphy Island or, as it is designated in this record, island No. 1, is not contested herein. The ownership of islands Nos. 3 and 4 was an issue in the case in the district court. Peltz claimed to own them because, as he asserted, they were riparian to island No. 1. Koch contended they were riparian to the land he owned south of them. Appellant claimed them because of his ownership of Lot 5. The issue as to the ownership of islands Nos. 3 and 4 has been eliminated as to appellees because Peltz has abandoned any claim in and to island No. 4 and he and his wife conveyed any interest they had therein to Koch. Likewise Koch has abandoned any claim in and to island No. 3 and he and his wife conveyed any interest they had therein to Peltz. There was a controversy in the district court as to the ownership of island No. 2. That issue was vigorously and extensively litigated. The district court determined that the part of island No. 2 west of a line 500 feet west of the west tip of island No. 1 was the

property of Young and the part of island No. 2 east of that line was the property of Peltz. There is no cross-appeal and the decision of the trial court in that respect is final. There is no issue between appellant, Young, or Koch with regard to the channels in the river since these parties each own land on the south bank of the river and their attitudes are identical.

Koch became the owner of the north half of the north half of the northeast quarter of the northeast quarter of Section 13, Township 17 North, Range 4 East of the 6th P. M. in Butler County, and the accretion land described as commencing at the northeast corner of Section 13, thence west along the north line of the section a distance of 1,440 feet, thence north at right angles to the said north line to the center of the Platte River, thence east along the center line of the river to the east line of Section 13 as extended, and thence south along the extended east line of Section 13 to the point of beginning, by a conveyance thereof to him by Young dated April 9, 1951. Koch had been in the possession of and he had used the area described by metes and bounds and in addition thereto a strip 118.2 feet immediately to the west thereof for several years before the conveyance last above described. The area extended west from the northeast corner of Section 13 a distance of 1,558.2 feet to the point where the high bank of the river and the north line of Section 13 intersected, thence north to the thread of the stream of the Platte River, thence east to the east line of Section 13, thence south to the place of beginning. It was claimed that there was incorrect information as to the distance from the northeast corner of Section 13 to the point of intersection of the high bank and the north line of Section 13 and that it induced a wrong description of the property intended to be conveyed to Koch by Young. The strip 118.2 feet wide above referred to has been since the trial of the case conveyed by Young to Koch and thereby

any issue concerning it between them has been resolved and requires no further notice herein.

The record is convincing that at some time after the government survey of 1857 the south bank of the Platte River as it then existed in said Sections 12 and 13 eroded southward by the action of the river; that all of Lot 5 in Section 12 was washed away except the part thereof bounded on the south by the south line of said Section 12 and extending from a point 1,558.2 feet west of the southeast corner of said section, thence westerly a distance of 1,132 feet; that so much of Lot 5 as it formerly existed east of the point 1,558.2 feet west of the southeast corner of said Section 12 and so much thereof as formerly existed west of a point 2,690.2 feet west of the southeast corner of said section was so washed away; that after the washing of the south bank it began to move northward by the process of accretion and now the south bank of the river lies north of the south line of Section 12 across that section; that the accretion attached and became the property of the owners of the south bank of the river at the time such accretion began; that the accretion to the south bank of the river west of a point 2,690.2 feet westerly of the southeast corner of Section 12 became the property of the predecessors in title of Young and by virtue of conveyances subsequently made is now owned by Ralph I. Young and Anna M. Young as joint tenants with right of survivorship; that the accretion which attached to that part of Lot 5 remaining after the southernmost erosion of the river bank described as a tract or parcel of real estate immediately north of and adjacent to the part of the south section line of Section 12 between a point 1,558.2 feet west of the southeast corner of said section and extending westerly therefrom along the south line a distance of 1,132 feet became the property of the predecessors in title of appellant and by virtue of conveyances subsequently made is now owned by Roy Wemmer, the appellant; that the accretion that attached

to the south bank of the river from the east line of Section 12 to a point 1,440 feet due west of the east section line became the property of the predecessors in title of Koch and by virtue of conveyances subsequently made has become and is the property of Harry A. Koch; and that the accretion that attached to that part of the south bank of said river between a point beginning 1,440 feet westerly of the east line of said Section 12 and extending westerly a distance of 118.2 feet became the property of the predecessors in title of Young and by virtue of subsequent conveyances was at the time of the judgment owned by Ralph I. Young and Anna M. Young as joint tenants with right of survivorship.

If by gradual erosion a river becomes the boundary of land, the owner thereof is a riparian owner and is entitled to all accretion thereof. If by the process of accretion and reliction the water of a stream gradually recedes, changes the channel of the stream, and leaves the land dry that was previously submerged by water, the land becomes the property of the riparian owner. The erosion of a river which cuts entirely across riparian land and into the land of an adjoining owner operates to destroy the title of him whose land was originally riparian and he may not reassert his title if the river reverses its traverse wanderings and new land is formed within what were his original boundaries. Worm v. Crowell, *supra*.

Appellant asserts a prescriptive easement in his favor across the Young land from the north-and-south highway on the west section line, east along the northern part of the Young property, to the land and cabin of appellant. He pleads that this means of ingress and egress to and from his property existed for as much as 40 years. He seeks to enjoin Young from interfering with the easement or its use as a road to and from the property of appellant.

Appellant is a resident of Omaha and has been a cattle dealer there for about 50 years. He says he went to

the area involved in this case in the year 1936. He was there then as a guest of Mat Fleek. When appellant began his visits to that location he testified that there were three routes available to him. His description of the courses of the routes was far from clear and certain. He claimed to have used each of them. As nearly as can be determined from his testimony one of the routes was from the east, one from the south which passed near the buildings of Barcal, and another from the west beginning with the first road in Butler County. This third route was in fact two, one north of the fence on the Young property and one south of the fence. Appellant traveled each of these routes as his convenience suggested. He continued to use all three ways to get to Mat Fleek's cabin. Before 1945 there was another road, which made four, according to the testimony of appellant. The course of the fourth route was not given by him. There were two roads eliminated and discontinued by Young without the consent of appellant and without objection, protest, or resistance from him.

There was a road in 1933 from the north-and-south highway along the west section line of Section 13 near the south or high bank of the Platte River. The testimony advises that it was a winding road extending to the east to the farm buildings on the Barcal land. There was a fence north of the road. The road was moved in 1934 several hundred feet south and it extended directly east and west. This was done by and for the convenience of Barcal or his tenant. The road then approached the farm buildings from the south and the old or former road was not used afterwards. Young became the owner of what had been the Barcal land and in 1947 a road was located to the north above the high bank. Since that time it has been the only road west of the farm buildings. That road was about a quarter of a mile north of the immediately former one. There was an entrance to the accretion through a gate in the fence. The orig-

inal gate was near the north-and-south public highway along the west line of Section 13. Young, when he took possession of the land, located a gate approximately 300 feet east of the old gate and the former gate was thereafter not used.

There were several persons who testified concerning a road, or more than one road, at the instance of appellant. There were only two of these persons who had made a trip into that area before this case was instituted on March 31, 1951. Gus Lindee, a resident of Omaha, said he had known appellant for about 38 years and was familiar with his hunting cabin on the Platte River. The witness was first there in about 1946. He had visited at the Mat Fleek cabin near the river about 1936. The route he followed to the Fleek place was by traveling on the highway west of Section 13. From there he said there was a road east on farms east of the section line. It turned east, went right down in Fleek's place, and went past it to the east. There were no gates on it. He could go north on the section-line road and turn east to the Fleek place without interruption. He said in later years he came from the east north of Koch's place, turned west, and went to the Wemmer place. And down through the years from 1936 until the fall of 1956 he used both routes, one from the west and one from the east. Neither of the routes he described was identifiable as a route of travel that was described by appellant in his testimony.

Witness Fred Pinnow, a resident of Omaha and an acquaintance of appellant since about 1923, said he was acquainted with the area where appellant has his hunting shack on the Platte River. Witness first went there about 1945 or 1946 when Mat Fleek was living in the area. He was there many times after appellant acquired the Fleek place and built his cabin. Witness said he traveled from the highway west of Section 13 on a road that went east to the Young buildings. It then made a swing, went through a yard, right on down to

the Wemmer shack, and right on east. He said there was no fence or gate across that road when he first used it. Later there was but he could not tell when. He said he afterwards traveled to the Wemmer cabin from the west and from the east but he did not attempt to describe the course he followed. The route from the west as he described it or the one from the east mentioned by him cannot be identified with any of the four routes mentioned or specified in the testimony of appellant. The most enlightening statement made by this witness was when he was asked where the fence along the road from the west was placed and he answered: "Various places. They sometimes made us turn in way down on the west end and drive up in the pasture and we went through the barnyard. There was never any certain way of going. You just got there."

The two persons who testified in an attempt to establish a prescriptive easement who had observed or experienced traveling conditions and routes to the cabin long enough before this case was commenced to be able to testify to right by prescription were appellant and Gus Lindee. Their testimony has been noticed and summarized above. Appellant spoke of several roads, at least four, and he mentioned five. Gus Lindee traveled a route indefinitely described from the west section line but whether it followed the high bank or went down to the accretion is not stated. He gave no specifications of the way of travel. Appellant employed any one of several ways in his travel as his convenience dictated. He made no claim of right to any of them. The evidence does not contain specifications sufficient to enable a court to locate and describe a prescriptive easement for the purposes claimed by appellant. The permissible inference from the record is that appellant used ways of travel to his cabin that were indicated by the farm owner or his tenant for the use and convenience of the Young farm. Appellant used these without claim of right and when a change was made in them by the

owner of the land, appellant utilized the new way without objection or argument. This practice persisted until this litigation had its inception. Then for some reason appellant sought to convert what had been an agreeable, friendly, and permissive use of a way of travel as a courtesy granted one neighbor to another into a roadway sanctioned and mandated by the court. This claim of appellant must fail because the proof is not sufficient to establish a prescriptive easement to his land or cabin from the west or from the east.

The proof concerning the claim of appellant of a prescriptive easement is equivocal, uncertain, and unsatisfactory. It is not of the quality that is required to establish such a right. A prescriptive easement is not looked upon 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 being enjoyed. The proof must be clear, convincing, and satisfactory. Jurgensen v. Ainscow, 155 Neb. 701, 53 N. W. 2d 196; Dunn v. Thomas, 69 Neb. 683, 96 N. W. 142; Onstott v. Airdale Ranch & Cattle Co., 129 Neb. 54, 260 N. W. 556; Kuhlmann v. Platte Valley Irr. Dist., 166 Neb. 493, 89 N. W. 2d 768.

A sufficient obstacle to finding that appellant has the right he claims is the absence of clear, convincing, and satisfactory evidence of when the claimed period of adverse user began; from what place the user originated; the course of it on the land of what is claimed to be the servient estate; the identity of that course during the period required to establish an easement; and the quantity of land affected by the user. 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 ease-

ment must be viewed from both ends of the prescriptive period. The nature and extent of the 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 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.

In Dunn v. Thomas, *supra,* before considering the use had during the claimed prescriptive period, the court closely examined and defined the nature and extent of the use 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 statutory period, with respect to manner and extent. * * * one who seeks to acquire an easement * * * over another's land by adverse user, must maintain it without material change of location for the full statutory period." See, also, Drieth v. Dormer, 148 Neb. 422, 27 N. W. 2d 843.

Fox v. Pierce, 50 Mich. 500, 15 N. W. 880, declares: "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 language in Stubblefield v. Osborn, 149 Neb. 566, 31 N. W. 2d 547, may be appropriately applied to the present case: "In the instant case the evidence by the plaintiffs shows the original entry and use to have been permissive. The plaintiffs did not inform Bolton that they claimed a right-of-way and perpetual easement across his land. They crossed the land on occasions to go hunting, as did others. There was no claim of right or exclusive use. The most that can be said as to their crossing the lands in question is that it was permissive only, a neighborly act on the part of the owners or tenants on the land. There was no claim of ownership on the part of plaintiffs of such a nature that they openly and forcibly asserted directly against the actual owners of the land in such a manner that the owners would be required to take affirmative action against the plaintiffs. We have analyzed the cases cited by the plaintiffs as to the presumption arising where there has been open, visible, continuous, and unmolested use of a roadway across the land of another for a period exceeding ten years * * *. The cases cited by the plaintiffs in such respect show affirmative participation or negative acquiescence by the owner that placed him in a position that would make it properly necessary for him to establish the facts that the claims are inconsistent with his own acts of commission or omission." The evidence in this case fails to show any claim of right by appellant or negative acquiescence or affirmative participation by the owner of the land which placed him in a disadvantageous position.

Frank W. Barcal and his wife conveyed land owned by the former in Section 13 which was riparian to the river, with accretion thereto, to W. A. Malovec. The grantee and his wife subsequently reconveyed the land

to F. W. Barcal, who was the same person as Frank W. Barcal, but the last deed made no reference to accretion. W. A. Malovec was afterwards one of three trustees to whom the land was conveyed in trust by Frank W. Barcal and his wife. The trustees, as the trust deed authorized, sold and conveyed the land to Young. W. A. Malovec was one of the grantors in that conveyance. It was dated February 29, 1945. W. A. Malovec and his wife on January 10, 1951, made a deed to Koch for all the land between the north line of Lots 1 and 2 and the north half of the northeast quarter of Section 13 and the Platte River. It was contended at the trial that the last conveyance described above conveyed to Koch title to all the accretion to that section. The fact that the deed from W. A. Malovec and his wife to Frank W. Barcal did not describe the accretion that had formed to the land that was described in the deed was unimportant because the deed conveyed any accretion to the land which was specified in the deed. Accretion must be expressly excluded from a conveyance to avoid a transfer of it. Topping v. Cohn, 71 Neb. 559, 99 N. W. 372; Mulhall v. State, 140 Neb. 341, 299 N. W. 481. The trial court correctly adjudicated that the deed to Koch was a nullity because the grantors had no interest at the time of the conveyance in the land therein described.

Koch contends that the judgment rendered on September 6, 1930, in case No. 4373 in the district court for Butler County in which Frank W. Barcal was plaintiff and Milo Evans was defendant determined all questions with respect to the lands between the Platte River and the north line of Section 13 and adjudicated that said lands were accretion. Koch alleged that any claim of appellant thereto was subject to the judgment of the court in that case. The trial court denied that contention and Koch has prosecuted a cross-appeal. There were only two parties to that case. Appellant was not a party thereto and makes no claim under or through

either of the parties to that case. What was decided or adjudicated in that case did not affect or bind appellant. State v. Chicago, R. I. & P. Ry. Co., 61 Neb. 545, 85 N. W. 556, stated on this subject: "It is a maxim of general jurisprudence that a party is not concluded by a judgment or decree rendered in an action to which he was not a party." See, also, Agnew v. Montgomery, 72 Neb. 9, 99 N. W. 820; In re Estate of Vetter, 142 Neb. 167, 5 N. W. 2d 215; Hanks v. Northwestern State Bank, 143 Neb. 204, 9 N. W. 2d 175. The conclusion of the trial court in this respect was correct and the cross-appeal may not be sustained.

Appellant complains that his motion for a new trial on the ground of newly discovered evidence was improperly denied. The alleged newly discovered evidence said to have been made aware of after the trial and an adverse adjudication was that the United States government had made a survey of Lot 5 of Section 12 in 1928 and again in 1932. These alleged facts were discovered by investigation and inquiry made by counsel of appellant after the trial and apparently between June 14, 1957, the date of the rendition of the judgment, and June 22, 1957, the date of the filing of the motion of appellant for a new trial, an assignment of which was newly discovered evidence material for the plaintiff which he could not with reasonable diligence have produced at the trial. There is no claim that discovery could not have been made before the trial or that any effort to that end was made. It is not said that the surveys were concealed or hidden from anyone or that the facts concerning them could not have been secured at any time by proper request therefor. Appellant became interested in this property in 1945. He commenced this case in March 1951 but the trial of it was not had until the year 1957. The evidence claimed to have been recently learned of had existed for more than 25 years. The facts of any survey made by the government are shown by public record. The failure of

litigant to investigate such possible source of information falls far short of the reasonable diligence required as a condition of securing another trial because of newly discovered evidence. § 25-1142, R. R. S. 1943. Newly discovered evidence is not in itself reason for another trial of a cause if diligence before the trial of the case would have discovered the alleged newly discovered evidence. 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 inattention. Jensen v. John Hancock Mutual Life Ins. Co., 145 Neb. 409, 16 N. W. 2d 847; Grosse v. Grosse, 166 Neb. 55, 87 N. W. 2d 900. The motion for a new trial because of this assignment was properly denied.

The manner in which this court considers and decides an equity case has been frequently stated. Keim v. Downing, 157 Neb. 481, 59 N. W. 2d 602; Worm v. Crowell, *supra*. The trial court inspected the premises and the physical matters involved after the evidence at the trial was concluded and before it arrived at a conclusion in the case. 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, if there is other competent evidence in the record to sustain the findings. Keim v. Downing, *supra;* Worm v. Crowell, *supra*.

The parties to this case stipulated that all north-and-south boundaries found to exist between the parcels of real estate owned by them should be parallel to the east line of Section 12, Township 17 North, Range 4 East of the 6th P. M. in Butler County. The stipulation was observed by the trial court in the decision rendered herein.

The findings of the trial court are sustained by the record and they are adopted by this court as its findings. The cross-appeal of Koch should be and it is denied. The judgment should be and it is affirmed.

AFFIRMED.

WILLIAM D. MCALEXANDER, ADMINISTRATOR OF THE ESTATE OF WILLIAM R. BANNER, DECEASED, APPELLANT, V. ESTATE OF DARRELL LEWIS, DECEASED, ET AL., APPELLEES.
WILLIAM D. MCALEXANDER, ADMINISTRATOR OF THE ESTATE OF WILLIAM R. BANNER, DECEASED, APPELLANT, V. DANIEL D. LEWIS ET AL., APPELLEES.

93 N. W. 2d 632

Filed December 26, 1958. No. 34418.

1. **Negligence.** Negligence is a question of fact and may be established by circumstantial evidence.
2. ———. In proving a case by circumstantial evidence the law requires that the facts and circumstances proved, together with all inferences that may be reasonably drawn therefrom, shall indicate with reasonable certainty the negligent act complained of.
3. **Automobiles: Negligence.** Where the circumstances proved show with reasonable certainty that the impact of two vehicles involved in an accident occurred on defendant's left-hand side of the center of the highway, the evidence is sufficient to go to the jury on the question of defendant's negligence.
4. ———: ———. In such a situation the plaintiff is not required by proof to eliminate all possibility that the accident may have happened otherwise in order to present a case for the jury.

APPEAL from the district court for Richardson County: VIRGIL FALLOON, JUDGE. *Reversed and remanded.*

Baylor, Evnen & Baylor, Warren K. Urbom, and *Joseph C. Murphy,* for appellant.

Paul P. Chaney, Healey, Davies, Wilson & Barlow, Patrick W. Healey, and *Wiltse & Wiltse,* for appellees.

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

CARTER, J.

This appeal involves two actions at law which were consolidated for trial. They grow out of an automobile accident. The plaintiff, the administrator of the estate of William R. Banner, deceased, brought one action against the estate of Darrell Lewis, deceased, and the administrator of said estate, for the death of plaintiff's deceased. The plaintiff brought the second cause of action against Daniel D. Lewis and Inez M. Lewis, the parents of Darrell Lewis, deceased, for the death of plaintiff's deceased, under the family purpose doctrine. The trial court directed a verdict against the plaintiff in both actions. The plaintiff has appealed from the judgments for the defendants entered pursuant to the verdicts directed by the trial court.

The only issue raised by the appeal is whether or not the trial court was correct in holding that there was insufficient evidence of negligence on the part of Darrell Lewis to take the case to the jury. We shall limit our discussion to that one issue.

The accident occurred at about 12 o'clock noon on March 18, 1954, on state highway No. 67, south of Shubert, Nebraska. Plaintiff's decedent was driving south in a Packard automobile accompanied by his wife, Elizabeth, and his two children, Judy Ann and Michael Ray, aged 3 and 1½ years respectively. A Mr. and Mrs. Fry were also occupants of the Packard automobile.

The Chevrolet automobile was being driven north by Darrell Lewis. There were no other occupants in the Chevrolet car. Mr. and Mrs. Banner, Mr. and Mrs. Fry, and Darrell Lewis were killed in the accident. The surviving children were of such tender years that they were incompetent as witnesses. The result is that there were no eyewitnesses to the accident.

The evidence shows that the road was graveled and

about 28 feet wide. It was a very murky day, the evidence showing that a heavy rain fell within 5 minutes after assistance arrived at the scene of the accident. The Packard automobile was on the west side of the center of the highway within 3 feet of a ridge of gravel along the west side of the road. The Chevrolet automobile was also on the west side of the center of the highway about the same distance from the gravel ridge. The two cars appeared to have hit approximately head-on. The fronts of the cars were about 1 foot apart, although parts of the wrecked portions of each of the two cars were in contact with the other. There were water and grease spots under each car, and none elsewhere in the vicinity. There was broken glass around the automobiles but little, if any, was found on the east side of the center of the road. The evidence shows that after the accident Mr. Fry was on the ridge of gravel to the right of the Packard car. Mrs. Banner was between the ridge of gravel and the Packard car, her body being described as hanging out of the front door of the car. There were no car tracks or skidmarks observed by any one before or after the rain. The front of each car had suffered extreme damage. There is no evidence bearing upon the issue of negligence except as here summarized.

Negligence is a question of fact and may be established by circumstantial evidence. All that the law requires is that the facts and circumstances proved, together with the inferences that may be reasonably drawn therefrom, shall indicate with reasonable certainty the negligent act complained of. Cox v. Babington, 166 Neb. 609, 90 N. W. 2d 64; Davis v. Dennert, 162 Neb. 65, 75 N. W. 2d 112.

The plaintiff alleged in his amended petition that Darrell Lewis was negligent in that he drove his automobile on the west side of the center of the highway, it being his left-hand side thereof, and that he failed to yield the west half of the highway to the driver of the

Packard automobile. In proof of these allegations the evidence shows the following circumstances: The two automobiles were on the west side of the center of the graveled portion of the highway after the accident. Each was equally distant from the gravel ridge along the west side of the highway. The water and oil marks were under the two automobiles and not elsewhere. The debris resulting from the collision was on the west side of the center of the road. The resulting damages to the two cars clearly indicates a head-on collision. These circumstances were sufficient to permit the jury to find that the impact of the collision occurred on the west side of the center line of the highway. There are no circumstances indicating any other inference or conclusion. The plaintiff is not required to eliminate by proof all possibility that the accident may have happened otherwise in order to present a question for the jury. The jury could find in the case before us that the impact of the two automobiles occurred on the west side of the center of the highway. Such being determined from the evidence, the jury could find that Darrell Lewis was negligent in driving his automobile on his left-hand side of the road. Such conclusions result from inferences that can reasonably and fairly be drawn from the proved circumstances.

The defendants rely upon a line of cases holding generally that negligence cannot be inferred from the position of the automobiles after an accident occurred. This line of cases is fairly represented by Anderson v. Interstate Transit Lines, 129 Neb. 612, 262 N. W. 445, and Bowers v. Kugler, 140 Neb. 684, 1 N. W. 2d 299. A close reading of these cases will disclose that their holdings are that the position of the automobiles after the accident will not support an allegation of negligence when such positions do not reasonably tend to identify the point of impact. This is made clear by the court in the Interstate Transit Lines case where it is said: "Nothing in the evidence tends to reasonably identify

the point of collision, with reference to the center boundary of the highway."

The circumstances in the instant case are sufficient to support a finding that the impact of the two automobiles occurred on the west side of the center of the highway and that Darrell Lewis negligently operated his automobile on the west side of the center of the highway while proceeding north, contrary to the rules of the road. We necessarily conclude that the evidence of the plaintiff was sufficient to present a jury question and that the trial court erred in directing verdicts against him. The judgments are reversed and the causes remanded for a new trial.

REVERSED AND REMANDED.

HARLAN J. NORMAN ET AL., APPELLANTS, V. GEORGE SPRAGUE, APPELLEE.
93 N. W. 2d 637

Filed December 26, 1958. No. 34451.

1. **Appeal and Error.** In determining the sufficiency of evidence to sustain a verdict it must be considered most favorably 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 be deduced therefrom.
2. **Trial.** In a jury case where different minds may draw different conclusions or inferences from the adduced evidence, or if there is a conflict in the evidence, the matter at issue must be submitted to the jury.
3. ———. In the absence of a request therefor, the trial court is not required to give a cautionary instruction relative to the weighing of circumstantial evidence.
4. ———. The meaning of an instruction, not the phraseology, is the important consideration, and a claim of prejudice will not be sustained when the meaning of an instruction is reasonably clear.
5. **Trial: Appeal and Error.** When different instructions are given on the same subject, they should be considered together, and if they fairly submit the case, the judgment will not be reversed

for indefiniteness or ambiguity in one of the instructions.

6. ———: ———. In determining whether or not there was error in a sentence or clause of an instruction, it will be considered with the instruction of which it is a part and the other instructions, and the true meaning thereof will be determined not from the sentence or clause alone but by a consideration of all that is said on the subject.

7. ———: ———. Instructions must be considered and construed together, and if they are not sufficiently specific in some respects, it is the duty of counsel to offer requests for instructions that will supply the omission and, unless that is done, the judgment will not ordinarily be reversed for such defects.

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

Beatty, Clarke, Murphy & Morgan, Donald W. Pederson, and *Frank E. Piccolo, Jr.,* for appellants.

Daniel E. Owens and *Russell & Colfer,* for appellee.

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

CHAPPELL, J.

Plaintiffs, Harlan J. Norman and Hugh Leech, hereinafter designated by their last names or as plaintiffs, brought this action against George Sprague, hereinafter called defendant, seeking recovery of damages under section 54-601, R. R. S. 1943, for the alleged killing, wounding, worrying, or chasing plaintiffs' sheep by two coon dogs owned by defendant.

Paragraph I of plaintiffs' petition alleged in substance that on and after January 10, 1957, they owned and maintained about 1,000 sheep in a corn field on a farm in Chase County. Paragraph II alleged that defendant resided across the road therefrom and owned two coon dogs. Paragraph III alleged that during 2 weeks immediately preceding January 10, 1957, said dogs continually worried and chased plaintiffs' sheep and killed 19 of them. Defendant's answer denied all of paragraph III, and for want of any competent proof by plain-

tiffs of the allegations contained in such paragraph, the trial court properly withdrew from the jury defendant's alleged liability for the death of said 19 sheep.

Paragraphs IV, V, and VI of plaintiffs' petition also alleged that on January 10, 1957, defendant's dogs killed 26 of plaintiffs' sheep; wounded and injured 64 of them so that it was necessary to dispose of them at the best price obtainable; and that plaintiffs' remaining sheep were chased and worried by defendant's dogs, which caused said sheep to be thrown off feed and lose weight.

For answer, defendant admitted paragraph II of plaintiffs' petition; and for lack of information as to ownership of the sheep and the number thereof, defendant denied paragraph I, and denied all of paragraphs IV, V, and VI. Defendant also alleged that he had owned the two coon dogs for several years; that they had always been around in the area where defendant resides and among sheep and other livestock in such area, but said dogs never worried, chased, or killed any of them; and that plaintiffs' sheep, if any, died from disease or causes other than alleged in plaintiffs' petition.

Upon submission of such issues to a jury, it returned a verdict for defendant, and judgment was rendered accordingly. Thereafter, plaintiffs' motion for new trial was overruled, and they appealed, assigning in substance that: (1) The verdict and judgment were contrary to the evidence and law, and the trial court erred in overruling plaintiffs' motion for directed verdict on the question of liability of defendant made at the conclusion of defendant's evidence; (2) the trial court erred in failing to instruct on circumstantial evidence; and (3) the trial court erred in giving instruction No. 7. We do not sustain the assignments.

Section 54-601, R. R. S. 1943, provides in part: "* * * the owner or owners of any dog or dogs shall be liable for any and all damages that may accrue * * * (2) to any person, firm or corporation by reason of such dog or dogs killing, wounding, worrying or chasing any

sheep or other domestic animals belonging to such person, firm or corporation."

As early as Cook v. Pickrel, 20 Neb. 433, 30 N. W. 421, this court construed such statute and concluded in effect that the owner of dogs was not liable thereunder unless competent evidence established that the injury or death of such domestic animals was directly attributable to the killing, wounding, worrying, or chasing by the owner's dogs.

We have also held that in determining the sufficiency of evidence to sustain a verdict it must be considered most favorably 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 be deduced therefrom. Clouse v. St. Paul Fire & Marine Ins. Co., 152 Neb. 230, 40 N. W. 2d 820, 15 A. L. R. 2d 1008.

Further, it is well established that: "In a jury case where different minds may draw different conclusions or inferences from the adduced evidence, or if there is a conflict in the evidence, the matter at issue must be submitted to the jury." Behrens v. Gottula, 160 Neb. 103, 69 N. W. 2d 384.

In the light of such rules, we have examined the pertinent evidence, which as summarized discloses the following: Norman lived on a farm 1½ miles south of Lamar. During the summer of 1956, he and Leech entered into an agreement whereby Leech agreed to purchase some sheep and Norman agreed to care for them. The profits were to be divided equally between plaintiffs. Pursuant thereto, Leech purchased and weighed 995 sheep in San Angelo, Texas, then had them trucked to Imperial and placed them in Norman's care on Norman's farm. The sheep were lambs which then weighed about 50 to 70 pounds each, but Norman kept no records; he did not even know the exact number of sheep involved, and only three of them were ever weighed after purchase and before January 10, 1957.

After pasturing the sheep on Norman's own wheat grounds for some time and also in various fields in other locations in that community, plaintiffs moved them into a 50-acre fenced corn field on the Whitten farm in October 1956. That field was located just across the road from defendant's farm and about 30 rods from defendant's farm yard. One Smith was in possession of the improvements on the Whitten farm at that time, but one Mauer, Whitten's son-in-law, occupied them as a tenant after about December 6, 1956, when Smith vacated the premises.

Norman usually drove over from his farm to such corn field each morning to look after the sheep and see that they had water and food. In the meantime, plaintiffs had lost several sheep without knowing the cause of death. Norman stated that: "* * * at one time we thought maybe it was kidney stones; some said it was and some said it wasn't." One dead sheep was posted and a kidney stone was pressure-forced out of it. Defendant, who acted as a kind of unlicensed veterinarian in the community, had so forced a kidney stone out of one of plaintiffs' live sheep, but it died. Defendant visited with Norman many mornings among the sheep, and observed that there were usually dead sheep and also sick live ones that stood stiff in their back parts, a symptom of kidney stones.

The sheep had been sheared about December 1, 1956, and within 2 or 3 weeks before January 10, 1957, plaintiffs found 10 dead sheep scattered throughout the field. Also, later and before January 10, 1957, they found nine more dead sheep in the same area. An examination of all of them by plaintiffs and some of them by defendant and a veterinarian failed to determine or discover what happened to such 19 sheep or caused their death, although one of them had a bruise on its neck which might have been a dog bite.

Prior to January 10, 1957, Norman and Mauer had many times seen defendant's rather large, lop-eared

coon dogs trailing and hunting through plaintiffs' field of sheep without killing, wounding, worrying, or chasing any of them in any manner, and no one ever did see them do so at any time, either prior to or on and after January 10, 1957. In that connection, once defendant asked Norman, " 'What do you think about them dogs running through your sheep,' " and Norman replied that he "didn't think they were hurting them," or, as stated by defendant, Norman replied, " 'No, let them go, I think they are protection on coyotes.' "

After dinner on January 10, 1957, Mauer saw one live sheep near his corrals, and a couple of hours later he saw three or four more there. An attempt to drive them away failed. They simply did not move, but stiffly stood their ground or lay down. He then heard some dogs out in plaintiffs' corn field barking and howling in the same manner as he had heard defendant's coon dogs do, and he assumed that they were defendant's dogs because he had seen them running back and forth from that field during the afternoon. He had never seen defendant's dogs chase or inflict any damage on plaintiffs' sheep, although he had heard them barking and had seen them trailing through the sheep in the field many times before January 10, 1957. After dark, about 6 p. m. on that date, Mauer tied his own dog in his barn, but that dog barked continuously. Mauer also heard dogs barking over in plaintiffs' corn field, so he telephoned Norman and told him to come over because there seemed to be a disturbance in his sheep. In that connection, there were other dogs in the neighborhood. A neighbor living ½ mile east of Norman's place owned a pretty good-sized dog that was a "cross with a police dog," but Norman testified that he never saw that dog where the incidents here occurred. Another neighbor had a shepherd dog, but Norman testified that he never saw such dog out there. Another neighbor who lived ¾ mile north of there had a dog, but Norman testified that he had never seen that dog

"tear around." Also, Mauer had a golden retriever. He testified that he had owned the dog only a few weeks so he kept the dog close to him and tied at night, and that he had no knowledge that the dog ever got out and molested plaintiffs' sheep. In such respects, plaintiffs argued that all other dogs in the neighborhood had been accounted for, as well as the possibility of attack by coyotes, upon the basis of modus operandi and physical facts, therefore, as a matter of law, the court was required to conclude that the injuries and death of plaintiffs' sheep were directly attributable to defendant's dogs. We cannot agree, because under all the facts and circumstances that issue was for determination by the jury.

Norman went over to the field immediately after being called by Mauer. He then drove through the gate, flashed his car lights, and saw a band of sheep circling around. He hollered, and defendant's two dogs came running out and away from the band in different directions. One ran to the road and Norman chased it home with his car, after which both dogs ran toward defendant's barn where their mother had been tied.

Norman testified that he got out of his car at defendant's house and, in response to his knock, defendant came to the door and said: " 'Harlan, have you seen my dogs?' " and Norman replied: " 'Yes, I chased the fools home.' " Defendant had a different version. In that connection, he testified that when Norman came to his door, defendant asked, " 'What's the matter, Harlan,' " and Norman replied, " 'Your dogs are in the sheep.' " In that connection, Norman testified that he thought defendant had been away from home all day, but defendant testified positively that he had been at home all day and had seen his dogs around his place several times during the day.

Both Norman and defendant then examined the dogs under the electric light in defendant's barn. There is a dispute about whether the dogs' tongues were hanging

out and they were panting, but be that as it may, they found no blood whatever on either dog, although when the sheep were later examined in the field, some of them were bloody and there was blood on the snow in the area. Norman claimed that he found a little piece of wool in one dog's mouth, but defendant denied that, and if it were wool, plaintiffs never made any effort to preserve it.

Norman and defendant then went to the corn field where they found some dead sheep and some wounded sheep with the flesh on their right shoulders torn downward in a similar pattern. However, defendant testified that they found no such sheep where Norman claimed he saw the dogs, and that the dead sheep lay farther north near a county road. They then picked up one sheep that was badly wounded and took it to defendant's house where defendant sewed it up. Norman then borrowed defendant's needle and thread, and returned to the field with Mauer where they worked on some of the wounded sheep until about 11 p. m. However, it was cold with snow on the ground, and the sheep were scared and hard to catch, so they left until morning. At that time, plaintiffs found 24 or 26 dead sheep but only some of them had been wounded as aforesaid. They also found 64 wounded sheep, so plaintiffs placed them and 154 others in a truck, in order to make a full load, and sold them to a buyer in Scottsbluff. The next day plaintiffs asked defendant if he were going to pay for damages to the sheep, and defendant suggested that they should come back after they had received returns from the sale at Scottsbluff. Plaintiffs testified that defendant promised to pay the damages, which defendant categorically denied. A few days later, plaintiffs returned and demanded $1,264 damages, and informed defendant that if that amount were not paid, it would be a whole lot more. However, defendant refused to pay, stating that his dogs did not cause any of the damage, and he wouldn't pay anything he didn't owe.

In that connection, plaintiffs' version was that defendant said his dogs didn't do that much damage, but defendant denied making such statement. Plaintiffs adduced evidence, some of which was remote and conjectural in quality or character with regard to the amount of damages, but nevertheless the trial court comprehensively submitted that issue to the jury, and it would serve no purpose to recite such evidence here.

Defendant testified that he had resided in Chase County since 1916 and had owned, trained, and hunted with coon dogs for 30 years. On January 10, 1957, he owned three such dogs. The two here involved were born September 24, 1952, and defendant had hunted with them since they were 18 months old. His other dog, their mother, was tied in his barn, but the first two were loose in the neighborhood at all times, even after January 10, 1957. However, plaintiffs kept their remaining sheep on Whitten's place about another week after January 10, 1957, but claimed that they did not see defendant's dogs loose again. Defendant, as did others, had often seen the two dogs trail through the sheep bands of neighbors, including plaintiffs, without paying any attention to the sheep, and the sheep paid no attention to the dogs but simply spread out and let the dogs go on through the band. Defendant testified, and others verified, that his dogs had never bothered any types of livestock; that they could not even be directed or forced to do so; and that they would run from any livestock that stood its ground. Defendant had seen coyotes in the neighborhood during the fall and winter of 1956-1957. A witness for plaintiffs, who had described the symptoms of kidney disease in sheep and the manner of death therefrom and had stated the reason why sheep died when chased by dogs and coyotes, testified that he had experience with both dogs and coyotes killing sheep. He testified that dogs chase and kill sheep for fun. However, coyotes generally do so for food during dark early mornings, and when one sheep is finally killed,

they usually quit. Such witness was a member of an association in Chase County which had been instrumental in procuring the county board to organize a coyote-killing campaign because there were more coyotes in that area than in other western counties. He testified that if several coyotes got in a band of sheep and chased or bit them, they would produce the same result as dogs would.

The party who occupied the Whitten improvements prior to December 6, 1956, where plaintiffs' sheep were being fed, was a witness for defendant. Such witness was familiar with defendant's dogs, and while living there had regularly seen them trail through the field and plaintiffs' bands of sheep, without chasing or attacking them or any other livestock in any manner. Defendant's brother-in-law testified that he lived in the same neighborhood. He was familiar with defendant's dogs. He had hunted with defendant and his dogs six or seven times between August and December 1956, and again in the fall of 1957. During that time, defendant's dogs had trailed through his own bands of sheep and those of neighbors many times, and he never saw the dogs chase, worry, or cause the sheep to mill around. Also, he never saw the dogs bother any other livestock. Another neighbor gave comparable testimony and recited that many times in the fall of 1956 and as late as the spring of 1957 he had hunted with defendant and his dogs, and that he had seen the dogs trail through the neighbors' bands of sheep without paying any attention to the sheep or any other livestock.

Much of the evidence heretofore recited was circumstantial, but some of it was directly conflicting. We conclude that the issues were for determination by a jury; that to have directed a verdict for plaintiffs on the issue of liability would have been entirely erroneous; and that the verdict and judgment thereon were not contrary to the evidence and law.

Plaintiffs argued that the trial court erred preju-

dicially in failing to instruct the jury on circumstantial evidence, although admittedly no request was made for such instruction. We do not agree.

In Osborne v. State, 115 Neb. 65, 211 N. W. 179, this court construed a rule of practice under both the criminal and civil code, and, citing authorities from this jurisdiction, said: "It is the duty of the court on its own initiative to instruct the jury as to the general rules of law applicable to the case, and in such a way as not, either by omission or by expression, to withdraw from the consideration of the jury an issue or essential element necessary for its determination. However, if an instruction is desired by either party which would serve only to guide the jury in weighing certain features of the evidence in connection with the issues, then in such case it devolves upon such party to request such specific instruction."

In Clark v. State, 151 Neb. 348, 37 N. W. 2d 601, quoting with approval from Fetty v. State, 121 Neb. 228, 236 N. W. 694, and citing other authorities from this jurisdiction, we held: "In the absence of a request therefor the trial court is not required to give a cautionary instruction relative to the weighing of circumstantial evidence." We conclude that the trial court did not err in failing to instruct on circumstantial evidence.

Plaintiffs also argued that instruction No. 7 given by the trial court was prejudicially erroneous. We do not agree.

In Brown v. Hyslop, 153 Neb. 669, 45 N. W. 2d 743, we held: "The meaning of an instruction, not the phraseology, is the important consideration, and a claim of prejudice will not be sustained when the meaning of an instruction is reasonably clear.

"When different instructions are given on the same subject, they should be considered together, and if they fairly submit the case, it will not be reversed for indefiniteness or ambiguity in one of the instructions.

"In determining whether or not there was error in a sentence or clause of an instruction, it will be considered with the instruction of which it is a part and the other instructions, and the true meaning thereof will be determined not from the sentence or phrase alone but by a consideration of all that is said on the subject." See, also, Myers v. Willmeroth, 151 Neb. 712, 39 N. W. 2d 423.

As recently as Tate v. Borgman, *ante* p. 299, 92 N. W. 2d 697, we held: "Instructions must be considered and construed together, and if they are not sufficiently specific in some respects, it is the duty of counsel to offer requests for instructions that will supply the omission and, unless that is done, the judgment will not ordinarily be reversed for such defects."

In the light of such rules, we have examined all of the instructions. In that connection, instructions Nos. 1, 6, and 9 concisely and clearly identified and separately stated the three factors or elements for each or all of which plaintiffs sought damages alleged to have been proximately caused by defendant's dogs. Those and all other instructions as well correctly stated all related issues and properly applied rules of law applicable thereto. In such respect, those instructions separately, comprehensively, and properly submitted plaintiffs' claimed damages for: (1) Plaintiffs' sheep allegedly killed; (2) plaintiffs' sheep allegedly wounded; and (3) plaintiffs' remaining sheep which were allegedly chased and worried, causing them to be thrown off feed and lose weight.

Instruction No. 7, about which plaintiffs complain, said: "You are instructed and cautioned that before the plaintiffs are entitled to recover in this action for any injuries or death to the sheep involved in this action, you must find from a preponderance of the evidence that such injury, loss of weight, or death, if any, were the direct and proximate result of the acts on the part of the dogs involved herein.

"It is for you to determine from all the facts and cir-

cumstances in this case whether or not the dogs belonging to the defendant, George Sprague, caused the alleged injuries, death, or loss of weight of plaintiffs' sheep.

"If you fail to find from a preponderance of the evidence that the injuries or death to the sheep involved herein, if any you find, were the direct and proximate result of any acts on the part of defendant's dogs; or if you find from the evidence that *such injuries or death, if any shown were due to some other cause or some disease from which such sheep were suffering,* then the plaintiffs are not entitled to recover and you should return a general verdict in favor of the defendant." (Italics supplied.)

In that connection, plaintiffs argued that the italicized portion in the last paragraph was not only confusing because not sufficiently specific, but also because it submitted issues not supported by any evidence. It will be noted that the words "such injuries or death" and the first and second clauses of the last paragraph as well, were in the alternative, and as heretofore shown, the jury could have reasonably concluded that "such injuries or death" of plaintiffs' sheep were not the direct and proximate result of any acts on the part of defendant's dogs, thus of necessity either "such injuries or death" were due to some other cause. Also, there was evidence from which the jury could have reasonably concluded that the loss of weight or death of some of plaintiffs' sheep was caused by disease.

The phraseology of the paragraph, from the semicolon after the word "dogs" to the word "then" could as well have been left out, because in effect it had the same meaning as the clause preceding it. The meaning of the phraseology about which plaintiffs complain is not confusing when considered in the light of the instruction of which it is a part, and of preceding and subsequent instructions given which related to the same subject. If, as plaintiffs claim, the last paragraph of instruction

No. 7 was not sufficiently specific in some respects, they should have timely requested other instructions to supply the omission. We conclude that instruction No. 7 was not prejudicially erroneous.

For reasons heretofore set forth, we conclude that the judgment of the trial court should be and hereby is affirmed. All costs are taxed to plaintiffs.

AFFIRMED.

WENKE, J., participating on briefs.

SAM PHILLIPS ET AL., APPELLEES, V. STATE OF NEBRASKA, DEPARTMENT OF ROADS AND IRRIGATION, APPELLANT.

93 N. W. 2d 635

Filed December 26, 1958. No. 34469.

1. **Eminent Domain.** 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.
2. ———. Special benefits are those which arise from the peculiar relation of the land in question to the public improvement.
3. ———. 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.
4. **Trial.** It is the duty of a trial court to instruct the jury on each issue presented by the pleadings which is supported by evidence.
5. **Appeal and Error.** It is error for a trial court to instruct the jury on an issue made by the pleadings in the cause which is not supported by evidence.

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

Clarence S. Beck, Attorney General, *Harold S. Salter,* and *Jean Wells,* for appellant.

Stewart & Stewart, for appellees.

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

BOSLAUGH, J.

Appellees were the owners of the west half of the west half of Section 2, Township 8 North, Range 22 West of the 6th P. M., Gosper County. A graveled State Highway, No. 283, between Lexington and Elwood was adjacent to and passed by the land of appellees on the west of it. The land was a good, appropriately improved farm and was used for agricultural purposes generally pursued in that area. About half of the land was irrigated. Appellant appropriated 1.07 acres of the land by condemnation proceedings for use in the reconstruction and improvement of the highway. The area appropriated was immediately east of the existing highway right-of-way and extended from the north part of the land of appellees south to a point about 500 feet north of the southwest corner thereof. It was generally 37 feet wide but at one point and for a short distance it was 46 feet in width. It passed to the west of the buildings on the land of appellees and the east line of the tract taken is only about 30 feet from the west or front of the house in which appellees make their home.

The project involving the highway commenced at Elwood and ended at a canal bridge near the north part of the land of appellees. The right-of-way is to be widened in places, a right angle turn at the southwest corner of the land is to be eliminated, and a gentle curve substituted for it. The road is to be leveled out so that it will have a more uniform grade and it will be paved with asphalt concrete. The graveled road along the farm buildings is about 7 feet below the level of the surrounding ground. It will be filled in about 5 feet. The driveway from the graveled road to the farm buildings is approximately 20 feet wide, connects with the highway an estimated 350 or 400 feet north of the buildings on the farm, and extends south to the buildings. It has a rock surface and is satisfactory to appellees. It is located on the land condemned by appellant. Appellant proposes to eliminate the present driveway and to con-

struct a new one which will extend from the highway directly to the location of the buildings on the farm of appellees. Specifications for or facts concerning the new driveway do not appear in evidence.

Appellant by its answer pleaded that special benefits will accrue to appellees by reason of the fact that their property will abut on a hard-surfaced highway when the improvements thereto are completed, and the fact that a cut in front of the property will be filled and the means of ingress and egress to and from their property will be improved. This was denied by reply of appellees.

Appellant, by a tendered instruction, asked the trial court to instruct the jury on the subject of special benefits. The court refused to do so. This refusal of the court is the only complaint of appellant presented by this appeal.

There is no evidence in the record that the land of appellees has a peculiar relation to the contemplated improvement of the highway. What evidence there is on the subject is to the contrary. It is that all the owners of land abutting along the highway to be improved will enjoy identical benefits with any benefits therefrom to appellees. A witness produced by appellant testified that a paved highway would increase the value of the land adjoining it on either side of it, and that he considered the land of appellees was more valuable after the 1.07 acres were taken by appellant because of the paved highway but that did not help just appellees but everybody who had land abutting on the highway. The witness did not attempt to evaluate the amount of the alleged benefits the improvement would contribute to appellees or any other landowners abutting on it. The claimed benefits either because of the improved highway or the new driveway from it to the farm of appellees were not at the trial expressed in any manner in terms of money. There is no way that a jury in this case could have determined from the evi-

dence the amount in money of any special benefits to appellees. Appellant offered the testimony of a real estate broker of 25 years' experience in the county where the land is located. He said while being examined by counsel for appellant that the change in the driveway as it now exists to the one appellant proposed to construct would make no difference in the value of the land of appellees.

There is no peculiar relation of the land of appellees to the public improvement concerned in this case either because of the changes made in the highway or the construction of the contemplated driveway from it to the buildings on the farm. The record contains no evidence of any special benefits to appellees because of the public improvement.

Backer v. City of Sidney, supplemental opinion, 166 Neb. 492, 89 N. W. 2d 592, states: "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." See, also, Crawford v. Central Nebraska Public Power & Irr. Dist., 154 Neb. 832, 49 N. W. 2d 682; Langdon v. Loup River Public Power Dist., 144 Neb. 325, 13 N. W. 2d 168; Prudential Ins. Co. v. Central Nebraska Public Power & Irr. Dist., 139 Neb. 114, 296 N. W. 752, 145 A. L. R. 1.

Langdon v. Loup River Public Power Dist., *supra,* contains the following: "The defendant complains because the court failed to instruct as to special benefits.

* * * The record discloses no evidence of any special benefits and therefore no instruction thereon was required nor should it have been given." The duty of the trial court was to instruct the jury on each issue presented by the pleadings which was supported by evidence. McKain v. Platte Valley Public Power & Irr. Dist., 151 Neb. 497, 37 N. W. 2d 923. It may be prejudicial error if the trial court includes in an instruction a matter presented by a pleading concerning which there is no evidence tending to establish it. Bramhall v. Adcock, 162 Neb. 198, 75 N. W. 2d 696.

The trial court was correct in refusing to instruct the jury in this case on the subject of special benefits. The judgment of the district court should be and it is affirmed.

AFFIRMED.

FRANK H. JOHNS, APPELLEE, V. ELSIE CARR ET AL., APPELLANTS.
93 N. W. 2d 831

Filed December 26, 1958. No. 34483.

1. **Appeal and Error.** An appeal of a cause from the district court must be considered and decided by this court on the basis of the information contained in the record presented which, if properly authenticated, imports absolute verity.
2. **Deeds.** Delivery of a deed, an essential to its being operative, is largely a question of intent to be determined from the facts and circumstances of each case.
3. ———. Any acts or words showing intention of the grantor to deliver and the grantee to accept a deed are sufficient to constitute a delivery of it.
4. ———. The recording of a deed in the manner provided by law is generally evidence of the delivery and acceptance of the deed if the conveyance is beneficial to the grantee.
5. ———. Assent of the grantee is not an essential element of the delivery of a deed; neither is it necessary that the grantee have knowledge of the deed prior to the death of the grantor.
6. **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.

7. ———: ———. An admission made in a pleading on which the trial is had 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.

8. ———: ———. A judicial admission is a formal act done in the course of judicial proceedings which is a substitute for evidence, thereby waiving and dispensing with production of evidence by conceding for the purposes of litigation that the subject of the admission is true.

9. **Trial: Judgments.** The prerequisites of granting a summary judgment are that the movant demonstrate that there is no genuine issue of fact in the case and that he is entitled to judgment as a matter of law.

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

Hugh W. Eisenhart, Perry, Perry & Nuernberger, and *Edwin C. Perry,* for appellants.

Johnston & Grossman, for appellee.

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

BOSLAUGH, J.

The second amended petition contains the following: Appellee and Fern Winslow Johns, husband and wife, were the owners of real estate involved herein. Appellee from about August 11, 1935, had a long experience of illness and mental depression because of which he was committed to a mental hospital and subsequently discharged therefrom by habeas corpus proceedings. Appellee on or about June 22, 1953, was despondent and became intoxicated. His wife had him committed to jail and he was nervous and upset. His wife and appellants while he was in jail had a conference or conferences concerning the property involved in this case. Appellants authorized and instructed the wife of appellee to obtain a deed from him to the real estate in-

volved herein to appellants as grantees. The wife of appellee obtained his release from jail about June 23, 1953. He returned to his home in a confused state of mind and under the influence of intoxicating beverages and drugs. He was then in doubt concerning his sanity and liberty and was afraid he might be confined in jail or a mental institution for life. He, while in the condition aforesaid, agreed as requested by his wife and appellants to sign papers on conditions that appellants would pay to appellee $5,000; that a life estate would be reserved to him and his wife or the survivor of them; and that on the death of both of them the property would be divided equally between the son of appellee and Elsie Carr, one of the appellants. The terms and conditions stated by appellee were accepted by his wife and she and appellants represented to appellee that a paper presented to him for his execution complied with and expressed the agreement and conditions required by appellee. The paper did not express the verbal agreement and conditions. He later learned appellants claimed the paper was a deed of the property that conveyed it to them. Appellants accepted the paper which purported to be a deed, filed said purported deed of record with the register of deeds of Furnas County, took possession of the real estate, and claimed to be the owners thereof because of the deed and the recording of it. Appellee received no consideration for signing the deed and his signature thereto was procured by fraud and misrepresentation to his damage in excess of $10,000. The appellants, because of the acceptance of the deed and the filing of it for record, were estopped from denying the agency and misrepresentations of the wife of appellee made to him, as he alleges. Appellants have accepted and filed the deed for record and taken possession of the real estate. It is inequitable to allow them to retain the property and its income without payment of any consideration. If the deed is valid, they should be required to pay appellee $5,000 and the deed

should be reformed to comply with the true agreement and the interest of appellee and his son in the real estate as agreed. If the deed is void, it should be set aside. The prayer of the petition is for relief appropriate to the allegations of the petition.

The answer of appellants admits that appellee and Fern Winslow Johns were husband and wife as alleged by appellee and denies all other statements of the second amended petition of appellee. The answer alleges that: The interest of appellee in the real estate described in the petition during the lifetime of his wife was the inchoate interest of a husband in the real estate of his wife. The wife of appellee is now deceased. Elsie Carr was a sister and W. H. Winslow and Ivan Winslow were brothers of the deceased. The real estate described in the petition was property owned by the Winslow family and it was inherited by Fern Winslow Johns from her mother before the daughter was married to appellee. The deed conveying the real estate described in the second amended petition to Elsie Carr, W. H. Winslow, and Ivan Winslow as C. Ivan Winslow, appellants, as joint tenants, subject to a life estate therein of Fern Winslow Johns, was executed by Fern Winslow Johns and Frank H. Johns, wife and husband, June 29, 1953. The deed was acknowledged before a notary public, who was an attorney, of the State of Kansas. It was delivered to the office of the county clerk of Furnas County thereafter, was recorded, and is now of record in the public records of that county. The fee of the county clerk for recording the deed was paid on the date it was recorded by Fern Winslow Johns. The grantees named in the deed had no knowledge of it until after the death of Fern Winslow Johns but they accepted it and the benefits thereof as a gift from their sister. Appellants ask that the petition be dismissed and the title to the land be quieted in them.

The reply asserted that none of the appellants had possession or control of the alleged deed or the real

estate before the death of Fern Winslow Johns; that neither she nor appellee had any intention of making a gift of the real estate to appellants or any of them; and that after the death of Fern Winslow Johns appellants took and have since had possession of the real estate under claim of ownership and have had the use and benefit of it. Appellee denied all other statements of the answer of appellants and prayed that the deed be held to be void or, in the alternative, that appellee be decreed a life estate in the real estate, awarded a judgment for $10,000, and for equitable relief.

A motion for summary judgment was made by appellee for the reason stated therein that the answer of appellants admits that no delivery of the deed was made to them. The district court found that appellee was entitled to a summary judgment because the answer alleged that the deed was filed and recorded in the public records of Furnas County and the appellants had no knowledge of the deed being drawn or delivered to the county clerk for recording until after the death of their sister, Fern Winslow Johns, and that by reason thereof appellant had not accepted the deed during the lifetime of one of the grantors and the delivery of said purported deed was incomplete. The motion for summary judgment was sustained and a judgment was rendered setting aside the deed.

The certification by the court reporter and the order of allowance by the judge of the district court establish that the bill of exceptions contains all evidence offered and the evidence received in this cause. It does not show that any evidence was offered or received on December 2, 1957, or on any other date except March 8, 1958. On that date the motion of appellants for a new trial and their motion to set aside the judgment were heard, exhibits were offered in support of the motions, and they were received in evidence. This is the only occasion in the experience of this litigation that the record shows that any evidence was offered or received.

The journal entry of the trial court of the hearing December 2, 1957, on the motion of appellee for summary judgment recites the motion was presented, argued, and submitted, whereupon the court took it under advisement. The journal entry of the district court of the proceedings had in the case January 8, 1958, states that after careful consideration of the pleadings, argument, and written briefs the court finds that the action involves the legality of a certain deed. There is no mention in either of the journal entries of evidence having been taken or considered in the hearing or decision of the motion for summary judgment. The statement of the brief that appellee filed a motion for summary judgment, that trial was had on December 2, 1957, that evidence was offered, and that the question was argued and taken under advisement by the court, and the statement that the record and bill of exceptions indicate positively that certain evidence was presented at the trial of the case December 2, 1957, are each incorrect. The record establishes beyond any area of legitimate argument that there was no evidence offered on the hearing on the motion for a summary judgment and that it was by the court considered and decided exclusively upon the pleadings, arguments of counsel, and written briefs. It follows that the argument of appellee that the action of the trial court granting a summary judgment may not be reviewed in this court because the bill of exceptions does not show "the evidence which the trial court may have considered" is without substance since the record evidences beyond question that there was no evidence considered in that regard. The record of the proceedings in the trial court as certified to this court imports verity and this court must determine an appeal exclusively on the basis of what the record shows.

So far as the action of this court of review can be considered a trial, it is trial of the correctness of the happenings in the cause in the trial court. The evidence of the happenings the correctness of which is on trial

is furnished only by the record presented in this court as by its records alone can the trial court speak. Haswell v. State, *ante* p. 169, 92 N. W. 2d 161. See, also, In re Estate of Piel, 141 Neb. 783, 4 N. W. 2d 875; Segebart v. Gregory, 160 Neb. 64, 69 N. W. 2d 315.

The basis of the motion for summary judgment was the assertion that the answer of appellants admitted that no delivery of the deed was made to them. The status of the case when the motion for summary judgment was made and when it was heard, considered, and passed upon by the trial court was that issues had been joined by the second amended petition of appellee, the answer of appellants, and the reply of appellee. The court was limited to a consideration of the information contained in the pleadings in making a decision on the motion. It could not have been otherwise because there was nothing else in the record of the case which the court could have made the basis of the decision of the motion. Appellee speaks almost not at all about the pleadings and the issues thereby made but he refers repetitiously to matters of alleged fact contained in the bill of exceptions, none of which were in the record or before the trial court until long after the motion for summary judgment had been decided and a plenary judgment rendered for appellee. Appellee admits that none of the matters last above referred to were before or considered by the trial court in his disposition of the motion for summary judgment. The answer of appellants did not by any words therein admit that no delivery of the deed was made to them. The trial court in granting the motion did not so find. The court only found that the answer says that the deed was filed and recorded in the office of the county clerk of Furnas County, that appellants had no knowledge of the deed being prepared and presented to the county clerk for recording until after the death of their sister and by reason thereof appellants had not accepted the deed in the lifetime of their sister, one of the grantors, and

that the delivery of the deed was incomplete because of the lack of acceptance by the grantees. The allegations of the answer referred to by the trial court were a sort of explanatory denial by appellants supplemental to their general denial in the answer of the charges of fraud and misrepresentation made against them by appellee in his petition which he claims induced him to execute the deed conveying the real estate involved herein to the sister and brothers of the wife of appellee. These were not allegations or admissions of nondelivery or nonacceptance of the deed.

The answer of appellants denied all the allegations contained in the second amended petition of appellee except only the one that stated appellee and Fern Winslow Johns were husband and wife. Thereby an issue was made and existed as to all material allegations of the cause of action made by the second amended petition. Appellee pleaded therein that he made an agreement with his wife who acted for herself and appellants to convey the real estate for a consideration stated upon conditions which appellee specified. A deed was executed by appellee and his wife but it did not comply with the alleged agreement made or the asserted conditions specified by appellee and he was not paid the amount he was to receive for the deed, according to his allegations. He pleaded he did not deliver the deed and that he was induced to execute it because of fraud and misrepresentation of his wife and appellants. These allegations were all denied by the answer of appellants. They were issues of fact that resisted disposition of the case by a summary judgment. The delivery or nondelivery of the deed was a question of fact which could only be litigated by production of evidence of facts and circumstances surrounding and concerning it.

Delivery of a deed is essential to render it operative. Delivery is largely a question of intent to be determined by the facts and circumstances of each particular case. No particular words, acts, or ceremony are necessary

to constitute delivery of a deed. Any acts or words showing intention of the grantor to deliver and the grantee to accept are sufficient. Brown v. Westerfield, 47 Neb. 399, 66 N. W. 439, 53 Am. S. R. 532; Ladman v. Ladman, 130 Neb. 913, 267 N. W. 188; Smith v. Black, 143 Neb. 244, 9 N. W. 2d 193; Milligan v. Milligan, 161 Neb. 499, 74 N. W. 2d 74; Short v. Kleppinger, 163 Neb. 729, 81 N. W. 2d 182.

The second amended petition of appellee asserts that the appellants filed the purported deed of record with the register of deeds of Furnas County. The real estate described in the deed and involved herein is in that county. The recording of the deed was some evidence both of delivery and of acceptance of it since the conveyance was beneficial to appellants. Gustin v. Michelson, 55 Neb. 22, 75 N. W. 153; Home Fire Ins. Co. v. Collins, 61 Neb. 198, 85 N. W. 54; Bowman v. Griffith, 35 Neb. 361, 53 N. W. 140; United States v. 12,800 Acres of Land, Etc., 69 F. Supp. 767.

The trial court found that appellants could not have accepted the deed after the death of Fern Winslow Johns, one of the grantors. Appellee apparently believes that assent of the grantee is an indispensable requirement of the delivery of a deed. This court has decided otherwise as to both of these views. Smith v. Black, *supra,* contains this language: "It is not necessary that grantees shall have knowledge of the deeds prior to the death of the grantor. * * * The appellants substantially urged that there was no delivery since there was no assent thereto by grantees, assent being an essential element of delivery. The authorities cited, we think, do not support this contention."

The second amended petition of appellee contains this: "* * * that said defendants (appellants) and each of them accepted said paper (the deed in question), took possession of said real estate and property filed said purported deed of record with the Register of Deeds of Furnas county, Nebraska, and claim the same to be a

deed to said real estate and property and by virtue of said paper and the recordation thereof claim title to said property and real estate as against the plaintiff and the world * * *." Later it is therein pleaded by appellee that appellants, having accepted and filed the deed of record, taken possession of the property, and accepted the benefits and fruits of the conspiracy, are estopped to deny the aforesaid representations, promises, and fraudulent misrepresentations. These are admissions of the acceptance of the deed and the filing of it for record in the public records of the proper county made in the pleading which is the foundation of the litigation. The effect of such an admission has been by this court frequently and recently declared. Kuhlmann v. Platte Valley Irr. Dist., 166 Neb. 493, 89 N. W. 2d 768, states: "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 * * *. 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. * * * 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."

There are genuine issues of fact made by the pleadings including the one concerning the delivery or nondelivery of the deed of June 29, 1953. Appellee was not entitled to a judgment as a matter of law. The prerequisites of granting a summary judgment are that the movant demonstrate that there is no genuine issue of fact in the case and that he is entitled to judgment as a matter of law. Eden v. Klaas, 165 Neb. 323, 85 N. W. 2d 643; Spidel Farm Supply, Inc. v. Line, 165 Neb. 664, 86 N. W. 2d 789.

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

REVERSED AND REMANDED.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1959

HERMAN HERT, APPELLANT, V. CITY BEVERAGE CO., INC., A CORPORATION, ET AL., APPELLEES.

94 N. W. 2d 27

Filed January 9, 1959. No. 34424.

1. **New Trial: Appeal and Error.** In a case where the trial court sets aside a verdict, grants a new trial, and gives no reason for so doing, and appeal is taken therefrom, 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 what he contends is prejudicial error justifying the decision of the trial court. The appellant then in reply has the right of meeting the contention of the appellee.
2. **Appeal and Error.** Before an error requires a reversal it must be determined that it was prejudicial to the rights of the party against whom it was made.
3. **New Trial: Appeal and Error.** Where a party has sustained the burden and expense of a trial and has succeeded in securing the verdict 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.
4. **Damages: New Trial.** Where a verdict in an action for damages is excessive and it appears to have been returned under the influence of passion and prejudice rather than on facts or that the jury misapplied the law, it is the duty of the court to set aside the verdict and grant a new trial.
5. **Damages: Appeal and Error.** The question of the amount of damage is one solely for the jury and its action in this respect will not be disturbed on appeal if it is supported by evidence

and bears a reasonable relationship to the elements of injury and damage proved.

6. **Damages.** There is no established monetary measure for pain and suffering.
7. **Damages: Appeal and Error.** If a jury has considered the duration and severity of pain and suffering and has manifested by verdict a reasonable attitude thereto in fixing damages, the verdict will be upheld on appeal.

APPEAL from the district court for Douglas County: ARTHUR C. THOMSEN, JUDGE. *Reversed and remanded with directions.*

Martin A. Cannon and *Mathews, Kelley & Stone,* for appellant.

Bryce Crawford, Jr., and *Crawford, Garvey, Comstock & Nye,* for appellees.

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

YEAGER, J.

This is an action for damages by Herman Hert, plaintiff and appellant, against City Beverage Co., Inc., a corporation, Leo Dahir, doing business as City Beverage Co., and Frank Tomes, defendants. It developed on the trial that there was no corporation, hence the true defendants are Dahir and Tomes. These two defendants are appellees. The action was based directly upon a charge of negligence against the defendant Tomes who was at the time in the employ of the defendant Dahir. It is clear that Tomes was at the time an employer of Dahir and if Tomes was liable Dahir was also liable under the theory of respondeat superior. This is not questioned. Further mention will not be required herein of Dahir, therefore Hert will be hereinafter referred to as plaintiff and Tomes as defendant.

The case was tried to a jury and a verdict was returned in favor of plaintiff and against the defendants for $4,399.97. Judgment was rendered on the verdict. A motion for new trial was duly filed which was sus-

tained. From the order sustaining the motion for new trial the plaintiff has appealed.

For the purposes of this opinion, although the entire verdict was set aside, only the $4,000 portion requires discussion. This amount represents, as is indicated by arguments in the briefs, what was allowed for personal injuries and the appeal is thereto related. The balance represents an amount allowed for other damages concerning which there is no dispute.

The order setting aside the verdict does not contain any reasons therefor. It is true that the plaintiff was given leave on February 3, 1958, which was 7 days after the ruling on the motion for new trial, to make as part of the bill of exceptions a memorandum of the trial judge addressed to the attorneys for the parties in which was set forth grounds for setting aside the verdict. The memorandum however was never incorporated in the bill of exceptions.

The case therefore comes here as one wherein no reasons appear in an order for setting aside the verdict and granting a new trial. The rule to be observed in presenting the appeal is the following: "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." Greenberg v. Fireman's Fund Ins. Co., 150 Neb. 695, 35 N. W. 2d 772. See, also, Fuss v. Williamson, 159 Neb. 525, 68 N. W. 2d 139; Gain v. Drennen, 160 Neb. 263, 69 N. W. 2d 916; Wright v. Lincoln City Lines, Inc., 163 Neb. 679, 81 N. W. 2d 170.

The plaintiff sets forth one assignment of error as

follows: "The Court erred in sustaining the defendant's motion for a new trial." The substance of the argument in support of the assignment is that plaintiff testified that he was injured; a policeman testified that plaintiff complained of injury at the scene, and the police report so shows; the doctor who attended plaintiff 2 days later said plaintiff was permanently injured; a consultant orthopedist said plaintiff was injured; a doctor called as a witness by the defendant admitted that previously he had diagnosed a lumbo-sacral strain and that plaintiff was injured, but disputed only the severity of the injury; and that there was no testimony that he was not injured, on account of all of which a verdict of $4,000 for general damages could not be regarded as excessive. The argument as it pertains to injury directs attention to particular evidence in the bill of exceptions. Support for the argument is found in the evidence to which attention has been directed. This support, except as to that given by the plaintiff, is in the nature of opinions based upon subjective symptoms rather than upon objective findings.

On his part the defendant presents in his brief only the question of whether or not the verdict was so excessive as to warrant the granting of a new trial; admissibility of evidence in one particular; and proper approach to be taken by this court when a case comes here for review of an order sustaining a motion for new trial.

The evidence which the defendant contends was inadmissible was objected to, as we interpret, on the ground that it was not properly identified. The offered evidence was X-rays. Without this foundation doctors were allowed to state what the X-rays portrayed. Later in the trial the X-rays were again offered and at that time the defendant expressly waived any objection as to foundation.

While it may be said that in the first instance there was error, in the light of the subsequent substantial waiver of objection to which attention has been called,

it may not well be said that the defendant was prejudiced. The applicable rule in such cases is the following: "Before an error requires a reversal it must be determined that it was prejudicial to the rights of the party against whom it was made." Buhrman v. Smollen, 164 Neb. 655, 83 N. W. 2d 386. See, also, Wolfe v. Mendel, 165 Neb. 16, 84 N. W. 2d 109.

In a case which comes here for review of an order setting aside a verdict and granting a new trial it is the duty of this court to observe the following rule: "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." Greenberg v. Fireman's Fund Ins. Co., *supra.*

In a case where the question to be determined is that of whether or not the amount allowed justified the court in setting aside the verdict this court is to be guided by rules which are set forth in the syllabus of Peacock v. J. L. Brandeis & Sons, 157 Neb. 514, 60 N. W. 2d 643. The source of these rules is found in the cases cited in the opinion. The rules are:

"Where a verdict in a personal injury case is excessive and it appears to have been returned under the influence of passion and prejudice rather than upon the facts or that the jury misapplied the law, it is the duty of this court to set the verdict aside and grant a new trial."

"The question of the amount of damage is one solely for the jury and its action in this respect will not be disturbed on appeal if it is supported by evidence and bears a reasonable relationship to the elements of injury and damage proved."

The record discloses the following facts and circumstances which must be considered in the light of these rules in determining the question of whether or not the court properly set aside the verdict and granted a new

trial: The accident out of which the action grew occurred on September 14, 1955; while liability, if damage is proved, is not admitted by the defendant he made no effort on the trial to defend against liability; the trial was had in October 1957; the plaintiff as a witness gave testimony as to the accident and resultant injuries; and he testified substantially that he received an injury which caused pain in the lower part of his back and that he suffered pain, discomfort, and still so suffers, that he continued in his employment but on account of the persistence of pain he worked shorter hours than he ordinarily did theretofore, that he has not been able to sleep with any degree of comfort except when he lies on his stomach, and that discomfort is entailed in driving an automobile in his occupation which is that of salesman. He testified to other details related to his condition but it is not deemed necessary to set them out here.

Based upon history given by the plaintiff and an examination of X-rays a doctor testified in substance that he found a pathological condition at the lower extremity of the spinal column which he did not say was caused by the accident, but he did say that, in his opinion, it was aggravated by the accident and caused the pain and discomfort of which the plaintiff complained, and which in his opinion would be continuous thereafter. The record discloses that the plaintiff was 39 years of age and his life expectancy was from 28 to 30 years.

Another doctor gave it as his opinion that the pain and discomfort from which the plaintiff suffered and was suffering was caused by the accident.

A doctor called by the defendant, on substantially the same history as that on which the testimony of the plaintiff's witnesses was based, evidence of the same pathological condition, and an examination made on May 13, 1957, testified that there was mild tenderness in the area indicated by plaintiff, but there was no evidence of injury or disability, and nothing from which

an objective finding of injury or disability could be made by him. He gave an opinion that at the time of the accident the plaintiff had a mild low back strain but that there was little or no disability at the time he made his examination.

It becomes clearly apparent that there is evidence to sustain the finding of the jury that the plaintiff suffered an injury for which he was entitled to recover damages. The remaining question therefore is that of whether or not the amount awarded bears a reasonable relationship to the injury and damage proved.

From the brief summary of evidence set out herein the jury was justified in finding that the plaintiff suffered an injury with resultant pain and discomfort which persisted from the date of the accident down to the date of trial, and which would persist thereafter. There is no monetary measure for pain and suffering but it is well recognized that damages are allowable therefor. If a jury has considered the duration and severity of pain and suffering and has manifested by verdict a reasonable attitude thereto in fixing damages the verdict will be upheld on appeal. See Peacock v. J. L. Brandeis & Sons, *supra.*

In the light of the facts as disclosed by the record in this case and this principle we are unable to say that the award of damages for personal injuries by the jury was excessive.

The order and judgment of the district court sustaining the motion for new trial and setting aside the verdict of the jury is reversed and the cause remanded with directions to reinstate the verdict and judgment rendered thereon.

REVERSED AND REMANDED WITH DIRECTIONS.

MERLIN OLSON, APPELLEE, V. THOMAS SHELLINGTON, APPELLANT.

94 N. W. 2d 20

Filed January 9, 1959. No. 34448.

1. **Negligence: Trial.** An issue of gross negligence is for the jury if the evidence relating thereto is conflicting and from which reasonable minds might arrive at different conclusions.
2. ———: ———. When the evidence is resolved most favorably to the existence of gross negligence and thus the facts are determined, the inquiry of whether they support a finding of gross negligence is one of law.
3. **Automobiles: Trial.** A guest, to recover damages from a host for injury received by the guest while riding in an automobile operated by the host, must prove by the greater weight of the evidence in the case the gross negligence of the host relied upon and that it was the proximate cause of the accident and injury.
4. **Automobiles: Negligence.** Gross negligence within the meaning of the motor vehicle guest statute means great and excessive negligence or negligence in a very high degree. It indicates the absence of slight care in the performance of duty.
5. ———: ———. Gross negligence within the meaning of the motor vehicle guest statute has also been defined as an entire failure to exercise care or the exercise of so slight a degree of care as to justify the belief that there was an indifference to the safety of others.
6. ———: ———. A finding of gross negligence is justified if there is evidence of imminence of danger known to the operator of an automobile, continuous negligent operation thereof, and that the operator of the automobile was heedless of the consequences which might ensue by the negligent operation of it consisting not only of rate of speed but of other conditions known to the operator which enhanced the peril.
7. ———: ———. It is not indispensable to establish gross negligence that it be shown that protest by the guest or others was made to the operator of the automobile because of his conduct or omission prior to the time of the accident.
8. ———: ———. The failure of the driver of an automobile to maintain a proper lookout along the road ahead of him when driving at high speed at nighttime on a country road with a restricted lighted distance ahead of him is an important consideration in deciding whether or not gross negligence existed as a proximate cause of the accident.
9. ———: ———. It is the duty of a driver of an automobile at

night on a highway to proceed so that his headlights will mark out the traveled road.

10. ———: ———. The speed of an automobile may be unlawful even though it is within the statutory prima facie limits if it is unsafe or it is greater than is reasonable or prudent under the existing conditions.

11. Negligence. More than one act of negligence may in combination amount to gross negligence within the motor vehicle guest statute.

APPEAL from the district court for Dixon County: JOHN E. NEWTON, JUDGE. *Affirmed.*

Budd B. Bornhoft and *Healey, Davies, Wilson & Barlow,* for appellant.

Harry N. Larson and *Wear, Boland, Mullin & Walsh,* for appellee.

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

BOSLAUGH, J.

This appeal is from a judgment in favor of appellee for damages resulting from injuries sustained by him while a guest in an automobile operated by appellant in a manner alleged by appellee to have been grossly negligent. Appellant tested the sufficiency of the proof to warrant a verdict for appellee at the completion of his case-in-chief and again after the final rest of the parties, and each of the motions was denied. The verdict was for appellee and judgment was accordingly rendered. A motion by appellant for judgment notwithstanding the verdict or, in the alternative, for a new trial was denied. This appeal is a challenge of the correctness of the action and conclusion of the district court.

The assignments in this court are that the trial court erred in denying each of the motions of appellant for a directed verdict in his favor; in submitting the case to the jury because of the absence of evidence of gross negligence of appellant in any of the respects charged; and in denying the motion of appellant for judgment

notwithstanding the verdict or for a new trial. The substance of these is that the evidence fails to sustain a finding adverse to appellant on the issue of gross negligence. They will be so considered in the disposition of the appeal.

The tragedy resulting in this litigation occurred on the night of June 29, 1952. Appellee, who had then completed his second year in high school, was 16 years of age. Appellant, who had just finished his junior year in high school, was then 17 years of age. They, Bill Griggs, and Charlie Swenson were members of the Junior American Legion baseball team of Wakefield where they resided. The ball team was to engage in competition with another baseball organization in Wayne on the date above stated, and the four of them and Gerald Meyer, who was not a member of the baseball team, departed from Wakefield in an automobile operated by appellant in the early evening of that date for Wayne. They proceeded west from Wakefield on a road which intersected Highway No. 15 at which place they turned south and continued until they arrived at their destination. This part of their sojourn was uneventful. They, except Gerald Meyer, participated in the ball game and soon thereafter at about 11 o'clock they, except Bill Griggs who had made other plans, were ready to commence the return trip from Wayne to Wakefield.

They elected not to follow the route they did on the trip to Wayne but to travel what is referred to in the record as the Seventh Street road. Its course from Wayne was due east 8 miles where it intersected a road 2 miles south of Wakefield on which they expected to finish the return trip. The Seventh Street road was described as a better-than-average, fairly smooth, solid, dry, dirt road. It was frequently intersected by other roads and was quite hilly in places. There was a hill of moderate elevation slightly more than one-fourth of a mile west of the place of the accident which is the subject of this litigation. It leveled off to the east some

800 to 900 feet west of the site of the accident and from there to the bridge where the accident occurred the road was generally on the same grade as the bed or floor of the bridge. The road west of the bridge was 20 feet wide. It extended due east and west until it came near to the west side of the bridge which constituted a part of the road. The bridge was 6 miles east of Wayne. It was on a 45 degree angle from southwest to northeast and was in fact the intersection of the Seventh Street road and a north-and-south road. The road from the south intersected the road from the west at the southwest end of the bridge. The bridge because of its position on an angle would have been directly in the course of each of the roads if they had been extended and continued in a straight course. A traveler proceeding on the road from the west if he continued in a straight course to the east when he came to the bridge, would have struck the railing on the right-hand or southeast side of the bridge as he proceeded towards the east. It was because of this that as the road from the west approached very near to the bridge, it sharply curved to the northeast so that entry on the bridge by a traveler from the west could be made at the southwest end of the bridge. The bridge was not easily visible to a traveler from the west until he was quite near it. It was estimated that the bridge could be seen by such a traveler when he was from 100 to 200 feet from it.

The bridge was a concrete structure 25 feet wide, and 28 feet long. It had a concrete floor. There was a railing on each side made of channel iron the length of the bridge and each was fastened to 5 metal standards set in cement. A 12-inches-wide, 3-inches-thick, 20-foot-long standard bridge plank was placed along the inside of the right-hand railing of the bridge, extending from the southwest corner of it toward the northeast. It was fastened to the railing and also a metal post near the southwest corner which supported a bridge-capacity

plate or marker. The top of the plank was about 3 or 3½ feet above the floor of the bridge at the southwest end and it decreased in height toward the northeast until that end of it rested on or near the floor of the bridge. The floor of the bridge was covered with dirt, the railing was unpainted and badly rusted, and the plank was unpainted and weather-beaten. Each of these blended into the color of the road and was not easily distinguishable. There had been prior accidents on this bridge. The right-hand railing had been forced outward and downward. It was afterwards straightened up to some extent but it was not in good condition.

There was a bridge-capacity sign or marker on a metal post 3 or 3½ feet high at the southwest corner of the bridge near the southwest end of the southeast railing of the bridge. It was a reflector type of sign or marker and it would reflect a red color and shine at night if a light shown on it. There was on the marker "10 TON CAP." The headlights of an automobile if they were a proper height from the surface of the road would illuminate the marker when the car was about 300 feet from it until the car approached and came to the location of the sign. It faced the southwest in an attempt to be visible to travelers approaching it from the west and from the south. It was estimated to be 4 inches wide by 6 inches long or 4 inches wide by 8 inches long. The long way of it was perpendicular. Probably because it was on an angle, it appeared smaller than it actually was. It was said that it appeared to be about 2 inches wide to a traveler on the highway. There was evidence that the marker was there in place as it had been for 2 or 3 years on the afternoon of June 28, 1952, which was the day before the accident.

The occupants of the automobile when it left Wayne on the return trip were appellant who operated it, appellee in the back seat was to the right, to the left of him was Charlie Swenson, and Gerald Meyer was to the right of appellant in the front seat. They continued

that seating arrangement until the accident. Appellee had never traveled the Seventh Street road between Wayne and Wakefield or any part of it except 2 miles immediately east of Wayne. He depended on appellant as the driver of the automobile. The weather was pleasant and dry. It was clear but quite dark.

Appellant lived at Wakefield within 4 miles of the place of the accident all his life. He hunted in that territory with his father and went by the bridge at least once each hunting season. He had been on the intersection where the bridge was, knew where it was, and had gone over it at different times. Appellant accompanied an employee of his father on a trip made in a pick-up truck owned by his father from Wakefield to Wayne on the Seventh Street road across the bridge in the daytime about 1 week before the accident. The return trip was made over the same route and across the bridge by them that day. It was not shown that appellant had operated any vehicle on that road or the bridge before the time of the accident. There was no condition or thing which interfered with vision on the return trip except the natural darkness of the night. There was no other traffic. Appellant did not pass or meet any vehicle and he saw no vehicle approaching on any side road.

The road was not entirely straight or level all the way. There were hills on a part of it. Appellant did not as he drove east that night anticipate any turns in the road ahead of him. When the automobile was coming out of Wayne and until it crossed the railroad track about one-fourth of a mile east of the city the speed of it was about 25 miles per hour. Its speed was increased from there to about 45 to 50 miles per hour and that speed was generally continued to the place of the accident. Appellant was compelled to have his foot on the accelerator of the car to attain and sustain that speed.

The lights on the car were operating and were on high

beam. Appellant responded to an inquiry as to how far ahead he could see that he did not know but he could see as far as his headlights. In answer to a question as to how far that was he stated he never paid any attention and that he did not know. He later said he could see ahead approximately 25 feet with his headlights on bright. He said he understood feet and yardage, that he knew 25 feet were 8⅓ yards, and that when he testified about 25 feet he knew exactly what he wanted to be understood to mean. When he came down the last hill about one-fourth of a mile west of the place of the accident onto the lower or level part of the road he continued toward the bridge with his foot on and was using the accelerator of the car and had a speed of 45 to 50 miles per hour. As he traveled to the place of the accident he said he did not see the bridge-capacity sign at the southwest corner of the bridge though he was looking ahead down the road and it looked clear. He was driving straight ahead with a clear front windshield, both hands on the steering wheel, and possibly talking to the boys in the car. He noticed nothing peculiar about the road and continued to go straight ahead, not seeing the curve in the road, onto the bridge at the same rate of speed until he suddenly saw an object immediately in front of the automobile within a very close distance which turned out to be the bridge but he said it looked like a plank someone had put across the road in front of him as maybe a joke or prank. Appellant could not stop and the accident happened.

The automobile traveled toward the east with its south or right-hand wheels about 2 feet inside the southwest corner of the bridge. A wheel track was found which was 23 inches inside the southwest corner that extended to the southeast edge of the bridge. The bridge plank above described was struck and broken in pieces. The bridge railing outside of the plank was displaced. The post on which was fastened the capacity marker was bent. The automobile went off the south-

east side of the bridge, traveled through space to the east for 45 feet, struck the bank on the far side of the creek, and made and left a hole in the bank. It was a big hole, the making of which required a terrific force. The hole in the bank was directly in line with the wheel track found on the bridge. The hole in the bank was only 5½ feet below the level of the floor of the bridge. The distance from the floor of the bridge to the bottom of the creek was about 8 feet. The automobile turned over and landed on its top 42 feet from where it contacted the east bank of the creek. It came to rest in the creek 85 feet from the bridge measured on a direct line from where it left the bridge to where it came to rest. Appellee thereby sustained injuries which have resulted in total permanent disability.

There is evidence tending to establish the truth of each of the matters recited above. The evidence concerning material matters in this case is conflicting but the circumstances of the cause require that in considering and deciding the sufficiency of the proof to sustain a verdict for appellee on the issue of gross negligence, the evidence relating to it must be viewed most favorably toward appellee, controverted matters must be resolved in his favor, and he must have the benefit of any reasonable inferences deducible therefrom. Werner v. Grabenstein, 165 Neb. 231, 85 N. W. 2d 297. It is because of this that only the proof tending to establish the existence of gross negligence is included in the foregoing recitation and that contradictory evidence has been disregarded.

An issue of gross negligence must be decided from the facts of each case. Such an issue is for the jury if the evidence relating thereto is conflicting and from it reasonable minds might arrive at conflicting conclusions. When the evidence is resolved most favorably to the existence of gross negligence and thus the facts are determined, the inquiry of whether or not they support a finding of gross negligence is one of law. A guest to

recover damages from a host for injury received by a guest while riding in an automobile operated by the host must prove by the greater weight of the evidence that it was the proximate cause of the injury. Gross negligence within the meaning of the motor vehicle guest statute means gross and excessive negligence or negligence in a very high degree. It indicates the absence of slight care in the performance of duty. Werner v. Grabenstein, *supra.* Gross negligence within the meaning of the guest statute has also been defined as an entire failure to exercise care or the exercise of so slight a degree of care as to justify the belief that there was an indifference to the safety of others. Larson v. Storm, 137 Neb. 420, 289 N. W. 792; Gummere v. Mudd, 139 Neb. 370, 297 N. W. 622. A finding of gross negligence is justified if there is evidence of imminence of danger known to the operator of an automobile, continuous negligent operation thereof, and that the operator of the automobile was heedless of the consequences which might ensue by the negligent operation of it consisting not only of rate of speed but of other conditions known to the operator which enhanced the peril. Werner v. Grabenstein, *supra.*

The fact that appellee or any of the other passengers in the automobile did not complain of or warn appellant of danger in his manner of operating the vehicle before the accident has been the subject of frequent mention. Appellee had not been over the road and had no knowledge of the existence, location, or condition of the bridge or of any hazard it presented to travelers attempting to use it. Appellant had superior knowledge in this respect and was charged with knowledge of the bridge and the danger of imprudent operation of an automobile to and across it. Appellee could not have been expected to warn appellant concerning something about which appellee had no knowledge and in reference to which appellant had information because of his past experiences at and near the bridge. It is not indispensable

to establish gross negligence that it be shown that protests by the guest or others were made to the operator of an automobile of his conduct or omissions prior to the time of the accident. Lemon v. Hoffmark, 132 Neb. 421, 272 N. W. 214; Black v. Neill, 134 Neb. 764, 279 N. W. 471.

The specifications of gross negligence pleaded by appellee include the charge that appellant failed to maintain a proper lookout and to observe the turn in the road at the bridge in time to have avoided the accident; that he failed to have the automobile under proper control and to drive it so as to follow the turn in the road onto the bridge and thereby have avoided driving off the side of the bridge; that he operated the automobile at an excessive speed of 45 to 50 miles per hour under the circumstances present; and that he operated the automobile without sufficient lights. There was evidence supporting each of these charges of gross negligence. The failure of the driver of an automobile to maintain a proper lookout along the road ahead of him when driving at high speed in the nighttime on a country road with a restricted lighted distance ahead of him is an important consideration in deciding whether or not gross negligence existed as a proximate cause of the accident. Larson v. Storm, *supra;* Gustason v. Vernon, 165 Neb. 745, 87 N. W. 2d 395. It is the duty of a driver of an automobile at night on a highway to proceed so that his headlights will mark out the traveled road. Olson v. County of Wayne, 157 Neb. 213, 59 N. W. 2d 400; Shields v. County of Buffalo, 161 Neb. 34, 71 N. W. 2d 701. The fact that the course of the automobile continued directly to the east from where it left the traveled portion of the road until it struck the railing and went off the bridge and that there was no evidence of an attempt of the operator to turn it to the left or to stop it is convincing that the driver was oblivious to the situation until the accident was inevitable and probably until it happened.

Appellant attempts to justify the speed at which he was driving the automobile before and at the time of the accident as within the statutory limits and therefore lawful. The speed of an automobile may be unlawful even though it is within the statutory prima facie limits if it is unsafe or is greater than is reasonable or prudent under the existing conditions. § 39-7,108, R. R. S. 1943; Carlson v. Hanson, 166 Neb. 96, 88 N. W. 2d 140.

It was a proper consideration for the jury as to whether or not the speed of the automobile was unsafe, unreasonable, imprudent, and grossly negligent under the existing conditions as shown by the evidence. More than one act of negligence may in combination amount to gross negligence within the guest statute. Paxton v. Nichols, 157 Neb. 152, 59 N. W. 2d 184.

The evidence is sufficient to sustain a finding of imminence of danger known to appellant because of the location, condition, and situation of the bridge; the condition of the lights of the automobile; and a course of negligent acts and omissions in the operation of the automobile without regard to the consequences that might be and were promptly inflicted upon the guest. The proof permitted the jury to find an absence of slight care in the performance of duty by appellant and such a failure by him to exercise prudence and care as to justify a conclusion that there was an indifference to the safety of his guest. The court properly submitted this case to the jury.

The judgment should be and it is affirmed.

AFFIRMED.

ELVIN L. NELSON, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.

94 N. W. 2d 1

Filed January 9, 1959. No. 34456.

1. **Indictments and Informations.** To charge a statutory offense, the information or complaint must contain a distinct allegation of each essential element of the crime as defined by the law creating it, either in the language of the statute or its equivalent.
2. ———. The general rule is that a defect in the manner of charging an offense is waived if, upon being arraigned, the defendant pleads to the general issue, provided the information contains no jurisdictional defect and is sufficient to charge an offense under the law.
3. **Indictments and Informations: Appeal and Error.** An information questioned for the first time on appeal must be held sufficient unless so defective that by no construction can it be said to charge the offense for which accused was convicted.
4. **Criminal Law: Indictments and Informations.** A plea of not guilty is a waiver of all defects in an information that can be reached by a motion to quash.
5. ———: ———. It is the general rule that defects or omissions in the indictment or in the mode of finding the indictment, which are of such a fundamental character as to make the indictment wholly invalid, are not subject to waiver by the accused.
6. ———: ———. It is equally the general rule that defects and omissions which run only to the form in which the various elements of the offense are stated, or to the fact that the pleading is inartificially drawn, are waived by not objecting thereto in some appropriate manner in the preliminary stages of the proceeding, or, as to some matters, before determination of the issue on the merits.

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

Thomas J. Sheehan, Jr., 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.

SIMMONS, C. J.

This appeal presents the questions of the legal sufficiency of an information purporting to charge the uttering of a forged instrument under the provisions of section 28-601, R. R. S. 1943, and whether that question may be raised in this court for the first time on appeal.

We herein refer to the plaintiff in error as defendant, and to the defendant in error as the State.

The information charged that defendant "did, with the intent to defraud, utter, or publish as true and genuine, a false, forged, and counterfeited check for the payment of money, which bank check was of the following tenor, to wit: (instrument copied) * * * contrary to the form of the Statutes * * *."

The statute provides that whoever shall "utter or publish as true and genuine * * * knowing the same to be false, altered, forged, * * *."

The attack on the information is based on the failure to allege the element of "knowing the same to be * * * forged."

The defendant was tried, found guilty "of the crime of forgery," and sentenced to a term of 5 years in the penitentiary.

Defendant presents here a number of assignments of error. We find it necessary to determine only the two questions above stated.

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

The State, calling our attention to Newby v. State, 75 Neb. 33, 105 N. W. 1099, and Barton v. State, 111 Neb. 673, 197 N. W. 423, advises that the information "may be defective."

In Newby v. State, *supra,* the defendant was found guilty of having in his possession a forged instrument with intent to utter and publish, etc. The words "knowing the same to be false" were not contained in the information.

We held that: "The rule is well settled that to charge

a statutory offense the information must contain a distinct allegation of each essential element of the crime as defined by the law creating it. In charging a statutory offense it is always necessary, and generally sufficient, to charge it in the language of the statute, or its equivalent. While the precise words of the statute need not be used, it is necessary that words equivalent in meaning be employed." We held that the information was not sufficient to charge the crime of which the defendant was convicted, and reversed the judgment and remanded the cause.

In Barton v. State, *supra,* the defendant was found guilty of a violation of the statute here involved by having the unlawful possession of a forged instrument. The information did not allege that the possession was "with an intent to utter and publish the same as true and genuine." We held: "The material elements of the offense of the unlawful possession of a forged instrument under the foregoing section are: (1) Possession, with intent to utter and publish as true and genuine, of the forged instrument, (2) knowing the same to be false, forged or counterfeited, (3) with intent to prejudice, damage or defraud any person or persons, body politic or corporate. * * * To charge a statutory offense the information must contain a distinct allegation of each essential element of the crime as defined by the law creating it, either in the language of the statute or its equivalent." We reversed the judgment and remanded the cause.

The State calls our attention also to Rownd v. State, 93 Neb. 427, 140 N. W. 790, where we held: "Many authorities are cited in support of this contention, and it may be conceded that to charge the crime of uttering and publishing a forged check, as defined in section 145 of the criminal code, the words, 'knowing the same to be false,' or their equivalent, must appear in the information, and where such words are wholly omitted from the information it will not sustain a conviction."

The State also calls our attention to Dutiel v. State, 135 Neb. 811, 284 N. W. 321, wherein we held that a demurrer to the complaint should have been sustained and that: "Section 11, art. I of the Constitution of Nebraska, provides: 'In all criminal prosecutions the accused shall have the right * * * to demand the nature and cause of accusation.'

"To charge a statutory offense, the information or complaint must contain a distinct allegation of each essential element of the crime as defined by the law creating it, either in the language of the statute or its equivalent. (Citing cases.)

"These decisions are based upon the constitutional provision above quoted."

Defendant relies on our holding in Fredericksen v. Dickson, 148 Neb. 739, 29 N. W. 2d 334, where we held that: "To charge a statutory offense, the information or complaint must contain a distinct allegation of each essential element of the crime as defined by the law creating it, either in the language of the statute or its equivalent."

The information in this case is fatally defective in that it did not state an essential element of the statutory offense upon which it is based.

As to the question of waiver the State calls attention to State ex rel. Gossett v. O'Grady, 137 Neb. 824, 291 N. W. 497, wherein we held: "It is a general rule that, where an objection is not made at the time prescribed by law, the objection is waived. * * * A plea of guilty waives any defect not jurisdictional, and which may be taken advantage of by motion to quash or by plea in abatement." We there held that the error in the information was not jurisdictional where collaterally attacked and had been waived.

The State also relies on our holding in Hunt v. State, 143 Neb. 871, 11 N. W. 2d 533, where we held that: "The general rule is that a defect in the manner of charging an offense is waived if, upon being arraigned,

the defendant pleads to the general issue, provided the information contains no jurisdictional defect and is sufficient to charge an offense under the law. * * * The governing principle is that an information is fatally defective only if its allegations can be true and still not charge a crime. * * * An information questioned for the first time on appeal must be held sufficient unless so defective that by no construction can it be said to charge the offense for which accused was convicted."

The State relies on a quote in the opinion in Hunt v. State, *supra,* from 24 C. J. S., Criminal Law, section 1671, page 275, wherein it is said that when an information is fatally insufficient, the objection may be raised for the first time on appeal "in the absence of a statute to the contrary."

The State contends, correctly, that this question is raised for the first time in this court.

The State then contends that there is "a statute to the contrary."

The statutes relied on by the State are: "A motion to quash may be made in all cases when there is a defect apparent upon the face of the record, including defects in the form of the indictment or in the manner in which an offense is charged." § 29-1808, R. R. S. 1943.

"The accused may demur when the facts stated in the indictment do not constitute an offense punishable by the laws of this state, or when the intent is not alleged, when proof of it is necessary to make out the offense charged." § 29-1810, R. R. S. 1943.

"The accused shall be taken to have waived all defects which may be excepted to by a motion to quash, or a plea in abatement, by demurring to an indictment or pleading in bar or the general issue." § 29-1812, R. R. S. 1943.

The State then contends that section 29-1812, R. R. S. 1943, "provides that the accused shall be taken to have waived all defects which may be excepted to by a motion to quash or demurrer."

The State misreads the statute. Section 29-1808, R. R. S. 1943, relates to "a defect * * * upon the face of the record, including defects in the form of the indictment or in the manner in which an offense is charged."

Section 29-1810, R. R. S. 1943, provides for a demurrer "when the facts stated * * * do not constitute an offense punishable by the laws of this state * * *."

To what does the waiver provision apply? Section 29-1812, R. R. S. 1943, provides that an accused "by demurring" shall be taken to have waived "all defects that may be excepted to by a motion to quash." The statute does not provide that a failure to demur waives defects that may be excepted to by a demurrer.

The distinction between the function of a motion to quash and a demurrer are shown in our opinions. We held in Trimble v. State, 61 Neb. 604, 85 N. W. 844, that: "A plea of 'not guilty' * * * is a waiver of all defects in an information that can be reached by a motion to quash." This case has been cited with approval in Huette v. State, 87 Neb. 798, 128 N. W. 519; Green v. State, 116 Neb. 635, 218 N. W. 432; Matters v. State, 120 Neb. 404, 232 N. W. 781; and State ex rel. Gossett v. O'Grady, *supra*. See, also, Wiese v. State, 138 Neb. 685, 294 N. W. 482. These cases all show that the waiver goes to those matters which may be raised by a motion to quash.

In Barton v. State, *supra,* defendant filed a motion to quash and a demurrer, contending that the information was fatally defective. On appeal here we pointed out that both a motion to quash and a demurrer were filed raising the question. We held that: "The demurrer should have been sustained."

The defendant by failing to demur and by pleading not guilty did not waive the fatal defect of the information.

We have held that a question of a fatal defect in an information may be raised on motion in arrest of judgment which would be contrary to the State's contention

that a plea to the general issue waived defects which may be excepted to by demurrer.

In Smith v. State, 68 Neb. 204, 94 N. W. 106, the defendant pleaded not guilty to an information. During the trial he changed his plea to guilty to the charge and moved in arrest of judgment that the charge did not state a crime. The motion was overruled. We held that a plea of guilty to the act charged was not a plea of guilty to the statutory crime, and that "by a motion in arrest of judgment the defendant properly challenged the authority and jurisdiction of the court to pronounce sentence of imprisonment in the penitentiary against him as if he were guilty of the commission of such crime."

In Newby v. State, *supra,* the accused, after verdict and before sentence, filed a motion in arrest of judgment on the ground that the information upon which he was convicted did not state facts sufficient to charge a crime. We sustained the contention and held that the trial court erred in not sustaining the motion in arrest of judgment.

Likewise in Altis v. State, 107 Neb. 540, 186 N. W. 524, the defendant was convicted and by motion in arrest of judgment claimed that the information did not charge a crime. We held that the motion should have been sustained.

In 27 Am. Jur., Indictments and Informations, section 187, page 731, it is stated: "It is the general rule that defects or omissions in the indictment or in the mode of finding the indictment, which are of such a fundamental character as to make the indictment wholly invalid, are not subject to waiver by the accused. * * * But it is equally the general rule that defects and omissions which run only to the form in which the various elements of the offense are stated, or to the fact that the pleading is inartificially drawn, are waived by not objecting thereto in some appropriate manner in the preliminary stages of the proceeding, or, as to some matters, before determination of the issue on the merits."

Wyoming has a statute substantially in the language of our section 29-1808, R. R. S. 1943. In State v. Spiegel, 39 Wyo. 309, 270 P. 1064, 64 A. L. R. 289, there was presented an attack on an information made using the disjunctive "or." The court stated that some authorities hold that an information so drawn "to be fatally defective" and others hold it subject to a motion to quash. It held that the information was not fatally defective and under the statute was subject to a motion to quash. Such a motion not having been made, it was held to have been waived.

In Hagner v. United States, 285 U. S. 427, 52 S. Ct. 417, 76 L. Ed. 861, the question of the sufficiency of an indictment was raised by motion in arrest of judgment after a verdict of guilty. A statute provided that: "No indictment * * * shall be deemed insufficient, nor shall the * * * judgment * * * be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant," citing section 1025, Revised Statutes (U.S.C. Title 18, Sec. 556). This may be compared with "defects in the form of the indictment or in the manner in which an offense is charged." § 29-1808, R. R. S. 1943. The court held: "This section was enacted to the end that, while the accused must be afforded full protection, the guilty shall not escape through mere imperfections of pleading. * * * It, of course, is not the intent of § 1025 to dispense with the rule which requires that the essential elements of an offense must be alleged; but it authorizes the courts to disregard merely loose or inartificial forms of averment. Upon a proceeding after verdict at least, no prejudice being shown, it is enough that the necessary facts appear in any form, or by fair construction can be found within the terms of the indictment."

We held in Hunt v. State, *supra,* that an objection to an information may be raised for the first time on appeal where so defective that by no construction can it be

said to charge the offense for which accused was convicted. (See preceding quote.)

The criminal law of the State of Ohio "almost bodily" was adopted by the Legislature of this state in 1873. Bohanan v. State, 18 Neb. 57, 24 N. W. 390, 53 Am. R. 791; Knothe v. State, 115 Neb. 119, 211 N. W. 619.

Sections 29-1808 and 29-1810, R. R. S. 1943, remain substantially in the language of the statutes of Ohio. Section 29-1812, R. R. S. 1943, remains exactly in the same language as in the Ohio Code. § 13439-6, 13439-9, 13439-11, Schneider's Ohio Criminal Code Annotated, pp. 721, 723, and 724.

In State v. Marcinski, 103 Ohio St. 613, 134 N. E. 438, the defendant pleaded guilty to a charge in an "affidavit," in the mayor's court, of having unlawful possession of intoxicating liquor. The court of common pleas affirmed. On an error proceeding the court of appeals reversed the judgment on the ground that no offense was alleged. The state prosecuted error to the Supreme Court, contending that the defendant having pleaded guilty he could not thereafter by motion for a new trial or by proceeding in error raise the question of the sufficiency of the affidavit. The court held that the accused had the right upon a proceeding in error to challenge the legal sufficiency of the charge to state a crime.

We accordingly hold that the defendant by failing to move to quash or demur did not waive the right to raise that issue and that it may be raised in this court for the first time on appeal.

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

REVERSED AND REMANDED.

CLEARWATER ELEVATOR COMPANY, APPELLANT, V. MARY HALES ET AL., APPELLEES.

94 N. W. 2d 7

Filed January 9, 1959. No. 34464.

1. **Trial: Judgments.** The prerequisites of granting a summary judgment are that the movant establish that there is no genuine issue of fact in the case and that he is entitled to judgment as a matter of law.
2. ———: ———. In considering a motion for summary judgment the court should view the evidence in the light most favorable to the party against whom it is directed.
3. ———: ———. The court examines the evidence on motion for summary judgment, not to decide any issue of fact presented, but to discover if any real issue of fact exists. If there is a genuine issue of fact to be determined, a summary judgment may not be properly entered.

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

Harold Rice, Frederick M. Deutsch, and *William I. Hagan,* for appellant.

Thomas E. Brogan, for appellees.

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

MESSMORE, J.

This is an action brought in the district court for Antelope County by the Clearwater Elevator Company, a corporation, plaintiff, against Mary Hales and Maude M. Brion, also known as Maud M. Brion, defendants, to foreclose a subcontractor's lien on real estate owned and occupied by the defendants for the furnishing of materials relating to the erection of a duplex residence. The defendants moved for a summary judgment. The trial court sustained the motion of the defendants for summary judgment and removed the lien on said real estate, dismissed the plaintiff's action, and taxed the costs to the plaintiff. The plaintiff filed a motion for new trial and a supplemental motion for new trial, both of which

were overruled. From the overruling of the plaintiff's motion for new trial and supplemental motion for new trial, the plaintiff appeals.

The plaintiff's petition, in substance, alleged that it is a corporation organized under the laws of Nebraska with its principal place of business in Clearwater, Antelope County; that at a date unknown to plaintiff but prior to October 1, 1955, the plaintiff was informed and believed that Arnold V. Middleton entered into a contract with the defendants for the erection of a dwelling house on Lot 1 and the east half of the vacated alley lying between Lots 1 and 12, Block 174, in the city of Neligh, said real estate being owned by the defendants; that prior to October 10, 1955, plaintiff and Arnold V. Middleton entered into an oral agreement whereby plaintiff would furnish certain building materials for the erection of the dwelling house on the real estate above described for the defendants; that in compliance with said oral agreement the plaintiff furnished certain building materials for the erection of the dwelling house in the total amount of $8,542.49, said material having been furnished between October 10, 1955, and May 21, 1956; that between the dates of October 14, 1955, and April 9, 1956, the plaintiff received payments on said account and gave credit for materials returned, such payments and credits being in the amount of $5,706.66, leaving a balance due plaintiff of $2,835.83; and that on or about July 3, 1956, plaintiff, within 60 days after the last item of said material had been furnished, filed in the office of the county clerk of Antelope County a subcontractor's lien on the above-described premises for the full amount of the account, stating that plaintiff had and claimed a lien on said premises. The plaintiff, after giving credit for $48.96 for materials returned after the lien was filed, prayed for judgment against the defendants for the sum of $2,786.87, with interest at the rate of 6 percent per annum from May 21, 1956, for a decree adjudging the same to be a first lien upon the said premises, for an

order directing sale of the said premises for the satisfaction of said lien and the application of the proceeds thereof to the payment of the plaintiff's lien, and for costs expended.

The defendants' motion for summary judgment against the plaintiff was in substance as follows: That the plaintiff was a subcontractor for Arnold V. Middleton; that as such subcontractor, under section 52-102, R. S. Supp., 1955, the subcontractor's lien must be filed with the register of deeds within 60 days from the furnishing of such material; and that the subcontractor's lien of the plaintiff was not filed within the time provided for by the statute.

In support of their motion for a summary judgment, the defendants introduced written admissions and answers of the plaintiff to certain interrogatories, affidavits of parties, and the filing of the mechanic's lien of record in Antelope County.

For a determination of this appeal we consider only the following assignment of error. The plaintiff assigns as error that the trial court erred in sustaining the defendants' motion for a summary judgment.

There are well-established rules that relate to the summary judgment act. The prerequisites of granting a summary judgment are that the movant establish that there is no genuine issue of fact in the case and that he is entitled to judgment as a matter of law. See Spidel Farm Supply, Inc. v. Line, 165 Neb. 664, 86 N. W. 2d 789. See, also, Eden v. Klaas, 165 Neb. 323, 85 N. W. 2d 643.

In Healy v. Metropolitan Utilities Dist., 158 Neb. 151, 62 N. W. 2d 543, this court said: "In considering a motion for summary judgment the court should view the evidence in the light most favorable to the party against whom it is directed. * * * The court examines the evidence on motion for summary judgment, not to decide any issue of fact presented, but to discover if any real issue of fact exists. If there is a genuine issue

of fact to be determined, a summary judgment may not be properly entered."

The reason advanced by the defendants for sustaining the defendants' motion for a summary judgment was that the mechanic's lien of the plaintiff was not filed within the time contemplated by the statutes.

Section 52-101, R. S. Supp., 1955, provides in part: "Any person who shall * * * furnish any material, * * * (1) for the construction, erection, * * * of any house, * * * or appurtenance, (2) for grading, filling in, excavating, leveling, clearing, grubbing, furnishing, and placing soil or sod, (3) for furnishing and planting trees, shrubs, or plant materials, * * * shall have a lien to secure the payment of the same upon such house, * * * or appurtenance and the lot of land upon which the same shall stand or the work is performed; * * *."

Section 52-102, R. S. Supp., 1955, provides in part: "Any * * * subcontractor who shall * * * furnish any material * * * for any of the purposes mentioned in section 52-101, to the contractor, or any subcontractor who shall desire to secure a lien upon any of the structures mentioned in said section, may file a sworn statement of the amount due him from such contractor for such * * * material, * * * together with a description of the land upon which the same was * * * used, within sixty days from * * * furnishing such material * * * with the register of deeds of the county wherein said land is situated. If the contractor does not pay such * * * subcontractor for the same, such subcontractor * * * shall have a lien for the amount due for such * * * material, * * * on such lot or lots and the improvements thereon from the same time and in the same manner as such original contractor; * * *."

The plaintiff is in accord with the authorities cited by the defendants to the effect that if the last item or items were not furnished in the prosecution of the contract by the contractor, but are unrelated items or items furnished pursuant to an independent contract or pur-

chase, the time for filing the mechanic's lien by a subcontractor will not be extended. Also, if the last item is not furnished in the prosecution of the original contract by the contractor but for the purpose of reviving or extending the time for filing the lien, then those items may not be considered.

In Coates Lumber & Coal Co. v. Klaas, 102 Neb. 660, 168 N. W. 647, this court held: "The subcontractor's right to a lien for services or material furnished to the contractor does not depend upon the terms of the contract entered into between the owner and the contractor."

The record discloses that J. A. Middleton is the president of the plaintiff corporation. Robert Middleton is one of his sons and the secretary and treasurer of the plaintiff corporation. Alta Middleton, wife of J. A. Middleton, is vice president of the corporation. Arnold V. Middleton is a son of J. A. Middleton, and owns one share of stock in the corporation, but is in the business of contracting for the construction of buildings and dwellings, separate and apart from any of the corporation business. On September 27, 1955, the defendants contracted with Arnold V. Middleton to construct a residence duplex for them in Neligh, for which they were to pay the sum of $15,690. The written agreement was prepared by a daughter of one of the defendants. This contract provided in substance, insofar as necessary to consider here, that it was a contract for material and labor necessary and required in the completion of a one-story residence for Mrs. Leonard Hales and Mrs. Maude M. Brion, to be constructed on the property described in the contract. The contract was to cover all labor and material in place, required for the construction of the residence, according to the plans, specification sheet, and typewritten list of all alterations and additions attached to the contract, including two stone planters in front of the picture windows. The contractor was to excavate for all footings, dig all ditches for the laying of sewer, water, and gas connections, *and do all the final*

grading and seeding. The terms of payment were set out in the contract. The contractor was to furnish all material and labor necessary for the proper and complete execution of everything described. Final completion date for the contract was January 1, 1956.

The construction of the duplex commenced in the first week or 10 days of October 1955. The defendant, Mrs. Hales, moved into the duplex on February 17, 1956. Mrs. Brion moved into the duplex on February 21, 1956. There is in evidence a check dated February 23, 1956, made to the contractor, signed by Mrs. Hales, and a check dated March 9, 1956, to the contractor, signed by Mrs. Brion. The first-above check was in the amount of $1,000, and the second check was for $1,513.70. Both of the above checks were issued subsequent to the date the defendants occupied the duplex, and designated as final payments under the terms of the contract.

The plaintiff claimed no interest as being a party to the construction of the duplex.

The plaintiff did not include the subcontractor's lien in its pleadings, nor was it offered in evidence at the time of the hearing. The mechanic's lien was filed of record in Antelope County on July 3, 1956, and was not made a part of the record in this case until the plaintiff filed its supplemental motion for new trial.

Pertinent parts of the deposition of the contractor received in evidence may be summarized as follows: He was engaged in the contracting business during the period from September 1955 to January 1956. He contracted to build a residence property in Neligh for the defendants, by written contract, and had personal supervision of the construction of the duplex. He obtained most of the lumber used in the construction of the duplex from the plaintiff corporation. The material furnished by the plaintiff was billed to Arnold V. Middleton as an individual, or the A. V. Middleton Construction Company. The material purchased by Arnold V. Middleton was his obligation under the terms of the

contract and his responsibility. The "Weld Crete," for which a charge was made on May 21, 1956, and which was delivered about the middle of May, is a material used to join new concrete to old concrete. This material was used on the driveway where it was joined to the curb. This was about the time the driveway was being put in, and about that time the contractor got 64 sacks of cement from the plaintiff to pour the sidewalks. He used the same for that purpose, for the driveway, and for footings for planter boxes. The contractor went to the plaintiff's place of business to get this cement and picked it up by truck sometime during the middle of the month of May 1956. There is no charge made for the 64 sacks of cement in the itemized statement which is made a part of and attached to the mechanic's lien. It was either an oversight, if it was obtained, or it never was obtained. The contractor further testified that on May 7, 1956, there was a charge for 5 pounds of bluegrass seed which was used for seeding the lawn. The contractor was required to seed the lawn under the terms of the contract. He further testified that he laid the driveway, which was a complete driveway from the garage to the street. This had nothing to do with the occupancy of the house, but was a part of the contract. He further testified that "Leptyne" is a thinner used in paint. On April 23, 1956, 3 sacks of white cement were used for the planter boxes in front of the house which were tied into the house. He was obligated to do the work, as provided for by the contract.

The affidavit of the defendants stated in substance that on September 27, 1955, the defendants entered into a contract with the contractor for the construction of a one-story residence in the city of Neligh; and that the contract provided that the contractor was to provide all materials and entirely construct said premises. The defendants' affidavit further states that the contract specifically provided that final completion date was to be January 1, 1956; that neither of the said affiants paid

the final sums until the residence was completed; that affiant Maude M. Brion moved into her portion of the residence on February 21, 1956, and affiant Mary Hales moved into her portion of the residence on February 17, 1956; that together they occupied the entire residence; and that construction was substantially completed by January 1, 1956, and entirely completed prior to the time they moved in to occupy said residence.

The itemized account attached to the subcontractor's lien discloses that materials were furnished by the plaintiff in October, November, and December 1955, and January, February, March, and until April 23, 1956. Then on May 7 there was a charge for 1 gallon of Leptyne and 5 pounds of bluegrass, and on May 21, a charge for 1 quart of Weld Crete, making a total of $8,542.49, less credit of $5,706.66, leaving a balance of $2,835.83, for which amount the plaintiff claims a mechanic's lien.

The contract provides that the contractor is to excavate for all footings, dig all ditches for the laying of sewer, water, and gas connections, *and is to do all final grading and seeding.*

Section 52-101, R. S. Supp., 1955, incorporates in said section the word "appurtenance."

Webster's New Twentieth Century Dictionary (2d Ed.), p. 92, gives the following definition of the word "appurtenance": "In law, such buildings, rights, and improvements as belong to a house or to land are called the appurtenances, as outbuildings, gardens, pasturage, etc. to a house, * * *."

In Black's Law Dictionary (3d Ed.), p. 132, "appurtenance" is defined as: "That which belongs to something else; an adjunct; an appendage; something annexed to another thing more worthy as principal, and which passes as incident to it, * * *."

"The term 'appurtenances' may perhaps include, without any forced construction, the yard and sidewalk, and work and labor performed and materials furnished for such appurtenances as probably within the spirit of the

statute." McDermott v. Palmer, 8 Selden (N. Y.) 383.

"Appurtenances," as used in a New York statute giving a lien upon the lot, building, and "appurtenances" for materials used for making improvements thereon, include a sidewalk in front of the premises. See Kenney v. Apgar, 93 N. Y. 539.

The New York statute referred to in the last-cited case was in substance similar to section 52-101, R. S. Supp., 1955. If a sidewalk may be called an appurtenance, a driveway may be called an appurtenance, and footings for a planter box may be called an appurtenance. In the light of the above definitions of "appurtenances" and considering the terms of the contract here involved, the contractor was required thereunder to level, grade, and seed the lawn, which was an appurtenance.

As we view the evidence introduced with reference to the motion for summary judgment, the same discloses a genuine issue of fact to be determined. The issue of fact to be determined is whether or not the items furnished by the subcontractor in May 1956 were furnished in the performance of the original contract, and if such items were so furnished by the subcontractor, then the question as to whether or not the subcontractor filed its mechanic's lien in time within the contemplation of the statute would arise. We determine only that the trial court erred in sustaining the defendants' motion for a summary judgment, for the reason that there is a genuine material issue of fact to be determined. The defendants were not entitled to a judgment as a matter of law.

We reverse the judgment of the trial court, and the cause is remanded for further proceedings according to law.

REVERSED AND REMANDED.

WENKE, J., participating on briefs.

JAMES D. MABE, ADMINISTRATOR OF THE ESTATE OF ROBERT MABE, DECEASED, APPELLANT AND CROSS-APPELLEE, V. ROBERT H. GROSS, APPELLEE AND CROSS-APPELLANT.

94 N. W. 2d 12

Filed January 9, 1959. No. 34470.

1. **Death: Actions.** The wrongful death statute, sections 30-809 and 30-810, R. R. S. 1943, creates a new cause of action unknown to the common law, and it should not be extended beyond the fair import of the language used.
2. ———: ———. The words "next of kin" in the wrongful death statute mean the class of persons nearest in degree of blood surviving the deceased. In its practical use it means, ordinarily, those persons who take the personal estate of the deceased person under the statute of descent.
3. ———: ———. A presumption of pecuniary loss exists in favor of one legally entitled to service or support from one killed by the wrongful act of another.
4. ———: ———. Where it is shown that the next of kin sustained such a relationship to the deceased that the law imposes upon him a duty to support them and that practical ability existed to enable him to perform that duty, a pecuniary loss is established and its extent is a question for the jury.
5. ———: ———. Where a presumption of pecuniary loss obtains from the relationship and a legal liability to support, the extent of the pecuniary loss must be left to the good judgment and common sense of the jury after it has considered all the evidence and circumstances in the case tending to fix the sum that will make full compensation for the loss sustained.
6. **Automobiles: Trial.** Where the undisputed evidence shows that a collision between two motor vehicles was due solely to the negligence of the defendant, it is the duty of the trial court to direct a verdict against him on the issue of liability.
7. **Negligence.** One who creates an emergency by his own negligent conduct will not be excused for his failure to pursue the safer of two courses open to him, and he will ordinarily be held guilty of negligence as a matter of law.

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

William S. Padley, for appellant.

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

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

CARTER, J.

This is an action for wrongful death brought by James D. Mabe, administrator of the estate of Robert Mabe, deceased, for the benefit of the next of kin, for pecuniary loss resulting from the death of plaintiff's decedent. The defendant denied negligence on his part and alleged contributory negligence of plaintiff's decedent. The trial court directed a verdict for the plaintiff for funeral expenses only. The plaintiff appeals from the judgment denying a recovery of damages other than funeral expenses to the next of kin. The defendant cross-appeals from the judgment entered against him, asserting that the trial court erred in holding him guilty of negligence as a matter of law and in directing a verdict against him for funeral expenses.

The automobile accident out of which this litigaton arose occurred 1.4 miles east of Brady, Nebraska, on U. S. Highway No. 30. Plaintiff's decedent was driving west at about 9 o'clock p.m., on November 1, 1956, the day of the accident. The pavement was 24 feet wide and the weather was described as misting slightly. The evidence shows that the automobile left the north edge of the pavement about 24 feet east of the point of impact and struck the truck of the defendant about 4 feet north of the pavement. Robert Mabe, the driver of the automobile, was killed in the accident. Marion Mabe, his brother, who was riding in the automobile, was asleep when the accident occurred and he remembered nothing concerning the accident, his evidence being that he was unconscious for 2½ days thereafter. Chuck Willis, a brother-in-law of Robert and Marion Mabe, was a third occupant of the car. He was also killed in the accident.

The evidence shows that the defendant was driving a diesel-powered tractor. He had driven into Brady

when he discovered that he had lost a wheel and tire from one of the dual wheels on his trailer. He left the trailer in Brady and went back toward the west to look for the lost wheel and tire. The accident occurred on his return trip at a point beyond Brady. The evidence shows that he applied his brakes about 250 feet west of the point of impact, as shown by the tire marks on the pavement. These tire marks show that the tractor crossed to the left side of the center line on the pavement about 128 feet west of the point of impact and that it left the pavement about 30 feet west of the point where the collision occurred. The parties stipulated that the funeral expenses for plaintiff's decedent were $660.15. The trial court in effect found that defendant was guilty of negligence as a matter of law and found also that the only damages proved were the funeral expenses in the amount of $660.15, and directed a verdict for plaintiff for that amount. The plaintiff contends that the trial court erred in refusing to submit to the jury the matter of damages based upon the pecuniary loss sustained by Susan Mabe, the 3-year-old daughter of Robert Mabe, and by James D. Mabe and Paula Mabe, the parents of Robert Mabe.

An action for wrongful death in this state exists by virtue of section 30-809, R. R. S. 1943. The damages that may be recovered and the disposition of the avails of any judgment obtained are controlled by section 30-810, R. R. S. 1943. The measure of recovery is fixed by these sections of the statutes. The applicable language is that part of section 30-810, R. R. S. 1943, which provides: "It shall be brought by and in the name of his personal representatives, for the exclusive benefit of the widow or widower and next of kin. The verdict or judgment should be for the amount of damages which the persons in whose behalf the action is brought have sustained. The avails thereof shall be paid to and distributed among the widow or widower and next of kin in the proportion that the pecuniary loss suffered

by each bears to the total pecuniary loss suffered by all such persons."

This case presents the question as to the meaning of the words "next of kin" as they are used in the foregoing statute. We think the meaning of these words is correctly stated in Wilcox v. Bierd, 330 Ill. 571, 162 N. E. 170, wherein it is said: "The words 'next of kin' are used as a technical legal phrase in their ordinary technical sense. (Dukeman v. Cleveland, Cincinnati, Chicago & St. Louis Railroad Co. 237 Ill. 104.) The term 'next of kin,' in its technical, legal meaning, means persons nearest in degree of blood surviving. In its practical use the term has come to mean, ordinarily, those persons who take the personal estate of the deceased under the statutes of distribution. The English courts hold that the primary and proper meaning of 'next of kin' is the nearest in proximity of blood living at the death of the person whose next of kin are spoken of. (2 Pope's Legal Definitions, p. 1025.) Under our statute on descent (Smith's Stat. 1925, chap. 39, sec. I, p. 979,) personal property descends first to the deceased's children and their descendants in equal parts, the descendants of the deceased's child or grandchild taking the share of its deceased parents in equal parts. When there is no child of the intestate or descendants of such child, and no widow or surviving husband, then the property descends to the parents, brothers and sisters of the deceased and their descendants, etc. * * * The next of kin of any deceased person are definite blood relatives or a definite class of blood relatives or kinsmen in existence at the time of the death of the deceased who would take his personal property in case he died intestate." See, also, Warren v. Englehart, 13 Neb. 283, 13 N. W. 401; Piechota v. Rapp, 148 Neb. 442, 27 N. W. 2d 682.

Under the statute of descent in this state personal property descends first to the decedent's children and the heirs of deceased children. It is only when there

is no child of the deceased, or descendants of a deceased child, that such property descends to the parents. It is clear, therefore, that the 3-year-old daughter of Robert Mabe is his next of kin under the wrongful death statute, and that the parents of Robert Mabe are not next of kin under the facts here existing.

The trial court held that the evidence was insufficient to show that the 3-year-old daughter suffered pecuniary loss resulting from the wrongful death of her father. The evidence shows that the deceased was 24 years of age and had a life expectancy of 39 years. He was divorced and the child was in the custody of her mother. Immediately prior to his death Robert Mabe was earning from $65 to $75 per week. He was a strong, able-bodied man.

The daughter Susan has a life expectancy in excess of 48 years. The only competent evidence of pecuniary loss resulting from the wrongful death of her father is a stipulation that deceased was paying support money for the benefit of his daughter at the time of his death, no amounts being shown.

The defendant contends that the foregoing evidence is insufficient to submit to the jury the amount of pecuniary loss sustained by the 3-year-old daughter. It cannot be questioned that there is a legal duty of a father to support his minor child. Under such circumstances the averment of relationship is sufficient. City of Friend v. Burleigh, 53 Neb. 674, 74 N. W. 50; Killion v. Dinklage, 121 Neb. 322, 236 N. W. 757. In the last case cited this court stated: "A presumption of pecuniary loss exists in favor of one legally entitled to service or support from one killed by the wrongful or negligent act of another." As early as Johnson v. Missouri Pacific Ry. Co., 18 Neb. 690, 26 N. W. 347, this court stated: "But, it is said that the word 'pecuniary' as used in our statute is not construed in a strict sense. The damages are largely prospective, and their determination committed to the discretion of juries upon

very meagre and uncertain data. A parent may recover for loss of expected services of children not only during minority, but afterwards, on evidence justifying a reasonable expectation of pecuniary benefit therefrom. Neither is it essential that this expectation of pecuniary benefit should be based on a legal or moral obligation on the part of the deceased to confer it, but it may be proved by any circumstances which render it probable that such benefit would, in fact, be realized." See, also, Missouri Pacific Ry. Co. v. Baier, 37 Neb. 235, 55 N. W. 913; Crabtree v. Missouri Pacific Ry. Co., 86 Neb. 33, 124 N. W. 932, 136 Am. S. R. 663; Kroeger v. Safranek, 161 Neb. 182, 72 N. W. 2d 831; Wieck v. Blessin, 165 Neb. 282, 85 N. W. 2d 628.

The proof of pecuniary loss in a wrongful death action is discussed in City of Friend v. Burleigh, *supra,* as follows: "The rule deducible from these cases, as well as from the weight of cases elsewhere, is that the petition must show facts from which a pecuniary loss is inferable. In the case of collaterals or others not legally dependent upon the deceased, at least where they are not heirs at law, facts must be pleaded showing an actual pecuniary interest in his life. Where, however, it is pleaded that the next of kin sustain such a relationship to the deceased that the law imposes upon him a duty to support them and that practical ability existed to enable him to perform that duty, a pecuniary interest is pleaded. Its extent is a question for the jury."

In Armstrong v. Union Stockyards Co., 93 Neb. 258, 140 N. W. 158, we said: "There is no certainty, and perhaps not even a probability, that the present earnings of an active young man of that age are the limit of his full capacity. What were the reasonable probabilities of his future earnings, and the future necessities of the beneficiaries? It is always difficult in such cases to determine the exact measure of the pecuniary loss, and this duty devolves upon the jury. They must take into consideration the condition of the parties and all of the

circumstances disclosed by the evidence, and determine what sum will make full compensation for the loss sustained." And in Moses v. Mathews, 95 Neb. 672, 146 N. W. 920, Ann. Cas. 1915A, 698, we said: "Ordinarily, the matter must be left to the good judgment and ordinary common sense of the jurors, considering the circumstances of each case, and, unless a verdict is manifestly unjust and excessive, it will not be disturbed on appeal." And also in Kroeger v. Safranek, *supra,* we said: " 'The law does not provide any positive, definite, mathematical formula or legal rule by which a jury shall fix the pecuniary loss suffered in the death of the head of a family. * * * A presumption of pecuniary loss exists in favor of one legally entitled to service or support from one killed by the wrongful or negligent act of another.' "

In Howlett v. Doglio, 402 Ill. 311, 83 N. E. 2d 708, 6 A. L. R. 2d 790, the court said: "In cases arising under the Wrongful Death Act, if the next of kin are lineal kinsmen of the deceased, a presumption of pecuniary loss obtains from the relationship, alone, sufficient to sustain a verdict and judgment awarding substantial damages, without proof of actual loss." We think the foregoing rule applies in this state where the deceased was under a legal liability to support the next of kin in whose behalf the action was commenced. The jury is required to take a perspective view of existing circumstances to determine the pecuniary loss sustained by those for whom the action may be maintained. The money value of such pecuniary loss cannot ordinarily be determined in dollars and cents. It is peculiarly a jury question to be determined from all the circumstances and evidence available.

On the basis of the foregoing authorities we conclude that the evidence of the essential facts was sufficient to permit a jury to determine the fair and just compensation for the pecuniary loss sustained by Susan Mabe, the next of kin, which resulted from the wrongful death

of Robert Mabe. The trial court erred in not submitting this issue to the jury.

The defendant contends that the trial court erred in finding him guilty of negligence as a matter of law. Upon this question the record shows that defendant observed two cartons of head lettuce in his driving lane by the lights of oncoming cars. The physical facts show and the defendant testifies that he immediately applied his brakes at the point where the tire marks begin. The evidence is conclusive that it was at a point approximately 215 feet west of the two cartons. Defendant testifies that the lights of the oncoming cars caused the cartons to cast shadows, giving the appearance that the right-hand side of the highway was obstructed. He applied his brakes for a distance of 125 feet. He then determined to turn left across the highway. He states that he decided against turning off the pavement to his right for fear of striking the guardrail posts on the south side of the highway. He states that he released his brakes and accelerated the tractor at the point where he crossed the center line of the highway with the intention of avoiding an accident by driving off of the left side of the highway. The evidence conclusively shows that he traveled 98 feet to the point where he left the north edge of the pavement and an additional 30 feet to the point of impact. The defendant asserts that he was faced with such an emergency that his negligence, if any, is excused.

We point out that according to the defendant's testimony, the two cartons were beyond the range of his driving lights and that he saw the two cartons of lettuce solely by the lights of oncoming cars. We think this evidence establishes that defendant was guilty of negligence as a matter of law. It is a general rule that a driver of a motor vehicle who drives at such a speed that he cannot stop within the range of his vision is guilty of negligence as a matter of law. No exception to this rule applies here for the defendant saw the ob-

struction beyond the range of his lights. The defendant, to avoid a charge of negligence, should have stopped his car within the range of his lights which distance was, according to his own testimony, a lesser distance than the point of the alleged obstruction in his driving lane. Admittedly he saw the obstruction beyond the range of his normal vision. He should have been able to stop within his range of vision and if he had done so there would have been no accident. His election to turn across the center line at a point 128 feet west of the point of impact, after braking his tractor for a distance of 125 feet, was the act creating the alleged emergency. The two cartons in his driving lane did not create the emergency that resulted in the collision. Consequently, the emergency was of his own making after a failure to stop his tractor within the range of his lights. The trial court took this view of the evidence and we think it was the correct one.

The defendant also complains of the action of the trial court in directing a verdict for the plaintiff on the question of the negligence of Robert Mabe. There is no evidence in the record of any negligence on his part. The collision was caused solely by the negligence of defendant in encroaching upon the driving lane of the Mabe automobile.

The only reversible error found in the record is the refusal of the trial court to submit to the jury the issue as to the amount of damages for the pecuniary loss sustained by Susan Mabe resulting from the wrongful death of her father, Robert Mabe. The judgment is reversed and the cause remanded for a new trial in accordance with the holdings of this opinion.

REVERSED AND REMANDED.

NATURAL GAS DISTRIBUTING CO., APPELLANT, V. CITY OF OGALLALA, NEBRASKA, A MUNICIPAL CORPORATION, ET AL., APPELLEES.

94 N. W. 2d 31

Filed January 9, 1959. No. 34471.

Municipal Corporations: Franchises. This case is governed by the rules of law set out in the case of Nebraska Natural Gas Co. v. City of Lexington, *ante* p. 413, 93 N. W. 2d 179, and the case of Kansas-Nebraska Natural Gas Co., Inc. v. City of St. Edward, *ante* p. 15, 91 N. W. 2d 69.

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

Sidner, Lee, Gunderson & Svoboda and *McGinley, Lane & Powers,* for appellant.

W. I. Tillinghast and *Firmin Q. Feltz,* for appellees.

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

MESSMORE, J.

This is an action brought in the district court for Keith County by the Natural Gas Distributing Co., against the City of Ogallala, a municipal corporation, the mayor, and members of the city council of the city. The city of Ogallala is a city of the second class. The purpose of the action was to obtain a judgment enjoining the defendants from preventing the plaintiff putting into effect a rate schedule for the sale of gas to its customers in the city.

The plaintiff's petition was in effect, with little variance, the same as that filed in the case of Nebraska Natural Gas Co. v. City of Lexington, *ante* p. 413, 93 N. W. 2d 179. To this petition the defendants filed a general demurrer. The demurrer was sustained. The plaintiff filed a motion for new trial which was overruled. The plaintiff appeals.

We deem it unnecessary to set forth the substance of

the petition or to make any further inquiry into the law involved.

We conclude that this case is governed by the rules of law set out in the case of Nebraska Natural Gas Co. v. City of Lexington, *supra,* and the case of Kansas-Nebraska Natural Gas Co., Inc. v. City of St. Edward, *ante* p. 15, 91 N. W. 2d 69. Therefore, the judgment of the trial court should be, and is hereby, reversed and the cause remanded for further proceedings according to law.

REVERSED AND REMANDED.

TED BREDEHOFT ET AL., APPELLANTS, V. COUNTY OF PLATTE, STATE OF NEBRASKA, A CORPORATION, APPELLEE.
94 N. W. 2d 18

Filed January 9, 1959. No. 34484.

1. **Eminent Domain.** A public highway regularly established by the county authorities under the law existing in 1895 (Comp. St. 1895, § 4509) must be regarded as taking land to the full width required by the statute defining the width of public highways, notwithstanding the fact that the petition for the highway and the order establishing the same does not mention the width of the road.
2. ———. Where compensation has been once paid for the establishing of a public road, an owner of property adjoining the road may not again recover damages for such taking on the theory that the compensation paid was erroneously determined.

APPEAL from the district court for Platte County: ROBERT D. FLORY, JUDGE. *Affirmed.*

Wagner, Wagner & Conrad, for appellants.

C. Thomas White and *Daniel B. McNair,* for appellee.

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

CARTER, J.

This case originated on a claim for damages filed

with the board of county supervisors of Platte County allegedly resulting from the widening of a county road to a width of 66 feet. The county by its answer asserted its right to the 66 feet without paying additional damages for its taking. The trial court found that the county was entitled to the full 66 feet and denied damages for the widening of the road to its full width. A judgment was entered also for damages to plaintiffs' lands for $250 resulting from the improper construction of the road. Error is not assigned in the granting of the $250 judgment. The only issue raised by the appeal is the correctness of the holding that the county was entitled to construct a 66-foot road on the highway involved without the payment of additional damages to the plaintiffs.

The plaintiffs were the owners of real estate adjoining the section-line road here involved. The evidence shows that in July 1895 the county road in question was established. The width of the road was not set out in the proceedings. Under the controlling statute in existence at that time all public roads were required to be 66 feet wide. Comp. St. 1895, § 4509. The regularity of the proceedings opening the road in 1895 is not here questioned. It is the contention of the plaintiffs that the record and memoranda on file with the county clerk of Platte County show that the county paid adjoining landowners for a 33-foot road only, and that adjoining landowners are entitled to compensation for the additional land taken and damages resulting to the remaining lands because of such further taking.

The evidence shows that the road used since 1895 and prior to the construction of the 66-foot road in 1957 was from 33 to 40 feet wide on the basis of the fences which appear to have been continuously maintained since 1895. We do not deem the location of the fences to be material since the plaintiffs could acquire no prescriptive right against the county.

The case is controlled by our decision in Taylor v.

Austin, 83 Neb. 581, 119 N. W. 1123, wherein we said in a similar case: "It is conceded that a portion of the land claimed as a highway has been inclosed by the plaintiff and her grantors for 20 years or more, and this fact, if the road had not been legally established, and the county was claiming only a prescriptive right, would entitle the plaintiff to hold the part so inclosed as her absolute property. While the width of the road was not designated in the petition therefor, nor in the report of the commissioners establishing the same, the statute at that time required that all public highways should be 66 feet in width, and, as this highway was regularly established and has been in use by the public since 1869, it must be conclusively presumed that it was established as a legal road 66 feet in width; and the fact that it has not been worked or used to its full width, and that some portion of it has been inclosed by the plaintiff, does not vest her with any title thereto, as title by prescription cannot be obtained to a public highway."

It is conclusively presumed therefore that the county established a road 66 feet in width in 1895. When plaintiffs' predecessors in title accepted the compensation for the land taken and damages to the remaining lands, the taking of the section-line road 66 feet in width became complete.

The plaintiffs argue that the records and memoranda found in the files indicate that the damages paid were calculated on a basis of a 33-foot road. Assuming the correctness of this contention, it cannot aid the plaintiffs. If plaintiffs' predecessors in title were dissatisfied with the compensation tendered, their remedy was to appeal. Plaintiffs cannot go behind the compensation paid, even if it was calculated on a basis not now acceptable. All the parties are conclusively presumed to know that the road taken was 66 feet in width when a lesesr width was not specified in the proceedings establishing the road. Anderson v. Nelson, 86 Neb. 752, 126 N. W.

314. Since plaintiffs' predecessors in title accepted the damages as fixed by the appraisers, plaintiffs are foreclosed from claiming any further damages for the 66-foot road taken in 1895. There can be but one recovery for the lands taken and damaged.

The trial court arrived at the same conclusion. The judgment of the district court is affirmed.

AFFIRMED.

CLARENCE LASH, APPELLANT, V. IVAN ERISMAN ET AL., APPELLEES.

94 N. W. 2d 32

Filed January 16, 1959. No. 34416.

1. **Pleading: Evidence.** An admission made in a pleading on which a trial is had is a judicial admission, and is a waiver of all controversy so far as the adverse party desires to take advantage of it. It is therefore a limitation of issues.
2. **Pleading: Appeal and Error.** An issue not raised by the pleadings and proof in the district court cannot be raised for the first time in the Supreme Court.
3. **Appeal and Error.** Except as to questions of jurisdiction, questions not presented to nor passed on by the trial court will not be considered on appeal.

APPEAL from the district court for Nemaha County: VIRGIL FALLOON, JUDGE. *Affirmed.*

Ginsburg, Rosenberg & Ginsburg, for appellant.

Dwight Griffiths, Moran & James, and *Simon Lantzy,* for appellees.

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

YEAGER, J.

This action as originally instituted was by Clarence Lash, plaintiff, against Ivan Erisman, Arnold Ernst, Irvin Dovel, and C. F. Kuncl, Jr., defendants. Before pro-

ceeding further it appears advisable to ascertain and present comprehensively the basic contents of the cause of action as it appears in the petition.

In the petition the plaintiff alleged in substance that he and the defendants were the directors and sole stockholders of the Auburn Nebraska Alfalfa Company, a corporation, which will be hereinafter referred to as the corporation, and the only persons interested in its operations; that in August 1946, the corporation ran into financial difficulties and was without sufficient working capital; that at that time all of these parties entered into an oral agreement that they would each separately and equally advance money necessary for the corporation to continue in business and if any one or more advanced more than the others that one or those would be reimbursed pro rata by the others; that in October 1946, the plaintiff and the defendant Ivan Erisman obtained a loan of $11,000 from the Auburn State Bank, the proceeds of which were advanced to the corporation under the terms of the oral agreement mentioned; that at various other times the plaintiff under the oral agreement advanced other sums of money to the corporation amounting to $12,437.60; that the total of the advancements made by the plaintiff amounted to $25,263.93; and that he believed others of the four defendants also made advancements in amounts not specified. He alleged that he had received no reinbursement for any advances made by him.

On the basis of these allegations he alleged that he was entitled to an accounting and a judgment in conformity with the results of such accounting.

It was further pleaded that the $11,000 was obtained from the Auburn State Bank on a personal note of plaintiff and the defendant Ivan Erisman for advancement to the corporation; that it was advanced pursuant to the agreement for contribution which has been mentioned; that the note was renewed from time to time by the makers until July 1947, when it was paid off by

the proceeds of a note made by the two makers to the Carson National Bank; that this note was renewed by and on the signatures of the makers until April 1949, when it was again renewed on the signature of plaintiff and by inadvertance without the signature of the defendant Ivan Erisman; that there was never any reimbursement of the amount by the corporation which company became bankrupt; that plaintiff paid the note with interest on July 2, 1949, and demanded contribution from the defendants which demand was refused; and that the total in this respect with interest amounted to $12,826.33. As to this amount as a part of the total of $25,263.93 the plaintiff pleaded that it was advanced to the corporation under the oral agreement mentioned, and that he, on accounting, was entitled to contribution from the four defendants for the excess which he had advanced. The prayer of the petition conformed to the allegations.

The plaintiff never pleaded a right of recovery against any of the defendants on any other theory. Particularly he never pleaded a right of recovery on the theory that he and the defendant Ivan Erisman were joint obligors on the bank note or obligation which he paid and was therefore and on that account entitled to contribution from him.

Answers were filed by all defendants except Irvin Dovel. The further concern of this case is with the plaintiff and Erisman. For the further purposes of this opinion the plaintiff will be referred to as appellant and Erisman as appellee.

The answer of the appellee is of considerable length but it becomes necessary at this point to set forth only that by its substance the appellee admits that the appellant advanced the sums of money to the corporation as loans which he claims that he advanced, including the $11,000, but that he is not entitled to recover any part thereof from the appellee. For reply the appellant generally denied the allegations of the answer.

The case was tried to the court and at the conclusion of the evidence of appellant a demurrer thereto on behalf of the defendant Dovel was sustained and motions for dismissal on behalf of the other defendants were sustained. Motion for new trial was duly filed as to the appellee which was overruled. From the order dismissing the action as to the appellee and the order overruling the motion for new trial the appellant has appealed.

It may be said unequivocally that the appellant failed to attempt to support his pleaded cause of action except in two respects. Some evidence was adduced in support of the alleged agreement that there was to be an equalization of advancements if the corporation did not make reimbursement, and there was evidence as to the source of the $11,000 which was advanced, but none as to the balance of the total amount for which he claimed a right of reimbursement from the defendants or any of them. There was no evidence adduced or offered upon which to make an accounting of advancements. The evidence as to the source of the $11,000 was sufficient to sustain the allegations of the petition in that respect, that is that in the first instance it was obtained by appellant and appellee on notes payable by them first to the Auburn State Bank, then to the Carson National Bank, and later discharged by payment made by the appellant. This amount by declaration of the petition was a part of the total advancement of $25,263.93 which on accounting the appellant claimed he was entitled to have allocated one-fifth to himself and one-fifth to each of the four-named defendants, subject to equalization among the five.

This statement as to the evidence is not important in relation to whether or not appellant has sustained proof of his pleaded cause of action. It is important only as a recital of related facts since the appeal in this case does not present that question. The question presented is one of whether or not another and entirely

different cause of action was sufficiently pleaded to render erroneous the dismissal of the action against the appellee.

The substantial contention of the appellant in this respect is that on the pleadings and the record made he had established the right to have judgment against the appellee for contribution of one-half of the principal and one-half of the interest paid by him in payment of the note for $11,000 to the Carson National Bank.

On the record the conclusion is inescapable that this right has not been established. The pleadings, instead of establishing any such right, expressly negative it. There is nothing in the petition or any other pleading from which it may be said that any such inference may flow.

The following from the petition contains the sole and only declaration by pleading of the theory upon which the case was presented to the district court:

"5. That in October of 1946, in accordance with such agreement and understanding, this plaintiff and the defendant, Ivan Erisman, were requested to obtain for said corporation a loan in the amount of $11,000.-00 from the Auburn State Bank; that said bank would not make said loan to said corporation, but agreed to make said loan to this plaintiff and the said Ivan Erisman on their personal note; that said matter was reported by the plaintiff to the defendants; and the defendants all requested the plaintiff to obtain said loan from the Auburn State Bank and advance the proceeds thereof to said corporation, and that they would all equally contribute to the payment thereof in the event the corporation failed to pay the same; that in accordance therewith the plaintiff and the defendant, Ivan Erisman executed and delivered to the said Auburn State Bank their note in the principal amount of $11,000.00 and received from said bank the proceeds of such loan in said amount, and immediately delivered the same over to the said corporation; that said corporation was unable to repay any part of said borrowing and said

note was from time to time renewed by the plaintiff and the said Ivan Erisman; that when said note came due the last time, on July 5, 1947, the said Auburn State Bank refused to renew the same; and thereupon this plaintiff and the said Ivan Erisman on or about July 5, 1947 procured from the Carson National Bank of Auburn, Nebraska the sum of $11,000.00, and on July 5, 1947 paid said sum to the Auburn State Bank in payment of said previous loan as hereinbefore described; that thereafter said loan was renewed from time to time with the said Carson National Bank; that on April 25, 1949 the last renewal of said note was made with the said Carson National Bank, and at said time the defendant, Ivan Erisman, through inadvertance, failed to sign said renewal note in the sum of $11,000.00, but the same was signed only by this plaintiff; that said renewal note was, however, executed by this plaintiff as renewal for the previous note theretofore executed by this plaintiff, and the said Ivan Erisman; and represented the advancement procured by this plaintiff for said corporation in accordance with the agreement hereinbefore set forth; that entire sum of $11,000.00 was received by the said Auburn Nebraska Alfalfa Company under the provisions of the oral agreement between the directors and stockholders hereinbefore set forth; * * * that on or about July 2, 1949 the plaintiff was called upon and did pay the said note to the said Carson National Bank; and the plaintiff thereafter demanded of the defendants that they contribute equally toward the amount of said payment, but that the defendants and each of them have failed, neglected and refused to pay the same or any part thereof, or to make any contribution toward the reimbursement of the plaintiff for the amount so advanced by him.

"6. That the total amount so advanced by the plaintiff on said note, including the interest paid thereon, amounted to the sum of $12,826.33, for which said sum, together with interest thereon, from the date of such

advancement, the plaintiff is entitled to contribution from the defendants. * * *

"8. That all together this plaintiff advanced to and for said corporation, in accordance with the agreement and understanding of the parties herein set forth, the total sum of $25,263.93; and said corporation has failed to repay to this plaintiff any part thereof, and no part of said sum can ever be recovered from said corporation; that under the agreement of the parties, as hereinbefore set forth, the defendants are obligated to contribute to this plaintiff sufficient funds, so that the advancements made by the plaintiff for said corporation will not exceed one-fifth of the total advanced by all of the parties for the benefit of said corporation. * * *

"10. * * * plaintiff alleges that the amounts advanced by him to and for the benefit of said corporation are far in excess of the equal one-fifth share which plaintiff was required to make by the terms of the agreement between the parties; and that, upon such accounting plaintiff is entitled to a judgment against the defendants for the excess amount advanced by the plaintiff and for contributions from the defendants for such excess."

The prayer is to the same effect as the petition, the pertinent part of which is as follows: "* * * that upon such accounting, adjustment be made as to the excess which the plaintiff has advanced beyond the one-fifth share of the total advancements required of him: that a judgment be entered against the defendants and each of them for contributions towards the excess amount advanced by this plaintiff; that this plaintiff have and recover judgment against each of the defendants for the equal share of repayment of the amount advanced by this plaintiff * * * together with interest thereon * * *."

As is apparent from what has been quoted herein the plaintiff elected his remedy and by his pleading, instead of incorporating anything which would give him the right to recover on the theory he now urges in this court, he has expressly and unequivocally precluded any

such right. These express and unequivocal declarations, under a well-established rule, are judicial admissions.

The applicable rule is as follows: "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." Barkalow Bros. Co. v. English, 159 Neb. 407, 67 N. W. 2d 336. See, also, Bonacci v. Cerra, 134 Neb. 476, 279 N. W. 173; Kuhlman v. Farmers Union Co-Operative Assn., 152 Neb. 597, 42 N. W. 2d 182; Anderson v. Evans, 164 Neb. 599, 83 N. W. 2d 59.

Under the circumstances of this case it must be said that on this record the appellant is bound by his judicial admissions. As has been indicated it is readily observable from what has been quoted herein that he has pleaded no theory other than a right of recovery based upon contract for contribution among the appellant and the four defendants. Moreover, none was presented by motion for leave to amend or any other type of motion during the trial, before or after the motions to dismiss were sustained, by suggestion in the examination of witnesses during the trial, or even in the motion for new trial. The theory advanced on the appeal appears for the first time in the assignments of error in the brief of appellant filed in this court. This comes too late to require consideration here.

In Horbach v. Butler, 135 Neb. 394, 281 N. W. 804, it was said: "An issue not raised by the pleadings and proof in the district court cannot be raised for the first time in the supreme court."

In Callahan v. Prewitt, on motion for rehearing, 143 Neb. 793, 13 N. W. 2d 660, it was said: "Except as to questions of jurisdiction, questions not presented to nor passed on by the trial court will not be considered on appeal." See, also, Williams v. Lantz, on rehearing, 123 Neb. 790, 244 N. W. 400; State ex rel. Sorensen v.

Commercial State Bank, 126 Neb. 482, 253 N. W. 692; Badura v. Lyons, 147 Neb. 442, 23 N. W. 2d 678; Sorter v. Citizens Fund Mutual Fire Ins. Co., 151 Neb. 686, 39 N. W. 2d 276; Young v. McCoy, 152 Neb. 138, 40 N. W. 2d 540.

There is no intent or purpose to say either that in his petition appellant could not have alleged facts which would have permitted him to assert the cause of action he now seeks to assert on this appeal, or to say that he could not plead such a valid cause of action in another action. The only purpose here is to say that in this action he elected his remedy and by the manner in which he made the election he is barred from presenting on this appeal his new theory. These are questions not properly before the court in this action.

In summary, the evidence adduced at the trial supports neither the theory set forth in the pleadings on which the appellant submitted the case to the district court, the theory on which he seeks a reversal by this court, nor any other theory which could be the basis of a recovery in his favor in this action.

In the light of this it may not be said that the district court erred in dismissing the petition of the appellant. The judgment is therefore affirmed.

AFFIRMED.

E. A. PULLIAM, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.

94 N. W. 2d 51

Filed January 16, 1959. No. 34427.

1. **Appeal and Error.** The function of assignments of error is that they set out the issues presented on appeal. They serve to advise the appellee of the questions submitted for determination in order that the appellee may know what contentions must be met. They also advise this court of the issues which are submitted for decision.

2. ———. In order that assignments of error as to the admission or rejection of evidence may be considered, the holdings of this court require that appropriate reference be made to the specific evidence against which objection is urged.
3. **Criminal Law: Trial.** In criminal cases, it is not the province of the court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Those matters are for the jury.
4. **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.
5. ———: ———. The credibility of witnesses and the weight of their testimony are for the jury to determine in a criminal case, and the conclusion of the jury should not be disturbed unless it is clearly wrong.
6. **Appeal and Error.** The giving of an instruction which submits to the jury the existence or nonexistence of a fact material to the issues in the case on trial, when no evidence has been introduced which would support a finding of its existence, is error for which the judgment may be reversed.
7. ———. It is error to give an instruction which assumes a controverted material fact upon which there is a conflict of testimony.

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

Chester N. Sutton, for plaintiff in error.

Clarence S. Beck, Attorney General, and *Richard H. Williams,* for defendant in error.

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

CHAPPELL, J.

An information filed by the State in the district court for Washington County charged defendant, E. A. Pulliam, in four separate counts with the crime of selling mortgaged personal property, and in four other separate counts charged defendant with the crime of removing mortgaged personal property out of and away from Washington County.

Defendant pleaded not guilty to each separate count, and upon trial to a jury defendant's motion for directed verdict made at conclusion of the State's evidence was overruled. Thereafter, upon submission of the issues to a jury, it rendered separate verdicts finding defendant guilty as to counts I, II, III, and IV, but not guilty as to counts V, VI, VII, and VIII. Subsequently, defendant's motion for new trial was overruled. Thereafter, judgment was rendered against defendant, and he was sentenced separately upon the first four counts, but said sentences were ordered to be served concurrently.

Thereupon defendant prosecuted error to this court and assigned in his brief: (1) That there were errors of law occurring at the trial and duly excepted to by defendant; (2) that there was an abuse of discretion by the trial court which prevented defendant from having a fair and impartial trial; (3) that the verdict was not sustained by sufficient evidence; and (4) that the trial court erred in giving instruction No. 29 in connection with the statement that defendant contends he received oral permission from the bank to make each sale. We sustain the last assignment.

Section 69-109, R. R. S. 1943, makes it a crime to sell, transfer, or dispose of mortgaged personal property or any part thereof without consent of the owner or holder of the debt secured by said mortgage, and prescribes a penalty for violation. As said in State v. Butcher, 104 Neb. 380, 177 N. W. 184: "The statute in question contains all the elements of the crime for which it is sought to provide punishment. The offense is purely statutory. The criminal act charged is made to consist in doing the things which the statute inhibits and makes their commission a crime. Hence, the law does not provide for criminal intent as being an essentially concomitant ingredient of the crime." The opinion also held that: "* * * The law was enacted to prevent the fraudulent transfer of mortgaged chattel property."

On the other hand, section 69-110, R. R. S. 1943, makes it a crime to remove, permit, or cause to be removed any mortgaged personal property or any part thereof out of the county within which such property was situated at the time such mortgage was given thereon, with intent to deprive the owner of said mortgage of his security, and prescribes a penalty for violation. As held in Wilson v. State, 43 Neb. 745, 62 N. W. 209: "Under the statute, the gist of the offense for which punishment is therein prescribed is the fraudulent removal of mortgaged personal property out of the county with the intent to deprive the owner of the mortgage of his security. The mortgagor who fraudulently removes from the county any portion of the mortgaged chattels, during the existence of the lien or title created by the mortgage, is equally amenable to the provisions of the law as the mortgagor who so removes the entire property mortgaged." Thus criminal intent is an essential concomitant ingredient or element of such crime.

The information here involved alleged in substance that on or about September 13, 1955, in Washington County, Nebraska, defendant did then and there in due form of law mortgage to North Side Bank, hereinafter called the bank, the following: 354 head of Yorkshire hogs, further separately listed as gilts, shoats, boars, sows, and pigs, described by weight or age and numbers of each; 45 head of Black Angus cattle, further separately listed as bulls, cows, heifers, and calves, described by weight or age and numbers of each; and 133 head of Shorthorn cattle, further separately listed as bulls, cows, steers, and calves, described by weight and numbers of each.

Count I appropriately charged in substance that on or about October 7, 1955, during existence of the lien of said mortgage, defendant unlawfully, fraudulently, and feloniously sold 67 white pigs described in said mortgage as Yorkshires to one Marvin Knickman, doing business as Knickman Livestock Sales Company, without first pro-

curing consent of the bank, owner and holder of the debt secured by said mortgage.

Count II likewise charged in substance that on or about October 4, 1955, during existence of the lien of said mortgage, defendant unlawfully, fraudulently, and feloniously sold four hogs, five yearling calves, and one calf, described in said mortgage, to Omaha Livestock Commission Company, without first procuring consent of the bank, owner and holder of the debt secured by said mortgage.

Count III then appropriately charged that on or about October 7, 1955, during existence of the lien of said mortgage, defendant unlawfully, wrongfully, knowingly, and feloniously removed part of said mortgaged property, to wit, 67 white pigs, out of and away from Washington County, where they had been mortgaged and kept, and that defendant did so with intent to deprive the bank of its security and defraud it thereby.

Count IV likewise charged in substance that on or about October 4, 1955, during existence of the lien of said mortgage, defendant unlawfully, wrongfully, knowingly, and feloniously removed part of said mortgaged property, to wit, four hogs, five yearling calves, and one calf, out of and away from Washington County, where they had been mortgaged and kept, and that defendant did so with intent to deprive the bank of its security and defraud it thereby.

Since defendant was acquitted as to counts V, VI, VII, and VIII, it would serve no useful purpose to review them here.

Under assignments of error numbered herein for convenience as No. 1 and No. 2, defendant argued that the trial court committed prejudicial error in the admission over objection of certain evidence appearing in various places throughout the voluminous record, upon the theory that it erroneously allowed defendant's character to be an issue. To search out and recite such evidence here would serve no useful purpose.

In that respect, as recently as Wieck v. Blessin, 165 Neb. 282, 85 N. W. 2d 628, which presented a comparable situation, we reaffirmed that: "The function of assignments of error is that they set out the issues presented on appeal. They serve to advise the appellee of the questions submitted for determination in order that the appellee may know what contentions must be met. They also advise this court of the issues which are submitted for decision.

"In order that assignments of error as to the admission or rejection of evidence may be considered, the holdings of this court require that appropriate reference be made to the specific evidence against which objection is urged."

In that opinion, after citing other authorities from this jurisdiction, we quoted with approval from Minick v. Huff, 41 Neb. 516, 59 N. W. 795, wherein this court held: "It is no part of the duty of this court to search a record for the purpose of ascertaining if there is error in it. On the other hand, every reasonable presumption will be indulged in favor of the correctness of the judgment of a district court, and any ruling of that court, alleged to be erroneous, must be specifically pointed out to be reviewed here."

Viewed in such light, we do not properly have before us for determination the question of admissibility of evidence about which defendant complains, some of which was admitted without objection or adduced by defendant himself, and only part of which was generalized in defendant's argument without any appropriate reference whatever being made in defendant's assignments of error to the specific evidence against which objection is urged. It is sufficient to say that the admission of such evidence was not a plain error unassigned, which would require reversal. In that connection, the general rule is that: "Where guilt of a defendant depends upon the intent, purpose, or design with which the act was done, or upon guilty knowledge thereof, collateral facts in

which he bore a part occurring before and leading up to the transaction complained of may be examined for the purpose of establishing such guilty intent, design, purpose, or knowledge, even though such facts show the commission of another crime." Yost v. State, 149 Neb. 584, 31 N. W. 2d 538.

We turn then to defendant's assignment that the verdict was not sustained by sufficient evidence. In that connection, as recently as Birdsley v. State, 161 Neb. 581, 74 N. W. 2d 377, this court reaffirmed that: "In criminal cases, it is not the province of the court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Those matters are for the jury.

"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.

"The credibility of witnesses and the weight of their testimony are for the jury to determine in a criminal case, and the conclusion of the jury should not be disturbed unless it is clearly wrong."

Viewed in that light, the record as summarized reveals the following pertinent evidence: On February 21, 1955, a chattel mortgage was duly executed in Washington County by defendant to the bank. That mortgage covered 187 head of cattle further separately listed as purebred Shorthorn cows, heifers, bulls, and calves, described by weight or age and numbers of each, and as purebred Angus cows, bulls, and a calf, described by age and numbers of each. Such mortgage also described: "1 Shorthorn bull, 4 years old. Deceased—insured for $8,500, known as C. B. Gold Max IV." In that connection, it was later discovered by the bank and admitted by defendant that such bull was not deceased, and was not insured for $8,500 as represented by defendant. As a matter of fact, on November 16, 1955, such bull was

admittedly alive and was located by the bank's officers at a place away from Aksarben Acres, the farm operated by defendant in Washington County. Later said bull was sold by the bank and the proceeds therefrom were applied on defendant's indebtedness to the bank.

The mortgage, on February 21, 1955, also covered 537 purebred Yorkshire hogs, further separately listed as boars, sows, gilts, and pigs, described by age and weight or numbers of each, together with other described and enumerated personal property and "All farm machinery and equipment and other chattels deliniated (delineated) in chattel mortgage dated November 1, 1954 and all natural increase of said live stock, * * * wheresoever located or found." Defendant also represented in said mortgage that "The above described live stock are owned by him free and clear of all liens and encumbrances, and are or will be on his premises above described home located 3 Mi. East & 3 Mi. North of Bennington in Section 19, Township 17, Range 12 in Washington County, Nebraska. 20 Acres on West Maple Street, ½ Miles North of Elkhorn, Douglas County, Nebraska." Such mortgage was given to secure payment of one promissory note for $33,500 given by defendant to the bank on February 21, 1955, which note matured in one week, on February 28, 1955. When that mortgage was executed, no inspection or count was made of the livestock and chattels covered by the mortgage, but defendant represented that it then covered all of the livestock owned by him on his place, and such mortgage was duly filed in both Washington and Douglas counties on February 22 and February 23, 1955. Five notations appear on the face of the mortgage indicating that at various times between February 21, 1955, and September 28, 1955, certain livestock covered by the mortgage, but not here involved, was sold, with the proceeds applied by the bank on previous notes given to it by defendant.

Also, in that connection, on September 13, 1955, de-

fendant duly executed the chattel mortgage heretofore mentioned in Washington County to the bank and same was duly filed in Washington County on September 14, 1955. That mortgage covered the hogs, pigs, cattle, and calves heretofore described, and was given to further secure four outstanding promissory notes given to the bank by defendant, to wit: "One for $2,170.00 Dollars, * * * dated August 23, 1955 due October 15, 1955 One for $9,576.90 Dollars, * * * dated August 30, 1955 due October 22, 1955 One for $23,900.00 Dollars, * * * dated November 1, 1954 due six months after date One for $33,500.00 Dollars, * * * dated February 21, 1955 due February 28, 1955 * * *" making a total of $69,146.90. Such mortgage was also in like form with that executed February 21, 1955, except it read: "This mortgage is taken as additional security and is not intended to release or discharge any existing rights, mortgages or liens." Defendant also represented that: "The above described live stock are owned by him free and clear of all liens and encumbrances, and are or will be on his premises above described. —— home located 3 Miles East & 3 Miles North of Bennington in Section 19, Township 17, Range 12 in Washington County, Nebraska." Four notations appear on the face of the mortgage, indicating that at various times between September 13, 1955, and October 11, 1955, certain livestock, not directly involved here, was sold or condemned by the government, with the proceeds applied by the bank upon defendant's indebtedness to the bank.

The information concerning the livestock thus mortgaged on September 13, 1955, was taken from an inspection and exact count thereof by defendant, and the bank's officers on September 1, 1955. Such animals were personally pointed out by defendant at his farm home known as Aksarben Acres, and at another location nearby in Washington County, where defendant represented that he owned all the animals. In other words, the bank at all times had a chattel mortgage on all livestock owned

by defendant. However, from time to time during October 1955, defendant was given permission from the bank to butcher some 83 hogs not directly involved to supply a sausage business operated by defendant, and the proceeds therefrom received by the bank were applied upon defendant's indebtedness to the bank.

Also, on September 6, 1955, a sworn financial statement was given by defendant to the bank. Such statement enumerated and placed a value on the 178 cattle and calves, and the 354 hogs and pigs described and included in the September 13, 1955, mortgage, together with defendant's farm home, other assets, and other chattels, some of which were included in the February 21, 1955, mortgage. Admittedly, one such other asset was falsely represented as "Due from Ins Co on Bull $8500," when in fact, as heretofore mentioned, such bull was still alive and nothing was due from any insurance company. Such statement also recited defendant's liabilities and falsely represented that as of September 1, 1955, he had a net worth of $28,360.

Defendant's wife, who was a cosigner of the notes given the bank, also gave a sworn financial statement on September 4, 1955. Therein she represented that she owned current cash and assets of $8,300, and described real estate worth $70,000, making a net worth of $78,300. However, one such item of real estate was "Acres 160 Legal Description (show county and state) Mills Co Ia Title in Ruth Pulliam Value $32000 Liens None." However, it was later discovered that she in fact never had owned any such land, and without such asset the livestock security was insufficient.

In the situation aforesaid, the bank's board of directors had a meeting on November 10, 1955, and decided to call defendant's loan and foreclose. Thereafter, on November 11, 1955, the bank's lawyers went to the bank to work out ways and means of handling the situation. While they were doing so, defendant came into the bank and was told about the bank's decision, where-

upon defendant reluctantly consented to voluntary foreclosure rather than formal action. That afternoon the president of the bank and one of its lawyers went out to defendant's farm where they saw numerous hogs in the lots and some cattle around the barn. In defendant's presence they ordered two trucks from a transportation company to come to defendant's farm, where they loaded 139 Yorkshire hogs, covered by the mortgage, and sent them to a livestock commission company in Fremont, where later defendant personally helped with the sale of the animals. They also talked with defendant on November 11, 1955, about sale of the rest of the hogs and cattle, and from defendant's home they then ordered seven more trucks to come the next day, November 12, 1955, and haul the rest of the livestock away.

However, about 6:30 a. m., November 12, 1955, defendant called the bank president by telephone, saying: "You needn't come out * * * All the cattle and hogs are gone." Thereupon the president of the bank and one of its lawyers went out to defendant's farm. There defendant said: "All the cattle are gone," but there were about 20 head in a pen near the barn. When asked, "Where did the cattle go?" Defendant said "They went to Western, Nebraska." When asked "Where?" Defendant replied, "I won't tell you * * * You will get your money when they are sold." When asked, "Who took them out?" Defendant said "The trucker." When asked "From where?" Defendant said "The trucker from Pender, Nebraska." When asked "Where did he take them?" Defendant refused to tell. Later that day, however, the president of the bank and its lawyer saw several cattle at another location on defendant's farm, which created a suspicion, so they drove over where the 45 Black Angus cattle were counted on September 1, 1955, and included in the mortgage on September 13, 1955, when defendant represented that they belonged to him. Such cattle were still there, but it was later discovered that none of them at any time ever belonged

to defendant as represented and mortgaged by him.

Early Monday morning, November 14, 1955, the president of the bank and one of its lawyers went out to defendant's farm. Defendant was not there at that time, but they waited for his return. He shortly returned and said that he had been to see the county attorney and sheriff at Blair and had made a clean breast of everything. They then went into defendant's house where he admitted that he had sold the mortgaged cattle and appropriated the proceeds to his own use. When asked where he had sold the other mortgaged livestock, defendant handed the bank's president and lawyer exhibit No. 5, an account of sales for Aksarben Acres through the Knickman Livestock Sales Co. of Council Bluffs on October 7, 1955, of 67 white pigs, for a net of $670, which defendant had appropriated to his own use. Defendant then also handed them exhibit No. 6, an account of sale showing a sale by defendant through the Omaha Live Stock Commission Co. on October 24, 1955, but designated as "Ship 10/4/55" of one calf for which defendant was allowed $20.55, and he appropriated that amount to his own use. The bank's lawyer then remarked that such two accounts of sale did not cover many of the missing animals, and asked defendant where the rest of the accounts of sale were, whereupon defendant replied that they were in a pile on his desk, and he could not then give the names, but he did give the names of some places where other mortgaged animals had been sold. Also, on November 14, 1955, another 14 head of hogs and 22 head of cattle were found on defendant's farm and hauled into a livestock commission company for benefit of the bank.

Exhibits Nos. 7, 8, and 9 are two accounts of sale and one delivery receipt representing the livestock hauled from defendant's farm by the bank, covering all the mortgaged animals the bank's officers could find. On November 14, 1955, defendant also revealed that he had sold 39 head of cattle to one Zimmerman for $3,125,

but the bank later received those funds. Thus, from the total number of cattle and calves covered by the September 13, 1955, mortgage, 82 head were not accounted for by defendant, and from the total number of hogs and pigs covered by said mortgage, 104 were not accounted for by defendant. In that connection, on November 17, 1955, defendant gave the bank's lawyer exhibit No. 28, a list of 10 various named livestock firms where he had sold mortgaged livestock which had not been accounted for. Such list included "Marvin Knickman Sales Co. C/B" where the October 7, 1955, sale and removal had been made by defendant, and the "Om Livestock Com Oma" where the October 4, 1955, sale and removal had been made by defendant.

In that connection, the president of the Omaha Livestock Commission Company of Omaha testified that exhibit No. 22 was an account of sale for defendant through said company of four hogs, three heifers, two yearlings, and one calf, on October 4, 1955, for $480.54 net. Exhibit No. 19 is a cancelled check issued October 4, 1955, by said company for that amount, payable to defendant, who endorsed said check and appropriated the amount to his own use.

Also, Marvin Knickman, operator of Knickman Livestock Sales Company in Council Bluffs, but designated by defendant in exhibit No. 28 as "Marvin Knickman Sales Co. C/B," identified exhibit No. 10 as an account of sale by his company for defendant of 67 white pigs on October 7, 1955, for $670. Exhibit No. 11 is a cancelled check issued by said company, which check was endorsed "Aksarben Acres by E. A. Pulliam" and the amount thereof was appropriated by defendant to his own use. Exhibit No. 5, which had been handed by defendant to the bank's officers on November 14, 1955, with the admission that he had on October 7, 1955, sold the mortgaged 67 white pigs described thereon and appropriated the money to his own use, was a carbon copy of the aforesaid exhibit No. 10.

Further, exhibit No. 25 is a copy of a ledger sheet taken from the records of trucker Dan Greeno, showing, together with evidence of the trucker's wife, that on October 7, 1955, the trucker hauled "67 stock to Co Bluffs" for defendant to the Knickman Livestock Sales Company. The trucker's wife, who kept his records, was asked on cross-examination: "I want to know if you knew what place Mr. Greeno went to get those 67 pigs?" Thereto she replied, referring to defendant, "To my knowledge it was his home place." In that connection also, the trucker testified that at defendant's direction such animals were picked up at Aksarben Acres, defendant's farm, and hauled to the Knickman Livestock Sales Company at Council Bluffs.

The president of the bank testified that only he and another named officer of the bank had any authority to give defendant consent to sell, transfer, or dispose of or remove any of the mortgaged property. In that respect, no consent was ever so given for the sale by defendant of the mortgaged property aforesaid, either on October 4, 1955, or on October 7, 1955, or for the removal thereof by defendant from Washington County on either of said dates, and the bank never received the proceeds from any such sales on either of said dates. In that connection, defendant admitted that he made such sales and removals and did not turn over to the bank any proceeds from either sale of the four hogs, three heifers, two yearlings, and one calf, on October 4, 1955, or from the sale of the 67 white pigs on October 7, 1955. His explanation of the reason therefor will be later discussed.

After application of the net proceeds of all sales made by the bank in calling defendant's loan, and after giving him all credits due on all accounts paid over by defendant, he still remained indebted to the bank for $54,553, and defendant had no other available assets with which to liquidate any part of it. That account included a note for $33,500 given the bank to cover an

overdraft in defendant's checking account of $30,405, which resulted from a manipulation of insufficient fund checks between a bank account at Bennington and his bank account at the North Side Bank. However, defendant was found not guilty in a federal criminal prosecution involving those transactions. In that connection, defendant was asked on cross-examination if he had ever been convicted of a felony, whereupon he replied, without objection, that he had been prosecuted for several felonies but he could not remember whether he had ever been convicted.

For his defense, defendant produced several witnesses who testified to various sales of hogs to defendant as a livestock buyer during 1955. One witness testified by deposition that he shipped some of his Shorthorn cattle to defendant during June and October 1955, with authority of defendant to sell them. Defendant testified that the six head of cattle and four hogs he was charged with selling and removing on October 4, 1955, were partly animals that he had bought and partly animals sent him for the purpose of sale by the owner, and that none of such animals were covered by the September 13, 1955, mortgage.

He also testified that the 67 white pigs he was charged with selling and removing on October 7, 1955, came from sows purchased by him over in Iowa in July 1955, and left there during weaning, but later removed to his farm. He also testified that they were not covered by the September 13, 1955, mortgage. He further testified that when the individual count of the livestock on his farm was made by him and the bank's officers in September 1955, he had other animals on other lands which he did not show the officers. Defendant denied that he had ever told the bank's officers that he had sold animals that were mortgaged. He admitted that he had talked with the county attorney and sheriff at Blair on November 14, 1955, but denied that he had confessed anything to them. Defendant admitted that on

November 12, 1955, he called the president of the bank and told him that he did not need to come out because the livestock was gone, and defendant admitted that on November 14, 1955, at his home the bank's officers wanted to know what had happened to the missing livestock, and he told them that he had sold a lot of it. Defendant testified that he had sent the cattle to one Zimmerman in Iowa where they were sold with the bank's officers present, and that he did not need consent to sell such cattle because after he had gone to the bank on November 11, 1955, its officers told him to sell them and they had gone with him to collect the money.

Defendant testified that the shortage of mortgaged hogs was accounted for because some were put in sausage and some were sold, with all proceeds therefrom paid to the bank. He also testified that the shortage of cattle was accounted for by sales, with the proceeds therefrom paid to the bank to reduce admitted overdrafts.

In the light of the aforesaid evidence, we conclude that the verdict and judgment were amply supported by competent evidence.

We turn then to the assignment and argument that instruction No. 29, given by the trial court, was prejudicially erroneous. We conclude that it was. Instruction No. 29 told the jury: "The State of Nebraska has charged the defendant with making four sales of certain items of livestock which were covered by the mortgages given to the North Side Bank by the defendant, and in each instance the State alleges in the various Counts relating to these sales that the defendant did not receive written permission of the bank before making such sale or sales. The defendant contends that he received oral permission from the bank to make each sale, and you are instructed that such oral permission, if given as contended by the defendant, was sufficient authorization for him to make such sales, and you should acquit him on any Count charging him with the crime

of selling mortgaged property if you find that oral consent was given for such sale or sales."

In that connection, defendant did not testify in any respect that he had permission to sell or remove the three heifers, two yearlings, one calf, and four hogs on October 4, 1955, and the 67 white pigs on October 7, 1955. Defendant's theory of defense at all times was that such livestock was not covered by the mortgage of September 13, 1955, and that he did not have and was not required in any manner to have the bank's consent to such sales or removals. The only testimony of defendant with regard to consent was given with regard to the cattle sold on November 14, 1955, after the bank had called defendant's loan, and the information contained no charge relating to sale or removal on that date.

Viewed in such light, the instruction erroneously submitted the existence of material facts with relation to defendant's theory of defense which were not supported by any competent evidence, and in effect erroneously assumed that defendant had sold the mortgaged property as charged but did so with the bank's consent, which was a controverted material fact upon which there was a conflict of testimony.

In that connection, it has long been a rule in this state that: "The giving of an instruction which submits to the jury the existence or non-existence of a fact material to the issues in the case on trial, when no evidence has been introduced which would support a finding of its existence, is error for which the judgment may be reversed." Morearty v. State, 46 Neb. 652, 65 N. W. 784.

It is also the rule that: "It is error to give an instruction which assumes a controverted material fact upon which there is a conflict of testimony." Metz v. State, 46 Neb. 547, 65 N. W. 190. See, also, Fullerton v. State, 148 Neb. 811, 29 N. W. 2d 618.

In respect to defendant's contention that instruction No. 29 was prejudicially erroneous, we have considered all of the instructions and conclude that in such respect

it did not fully, fairly, and correctly state the law. The conclusion is inevitable that instruction No. 29 was prejudicially erroneous, and deprived defendant of a fair and impartial trial.

For reasons heretofore stated, the judgment of the trial court should be and hereby is reversed and the cause is remanded for new trial on counts I, II, III, and IV of the information.

REVERSED AND REMANDED.

ROBERT O'NEILL, APPELLANT, V. MARION A. HENKE, APPELLEE.

94 N. W. 2d 322

Filed January 16, 1959. No. 34458.

1. **Automobiles: Intoxicating Liquors.** Under the provisions of section 39-740, R. R. S. 1943, the liability of a driver while driving under the influence of intoxicating liquor is a distinct ground of liability from that of the driver of a motor vehicle based upon gross negligence in the operation of a motor vehicle.
2. **Intoxicating Liquors.** Intoxicating liquor generally includes and means any liquor intended for use as a beverage, or capable of being so used, which contains alcohol no matter how obtained, in such a percent that it will produce some degree of intoxication when imbibed in a quantity that may practically be drunk.
3. ———. The distinctive characteristic of all liquors is that they contain alcohol, the basis of all intoxicating drinks; that they are capable of being consumed as a beverage; and that when so used, they will produce intoxication to some extent in the usual and common acceptation of the term.
4. ———. The term under the influence of intoxicating liquor means that a person is under the influence of alcoholic liquor if such person is under such influence of intoxicating liquor to such an extent as to have lost to an appreciable degree the normal control of his body or mental faculties, and to the extent that there is an impairment of the capacity to think and act correctly and efficiently.
5. **Automobiles: Intoxicating Liquors.** Liability for damage caused by the driving of a motor vehicle while under the influence of intoxicating liquor is on a parity with liability for damage

caused by gross negligence in the operation of a motor vehicle.

6. ———: ———. The driving of a motor vehicle by one under the influence of intoxicating liquor fully responds to all the elements necessary to constitute gross negligence under the provisions of section 39-740, R. R. S. 1943.

7. **Automobiles: Negligence.** Gross negligence, within the meaning of section 39-740, R. R. S. 1943, means negligence in a very high degree, or the absence of even slight care in the performance of a duty.

8. ———: ———. The existence of gross negligence must be determined from the facts and circumstances in each case.

9. ———: ———. The question of gross negligence is for the jury where the evidence relating thereto is conflicting and from which reasonable minds might draw different conclusions.

10. ———: ———. It is not necessary in all cases that the operator of a motor vehicle be aware of impending danger in order to hold him guilty of gross negligence, but that is a circumstance which should be considered.

11. ———: ———. A violation of statutes regulating the use and operation of motor vehicles upon the highways is not negligence per se, but evidence of negligence which may be taken into consideration with all the other facts and circumstances in determining whether or not negligence is established thereby.

12. ———: ———. Excessive speed of a motor vehicle does not necessarily establish gross negligence, although it is a factor to be considered.

13. ———: ———. As a general rule it is negligence as a matter of law for a motorist to drive a motor vehicle on a highway in such a manner that he cannot stop in time to avoid a collision with an object within the range of his vision.

14. ———: ———. The basis of this rule is that a driver of a motor vehicle is legally obligated to keep such a lookout that he can see what is plainly visible before him and that he cannot relieve himself of that duty. And, in conjunction therewith, he must so drive his motor vehicle that when he sees the object he can stop his motor vehicle in time to avoid it.

15. ———: ———. Exceptions have been recognized to this general rule where the object or obstruction or depression is the same color as the roadway and for that reason, or for other sufficient reasons, cannot be observed by the exercise of ordinary care in time to avoid a collision.

16. ———: ———. When the view of the driver of a motor vehicle is obstructed, whether by reason of a grade or otherwise, the speed of the motor vehicle should be so reduced that the motor

vehicle can be stopped within the distance the driver can see ahead.

17. ———: ———. Under the law of this state the lawfulness of the speed of a motor vehicle, within the limits fixed by law, is determined by the further test of whether the speed was greater than was reasonable and prudent under the conditions then existing.

18. ———: ———. What is a reasonable speed is necessarily largely dependent on the situation and the surrounding circumstances, it being obvious that a speed which would be safe, reasonable, and proper in some places and under some circumstances might be highly dangerous, unreasonable, and improper in other places and under other circumstances.

19. **Automobiles: Highways.** The driver of a motor vehicle on a public highway is required to operate it upon the right half of the highway unless it is impracticable to do so.

20. **Automobiles: Intoxicating Liquors.** Evidence as to drinking intoxicants within a reasonable time prior to an accident is a circumstance to be considered in determining whether or not a driver of a motor vehicle is guilty of gross negligence.

21. **Automobiles: Negligence.** The emergency rule cannot be successfully invoked by either party in a negligence case unless there is competent evidence to support a conclusion that a sudden emergency actually existed, and then it cannot be successfully invoked by one who has brought that emergency upon himself by his own acts or who has not used due care to avoid it.

22. **Negligence: Trial.** A verdict should not be directed, or a cause of action dismissed, or a judgment entered notwithstanding the verdict, unless the court can definitely determine that the evidence of defendant's negligence, when taken as a whole, fails to reach such degree of negligence that is considered gross.

23. ———: ———. Where the evidence of negligence falls within the area where reasonable minds can differ as to whether or not it establishes gross negligence then the determination of that question is for the jury and, absent prejudicial error otherwise, the judgment of the jury must prevail.

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

Smith Brothers and *Hugh Stuart,* for appellant.

William A. Stewart and *John E. Dougherty,* for appellee.

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

SIMMONS, C. J.

This is an action where plaintiff, a guest passenger, seeks to recover damages resulting from a collision of a motor vehicle, driven by defendant, with a truck on a highway. The right to recover is based on alleged gross negligence of the host driver under the civil liability provisions of section 39-740, R. R. S. 1943. At the conclusion of all the evidence the trial court sustained a motion of the defendant to dismiss on the ground that the evidence would not sustain a finding of gross negligence.

Plaintiff appeals.

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

The evidence is here stated under the established rule that such a motion admits the truth of all competent evidence favorable to the party against whom the motion is directed; that every controverted fact must be resolved in his favor; and that he is entitled to the benefit of every inference that can reasonably be deduced from the evidence.

The accident happened on the upgrade side of a hill and near the crest of a country road. The road was a graveled, improved highway, with a smooth surface, and with a width, normally suitable for travel, of 25 feet. However, at the time of the accident there was a windrow of gravel along the west side that reduced the available normal travel width of the road to 23 feet. We refer later herein to the position of the vehicles involved with reference to the 23-foot width of the road. See Krepcik v. Interstate Transit Lines, 154 Neb. 671, 48 N. W. 2d 839.

The automobile in which plaintiff and defendant were riding was a passenger car. The truck involved is described as a 1-ton truck upon which a grain box had

been mounted. The box was less than 8 feet wide.

At the point of the accident and for some distance prior thereto the road passed through a hilly pasture land area that was sparsely settled.

The road was dry and the weather was clear. The accident happened October 28, 1956, about 5:35 p.m. The sun was shining. There was no wind or other unfavorable atmospheric conditions.

Plaintiff and defendant had been friends and fellow employees for a number of years.

On Saturday evening defendant had attended a party at a club house outside the city of Lexington where he had consumed some intoxicating liquor. On Sunday about noon defendant and two other men had gone to the club house as the designated "crew" to clean up after the party of the night before. During the middle of the day the three men consumed about three-fourths of a bottle of whiskey, described as either a fifth or a pint.

The three men started to return to Lexington. Defendant was driving. After 2 miles of the trip had elapsed, one of the other men took over the driving because of the condition of the defendant. They went to Lexington where about 4 p.m. defendant and the others had a full course steak dinner. After it defendant gave no appearance of intoxication. About 5 p.m. defendant drove to the home of the plaintiff and invited plaintiff to accompany him to Eddyville, a town north of Lexington. At that time defendant's eyes were "glassy" but he appeared to be all right. Plaintiff and his wife agreed to go.

When plaintiff and his wife got in the car they smelled alcohol on the breath of defendant.

Defendant drove out of Lexington, obeying all stop signs, and for the first 7 or 8 miles of the trip in the country he drove at a reasonable rate of speed and so as to cause no concern. Defendant then began to increase his speed, driving at times from 70 to 80 miles per hour. At one time he drove across an irrigation lateral bridge

that was elevated above the road and threw his passengers into the top of the car. He slipped around corners and curves at an excessive speed. At one time plaintiff asked defendant, "What's the hurry?" Plaintiff at other times would look at the speedometer and defendant would then slow down, and then speed up. He drove mostly in the center of the road, weaving to the right and to the left.

At a distance of about 3 or 4 blocks south of the point of the collision defendant was driving in the center of the road at a speed in excess of 70 miles per hour. Plaintiff asked him to get over on the right side of the road. Defendant did not do so and continued along the center of the road, looking straight ahead, and without diminishing his speed.

About 200 feet from the point of the accident, plaintiff saw the truck coming over the hill. It was on its own side of the road. Defendant apparently saw it also for he put on his brakes and skidded a distance of 121 feet to the point of impact. His course of travel did not change from a directly forward movement along the center of the road.

The driver of the truck saw the on-coming car of the defendant and turned to his right to avoid a collision. He got over to the right sufficiently to avoid a collision with the body of the truck proper. Defendant's car hit and sideswiped the grain box. Defendant's car then swung to the right, and its wheels in a sidewise scuffing position, traveled a distance of 172 feet where it left the road on the left side, went into the ditch along the road, turned over, and came to rest 237 feet from the point of impact.

Plaintiff and his wife were thrown from the car. Plaintiff was severely injured. In the few minutes immediately after the accident, three different witnesses talked with the defendant. They smelled alcohol on his breath, his eyes were glassy, his speech was "thick," and he walked unsteadily. Two of these witnesses, after

describing defendant's appearance, speech, and actions, gave it as their opinion that he was under the influence of intoxicating liquor at that time.

The act commonly called the "guest passenger" statute provides in part: "The owner or operator of a motor vehicle shall not be liable for any damages to any passenger or person riding in such motor vehicle as a guest or by invitation and not for hire, unless such damage is caused by the driver of such motor vehicle being under the influence of intoxicating liquor or because of the gross negligence of the owner or operator in the operation of such motor vehicle." § 39-740, R. R. S. 1943.

In McCown v. Schram, 137 Neb. 498, 289 N. W. 890, we pointed out that under the statute driving while under the influence of intoxicating liquor was a distinct ground of liability from that of the driver of an automobile based upon gross negligence in the operation of a motor vehicle. See, also, Brown v. Mulready, 140 Neb. 500, 300 N. W. 421; Johnk v. Scanlon, 136 Neb. 187, 285 N. W. 488.

The plaintiff here does not base his cause of action upon the distinct ground of liability of driving while under the influence of intoxicating liquor. Rather plaintiff bases his cause upon an allegation of gross negligence in six particulars, one of which is that defendant was operating his automobile while under the influence of "alcoholic" liquor. We see no reason to differentiate between that allegation and the statutory phrase "intoxicating liquor." The latter includes the former as used here. We have held: "Intoxicating liquor generally includes and means any liquor intended for use as a beverage, or capable of being so used, which contains alcohol no matter how obtained, in such a percent that it will produce some degree of intoxication when imbibed in a quantity that may practically be drunk. The distinctive characteristic of all liquors is that they contain alcohol, the basis of all intoxicating

drinks; that they are capable of being consumed as a beverage; and that when so used, they will produce intoxication to some extent in the usual and common acceptation of the term." Franz v. State, 156 Neb. 587, 57 N. W. 2d 139.

We consider separately whether the evidence here as to driving while under the influence of intoxicating liquor is sufficient to take the case to the jury under the gross negligence issue.

In Danielson v. State, 155 Neb. 890, 54 N. W. 2d 56, we had a criminal case where the defendant was charged with operating a motor vehicle while under the influence of alcoholic liquor. We approved the following instruction: " 'The meaning of the term "under the influence of alcoholic liquor" as applied to a person operating a motor vehicle is, if the alcoholic liquor has so far affected the nerves, brain and muscles of the operator of a motor vehicle so as to impair to any appreciable degree his ability to operate his motor vehicle in the manner that an ordinary prudent and cautious man, in full possession of his faculties would operate the same, then the operator of said motor vehicle is under the influence of alcoholic liquor.' "

In Uldrich v. State, 162 Neb. 746, 77 N. W. 2d 305, we approved the following instruction: " '* * * a person is "under the influence of alcoholic liquor" if such person is under the influence of intoxicating liquor to such an extent as to have lost to an appreciable degree the normal control of his body or mental faculties.' "

In Hoffman v. State, 162 Neb. 806, 77 N. W. 2d 592, we approved this instruction: " '* * * the term "under the influence of intoxicating liquor," means that a person is under the influence of alcoholic liquor if such person is under such influence of intoxicating liquor to such an extent as to have lost to an appreciable degree the normal control of his body or mental faculties, and to the extent that there is an impairment of the capacity to think and act correctly and efficiently.' "

The above decision was had in a case involving the motor vehicle homicide act. The same language in the various statutes refers to the same subject matter and should receive the same construction.

In 1919 the Legislature in the Civil Administrative Code enacted a provision that: "It shall be unlawful * * * for any intoxicated person to operate a motor vehicle * * *," and made it a misdemeanor. Laws 1919, c. 190, art. IV, § 27, p. 828. In 1912 we decided Freeburg v. State, 92 Neb. 346, 138 N. W. 143, Ann. Cas. 1913E, 1101, wherein intoxication was defined in one instance as "synonymous with drunk" and as the condition that follows from the drinking of excessive quantities of intoxicating liquor.

In 1931 the Legislature changed the phrase to "operating a motor vehicle while under the influence of intoxicating liquor." Laws 1931, c. 103, § 1, p. 275. The language of the present law is "under the influence of alcoholic liquor." § 39-727, R. S. Supp., 1957. The same Legislature enacted the guest passenger statute using the phrase "under the influence of intoxicating liquor." Laws 1931, c. 105, § 1, p. 278.

It is to be noted that in the 1931 act (Laws 1931, c. 103, p. 274), the Legislature in the title stated that it was an act "to provide penalties for the operation of motor vehicles by persons while in a state of intoxication," although in the body of the act it used the clause "while under the influence of intoxicating liquor." In 1935 the act was amended, with the provisions remaining in the title and body of the act as before. Laws 1935, c. 134, p. 483. In 1937 the act was again amended. The Legislature then used the clause "while under the influence of alcoholic liquor" in the title of the act as well as in the body of the act. Laws 1937, c. 140, p. 503. The act was again amended in 1947 (Laws 1947, c. 148, p. 407); again in 1949 (Laws 1949, c. 116, p. 309); and again in 1951 (Laws 1951, c. 118, p. 528). In all of these amendments the title and body of the act re-

mained the same as in the 1937 act so far as the matter here being considered is concerned. The act was again amended in 1953 and the clause "under the influence of alcoholic liquor" was retained in the body of the act. Laws 1953, c. 214, p. 755. This enactment was subsequent to our decision in Danielson v. State, *supra.*

Commenting on a similar legislative history, the Supreme Court of Wisconsin in City of Milwaukee v. Richards, 269 Wis. 570, 69 N. W. 2d 445, said: "This change indicates that the legislature, with increasing awareness of the importance of safety in the operation of dangerous instruments on the highway, extended the prohibitions from persons who would come under the restricted category of absolute intoxication to those persons whose reactions would show that they were merely 'under the influence of intoxicating liquor'."

Two conclusions follow from the legislative provision here considered. The Legislature placed no limitation upon the extent of the influence required, nor can we do so save as we have defined the term as we are required to do. In passing it may be observed that the rule which we have adopted is less inclusive than the definition followed in some other jurisdictions. See, Hasten v. State, 35 Ariz. 427, 280 P. 670; City of Milwaukee v. Richards, *supra.*

The Legislature has not seen fit to change the definition we have adopted and we do not do so.

The second conclusion is that the Legislature in fixing liability for damage caused by the driving of a motor vehicle while under the influence of intoxicating liquor, put it on a parity with liability for damage caused by gross negligence in the operation of a motor vehicle. Without the sustaining benefit of a statute such as ours, in Tomasik v. Lanferman, 206 Wis. 94, 238 N. W. 857, the Supreme Court of Wisconsin held that "the driving of a car on our highways by one intoxicated fully responds to all of the elements necessary to constitute gross negligence." The Wisconsin court has repeatedly

followed the above decision as late as Twist v. Aetna Casualty & Surety Co., 275 Wis. 174, 81 N. W. 2d 523. The case has been quoted with approval in Zalewski v. Yancey, 101 Ohio App. 501, 140 N. E. 2d 592, and Scott v. Gardner, 137 Tex. 628, 156 S. W. 2d 513, 141 A. L. R. 50.

It necessarily follows that evidence sufficient to take a case to the jury on the ground of liability for driving while under the influence of intoxicating liquor is sufficient to take the case to the jury when that element is pleaded as gross negligence.

We have heretofore set out the evidence as to the defendant being under the influence of intoxicating liquor. It is patent that it would sustain a finding that the influence existed to the extent that he had lost to an appreciable degree the normal control of his body or mental faculties to the extent that there was an impairment of the capacity to think and act correctly and efficiently.

We construed the guest passenger statute for the first time in Morris v. Erskine, 124 Neb. 754, 248 N. W. 96. In the many cases dealing with that statute since, we have not departed from the basic rules there stated. They are: Gross negligence, within the meaning of section 39-740, R. R. S. 1943, means negligence in a very high degree, or the absence of even slight care in the performance of a duty. The existence of gross negligence must be determined from the facts and circumstances in each case. The question of gross negligence is for the jury where the evidence relating thereto is conflicting and from which reasonable minds might draw different conclusions.

The defendant analyzes many of our decisions where we based the finding of gross negligence on fact elements appearing in each case. He then advances the contention that the common denominator of the cases shows that there must be (1) consciousness of peril apparent to the driver; (2) heedlessness of the consequences; (3) a continuous course of negligent opera-

tion or conduct; (4) excessive speed; and (5) failure to heed timely warnings or protest.

We need refer to only one of the cases cited—that of Werner v. Grabenstein, 165 Neb. 231, 85 N. W. 2d 297, wherein we held: "A finding of gross negligence is justified if there is evidence of imminence of danger which was apparent to or known by the operator of an automobile and he was timely cautioned by the guest concerning the manner of his operation of the automobile but he persisted in his negligent operation thereof and if there is evidence that the operator was heedless of the consequences which might ensue by his negligent operation of the automobile consisting not only of rate of speed but of other conditions, known to the operator, which enhanced the peril."

This does not mean that all of those fact elements must exist in order to sustain a finding of gross negligence. It does mean that where those fact elements do exist the evidence is sufficient to sustain a finding of gross negligence.

For instance the first element of the rule proposed by the defendant is that the driver must be conscious of the peril, or as stated in the above quote, the imminence of danger must be apparent. We held in Thurston v. Carrigan, 127 Neb. 625, 256 N. W. 39, that: "* * * it is not necessary in all cases that the operator of a car be aware of impending danger in order to hold him guilty of gross negligence, but that is a circumstance which should be considered." See, also, Cunning v. Knott, 157 Neb. 170, 59 N. W. 2d 180, for a like holding.

The ultimate test in all cases is that stated in Morris v. Erskine, *supra:* "The existence of gross negligence must be determined from the facts and circumstances in each case."

The first "particular" which plaintiff pleaded as a fact element of gross negligence is that defendant drove his automobile at a high and unlawful rate of speed and in total disregard of the existing conditions. There was

evidence received that at times the defendant drove at speeds as high as 80 miles per hour and that for some distance immediately before the accident his speed was in excess of 70 miles per hour.

At the time this accident occurred, section 39-723, R. R. S. 1943, provided, so far as applicable here, that: "No person shall operate a motor vehicle on any highway outside of a city or village at a rate of speed greater than is reasonable and proper, having regard for the traffic and use of the road and the condition of the road, nor at a rate of speed such as to endanger the life or limb of any person, nor in any case * * * at a rate of speed exceeding sixty miles per hour between the hours of sunrise and sunset, and fifty miles per hour between the hours of sunset and sunrise."

Section 39-7,108, R. R. S. 1943, also provided in part that: "No person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions then existing. * * * The following speeds shall be prima facie lawful, but in any case when such speed would be unsafe, they shall not be lawful: * * * sixty miles per hour between the hours of sunrise and sunset and fifty miles per hour between the hours of sunset and sunrise upon any highway outside of a city or village. * * * The fact that the speed of a vehicle is lower than the foregoing prima facie limits shall not relieve the driver from the duty to decrease speed when approaching and crossing an intersection, when approaching and going around curves, when approaching a hill crest * * *."

That the jury could have found the defendant violated these provisions of the statute is obvious.

The established rule is: "A violation of statutes regulating the use and operation of motor vehicles upon the highways is not negligence per se, but evidence of negligence which may be taken into consideration with all the other facts and circumstances in determining whether or not negligence is established thereby." Landrum v.

Roddy, 143 Neb. 934, 12 N. W. 2d 82, 149 A. L. R. 1041. This was a guest case.

The rule is: "Excessive speed of a vehicle does not necessarily establish gross negligence, although it is a factor to be considered." Cunning v. Knott, *supra.*

We next consider certain allegations as to gross negligence together. They are that the defendant failed to have his automobile under proper control; that he drove in such a manner that he could not stop within the range of his vision; and that he failed to keep a proper lookout for the danger when his automobile was approaching the hill crest. Here again it is manifest that the jury could have found that he did not have his car under control so as to turn aside the 1 or 2 feet necessary to have avoided the collision and likewise that he could not stop within the range of his vision.

The rule is: "As a general rule it is negligence as a matter of law for a motorist to drive an automobile on a highway in such a manner that he cannot stop in time to avoid a collision with an object within the range of his vision. * * * The basis of this rule is that a driver of an automobile is legally obligated to keep such a lookout that he can see what is plainly visible before him and that he cannot relieve himself of that duty. And, in conjunction therewith, he must so drive his automobile that when he sees the object he can stop his automobile in time to avoid it. * * * Exceptions have been recognized to this general rule where the object or obstruction or depression is the same color as the roadway and for that reason, or for other sufficient reasons, cannot be observed by the exercise of ordinary care in time to avoid a collision." Guerin v. Forburger, 161 Neb. 824, 74 N. W. 2d 870. Quoted with approval in Egenberger v. National Alfalfa Dehydrating & Milling Co., 164 Neb. 704, 83 N. W. 2d 523.

We return now to that provision of section 39-7,108, R. R. S. 1943, that the fact the speed is lower than the prima facie limit of the act shall not relieve the driver

of the duty to decrease speed "when approaching a hill crest." Here the jury could have found not only that the defendant was not driving within the prima facie limit of the law, but was exceeding it; and also that he did not comply with the statutory duty of decreasing speed when approaching a hill crest.

In Reuhl v. Uszler, 255 Wis. 516, 39 N. W. 2d 444, the court held: "Independent of statute, when the view of the driver of an automobile is obstructed, whether by reason of a grade or otherwise, the speed of the car should be so reduced that the car can be stopped within the distance the driver can see ahead."

The evidence here would sustain a finding that the truck which came into view over the hill was first seen at a distance of 200 feet and that it was traveling at a speed of 35 to 40 miles per hour. It was in part closing the distance between the two vehicles. There is no contention that there was any other obstruction on the highway at the location here involved. Under these circumstances the rule regarding negligence based on inability of a driver to stop in time to avoid a collision with an object within the range of his vision has no application. As to this issue each party had the right to assume that the other would obey the rules of the road.

In Tews v. Bamrick, 148 Neb. 59, 26 N. W. 2d 499, we held: "Under the law of this state the lawfulness of the speed of a motor vehicle, within the limits fixed by law, is determined by the further test of whether the speed was greater than was reasonable and prudent under the conditions then existing. * * * What is a reasonable speed is necessarily largely dependent on the situation and the surrounding circumstances, it being obvious that a speed which would be safe, reasonable, and proper in some places and under some circumstances might be highly dangerous, unreasonable, and improper in other places and under other circumstances."

This brings us to the other particular that defendant was operating his automobile on the left or wrong side

of the road. It is patent that the jury could have so found, and that in the last 3 or 4 blocks of his travel that his car effectively blocked the right-of-way of a car traveling in the opposite direction on the highway.

Section 39-746, R. R. S. 1943, provides in part that: "Upon all highways of sufficient width, except upon one-way streets, the driver of a vehicle shall drive the same upon the right half of the highway * * *." Section 39-748, R. R. S. 1943, provides that: "Drivers of vehicles proceeding in opposite directions shall pass each other to the right, each giving to the other at least one-half of the main traveled portion of the roadway as nearly as possible." Citing section 39-746, R. R. S. 1943, we have held: "The driver of a vehicle on a public highway is required to operate it upon the right half of the highway unless it is impracticable to do so." Barney v. Adcock, 162 Neb. 179, 75 N. W. 2d 683.

The rule is: "The violation of an ordinance or statute requiring automobiles and other vehicles to drive to the right of the center of the highway does not constitute negligence per se, or as a matter of law; but whether or not such violation constituted negligence is a question for the jury under proper instructions." Davis v. Dennert, 162 Neb. 65, 75 N. W. 2d 112.

Not included in this summary is the allegation that defendant drove his automobile while under the influence of alcoholic liquor. As to that allegation we have made a separate finding. As to the other particulars we have found that there was evidence sufficient to sustain a finding of negligence as to each of them.

Before we go to the question of whether or not the evidence is sufficient to support a finding of gross negligence, there are other matters which should be mentioned.

The question of whether the defendant was operating his automobile under the influence of alcoholic liquor is for the jury to determine. Without regard to the determination of the jury on that question as a separate

issue, that evidence is for the consideration of the jury in determining whether the defendant was guilty of negligence under the other specifications, under the rule that: "Evidence as to drinking intoxicants within a reasonable time prior to an accident is a circumstance to be considered in determining whether or not a driver of a car is guilty of gross negligence." Cunning v. Knott, *supra.*

Defendant in his argument stresses the contention that there was only one caution with reference to speed and that is in the question asked by the plaintiff of the defendant, "What's the hurry?" This overlooks the testimony that when plaintiff would look at the speedometer, defendant would slow down and then speed up. It is inferable that this was a repeated process.

Defendant further argues that there was no time for him to act between the warning and the accident. There was obviously ample time for defendant to have observed the audible and visible requests to slow down. He did not do so. There was also a distance of some 3 or 4 blocks of travel in which defendant could have observed the demand to get over on the right side of the road. Defendant did not do so.

There is evidence that the accident happened quickly, but that relates to the time between the observation of the truck and the impact. During that time defendant did put on his brakes, but he did not turn to the right. The applicable rule is: "The emergency rule cannot be successfully invoked by either party in a negligence case unless there is competent evidence to support a conclusion that a sudden emergency actually existed, and then it cannot be successfully invoked by one who has brought that emergency upon himself by his own acts or who has not used due care to avoid it." Coyle v. Stopak, 165 Neb. 594, 86 N. W. 2d 758.

In Komma v. Kreifels, 144 Neb. 745, 14 N. W. 2d 591, we used language applicable here: " 'What amounts to gross negligence in any given case must depend upon

the facts and circumstances. What would amount to gross negligence under certain circumstances might, under different circumstances, be even slight negligence. Ordinarily, the question of negligence, whether slight or gross, is one of fact. If the evidence respecting it is in conflict and is such that ordinary minds might draw different conclusions therefrom, then a question of fact is presented for the jury to determine.'

"It is apparent that no one act of the defendant can be separated from the whole of these acts and held to be the independent cause of this accident. Under these circumstances each act is not to be segregated and weighed separately to determine whether or not it constituted gross negligence. The several acts are to be considered as a whole. While each of several acts, standing alone, may not exceed the bounds of ordinary negligence, yet, taken together, they may establish gross negligence. In such cases, it is for the jury to determine whether a defendant is guilty of gross or ordinary negligence. A verdict should not be directed nor a cause of action dismissed unless a court can definitely determine that the evidence of defendant's negligence, when taken as a whole, fails to reach that degree of negligence that is considered gross."

Our citation there was Thompson v. Edler, 138 Neb. 179, 292 N. W. 236. There we held: "It must be borne in mind, always, that no decision on gross negligence can constitute an absolute precedent in any other case. Each case necessarily differs somewhat in its particular facts and circumstances, and in the composite which results from them."

We re-examine and restate the rules that fix the area of determination accorded to a jury and the area of determination reserved to the courts in this class of cases.

We start with an act of the Legislature enacted in 1907. Laws 1907, c. 48, § 2, p. 192, now § 74-704, R. R. S. 1943. It applied to railway companies. It ameliorated

contributory negligence as a bar to recovery and provided for recovery of a comparative negligence judgment under certain circumstances. That provision concluded with these words (as it does now): "* * * all questions of negligence * * * shall be for the jury."

The statute was before this court for construction 6 years later in Disher v. Chicago, R. I. & P. Ry. Co., 93 Neb. 224, 140 N. W. 135. It was there contended that the statute took all questions of negligence from the court and made it a function of the jury. We held: "While this clause is declaratory of the existing rule, we think that at the time of its enactment in positive form the legislature had in mind the tendency of some courts to remove such questions in close cases from the jury, and that it was intended to extend rather than to limit the duty of the trial court to submit the same. We are not able, however, to adopt the construction for which the appellant contends, and hold that in every case the evidence must go to the jury, regardless of its legal effect. * * * We are satisfied that in a proper case, where the evidence or lack of evidence is so clear that reasonable minds could not differ, the power is with the court to direct a verdict; but in all other cases under this statute the issues must be left to the jury." The syllabus point is: "In a case arising under the employers' liability act, where the existence of negligence * * * is a matter at issue, a court is entitled to direct a verdict where the lack of evidence of negligence * * * is so clear that reasonable minds cannot differ as to its legal effect; but in all other such cases the issues must be left to the jury. * * * Ordinarily, wherever there is room for difference of opinion upon these questions, they must be submitted to the jury."

That decision was filed February 25, 1913. The Legislature was then in session. It proceeded promptly thereafter to enact with an emergency clause Laws 1913, c. 124, § 1, p. 311, now section 25-1151, R. R. S. 1943. The act adopted the doctrine of comparative negligence. It

followed, quite similarly, the language of the 1907 act. It, too, provided "and all questions of negligence * * * shall be for the jury." So the 1913 Legislature adopted the exact language of the 1907 act as to the area of determination of the jury immediately following the holding of this court defining the scope of the meaning of the provision.

In McCarthy v. Village of Ravenna, 99 Neb. 674, 157 N. W. 629, in a negligence action, we applied the holding in the Disher case to the construction of the 1913 general act. We thereby gave to the quoted language in the 1913 act the same meaning that we had previously given to the same language in the 1907 act.

We do not find further reference to this particular provision of the statute (§ 25-1151, R. R. S. 1943) in our subsequent decisions except in Lewis v. Rapid Transit Lines, 126 Neb. 158, 252 N. W. 804, where we held: "Our statute provides that all questions of negligence are for the jury. Comp. St. 1929, sec. 20-1151. This is all inclusive except as to such instances where the court can say as a matter of law that no negligence has been established as against some certain party."

The Disher case, *supra,* was cited with approval in Bauer & Johnson Co. v. National Roofing Co., 107 Neb. 831, 187 N. W. 59; Haffke v. Missouri P. R. R. Corp., 110 Neb. 125, 193 N. W. 257; Day v. Metropolitan Utilities Dist., 115 Neb. 711, 214 N. W. 647; and in Burry v. Interstate Transit Lines, 136 Neb. 695, 287 N. W. 66. In none of these cases do we find any withdrawal from the basic holding in the Disher case.

In Thompson v. Edler, *supra,* we had the question of the sufficiency of the evidence to support a finding of gross negligence under the automobile guest statute. We there held: "In an action for gross negligence under the automobile guest statute * * *, where there is adequate proof of negligence, a verdict should be directed for defendant only where the court can clearly say that it fails to approach the level of negligence in a very

high degree under the circumstances. In all other cases, it must be left to the jury to determine whether it amounts to gross negligence or to mere ordinary negligence."

This holding was directly followed in Komma v. Kreifels, *supra;* in Pavlicek v. Cacak, 155 Neb. 454, 52 N. W. 2d 310; in Bishop v. Schofield, 156 Neb. 830, 58 N. W. 2d 207; and in Paxton v. Nichols, 157 Neb. 152, 59 N. W. 2d 184.

In Paxton v. Nichols, *supra,* we held: "A verdict should not be directed, or a cause of action dismissed, or a judgment entered notwithstanding the verdict, unless the court can definitely determine that the evidence of defendant's negligence, when taken as a whole, fails to reach such degree of negligence that is considered gross."

Although we started using the expression "reasonable minds" cannot differ, and have otherwise used such expressions as "clearly say" and "definitely determine," yet all measure up to the same exacting test that must be applied before a court may refuse to submit a cause to a jury or set aside a jury's verdict. "In all other cases" the issue is for the jury to determine.

Beginning, then, with the enactment of the cited statutes down to the present time we have held that where the evidence of negligence falls within the area where reasonable minds can differ as to whether or not it establishes gross negligence then the determination of that question is for the jury and, absent prejudicial error otherwise, the judgment of the jury must prevail. It is only in those cases where reasonable minds cannot differ on the issue that it becomes a question of law for the court. As we said in Thompson v. Edler, *supra:* "Courts cannot hesitate in directing a verdict where the conviction is clear that negligence in a very high degree is not present."

If it be said that these rules may result in different verdicts under somewhat comparable circumstances, then the answer is that the jury has done so in the ex-

ercise of a power given it by law. We said in Thompson v. Edler, *supra:* "If the tapeline of past decisions seems at times to be somewhat inaccurately applied, and the processes of logic to be a bit variable in their result, this may be largely because the observer is looking at the facts in isolation and not in context." Something of that reasoning need be applied to juries' verdicts as well as to decisions of courts.

As we held in Komma v. Kreifels, *supra,* so we hold here that: "Here the jury were not bound to find that defendant's acts were negligence in a very high degree, but a jury question was in our opinion presented as to whether or not, under the circumstances here, the things which defendant did and failed to do amounted to negligence in a very high degree, i.e., gross negligence. * * * The trial court erred in dismissing plaintiff's cause."

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

REVERSED AND REMANDED.

WENKE, J., participating on briefs.

J. IVAN HALSTEAD ET AL., APPELLANTS, V. STEVE ROZMIAREK ET AL., APPELLEES.
94 N. W. 2d 37

Filed January 16, 1959. No. 34467.

1. **Schools and School Districts.** If the record of a proceeding before county superintendents of a proper hearing by them upon petitions filed by virtue of section 79-402, R. S. Supp., 1955, establishes that legal voters of the school districts concerned severally signed and filed proper petitions requesting a change of boundaries thereof, the superintendents acting jointly have jurisdiction and the mandatory duty to order and make the change requested by the petitions.
2. ———. It is a part of the public policy of the state to encourage the reorganization, consolidation, or elimination of inefficient and uneconomical school districts.
3. **Statutes.** This court will when interpreting a statute consider

the object intended to be accomplished by it and will give it a meaning which will attain its purpose rather than one which will defeat it.

4. **Schools and School Districts.** A municipal corporation, such as a school district, is a subdivision of the state created as a convenient agency for exercising the authority entrusted to it by the state, and the duration of the powers given it and the territory over which it may be exercised depend wholly upon the discretion of the state.
5. ———. A Class VI school district is not a "district affected" within the meaning of section 79-402, R. S. Supp., 1955, by a change made by the county superintendent of the boundaries of a Class III school district to include the territory of a Class I school district by virtue of a petition of 55 percent of the legal voters of the Class I school district and a petition of the board of education of the Class III school district, notwithstanding the Class I school district is within and is a part of the territorial area of the Class VI school district.
6. ———. A school district has no territorial integrity. It is always subject to the reserve power of the state exercised through administrative officer or officers to change the territory according to the current educational needs and good educational principles.
7. ———. A cause of action does not accrue to a school district, as a corporate entity, against a county superintendent for the manner in which he changes the boundaries of a school district.
8. **Statutes.** The Legislature by re-enacting a statute adopts the construction which had been previously given it by this court.
9. **Schools and School Districts.** An owner of taxable property within the territorial limits of a school district, but who is not a legal voter therein, does not have a sufficient interest in the matter of the consolidation of that school district with an adjoining one to authorize him to contest the annexation proceedings.

APPEAL from the district court for Logan County: ELDRIDGE G. REED, JUDGE. *Reversed and remanded with directions.*

Beatty, Clarke, Murphy & Morgan, Donald W. Pederson, Frank E. Piccolo, Jr., and *Roy E. Blixt,* for appellants.

Baskins & Baskins, for appellees.

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

BOSLAUGH, J.

Baker rural high school district of Logan County, a Class VI school district, hereafter referred to as Baker district, is composed of 13 Class I elementary grade school districts of Logan County and 2 Class I school districts of McPherson County. The Class I school districts of Logan County mentioned above include school districts Nos. 4 and 5. School district No. 89 of Custer County is a Class III school district which maintains a school of elementary and high school grades under the direction of a board of education. It has within its boundaries the incorporated village of Arnold where its school is located and conducted. School district No. 89 of Custer County, designated herein District 89, and school districts Nos. 4 and 5 of Logan County, spoken of hereafter as districts 4 and 5, are adjoining school districts.

More than 55 percent of the legal voters of districts 4 and 5 and the board of education of district 89 filed identical petitions in manner and form as provided by law with the county superintendent of Logan County and the county superintendent of Custer County for a change of the boundary of district 89 to include therein all the territory within the school district boundaries of districts 4 and 5. There was no petition filed with the county superintendents of the counties by any of the legal voters residing outside of districts 4 and 5 but located within the other 13 school districts within the Baker district and no list of all the legal voters of Baker district, properly sworn to, was filed with the county superintendent of either Logan County or Custer County.

A hearing was called, notice thereof was given, and a joint hearing was held June 29, 1957, by the county superintendents as the law requires. The county superintendents disagreed. The county superintendent of Logan County on July 26, 1957, found that there was no petition signed by 55 percent of the legal voters of the Baker district filed in the proceeding asking for the

change of boundaries requested; that to grant the changes in school district boundaries desired would be to remove part of the territory from the Baker district, to wit: Districts 4 and 5, which would affect Baker district without a petition signed by 55 percent of the legal voters of it requesting such change in school district boundaries; that there was not filed a petition signed by 55 percent of the legal voters of each school district affected as required by section 79-402, R. R. S. 1943; that there was no jurisdiction conferred and no mandatory duty imposed by said section to grant the changes in school district boundaries requested; and that the changes of school district boundaries requested by the petitions filed should be denied. He entered an order denying the changes of school district boundaries requested by the petitions filed. The county superintendent of Custer County on June 29, 1957, found that to grant the changes in the boundaries of district 89 to include the boundaries of districts 4 and 5 as requested would remove from Baker district some of its territory but would not disturb or affect its internal affairs; that the Baker district had no interest in the integrity or continuance of its boundaries; that it was not a school district affected by the requested change of boundaries within the meaning of section 79-402, R. R. S. 1943, and no petition from the electors of Baker district was required; that the petitions filed were legal and sufficient; that jurisdiction was thereby conferred upon the county superintendents of the counties; that the county superintendents were under mandatory duty to grant the changes in the school district boundaries of district 89 to include therein the territory then within the boundaries of districts 4 and 5; and that the petitions should be and they were granted.

Appellants filed a petition in error and prosecuted error proceedings in the district court of Logan County from the action of the county superintendents and in particular the findings and judgment of the county

superintendent of Logan County which determined that the county superintendents did not have jurisdiction to act in the premises because 55 percent of all the electors of Baker district did not sign petitions requesting a change of the boundaries of district 89.

The district court found that the county superintendents of Logan and Custer Counties were without jurisdiction to act upon the petitions of school districts 4 and 5 and the board of education of district 89 because there was no petition signed by 55 percent of all the electors of Baker district residing outside the territory of districts 4 and 5 and that the Baker district would be affected by the change in the boundaries of district 89 as requested by the petitions of the board of education of district 89 and districts 4 and 5. A judgment of dismissal of the petition in error of appellants was rendered and the motion for a new trial was denied. This appeal tests the correctness of the action of the district court.

There is no issue of fact in this case. The problem presented by it is a determination of the meaning of statutory language. Specifically it is whether or not Baker district is a "district affected" by a change in its boundaries and a transfer of the territory now within districts 4 and 5 to and its inclusion in district 89. The petitions which originated this proceeding were filed with the county superintendents in May and June, 1957. The applicable statute is section 79-402, R. S. Supp., 1955, and the relevant parts thereof are: "The county superintendent shall * * * change the boundaries of any district upon petitions signed by fifty-five per cent of the legal voters of each district affected. * * * Provided, changes affecting cities, villages, or Class III school districts may be made upon the petition of the school board or the board of education of the district or districts affected. Before the county superintendent authorizes any changes as provided for in this section, the county superintendent must fix a date for hearing and give all interested parties an opportunity to be heard

at such hearing. * * * Territory may be annexed to a district from an adjoining county when approved by the county superintendent of each of the counties involved." That language not only authorizes territorial changes in school districts but is a mandate that it must be done when legal petitions therefor are presented to the proper officer or officers. School Dist. No. 49 v. Kreidler, 165 Neb. 761, 87 N. W. 2d 429, declares: "When the record of proceedings before such county superintendents in a proper hearing by them upon petitions filed under section 79-402, R. S. Supp., 1955, discloses that the legal voters of the districts involved have severally signed and filed proper petitions requesting * * * a change of boundaries thereof, such superintendents, acting multilaterally and not unilaterally, have jurisdiction and the mandatory duty to order the changes requested by such petitions * * *."

If words of a statute are of doubtful meaning, they will be interpreted in a manner which will best effect the purposes of the enactment in preference to one which will defeat it. The intention of the Legislature when ascertained will prevail over the literal sense of the words used and this is especially true when the strict letter of the law would lead to injustice or absurdity. In interpreting a statute the legislative intent may be found from the reason of the enactment. Roy v. Bladen School Dist. No. R-31, 165 Neb. 170, 84 N. W. 2d 119.

A review of the school laws of the state is convincing that it is an object of the state to provide a simple and effectual method of rearranging, reorganizing, and consolidating school districts for the purpose of discontinuing minor, unsatisfactory, and expensive school districts and to replace them with more economical, less numerous, and more desirable organizations as a means of securing an advanced and improved educational system. The purpose of the statute important to this case represents a part of the effort of the state to that end. In Roy v. Bladen School Dist. No. R-31, *supra,* this court said:

"The Legislature has placed great emphasis upon the reorganization and consolidation of numerous inefficient and costly small school districts. Bladen and Campbell districts are two examples of that forward progress in eliminating Class I elementary rural school districts which contract with other districts for elementary education and obtain free high school education elsewhere." It is permissible to recognize the pertinent public policy of the state in finding the intention of the Legislature in regard to whether or not 55 percent of all the legal voters of a rural high school district having substantially the area of a county must sign and present petitions before one or more Class I school districts therein may by petition of legal voters therein join across county lines or otherwise with another school district with its consent and concurrence for both high school and grade school advantages. It is contended that it was the legislative intention that as a prerequisite of districts 4 and 5 being able to join district 89 as a part of it, both for grade and high school purposes, 55 percent of the legal voters of the Baker district which is comprised of 13 Class I districts in that county and 2 districts of that class in McPherson County, none of which have any interest in the schools of districts 4 and 5 and district 89, must petition and consent to a change of the boundaries of district 89. It is more probable that the intention of the Legislature was that the legal voters of districts 4 and 5 had the right to decide whether or not the grade schools of these districts should be discontinued and the area of the districts should become part of district 89 with its consent and concurrence. It is difficult to be convinced that the Legislature intended that 46 percent of the legal voters in practically the whole of Logan County with the addition of 2 grade school districts in McPherson County could control the school affairs of districts 4 and 5 and compel them to maintain a school in each of those relatively small districts for elementary instruction only and that they might not have the more

desirable school opportunities both as to grade and high school offered to them in district 89. Baker district furnishes only high school instruction. If districts 4 and 5 are discontinued and the area of them is made a part of district 89, the children of school age therein will have available to them in a single school educational opportunities in the lower and high school grades. The taxpayers in what are now districts 4 and 5 will contribute taxes in that event to support but one and not three schools as they are now required to do. If the territory of districts 4 and 5 cannot be included in district 89 until 55 percent of the legal voters in the whole of Logan County and two school districts in McPherson County petition therefor, it will never be accomplished. It is too much to expect that more than a few, if any, voters in Baker district outside of districts 4 and 5 could be found who would petition for the detachment of the territory of those two districts from Baker district and the inclusion of the territory in district 89. If the meaning of section 79-402, R. S. Supp., 1955, is as appellees contend, then the statute in this and all similar instances defeats itself. In School Dist. No. 49 v. Kreidler, *supra*, a very technical objection was interposed to prevent alteraton of the boundaries of school district No. 49 from being changed to include the territory of several other districts. The following statement from that case is appropriate and persuasive: "To hold otherwise would deny the legal voters of the districts involved their clearly expressed desires to become a part of district 49, and would place an insurmountable technical obstacle in the progressive creation of new districts from other districts and the changing of boundaries of districts under plain statutes duly enacted for such purposes."

The manner in which Baker district would be affected by the change in school district boundaries proposed in this proceeding, as pleaded by appellees, is that the change would remove districts 4 and 5 and the territory

thereof from Baker district with a resulting decrease in the amount and value of taxable property within it and an increase in the tax burden upon the property remaining within that district.

A school district is a creature of statute designated a body corporate, possessed of the usual powers of a corporation for public purposes as a convenient agency for exercising the authority that is entrusted to it by the state. § 79-401, R. R. S. 1943; State ex rel. School Dist. of Grand Island v. Board of Equalization, 166 Neb. 785, 90 N. W. 2d 421. Nickel v. School Board of Axtell, 157 Neb. 813, 61 N. W. 2d 566, speaks of and treats a school district as a municipal corporation: "Questions of public policy, convenience, and welfare, as related to the creation of municipal corporations, such as counties, cities, villages, school districts, or other subdivisions, or any change in the boundaries thereof, are, in the first instance, of purely legislative cognizance and, when delegated to any public body having legislative power, any action in regard thereto does not come within the due process clause of either the state or federal Constitutions."

In reference to the assertion of appellees that the proposed change of boundaries would affect the Baker district because it would deprive it of a part of its territory and this would result in a decrease of the amount and value of the taxable property in the district and would cause an increase of the tax burden upon the remaining property therein, it may be appropriately said that notwithstanding the statute provides that a school district is a body corporate, possesses the usual powers of a corporation for public purposes, and may sue and be sued, it is the firmly established law of this state that a school district may not maintain an action involving a change in the boundaries of a school district. A school district in this state has no territorial integrity. It is subject to the reserve power of the state exercised through administrative authority to change its territory

according to current educational needs and good educational principles. The state may change or repeal all powers of a school district, take without compensation its property, expand or restrict its territorial area, unite the whole or a part of it with another subdivision or agency of the state, or destroy the district with or without the consent of the citizens.

In Seward County Rural Fire Protection Dist. v. County of Seward, 156 Neb. 516, 56 N. W. 2d 700, this court quoted with approval the following from Hunter v. City of Pittsburgh, 207 U. S. 161, 28 S. Ct. 40, 52 L. Ed. 151: "'Municipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them. * * * The number, nature and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the State. * * * The State, therefore, at its pleasure may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done * * * with or without the consent of the citizens, or even against their protest. * * * Although the inhabitants and property owners may by such changes suffer inconvenience, and their property may be lessened in value by the burden of increased taxation, or for any other reason, they have no right by contract or otherwise in the unaltered or continued existence of the corporation or its powers, and there is nothing in the Federal Constitution which protects them from these injurious consequences.'" See, also, School Dist. No. 49 v. School Dist. No. 65-R, 159 Neb. 262, 66 N. W. 2d 561; Belgum v. City of Kimball, 163 Neb. 774, 81 N. W. 2d 205.

The New York Court of Appeals said in Bethlehem

Union Free School Dist. v. Wilson, 303 N. Y. 107, 100 N. E. 2d 159: "With respect to the claim that petitioner has been damaged by being deprived of part of its territory in contravention of its rights as a municipal corporation, it may be answered that a school district, though defined as a municipal corporation under section 3 of the General Corporation Law, has no territorial integrity; it is always subject to the reserved power of the State, exercised through its administrative officers in the Education Department, to change its territory according to current educational needs and good educational principles." See, also, Dowell v. Board of Education, 185 Okl. 342, 91 P. 2d 771; Zawerschnik v. Joint County School Committee, 271 Wis. 416, 73 N. W. 2d 566; People ex rel. Dixon v. Community Unit School Dist. No. 3, 2 Ill. 2d 454, 118 N. E. 2d 241; Anderson v. Peterson, 78 N. D. 949, 54 N. W. 2d 542.

If a school district as a legal entity is affected by change of its boundaries, it must follow that if any of its property rights are thereby involved or invaded or any of its financial affairs are involved of which it could complain, then it could maintain an action to protect those rights. However, it has repeatedly and consistently been decided and maintained by this court that no cause of action accrues to a school district as a corporation against a county superintendent for the manner in which he may change its boundaries. This doctrine was announced in the early case of Cowles v. School District No. 6, 23 Neb. 655, 37 N. W. 493, and it has since been consistently maintained. In that case the court said: "The laws of this state, as well by policy as by letter, have left the control of the boundaries of school districts, primarily, with the legal voters of each district respectively. * * * After the first or original organization of a new county into one or more school districts, no new districts can be formed, old ones altered, or the boundaries of any altered, without the movement therefor originating with the legal voters thereof, and their will to

that effect being expressed by petition of the strength prescribed by statute. These are matters with which the school district, as a corporation, or quasi corporation, has been vested with neither power nor duty * * *." See, also, School Dist. No. 49 v. Kreidler, *supra*.

School Dist. No. 67 v. School Dist. No. 24, 55 Neb. 716, 76 N. W. 420, declares: "No cause of action will accrue to a school district, as a corporation, against the county superintendent for the manner in which he may change boundaries of such district." The order of the county superintendent involved in that case was void and it was attacked by the school district for that reason. The court concluded: "Whatever may have been the rights of any voter of district 67 in the premises, the facts enumerated created no cause of action in favor of said district as a corporation. That a school district as such cannot question the action of a county superintendent in changing the boundaries of a district is thoroughly established in this state." See, also, Clausen v. School Dist. No. 33, 164 Neb. 78, 81 N. W. 2d 822.

The Legislature when it rewrote and re-enacted section 79-402, R. R. S. 1943, and included therein the language "district affected" knew that it was and had been from the early time when this court first spoke on the subject the law of the state that a school district as an entity had no such interest, property right, or concern in its boundaries as to qualify it to maintain an action concerning even a wholly void change therein by a county superintendent. The Legislature when it re-enacts a law adopts a judicial construction which has been previously given it. The Legislature is presumed to have known the effect which the statute originally had and by its enactment to have intended that effect to continue. County of Douglas v. Christensen, 144 Neb. 899, 15 N. W. 2d 53. A conclusion is justified that a school district is not in any legal manner affected as a corporate entity or subdivision of the state by a change of its boundaries.

There are only 3 school districts that would be affected by the proposed change of the boundaries of district 89. These are districts 4, 5, and 89. Districts 4 and 5 would be eliminated and their internal affairs and existence as a subdivision of the state would be ended. One reason why district 89 would be affected is that the applicable statute makes a newly enlarged district assume any indebtedness previously incurred by any district annexed unless it is otherwise specified in the petitions. It was not otherwise specified in the petitions in the present proceedings. Baker district would exist and could carry on its school affairs, would have and could exercise the same undiminished power of taxation, and could perform its governmental functions after the change in the boundaries the same as it has done in the past. State ex rel. Geneva School District v. Mitchell, 210 Wis. 381, 245 N. W. 640, 86 A. L. R. 1361, contains the following: "* * * the further question arises, and we think it should be determined, whether the school district itself has such an interest in the detachment of its territory as to authorize it to maintain this action. The present action does not involve the property of the district. If it involves anything in which the district has an interest, it is the 'affairs of the district,' and that raises the specific question of whether the boundaries of a district constitute any part of its affairs." The opinion refers to and quotes from authorities of various jurisdictions and proceeds as follows: "This declaration would seem to confine municipal affairs to the internal affairs of the municipality after the same has been organized and its boundaries fixed. It is only when the boundaries are fixed that the municipality comes into existence and is clothed with corporate powers. The municipality itself has nothing to say about its boundaries. That is a matter that is fixed or provided for by legislative action. When the legislature has provided for the boundaries of a municipality, that which may be termed the affairs of such municipality relates to

those transactions of corporate interest within the boundaries so fixed. * * * In People v. Los Angeles, 154 Cal. 229, 97 Pac. 311, it was held that the annexation of territory to a city was not a 'municipal affair,' but a matter entirely outside of 'municipal affairs.' "

Districts 4 and 5, district 89, Baker district, and the landowners and taxpayers who were not legal voters and taxpayers of districts 4 and 5 were designated as parties to this action. They or any of them were not proper parties. None of the named districts have any legal interest in the perpetuation of their boundaries; neither can any of them have an action in relation thereto. Likewise the landowners and taxpayers described above had no legal interest which would qualify them as litigants in a contest as to the boundaries of district 89. School Dist. No. 11 v. Copple, 88 Neb. 92, 128 N. W. 1133, states: "A person who owns taxable property within the territorial limits of a school district, but who is not a legal voter therein, has no such interest in the matter of the consolidation of that district with an adjoining one as authorizes him to contest the annexation proceedings either at the original hearing before the county superintendent or upon a review of the same by the district court."

The statute which authorizes this proceeding shows no concern with electors, landowners, or taxpayers affected but limits its scope to districts affected. The change of the boundaries of district 89 as proposed will not in any legal way affect Baker district. The fact that school taxes therein may be increased or decreased because of less school population therein does not affect its powers or rights in any manner of which the law takes cognizance. Districts 4 and 5 as legal entities are almost perfect democracies. Gaddis v. School District, 92 Neb. 701, 139 N. W. 280. The electors of school districts of that class have complete control of the school and school affairs in their respective districts and they alone may decide whether such school shall be con-

tinued or whether an attempt should be made to change the boundaries of the district.

The required statutory percentage of the legal voters of districts 4 and 5 have asked that the territory thereof be included in district 89. District 89 has by legal petition asked that its boundaries be changed to accomplish that result. Baker district is not within the meaning of the law a district affected by the proposed change of boundaries. The county superintendent of Logan County and the county superintendent of Custer County had jurisdiction and it was and is their mandatory duty to change the boundaries as requested in the petitions presented to them.

The judgment should be and it is reversed and the cause is remanded to the district court for Logan County with directions to sustain the petition in error of appellants and to order the county superintendent of Logan County and the county superintendent of Custer County, acting jointly, to grant the petitions filed with them in this proceeding and by proper order change the boundaries of district 89 to include therein the territory now within the boundaries of districts 4 and 5.

REVERSED AND REMANDED WITH DIRECTIONS.

IN RE APPEAL OF NEWMAN.
CABLE C. NEWMAN, APPELLEE, V. COUNTY OF DAWSON, NEBRASKA, APPELLANT.

94 N. W. 2d 47

Filed January 16, 1959. No. 34472.

1. **Taxation: Appeal and Error.** An appeal to the district court from action of the county board of equalization is heard as in equity, and upon appeal therefrom to this court it is tried de novo.
2. **Taxation.** Under the provisions of section 77-112, R. S. Supp., 1955, the elements required to be considered in fixing the assessed value of tangible property are the earning capacity of

the property, its relative location, its desirability and functional use, its reproduction cost less depreciation, and by comparison with other properties of known or recognized value.

3. ———. The burden of proof is upon a taxpayer to establish his contention that the value of his property has been arbitrarily or unlawfully fixed by the county board of equalization in an amount greater than its actual value, or that its value has not been fairly and proportionately equalized with all other property resulting in a discriminatory, unjust, and unfair assessment.

4. **Taxation: Appeal and Error.** Where the evidence shows that the assessed value of tangible property has been determined by a formula in substantial compliance with section 77-112, R. S. Supp., 1955, which has been uniformly and impartially applied, such assessed value will not ordinarily be disturbed on appeal on evidence indicating a mere difference of opinion as to such valuation.

5. ———: ———. To secure a reduction in the assessed value of tangible property it must be demonstrated by evidence that the assessment is grossly excessive or that its value has not been fairly and proportionately equalized, and is a result of arbitrary or unlawful action. The evidence must be such as to indicate the exercise of arbitrary action or the failure of plain legal duty, and not a mere error in judgment.

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

Edward A. Cook, III, for appellant.

William A. Stewart, for appellee.

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 Dawson County reducing the assessed value of certain real property of the plaintiff for the year 1956 from $16,080 to $10,000.

The plaintiff is the owner of the west 25 feet of Lot 3 and all of Lot 4, Block 53, Original Town of Lexington, Nebraska. The property had a frontage of 75 feet on West Fifth Street and was 100 feet in depth. A building

used primarily as a mortuary, 50 feet by 100 feet, was constructed on the property in 1948. It was a two-story building, the second story consisting of three rental apartments. It was constructed of cement blocks and veneered with brick. The building cost $34,000. The plaintiff rented the first floor as a mortuary to a partnership, of which he was one of the partners, for $150 per month. The total rental value of the building was placed at $300 per month by the plaintiff. The interior of the building was finished to meet the needs for which it was used. The building was insured for $50,000 and the plaintiff had offered it for sale for $55,000. The county board of equalization fixed its assessed value for tax purposes in 1956 at $16,080. On appeal the district court reduced the assessed valuation to $10,000. The county of Dawson has appealed.

The plaintiff testified that he was familiar with property values in Lexington. He testified that the property was assessed at a higher proportion of its actual value than the values for tax purposes placed upon other comparable properties, which resulted in an inequitable and unfair tax burden being cast upon him. He listed some 15 properties which he asserted were assessed for tax purposes at a lower proportion of their value than was his property. He was corroborated by a real estate dealer who testified that in his opinion the plaintiff's property was assessed too high when compared with the assessments of other properties alleged to be of a similar character and value. There is some opinion evidence adduced by the plaintiff that the property should have been assessed as low as $10,000, or thereabouts. This evidence is fragmentary and is not generally supported by the evidence offered by the plaintiff. It is clear that the evidence of the taxpayer will not sustain a reduction of the assessed valuation from $16,080 to $10,000, a percentage reduction of 37.81 percent. There is evidence, however, that the property was assessed disproportionately with other properties in

the city which we must consider along with the evidence offered by the county.

The county relies mainly upon the evidence of Robert Guge, the deputy county assessor of Dawson County. Prior to becoming deputy assessor he had been employed by a private firm of appraisers. His principal duties during the period of this employment were the determination of the actual value of real estate and its assessed value for tax purposes. The formula used for the valuation of buildings used for business purposes, which was adopted by the county assessor, is substantially as follows: The local cost of building materials was determined by inquiry of those engaged in the sale of such materials. Local wage rates of common and skilled labor were likewise determined. From this a unit replacement cost was fixed. The building to be appraised was then measured to determine the amount of floor space and cubic content. It was then examined as to the type of construction and the mechanical features of the building. The age and physical condition of the building were determined. The rental value of the property was considered along with its suitability as to location. Depreciation was calculated on the basis of its age. The evidence was that plaintiff's building was appraised for tax purposes according to this formula, as were all other business buildings in the city of Lexington.

The value of real estate in the business area was determined in the following manner: A questionnaire was sent to real estate dealers for their opinions as to value and desirability. Records of sales in the register of deeds office were examined. From this information the sale value was determined in order to fix the front foot value. The most valuable area in the business portion of this city is on Washington Street between Fifth and Sixth Streets. Property in this area was valued at $300 per front foot. Plaintiff's property was about a half a block from this area and its value was fixed at approximately $80 per front foot for tax purposes in

accordance with the formula applied to other properties in the area.

The county assessor testified that the property was assessed according to the formula devised; that he had checked the work sheets and found them correct; and that in his opinion the assessed value as fixed by the board of equalization was fair and equitable. The deputy assessor and members of the county board of equalization inspected the building. Complaint is made that the findings of the private appraisers, who formerly employed the deputy assessor, were relied upon. No contention is advanced that the findings were not correct.

The plaintiff does not point out where the formula used by the county assessor is unreasonable or unfair. In fact no complaint is made that the property is overvalued. The only objection is that its assessed value is too high in proportion to the values placed on other business properties in the city of Lexington.

An appeal to the district court from the action of a county board of equalization is heard in equity, and upon appeal therefrom to this court it is tried de novo. The burden of proof is on the taxpayer to establish his contention that the value of his property has been arbitrarily or unlawfully fixed by the county board of equalization at an amount greater than its actual value, or that its value has not been fairly and properly equalized when considered in connection with the assessment of other property and that such disparity and lack of uniformity result in a discriminatory, unjust, and unfair assessment. The burden imposed on a complaining taxpayer is not met by showing a mere difference of opinion unless it is established by clear and convincing evidence that the valuation placed upon his property when compared with valuations placed on other similar properties is grossly excessive and is the result of a systematic exercise of intentional will or failure of plain legal duty, and not mere errors of judgment. LeDioyt v. County of Keith, 161 Neb. 615, 74 N. W. 2d 455.

The evidence of the plaintiff is based on conclusions as to the proportionate assessed valuation of his property as compared with the assessed value of other properties alleged to be similar. Such conclusions, however, are no better than the facts testified to upon which they rest. Where such a conclusion is not supported by facts, it has little, if any, evidentiary value. The witnesses for the taxpayer do not fix the values of the properties with which his property is compared. The evidence is nothing more than the expression of opinions that plaintiff's property is disproportionately assessed to his injury. The evidence of the county of Dawson shows the use of a formula containing most, if not all, the elements required to be considered in determining the assessed value of tangible property. The applicable statute provides: "Basic value shall mean the value of property for taxation that is ascertained by using the following formula where applicable: (1) Earning capacity of the property; (2) relative location; (3) desirability and functional use; (4) reproduction cost less depreciation; and (5) comparison with other properties of known or recognized value." § 77-112, R. S. Supp., 1955.

Several of the properties testified to by the plaintiff as being comparable to his property are not similar. This includes four garage buildings which, although having a large floor space, are not finished on the inside except the offices in the front. Others are not comparable because of age. None of them is shown to have a known or fixed value. Plaintiff appears to rely primarily on the assessed value of the Reutlinger Building, the Lexington State Bank Building, and Farmers State Bank Building to establish a discrimination in his assessment. These properties were valued for assessment purposes at $13,475, $9,890, and $9,970, respectively. Each was assessed upon a valuation less than the $16,080 at which plaintiff's property was assessed.

The Reutlinger Building is a three-story building, 90 feet by 44 feet, with a two-story addition on the rear

which is 10 feet by 44 feet. The main building was constructed 51 years ago, and the addition 19 years ago. The depreciation allowed on this building clearly accounts for its lesser assessed valuation. The Lexington State Bank Building is 67 years old which accounts for its lesser assessed valuation. The Farmers State Bank Building is 60 years old as against plaintiff's 8-year-old building.

It has been frequently recognized by this court that absolute or perfect equality and uniformity in taxation cannot be attained. Something more than a difference of opinion must be shown. It must be demonstrated by evidence that the assessment is grossly excessive and is a result of arbitrary or unlawful action, and not a mere error of judgment. A claim of disproportionate assessment is not sustained when supported only by opinion evidence that the property is assessed at a higher proportion to its actual value than some other property. Such a contention must be sustained by evidence that the valuation is arbitrary or capricious, or so wholly out of line with actual values as to give rise to an inference that the assessor and county board of equalization have not properly discharged their duties. Mere errors of judgment do not sustain a claim of discrimination. There must be something more, something which in effect amounts to an intentional violation of the essential principle of practical uniformity. The law imposes the duty of valuing and equalizing of property for taxation purposes upon the county assessor and the county board of equalization. In reviewing the actions of tribunals created by law for ascertaining the valuation and equalization of property for taxation purposes, courts will not usurp the functions of such tribunals. It is only where such assessed valuations are not in accordance with law, or it is made to appear that they were made arbitrarily or capriciously, that courts will interfere. The valuation of property is largely a matter of judgment, but mere differences

of opinion, honestly entertained, though erroneous, will not warrant the interference of the courts. If uniformity of opinion were required, no assessment could ever be sustained. These principles are discussed at length in LeDioyt v. County of Keith, *supra,* and we find no reason for repeating the discussion here.

The evidence of the taxpayer indicates a difference of opinion with the county assessor and the county board of equalization as to the valuations fixed by the latter. The evidence of the county shows that the valuations were fixed by a formula within the requirements of section 77-112, R. S. Supp., 1955. Such formula was applied fairly and impartially to plaintiff's property and all similar properties. There is no evidence of arbitrary or capricious action by the taxing authorities, nor any claim of intentional or arbitrary discrimination. It is clear from the record that the plaintiff's property and properties similar thereto were valued for tax purposes by the same formula. The facts upon which the taxing authorities made their valuations for tax purposes were of superior quality to those offered in support of a reduction of the assessed values, which consisted of opinion evidence only.

We find on trial de novo that the evidence preponderates in favor of the county on the issues before the court. We necessarily conclude that the evidence of the taxpayer is insufficient to sustain a reduction of the assessed value of his property and that the trial court erred in granting any reduction thereof. The judgment of the district court is reversed and the petition of the plaintiff is dismissed.

REVERSED AND DISMISSED.

STATE OF NEBRASKA EX REL. WILLIAM G. LINE, COUNTY ATTORNEY IN AND FOR DODGE COUNTY, NEBRASKA, APPELLANT, V. RICHARD L. KUHLMAN, POLICE JUDGE OF THE CITY OF FREMONT, NEBRASKA, APPELLEE.

94 N. W. 2d 373

Filed January 16, 1959. No. 34474.

1. **Appeal and Error.** This court will take judicial notice of the fact that a bill of exceptions was not prepared, served, returned, or settled and allowed within the time provided by statute, and therefore cannot be considered on appeal.
2. ———. By the provisions of section 25-1140, R. R. S. 1943, the bill of exceptions must be reduced to writing within 40 days from the time notice of appeal is filed with the clerk of the district court unless extended as provided in section 25-1140.07, R. R. S. 1943.
3. ———. Where no extension of time is granted under section 25-1140.07, R. R. S. 1943, the bill must be prepared within 40 days after the filing of the notice of appeal, it must be served on the adverse party within 50 days thereafter, it must be examined and returned by the adverse party within 60 days, and it must be settled and allowed within 70 days. These limitations as to time are mandatory and they may not be waived.
4. ———. Exceptions are reduced to writing within the meaning of section 25-1140, R. R. S. 1943, on the day the court reporter certifies the draft as the bill of exceptions in the case.
5. ———. Section 25-1140.03, R. S. Supp., 1957, provides that the bill of exceptions shall be served on the adverse party within 10 days after the time prescribed in section 25-1140, R. R. S. 1943, or, if extended, within 10 days after the time prescribed in section 25-1140.07, R. R. S. 1943.
6. ———. Section 25-1140.04, R. S. Supp., 1957, provides that the bill shall be returned by the adverse party within 10 days.
7. ———. The aggregate time allowed for the performance of any of the statutory steps is not shortened or advanced by completing any of the steps enumerated in advance of the time limited by statute.
8. ———. An extension of time may be had under the provisions of section 25-1140.07, R. R. S. 1943. The extension is limited by the statute to the terms appearing in such order, and where the extension granted is less than 40 days, or the extension is circumscribed by other conditions or limitations, the limitations of time contained therein and the conditions of the order must be complied with.
9. ———. An extension of time for the preparation of the bill

is directly provided for in section 25-1140, R. R. S. 1943. An extension so had extends the period of time for service on the adverse party under section 25-1140.03, R. S. Supp., 1957. It likewise extends the time for return by the adverse party under section 25-1140.04, R. S. Supp., 1957. It likewise extends the time for settlement and allowance of the bill by the court under the provisions of section 25-1140.05, R. R. S. 1943.

10. ———. An extension of time under section 25-1140.07, R. R. S. 1943, for one of the latter separate mandatory steps above described does not relate back to nor extend the time fixed by statute for the previous procedures.

11. ———. The design of the statute is to allow a fixed time within which a bill of exceptions must be reduced to writing, served on the adverse party, returned, and submitted to the trial judge for settlement and allowance. The trial judge is without authority to allow a bill of exceptions not prepared in the manner and within the times fixed.

12. ———. In the absence of a bill of exceptions there is no question of fact determined by the district court for review in this court and no question will be considered here, a determination of which necessitates an examination of evidence produced in the trial court.

13. ———. In the absence of a bill of exceptions it is presumed that an issue of fact presented by the pleadings was established by the evidence, that it was correctly decided, and the only issue that will be considered on appeal is the sufficiency of the pleadings to support the judgment.

14. **Prohibition.** The district courts of this state have ample powers to administer, in proper cases, the remedy which a writ of prohibition affords.

15. ———. Prohibition is a preventive remedy rather than a corrective one.

16. **Automobiles.** Section 39-794, R. S. Supp., 1957, requires that the certified abstract of the judgment be sent to the Director of the Department of Motor Vehicles only in cases where the accused is convicted or his bail is forfeited.

17. **Prohibition.** Prohibition is derived from the common law and is essentially and wholly a proceeding at law. Courts of equity do not issue writs of prohibition.

18. ———. Prohibition is the proper remedy where an inferior tribunal assumes to exercise judicial power not granted by law, or is attempting to make an unauthorized application of judicial force.

19. ———. In general, three things are necessary to justify the issuance of a writ of prohibition; that the court, officer, or

person against whom it is directed is about to exercise judicial or quasi-judicial power, that the exercise of such power by such court, officer, or person is unauthorized by law, and that it will result in injury for which there is no other adequate remedy.

20. ———. In the absence of a statute, a writ of prohibition ordinarily issues to restrain judicial or quasi-judicial functions or acts only, and not to prevent acts of a legislative, ministerial, administrative, political, governmental, or executive character.

21. **Officers.** A ministerial act is one performed in response to a duty which has been positively imposed by law and its performance required at a time and in a manner or upon conditions which are specifically designated, the duty to perform under the conditions specified not being dependent upon the officer's judgment or discretion.

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

Clarence S. Beck, Attorney General, and *William G. Line,* for appellant.

E. L. Mahlin, for appellee.

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

SIMMONS, C. J.

This is an appeal from a judgment of the trial court dissolving a temporary writ of prohibition and denying a writ of prohibition.

The State appeals. The appellant will be referred to herein as the State and the appellee as defendant.

We affirm the judgment of the trial court.

We have held that: "This court will * * * take judicial notice of the fact that a bill of exceptions was not prepared, served, returned, or settled and allowed within the time provided by statute, and therefore cannot be considered on appeal." Neighbors & Danielson v. West Nebraska Methodist Hospital, 162 Neb. 33, 74 N. W. 2d 854.

By the provisions of section 25-1140, R. R. S. 1943, the bill of exceptions must be reduced to writing within 40 days from the time notice of appeal is filed with

the clerk of the district court unless extended as provided in section 25-1140.07, R. R. S. 1943. The notice of appeal was filed on May 21, 1958. The 40 days provided by this section expired on June 30, 1958. We held in Neighbors & Danielson v. West Nebraska Methodist Hospital, *supra,* that where no extension of time is granted under section 25-1140.07, R. R. S. 1943, "* * * the bill must be prepared within 40 days after the filing of the notice of appeal, it must be served on the adverse party within 50 days thereafter, it must be examined and returned by the adverse party within 60 days, and it must be settled and allowed within 70 days. These limitations as to time are mandatory and they may not be waived."

Exceptions are reduced to writing within the meaning of section 25-1140, R. R. S. 1943, on the day the court reporter certifies the draft as the bill of exceptions in the case. Neighbors & Danielson v. West Nebraska Methodist Hospital, *supra.*

The certificate here shows that the bill of exceptions was reduced to writing within the above rule on July 17, 1958, or on the 17th day after the statutory time had expired.

Section 25-1140.03, R. S. Supp., 1957, provides that the bill of exceptions shall be served on the adverse party within 10 days after the time prescribed in section 25-1140, R. R. S. 1943, or, if extended, within 10 days after the time prescribed in section 25-1140.07, R. R. S. 1943. Here the bill was served on the adverse party on July 26, 1958. That service was 16 days late under the statute.

Section 25-1140.04, R. S. Supp., 1957, provides that the bill shall be returned by the adverse party within 10 days.

We held in Neighbors & Danielson v. West Nebraska Methodist Hospital, *supra,* that the aggregate time allowed for the performance of any of the statutory steps is not shortened or advanced by completing any of the

steps enumerated in advance of the time limited by statute.

Here the bill was returned to the appellant on July 29, 1958. That step was 9 days late under the statute. The bill was settled and allowed on July 31, 1958, which was beyond the total period of 70 days allowed by section 25-1140.05, R. R. S. 1943, for the settlement and allowance of the bill.

We have discussed these statutory provisions in Neighbors & Danielson v. West Nebraska Methodist Hospital, *supra;* Burke Lumber & Coal Co. v. Anderson, 162 Neb. 551, 76 N. W. 2d 630; Bryant v. Greene, 163 Neb. 497, 80 N. W. 2d 137; and Benedict v. State, 166 Neb. 295, 89 N. W. 2d 82. We need not here set out again the full holdings there made.

An extension of time may be had under the provisions of section 25-1140.07, R. R. S. 1943. "The extension is limited by the statute to the terms appearing in such order, and where the extension granted is less than 40 days, or the extension is circumscribed by other conditions or limitations, the limitations of time contained therein and the conditions of the order must be complied with." Neighbors & Danielson v. West Nebraska Methodist Hospital, *supra.*

An extension of time for the preparation of the bill is directly provided for in section 25-1140, R. R. S. 1943. An extension so had extends the period of time for service on the adverse party under section 25-1140.03, R. S. Supp., 1957. It likewise extends the time for return by the adverse party under section 25-1140.04, R. S. Supp., 1957. It likewise extends the time for settlement and allowance of the bill by the court under the provisions of section 25-1140.05, R. R. S. 1943.

It is clear that an extension of time under section 25-1140.07, R. R. S. 1943, for one of the latter separate mandatory steps above described does not relate back to nor extend the time fixed by statute for the previous procedures.

The above discussion is brought about by this situation: On July 26, 1958, while the bill of exceptions is shown to have been in the possession of the defendant, the State filed an application for an order extending the time in which the bill of exceptions may be allowed. The court granted the application "for settling and allowing the Bill of Exceptions." That order did not relate to nor affect the statutory "mandatory" and "may not be waived" provisions for the preparation, service, and return of the bill. "The design of the statute is to allow a fixed time within which a bill of exceptions must be reduced to writing, served on the adverse party, returned, and submitted to the trial judge for settlement and allowance. The trial judge is without authority to allow a bill of exceptions not prepared in the manner and within the times fixed." Neighbors & Danielson v. West Nebraska Methodist Hospital, *supra*.

The bill of exceptions here cannot be considered.

The rules are: "In the absence of a bill of exceptions there is no question of fact determined by the district court for review in this court and no question will be considered here, a determination of which necessitates an examination of evidence produced in the trial court." Benedict v. State, *supra*.

"In the absence of a bill of exceptions it is presumed that an issue of fact presented by the pleadings was established by the evidence, that it was correctly decided, and the only issue that will be considered on appeal is the sufficiency of the pleadings to support the judgment." Bryant v. Greene, *supra*.

The trial court found that the permanent writ of prohibition should not be granted and that the temporary writ should be dissolved. It so decreed. The question, then, is: Did the trial court err in its findings and judgment?

It made no findings of fact upon which its action was based. Our task, then, is to determine what issues

of fact were presented by the pleadings which we may presume were established by the evidence.

Defendant is the duly elected and acting police judge of the city of Fremont. On December 30, 1957, the defendant, as police judge, on a plea of guilty, found one O'Hare guilty of careless driving, and assessed a fine of $5 and costs, which O'Hare paid.

On February 17, 1958, O'Hare filed an application requesting permission to withdraw his plea, and plead not guilty. The application was granted and the case set for trial March 17, 1958. Trial was had and O'Hare was found not guilty.

The defendant intended to certify the result of the proceeding of March 17, 1958, to the Director of the Department of Motor Vehicles. Section 39-794, R. S. Supp., 1957, provides that "In the event that such person is convicted" a certified abstract of the judgment shall be sent to the Director of the Department of Motor Vehicles.

The State prayed for a writ of prohibition preventing the defendant from certifying the results of the hearing of March 17, 1958, to the director.

In his answer in the trial court the defendant alleged that it was his duty to make certification of the proceedings under the above statute "where certain violations are involved" and asserted it to be an administrative duty. His answer in the trial court does not deny but rather affirms an intent to make the certificate to the director.

Our question, then, is: Should the court have issued a writ of prohibition preventing the certification of the result of the hearing of March 17, 1958?

We held in State ex rel. Wright v. Barney, 133 Neb. 676, 276 N. W. 676, that: "The district courts of this state have ample powers to administer, in proper cases, the remedy which a writ of prohibition affords. * * * Prohibition is a preventive remedy rather than a corrective one."

It is clear that section 39-794, R. S. Supp., 1957, requires that the certified abstract of the judgment be sent to the Director of the Department of Motor Vehicles only in cases where the accused "is convicted or that his bail is forfeited." The question still remains as to whether the writ of prohibition should issue where action purporting to be under the statute is intended by the defendant. In Massman Construction Co. v. Nebraska Workmen's Compensation Court, 141 Neb. 270, 3 N. W. 2d 639, we held: "Prohibition is derived from the common law and is essentially and wholly a proceeding at law. Courts of equity do not issue writs of prohibition."

By quotation in Conkling v. DeLany, *ante* p. 4, 91 N. W. 2d 250, it was held: " 'Prohibition is the proper remedy where an inferior tribunal assumes to exercise judicial power not granted by law, or is attempting to make an unauthorized application of judicial force, * * *.' "

The rule is stated in 73 C. J. S., Prohibition, § 8, p. 26, as follows: "In general, three things are necessary to justify the issuance of a writ of prohibition; that the court, officer, or person against whom it is directed is about to exercise judicial or quasi-judicial power, that the exercise of such power by such court, officer, or person is unauthorized by law, and that it will result in injury for which there is no other adequate remedy."

In Payne v. Lee, 222 Minn. 269, 24 N. W. 2d 259, it was held that: "A writ of prohibition lies to prevent any inferior court from exceeding its legitimate power and authority."

The corollary of the rule is stated in the texts as follows: "At common law it is well settled that a writ of prohibition must be directed to some judicial tribunal or officer. In other words, it lies only to prevent or control judicial or quasi-judicial action, as distinguished from legislative, executive, or ministerial action." 42 Am. Jur., Prohibition, § 11, p. 150. "In the absence of

statute, a writ of prohibition ordinarily issues to restrain judicial or quasi-judicial functions or acts only, and not to prevent acts of a legislative, ministerial, administrative, political, governmental, or executive character." 73 C. J. S., Prohibition, § 7, p. 23.

The remaining question is whether the act which the defendant was threatening to do was a ministerial act or a judicial one.

In Whipple v. Hill, 36 Neb. 720, 55 N. W. 227, 38 Am. S. R. 742, 20 L. R. A. 313, we held that: "The issuance or service of legal process, such as a summons, execution, or writ of attachment, is merely a ministerial act, * * *."

In Mitchell v. County of Clay, 69 Neb. 779, 96 N. W. 673, we held that: "When the law commits to any officer the duty of looking into facts and acting upon them, not in a way which it specifically directs, but after a discretion in its nature judicial, the function is quasi judicial. * * * Whenever the course to be pursued or the amount to be allowed is fixed by law, they must follow the law, and their acts in so doing or endeavoring so to do are ministerial only." (This case was reversed on rehearing for reasons not involved in the above rule of law. See 69 Neb. 795, 98 N. W. 662.)

In Larson v. Marsh, 144 Neb. 644, 14 N. W. 2d 189, 153 A. L. R. 101, we held that: "A ministerial act has been defined as one performed in response to a duty which has been positively imposed by law and its performance required at a time and in a manner or upon conditions which are specifically designated, the duty to perform under the conditions specified not being dependent upon the officer's judgment or discretion."

In Mekota v. State Board of Equalization & Assessment, 146 Neb. 370, 19 N. W. 2d 633, we quoted with approval this definition: " 'A ministerial act may * * * be defined to be one which a person performs in a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to, or

the exercise of, his own judgment upon the propriety of the act being done.' "

It necessarily follows that the act which the State here seeks to prevent by writ of prohibition is at best a ministerial act and not one of a judicial or quasi-judicial nature.

The trial court did not err in denying the writ. Its judgment is affirmed.

AFFIRMED.

WILLIAM SANNE, APPELLANT, V. AUGUST SANNE, APPELLEE, AMELIA SANNE, INTERVENER-APPELLEE.
94 N. W. 2d 367

Filed January 23, 1959. No. 34475.

1. **Homesteads.** It is the policy of this court and of courts generally to give a liberal construction to the homestead law for the purpose of protecting and preserving the home for those who would be benefited by its provisions.
2. ———. Under the provisions of section 40-104, R. R. S. 1943, the homestead interest of a married person cannot be conveyed or encumbered unless the instrument by which it is conveyed or encumbered is executed and acknowledged by both the husband and wife.
3. ———. A married man cannot by his own act or neglect deprive his wife of her property rights in the homestead either by his conveyance or encumbrance or by permitting a judgment by confession to be rendered against him for his individual debt, and such judgment cannot be made a lien on his wife's interest in the homestead.
4. ———. When a husband and wife reside upon homestead property and the wife is divorced from the husband but is awarded such property, the wife may continue to claim a homestead interest therein.
5. ———. A homestead, as defined by statute, once established is presumed to continue as such, and the burden of proving a waiver, loss, or abandonment thereof is upon the party asserting such waiver, loss, or abandonment.
6. ———. Under the homestead law in force in this state, a judgment is a lien only on the debtor's interest in lands, impressed with the character of a homestead, in excess of $2,000.

7. ———. The extent of a homestead is to be determined by the claimant's interest in the land and not by the fee simple value of the premises. In determining his homestead interest, valid mortgages and other liens are to be deducted from the value of the land and not from the $2,000 homestead exemption.

APPEAL from the district court for Antelope County: LYLE E. JACKSON, JUDGE. *Affirmed as modified.*

Elven A. Butterfield, for appellant.

Elmer C. Rakow, for appellee Amelia Sanne.

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

CHAPPELL, J.

On February 21, 1958, William Sanne, hereinafter called plaintiff, caused an execution to issue and be levied upon Lot 2, Pexton's Subdivision of Neligh, in Antelope County, Nebraska, to collect a judgment by confession theretofore obtained by plaintiff against his brother, August Sanne. Such judgment was allegedly for money loaned to and advanced for August Sanne in the amount of $1,829.65, with interest at six percent from July 1, 1955, less a $200 endorsement July 16, 1956. Sale of the property under execution was advertised to be held by the sheriff at 10 a. m., April 21, 1958.

In the meantime, on June 25, 1957, Amelia Sanne, hereinafter called defendant, had been granted an absolute divorce from August Sanne. The decree of divorce awarded to and confirmed in defendant title to the "family home" above described, "subject to whatever liens and encumbrances may exist against the same; * * *." Thereafter, on March 28, 1958, defendant herein filed an application in the district court in the form and manner provided by section 40-105, R. R. S. 1943, and sections in pari materia therewith, seeking to dissolve the levy on execution and to permanently enjoin plaintiff and the sheriff from levying execution against the premises on said judgment upon the alleged

theory that the property was defendant's homestead.

To defendant's application plaintiff filed an answer. Insofar as important here, it denied that defendant was occupying the premises as her homestead, and alleged that if she did have a homestead exemption of $2,000 it was subject to three itemized liens of record, which the court was without authority to eliminate. It should also be pointed out that at the hearing on defendant's application and plaintiff's answer August Sanne did not appear but the county attorney appeared on behalf of the sheriff and also the county, which claimed an old age assistance lien on the property.

On April 17, 1958, after a hearing on the merits, decree was rendered, concluding in effect that the property had been the homestead of August Sanne and defendant, as husband and wife, when plaintiff's judgment by confession was originally obtained; that the property was now the homestead of defendant, Amelia Sanne; and that plaintiff's judgment when obtained did not become and was not now an enforceable lien on said premises. However, it should be borne in mind, as hereinafter pointed out, that such judgment was a lien only on the debtor's interest in lands impressed with the character of a homestead in excess of $2,000, and was not a lien on the homestead interest. The judgment in the case at bar also dissolved the levy of execution by the sheriff; ordered him not to sell the property; without any qualification permanently enjoined plaintiff and the sheriff from levying execution against the premises on plaintiff's judgment; and taxed costs to plaintiff.

On April 21, 1958, at 10 a. m., after the judgment aforesaid had been rendered, plaintiff filed a so-called showing that it was his intention to place a bid of $4,326.41 on the property at sale thereof, of which $2,000 was to be applied on defendant's homestead exemption, with an amount equal to the old age assistance theretofore furnished August Sanne by the county, to be

held pending determination of priority of liens and division thereof. What disposition, if any, was made of such showing does not appear in the record except by inference, and plaintiff's motion for new trial did not assign as error any disposition thereof. It is sufficient here to say that in the light of evidence and authorities hereinafter cited, such attempted bid should not have been received because, as provided by section 40-111, R. R. S. 1943: "* * * no bid must be received unless it exceeds the amount of the homestead exemption," and is also greater than other existing valid liens on the property.

On April 25, 1958, plaintiff filed a motion for new trial, which was submitted without argument, and overruled on April 30, 1958. Thereupon, plaintiff appealed, assigning and arguing in substance: (1) That the trial court erred in failing to follow the statutes relating to the vacation or modification of judgments, and in vacating and modifying plaintiff's original judgment after expiration of the term and 2 years had elapsed without the filing of proper pleadings; (2) that over objections, the trial court erroneously admitted evidence without proper foundation and over objections erroneously admitted evidence that was not the best evidence and without proper foundation; and (3) that the judgment was not sustained by the evidence but was contrary thereto and contrary to law. We do not sustain the assignments except to find that the granting of the permanent injunction as aforesaid without any qualification was too all-inclusive and should be and hereby is modified to comply with the rule: "That the decree of the district court perpetually enjoining the appellants from attempting to satisfy their judgments by judicial sale of said homestead premises should be so modified as to permit appellants, at any time, to move the court for a vacation of such injunction on showing that the appellee, still owning the legal title to said premises, had permanently abandoned the premises as

a homestead, or that said premises had appreciated in value so that the interest of the appellee therein had become of a greater value than $2,000." Corey v. Schuster, 44 Neb. 269, 62 N. W. 470. In all other respects, the judgment should be and hereby is affirmed as so modified.

With regard to the first assignment of error, it is clearly and conclusively apparent from the record that the trial court did not in any manner or means vacate or modify plaintiff's judgment against August Sanne, and that the procedure followed by the parties and the court was authorized by and in conformity with sections 40-105, 40-106, 40-107, 40-108, and 40-111, R. R. S. 1943. Plaintiff's first assignment has no merit.

The second assignment also has no merit. In Pierce v. Fontenelle, 156 Neb. 235, 55 N. W. 2d 658, we reaffirmed that: "In a case tried to the court, either in law or in equity, the presumption obtains that the trial court in arriving at decision considered only such evidence as was competent and relevant, and this court will not reverse a case so tried because other evidence was admitted, if there is sufficient competent and relevant evidence in the record to sustain the judgment." Also, it should be pointed out that such assignment of error did not make any reference to or point out the specific admitted evidence against which objection is urged, and in that situation it is not the duty of this court to search the record for the purpose of ascertaining what evidence plaintiff is complaining about. See Wieck v. Blessin, 165 Neb. 282, 85 N. W. 2d 628.

We turn then to the question of whether or not the judgment was sustained by sufficient evidence. Upon examination of the record de novo, we conclude that it was. In such respect the record discloses the following: August Sanne and Amelia Sanne, defendant herein, were married in 1925. In 1944, they purchased the property involved, mostly for cash, with money accumulated by them during the marriage. Title thereto

was taken in the name of August Sanne. It was the only real property owned by them, and was the homestead where they lived with their four minor children until 1950. At that time they moved to Oregon and leased the property, but they returned in the fall of 1951 and moved back into the property known and described as their "family home."

In March 1953, August Sanne began receiving monthly old age assistance payments from Antelope County. He continued to do so, and on July 1, 1957, all such payments, amounting to a total of $2,326.41, were duly recorded valid liens on the property involved.

In the meantime, on or about October 6, 1955, plaintiff, William Sanne, filed an action in the district court for Antelope County against his brother, August Sanne, seeking to recover a judgment for $1,829.65, together with interest at six percent from July 1, 1955. Such sum allegedly consisted of money loaned to or advanced for August Sanne. The next day, on October 7, 1955, August Sanne executed and acknowledged before the attorney for plaintiff, who represented both parties, an offer to confess judgment in favor of William Sanne for the amount sought by him. Therein August Sanne admitted that he owed such indebtedness for money advanced to him; that he was willing to confess judgment therefor because he was without funds; that he had no way of raising funds; and that he was unable to repay said sums as he had agreed to do. In that situation, such offer to confess judgment was filed in the district court on November 1, 1955, and on that date or on October 28, 1955, a judgment by confession was rendered in favor of plaintiff, William Sanne, and against August Sanne for $1,829.65, together with interest at six percent from July 1, 1955, which judgment plaintiff herein contended was a lien on the property involved. In that connection, at the time such judgment was rendered, the old age assistance lien amounted to $1,152.81, and plaintiff at all times had knowledge of

August Sanne's indigent financial condition.

Sometime thereafter August Sanne sued Amelia Sanne, defendant therein and here, for divorce, and she filed a cross-petition. Without dispute, defendant had custody of their minor daughter, and no allowance was made for her support. After a hearing and on June 25, 1957, defendant was granted an absolute divorce upon her cross-petition. The court's decree also awarded defendant: "* * * the family home described as Lot 2 of Pexton's subdivision of Neligh, Nebraska, * * * together with its contents as a property settlement and title to said premises" was "confirmed in Amelia Sanne, subject to whatever liens and encumbrances may exist against the same; * * *."

The old age assistance lien then amounted to $2,326.41; the judgment here involved remained unpaid in the amount of $1,629.65; and the 1956 real estate taxes were unpaid. However, Amelia Sanne paid such taxes, but at the time of this hearing and judgment on April 17, 1958, the 1957 taxes, amounting to $52.74, were unpaid for want of funds by defendant, who was washing dishes in a cafe to help obtain sufficient money for her support.

While the divorce case was pending, defendant and her minor daughter continued to live in one isolated portion of the home, and August Sanne continued to live in another locked isolated portion thereof. However, after defendant was awarded a divorce as aforesaid, August Sanne moved out, but defendant and her minor daughter continued to live in the home, and a son who was of age but attended school in Wayne, also spent weekends in the home. The minor daughter was 19 years old and employed at the time of this hearing, but defendant was in law the head of a family and, under the circumstances presented here, she was entitled to her homestead rights to and interest in the property involved.

The evidence conclusively establishes that such prop-

erty was worth from $4,000 to $4,200. In that connection, at time of this hearing valid liens on the property amounted to at least $2,379.15, in addition to $1,629.65, the balance due on plaintiff's judgment if it were an enforceable lien at that time. However, when the $2,379.15 is added to defendant's homestead exemption of $2,000, to which she was legally entitled, the total would be $4,379.50, which was more than either the value of the property or plaintiff's purported bid of $4,326.41. In other words, as provided by section 40-111, R. R. S. 1943, such a bid, if properly and timely made, which it was not, could not have been received because it did not in any event exceed the amount of defendant's homestead exemption and existing valid liens on the property. However, if a proper bid is timely made for the required amount and same is paid into court, the matter of priority of liens is a question for the court to determine.

As said in Dougherty v. White, 112 Neb. 675, 200 N. W. 884, 36 A. L. R. 425: "It has always been the policy of this court, as well as of courts generally, to give a liberal construction to the homestead law for the purpose of protecting and preserving the home for those who would be benefited by its provisions."

Also, as stated in Phifer v. Miller, 153 Neb. 748, 45 N. W. 2d 907, citing section 40-104, R. R. S. 1943: "It is fundamental, also, that the homestead of a married person cannot be conveyed or encumbered unless the instrument by which it is conveyed or encumbered is executed and acknowledged by both the husband and wife."

In 26 Am. Jur., Homestead, § 139, p. 89, citing Novotny v. Horecka, 200 Iowa 1217, 206 N. W. 110, 42 A. L. R. 1158, it is said: "Under a statute requiring that an alienation of the homestead property be consented to or joined in by husband and wife, a judgment which has been entered by consent of only one spouse is ineffectual to deprive the other of the right of homestead."

In such cited case, comparable in material respects with that at bar, the court concluded, after citing numerous authorities, that a man cannot by his own act or neglect, deprive his wife of her property rights in the homestead, either by his conveyance or encumbrance, or by permitting a judgment by confession to be rendered against him for his individual debt, and such judgment cannot be made a lien upon his wife's interest in the homestead.

We held in Federal Credit Co. v. Reynolds, 132 Neb. 495, 272 N. W. 397, that: "When a husband and wife have a homestead in property, title to which is in the husband, and the wife is divorced from the husband, the latter may continue to claim a homestead interest in the property." That opinion said, quoting from Dougherty v. White, *supra:* " 'The law is settled that, where a husband and wife reside upon a homestead and the wife dies, the homestead character of the land continues and the surviving husband, although he may have no children or dependents residing with him, may still retain the homestead as such. Palmer v. Sawyer, 74 Neb. 108; Dorrington v. Myers, 11 Neb. 388; Galligher v. Smiley, 28 Neb. 189. The same rule obtains where the marriage relation has been dissolved by decree of court.' " By analogy, of course, when a husband and wife reside upon homestead property and the wife is divorced from the husband but is awarded such property, the wife may continue to claim a homestead interest therein.

In Karls v. Nichols, 148 Neb. 712, 28 N. W. 2d 595, we held that: "A homestead, as defined by statute, once established, is presumed to continue as such, and the burden of proving a waiver, loss, or abandonment thereof, is upon the party asserting such waiver, loss, or abandonment."

In Schroeder v. Ely, 161 Neb. 262, 73 N. W. 2d 172, we held that: "All that the law requires to establish a homestead is that the homestead claimant and his family

reside in the habitation or dwelling house, whatever be its character, on the premises claimed as a homestead.

"Under the homestead law in force in this state a judgment is a lien only on the debtor's interest in lands, impressed with the character of a homestead, in excess of $2,000." See, also, Ehlers v. Campbell, 159 Neb. 328, 66 N. W. 2d 585.

Also, in Connor v. McDonald, 120 Neb. 503, 233 N. W. 894, quoting from Corey v. Plummer, 48 Neb. 481, 67 N. W. 445, this court held: " 'The extent of a homestead is to be determined by the claimant's interest in the land, and not by the fee-simple value of the premises. In determining his homestead interest, valid mortgages and other liens are to be deducted from the value of the land, and not from the $2,000 homestead exemption.' " See, also, Hawley v. Arnold, 137 Neb. 238, 288 N. W. 823; Hoy v. Anderson, 39 Neb. 386, 58 N. W. 125, 42 Am. S. R. 591.

In the light of the evidence and aforesaid authorities which are applicable and controlling here, we conclude that defendant had a homestead interest in the property involved, and that the judgment of the trial court should be and hereby is affirmed except as modified in the manner heretofore ordered with relation to the granting of a permanent injunction. All costs are taxed to plaintiff.

AFFIRMED AS MODIFIED.

MICHAEL WESTON, A MINOR, BY WILLIAM M. WESTON, HIS FATHER AND NEXT FRIEND, APPELLEE, V. GOLD & COMPANY, A CORPORATION, ET AL., APPELLANTS.
94 N. W. 2d 380

Filed January 30, 1959. No. 34393.

1. **Negligence: Trial.** 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.

2. **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.
3. **Negligence.** Where the thing which caused the injury complained of is shown to be under the management of defendant or his servants and the accident is such as in the ordinary course of things does not happen if those who have its management or control use proper care, it affords reasonable evidence, in the absence of explanation by defendant, that the accident arose from want of care.
4. **Negligence: Pleading.** The doctrine of res ipsa loquitur proceeds on the theory that, under special circumstances which invoke its operation, the plaintiff is unable to specify the particular act of negligence which caused the injury, but if the petition alleges particular acts of negligence, then the plaintiff, in order to recover, must establish the specific negligence alleged, and the doctrine of res ipsa loquitur cannot be applied.
5. **Negligence.** Before the doctrine of res ipsa loquitur can be applied it must appear that the negligent cause or thing which produced the injury complained of was wholly and exclusively in the possession, and under the control or management, of defendant.
6. **Trial.** In testing the sufficiency of evidence to support a verdict it must be considered in the light most favorable to the successful party, that is, every controverted fact must be resolved in his favor and he should have the benefit of every inference that can reasonably be deduced therefrom.
7. ———. If a motion for directed verdict made at the close of the evidence in a case should have been sustained for want of evidence to support a verdict in favor of the party against whom made, it is the duty of the court on motion for judgment notwithstanding the verdict timely made to sustain such motion to set aside the verdict and to render judgment pursuant to the motion for directed verdict.

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

Stewart, Stewart & Calkins and *Floyd A. Sterns,* for appellant Gold & Company.

Woods, Aitken & Aitken, for appellant Otis Elevator Company.

Jack Devoe, Merril R. Reller, and *John McArthur,* for appellee.

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

YEAGER, J.

This is an action for damages by Michael Weston, a minor, by William M. Weston, his father and next friend, plaintiff and appellee, who will hereinafter be referred to as plaintiff, against Gold & Company, a corporation, and Otis Elevator Company, a corporation, defendants and appellants. The case was tried to a jury and a verdict was returned in favor of plaintiff and against both defendants for $5,000. The defendant Gold & Company, which will hereinafter be referred to as Gold, filed an alternative motion for judgment notwithstanding the verdict or for a new trial. The defendant Otis Elevator Company, which will be hereinafter referred to as Otis, filed separately a motion for judgment notwithstanding the verdict and one for a new trial. The motions of these parties were overruled. The defendants separately appealed and each has separately set out alleged errors which it contends entitle it to have the judgment reversed. These assignments, or such of them as require consideration herein, will be discussed along with the facts as they have been presented by the record and the controlling legal principles.

Factually, as disclosed by the record and necessary to disclose herein, the action grew out of an accident which occurred on July 13, 1954, on an escalator in a department store owned and operated by Gold. As to this factual statement there is no substantial dispute. The escalator or portion involved descended on an incline from the second to the first floor. It was installed by Otis in 1947 and 1948. It was regularly inspected by

employees of Otis but there was no evidence that the operation was under its control. Gold was the owner and in control of operation following installation to and including July 13, 1954. The escalator, as it passed downward between the two floors, was a series of steps and between the back of each step and the front of the next above was a riser. There was no vacant or open space between the step and riser. The escalator was operated between stationary panels on each side which were estimated at from 2 to 3 feet apart. There were handrails on top of the panels. The movement of the escalator was over fixed tracks which were not exposed to view. The steps in their turn as they reached the first floor passed thereunder and out of view. The normal space between the ends of the steps and risers and the enclosing panels on each side was from 3/32 to 5/32 of an inch. The purpose of the escalator was to provide passage for customers of Gold from the second to the first floor. In other words, it was for the purpose of allowing customers to step on a step and there remain until that step had reached the first floor. There was nothing protective against the space between the ends of the steps and the adjacent panels except the narrowness of the space. It is true that there was a trim molding extending from the top of the escalator to a point near the first floor, at a distance of about 1 inch above the front and 10 to 11 inches above the back of the steps of the escalator, but the defendants have not contended that this had a protective purpose.

On July 13, 1954, the plaintiff and his mother got on the escalator at the second floor and proceeded to descend to the first floor. The plaintiff, facing forward, preceded his mother. In some manner, when they were near the first floor the right shoe and foot of plaintiff became caught between a step or riser or both and the panel on the right side, and his large toe was amputated and his foot was otherwise injured.

The plaintiff pleaded that the cause of the accident was

negligence on the part of the two defendants. The pleading in this respect is found in paragraphs 5, 6, and 7 of the petition as follows:

"5. When approximately 3 or 4 steps from the first floor of said store, and while the said escalator was still in motion, plaintiff's right foot was caught and held in a void created by the edge of the step and the sidewall of said escalator; that the said defendants and each of them, were careless, and negligent in that they failed to install, equip, or erect said escalator with any protective devices in preventing a void occurring between the edge of the step and the sidewall of said escalator.

"6. That the defendants, and each of them, did negligently, carelessly, improperly and unlawfully design, construct, install, maintain and operate said escalator in a dangerous, unsafe and hazardous condition, in that as the steps approached the floor there was a void created between the edge of the step and the side wall of said escalator large enough to catch the toes or front part of a shoe of this plaintiff thereby making it hazardous for persons using said escalator and especially this plaintiff.

"7. That all times herein mentioned defendants and each of them knew, or in the exercise of reasonable care under the circumstances should have known, of the dangerous and hazardous condition caused by said void and that said defendants, and each of them, at all times herein mentioned failed and neglected to warn the plaintiff or take any means to protect the plaintiff about and from the aforesaid hazardous and dangerous condition."

The answers, to the extent necessary to refer to them herein, are that Otis generally denied the allegations of the petition, and Gold generally denied the allegations of the petition and pleaded that the accident was the result of negligence on the part of plaintiff and his mother.

The testimony given to support the allegations of negligence was very brief. The mother of plaintiff testified substantially that the plaintiff, then of the age of 5 years, got on the escalator ahead of her and that he stood quietly on the downward journey; that when they came near the bottom she saw a crack approximately 1½ inches wide on the side between the end of the step or riser and the panel; and that the toe of plaintiff's shoe was caught in this crack.

There is no direct testimony as to the cause of this claimed separation.

The testimony of witnesses for the defendants was to the effect that such a wide separation was impossible in the light of their knowledge of the construction of the escalator.

The shoe worn by plaintiff had a rubber sole and in this connection the defendants' witnesses substantially testified that in their opinion the toe of the shoe could not have become engaged as it was except by contact and pressure into the space between the step and panel made by the plaintiff himself. The testimony of defendants negatived any contention that there was any defect in construction of the escalator or in its condition for other reasons at the time.

On the evidence here summarized the court submitted the issue of negligence of the defendants to the jury.

Both defendants insist that under no theory of pleading or proof is the evidence sufficient to sustain a verdict holding them or either of them guilty of negligence. It should be pointed out that from an examination of the instructions given it may not be said with certainty whether it was the purpose to submit the case solely under the doctrine of res ipsa loquitur or also under the general rule which exacts proof of an act or acts of negligence charged by a preponderance of the evidence as a condition of a right of recovery. It is assumed therefore that it was the purpose to submit it on both theories. The case was submitted under the doctrine

of res ipsa loquitur as to both defendants. This was separately assigned as error.

A submission under this theory is a departure from the general rule that in actions wherein recovery of damages is sought on the ground of negligence the burden rests upon the plaintiff to prove by evidence the negligence which has been asserted.

Two late statements of rules to be observed in determining whether or not a case based on negligence shall be submitted to the jury are the following:

"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; Morse v. Gray, 166 Neb. 557, 89 N. W. 2d 842.

"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; Morse v. Gray, *supra*.

A familiar definition of the doctrine of res ipsa loquitur is as follows: "The thing speaks for itself. Rebuttable presumption that defendant was negligent, which arises upon proof that instrumentality causing injury was in defendant's exclusive control, and that the accident was one which ordinarily does not happen in absence of negligence." Black's Law Dictionary (3d ed.), p. 1539. See, also, Miratsky v. Beseda, 139 Neb. 229, 297 N. W. 94; Watson Bros. Transp. Co. v. Chicago, St. P., M. & O. Ry. Co., 147 Neb. 880, 25 N. W. 2d 396.

This submission is attacked as error on two grounds. On one of these grounds a like attack is made by both defendants. On the other the attack is by Otis. By the attack in which the two have joined they assert that the doctrine is not available to plaintiff since by his petition he charged specific acts of negligence, and that therefore and thereby he barred himself from the right to have a cause of action prima facie sustained by a presumption flowing from proof of an injury caused by an instrumentality under the exclusive control of the defendants or one of them.

The rule in this jurisdiction in this connection is as it is asserted to be by the defendants. This is not accepted in all jurisdictions but it has been accepted in some of them. It was accepted and declared in Mischnick v. Iowa-Nebraska Light & Power Co., 125 Neb. 598, 251 N. W. 258, and from this there has been no departure. In that case it was said: "The doctrine of res ipsa loquitur proceeds on the theory that, under special circumstances which invoke its operation, the plaintiff is unable to specify the particular act of negligence which caused the injury, but if the petition alleges particular acts of negligence, then the plaintiff, in order to recover, must establish the specific negligence alleged, and the doctrine of res ipsa loquitur cannot be applied." See, also, 65 C. J. S., § 220 (11), p. 1032.

From what has been quoted herein from the allegations of the petition it is made conclusively to appear that the plaintiff alleged particular acts of negligence. It follows of course that the court erred in submitting the case to the jury under the res ipsa loquitur doctrine.

The effect of the other ground urged by Otis alone that the court erred in submitting the case as to it under the res ipsa loquitur doctrine is to say that it may not be applied to this defendant since it has application only where the proof discloses that the defendant was in exclusive control of the instrumentality causing the injury.

The theory of the contention of this defendant is

sustained by the decisions of this court. In Miratsky v. Beseda, *supra,* this court said: "Before the rule (res ipsa loquitur) can be applied, 'It must appear * * * that the negligent cause or thing which produced the injury complained of was wholly and exclusively in the possession, and under the control or management, of defendant.' " The pertinent part of this was quoted from 45 C. J., Negligence, § 781, p. 1214.

There is no evidence that the instrumentality involved in this incident was either in the possession or under the control of Otis. It was exactly to the contrary. The evidence disclosed that the escalator was installed by it, and that its employees made frequent inspections of it and its operations in order to see that it was in proper operation and proper operating condition, but there was no evidence of possession or control.

It follows, in the light of this, that on both theories, as contended, the court erred in submitting the case to the jury under the res ipsa loquitur doctrine. It may not well be said that the error was not prejudicial.

Returning now to the question of whether or not under the general rule there was evidence sufficient to sustain a verdict in favor of plaintiff and against the defendants on any theory of pleading or proof, it becomes necessary to make a further review of the evidence.

This review must be made acceptable to the following:

"In testing the sufficiency of evidence to support a verdict it must be considered in the light most favorable to the successful party, that is, every controverted fact must be resolved in his favor and he should have the benefit of every inference that can reasonably be deduced therefrom." Smith v. Platte Valley Public Power & Irr. Dist., 151 Neb. 49, 36 N. W. 2d 478. See, also, Stolting v. Everett, 155 Neb. 292, 51 N. W. 2d 603; Davis v. Spindler, 156 Neb. 276, 56 N. W. 2d 107; Koutsky v. Bowman, 157 Neb. 919, 62 N. W. 2d 114.

"If a motion for directed verdict made at the close of the evidence in a case should have been sustained for

want of evidence to support a verdict in favor of the party against whom made, it is the duty of the court on motion for judgment notwithstanding the verdict timely made to sustain such motion to set aside the verdict and to render judgment pursuant to the motion for directed verdict." Hamilton v. Omaha & C. B. St. Ry. Co., 152 Neb. 328, 41 N. W. 2d 139. See, also, Stolting v. Everett, *supra.*

As is made apparent by the part of the petition quoted herein the plaintiff charged as negligence: Failure to install, equip, or erect the escalator with protective devices to prevent a void occurring between the edge of the step and side wall; designing, constructing, installing, maintaining, and operating the escalator in a dangerous, unsafe, and hazardous condition in that as the steps approached the floor there was a void created between the edge of the step and the side wall of the escalator large enough to catch the toes or front part of the shoe of plaintiff of which the defendants knew or in the exercise of ordinary care should have known; and that the defendants failed to warn or take any means to protect against the hazardous condition.

The mother of the plaintiff testified in substance that she saw an open space between the end of the step and the side wall of about 1½ inches. This was seen practically instantaneously with the catching of the foot. She further testified that plaintiff was not moving about in his descent but was standing still facing forward; that the shoes plaintiff was wearing were Keds; that after the accident the shoe and foot were caught and someone untied the shoe so that the foot could be removed; and that the escalator moved after the shoe and foot were caught but as to how much she could not tell. There was no other material testimony by this witness or any other of incidents actually and at the time involved in the occurrence as distinguished from causative factors, if any, inhering in the escalator and its appliances.

The evidence of plaintiff therefore discloses only that

there was a widening of the space between the end of a step and the side wall and that in this the shoe and foot of plaintiff were caught. The plaintiff adduced no evidence the effect of which was to say directly or by reasonable inference that this separation was caused by negligence of the defendants or either of them. Since the doctrine of res ipsa loquitur is not applicable in the case this lack of evidence may not be said to be supplied by presumption. In addition it is pointed out that there is nothing in the evidence of the defendants to indicate either directly or by inference that the defendants or either of them was at the time actively negligent.

It is true that there was evidence on the part of the defendants, by opinion which was entirely speculative in quality and character, as to what caused the accident but from this no inference of negligence on the part of either defendant could reasonably flow.

There was no evidence adduced by the plaintiff and none by the defendants that the separation of the step from the side wall except for the maximum distance of 5/32 of an inch temporarily, permanently, or specifically at the time this accident occurred was the result of any negligent act or failure to act in installing, equipping, erecting, designing, maintaining, or operating the escalator or that there was any hazard in its use by anyone who, in the exercise of ordinary care, was being conveyed thereon. The evidence of the defendants was to the contrary.

One charge of negligence is that the defendants failed to warn or take some means to protect against the hazardous condition flowing from the use of the escalator. The evidence discloses that there was not any notice or warning device relating to the use of the escalator. There was however no evidence that the use of the escalator by a person in the exercise of ordinary care presented any hazard or hazardous condition which required the giving of notice or warning.

In the light of these observations and the principles herein set forth it becomes apparent that the plaintiff has failed to sustain by evidence the allegations of negligence contained in his petition and, the question having been properly raised, the case should not have been submitted to a jury.

At the conclusion of the evidence the defendants separately moved for a directed verdict. In the light of what has been said these motions should have been sustained. These motions and the rulings thereon established the right of the defendants to file and to have a determination on their motions for judgment notwithstanding the verdict. See § 25-1315.02, R. R. S. 1943; Kohl v. Unkel, 163 Neb. 257, 79 N. W. 2d 405. In the light of the conclusion that there was no evidence to sustain a verdict in favor of the plaintiff it was the duty of the court to sustain the motions. See Hamilton v. Omaha & C. B. St. Ry. Co., *supra;* Stolting v. Everett, *supra;* Pavlicek v. Cacak, 155 Neb. 454, 52 N. W. 2d 310; Borcherding v. Eklund, 156 Neb. 196, 55 N. W. 2d 643; Hickman v. Parks Construction Co., 162 Neb. 461, 76 N. W. 2d 403.

Accordingly the judgment of the district court is reversed and the cause remanded with directions to sustain the motions for judgment notwithstanding the verdict and to render judgment dismissing plaintiff's action.

REVERSED AND REMANDED WITH DIRECTIONS.

IN RE APPLICATION OF OMAHA TRANSIT COMPANY. OMAHA TRANSIT COMPANY, APPELLANT, V. LILLIAN K. BRIGGS, DOING BUSINESS AS LOVELAND-ROCKBROOK LINES, ET AL., APPELLEES, CITY OF OMAHA, INTERVENER-APPELLANT.
94 N. W. 2d 461

Filed January 30, 1959. No. 34442.

1. **Public Service Commissions.** The prime object and real purpose of Nebraska State Railway Commission control is to secure

adequate sustained service for the public at minimum cost and to protect and conserve investments already made for that purpose, and in doing so primary consideration will be given to the public rather than to individuals.

2. **Municipal Corporations: Franchises.** The Constitution of the state prohibits granting a right to operate a common carrier passenger service upon the streets of a city without first obtaining the consent of a majority of the electors of the city. A franchise from a city legally granted, though by its terms not exclusive, is exclusive as against anyone who without valid authorization seeks to take away from the grantee a part of the business operated by him by virtue of the franchise.
3. **Constitutional Law: Street Railroads.** The words "street railroad" in Article XII, section 2, of the Constitution of Nebraska, apply to all means of mass transportation of passengers for hire in a municipality, without regard to the motive power employed.
4. **Franchises.** A franchise accepted and performed in whole or in part by a grantee of it becomes a contract between the city and the grantee.
5. **Public Service Commissions: Motor Carriers.** It is an indispensable requisite to the legal transportation of passengers by a common carrier within a city in this state that the common carrier have a franchise from the city authorizing the use of the streets for that purpose and a certificate of public convenience and necessity issued to the owner of the carrier by the Nebraska State Railway Commission.
6. **Public Service Commissions: Municipal Corporations.** The authority of the Nebraska State Railway Commission to issue a certificate of public convenience and necessity to a common carrier does not limit the power of a city by the exercise of the police power it possesses to control who may use its streets and public ways in the conduct of a public transportation business within the city.
7. **Municipal Corporations: Motor Carriers.** A common carrier of passengers in a city by the consent and authority of a franchise from it and a certificate of public convenience and necessity issued by the Nebraska State Railway Commission has capacity to litigate the ineligibility of anyone who without authority of law has engaged in operation as a common carrier within the city.
8. ———: ———. If an area served by a bus company, which has a certificate of public convenience and necessity but which has no franchise, is annexed by the city whose bus service is provided by a transit company under a franchise of the city authorizing it to operate within the limits of the city and is a

holder of a certificate of public convenience and necessity, the right of the transit company to extend its service to the newly annexed area is superior to the right of the bus company to continue to serve such area.

9. ———: ———. Municipal boundaries play a part in determining who should be permitted or required to perform common carrier services within the municipality.

10. Motor Carriers. The duty is imposed upon a common carrier to provide service to all the public and this requires it to be furnished where it is unprofitable as well as where it is profitable.

11. ———. Public convenience and necessity may be found in operating economies and those things which contribute to expedition, public safety, efficiency, and convenience in operation.

12. ———. The term public interest as used in the Motor Carrier Act of this state has direct relation to the adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision for the best use of the transportation facilities.

APPEAL from the Nebraska State Railway Commission. *Reversed and remanded.*

Kennedy, Holland, DeLacy & Svoboda and *Robert A. Skochdopole,* for appellant.

Donald L. Stern, for appellees.

Herbert M. Fitle, Bernard E. Vinardi, Irving B. Epstein, Frederick A. Brown, and *Donald H. Erickson,* for intervener-appellant.

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

BOSLAUGH, J.

Omaha Transit Company as a common carrier operated a motor bus transportation system within the city of Omaha by virtue of and in accordance with a franchise from the city and a certificate of public convenience and necessity issued to the transit company by the Nebraska State Railway Commission. Omaha Transit Company made an application March 13, 1957, to the Nebraska State Railway Commission, referred to herein

as commission, for a change in its service and routing as specified in the application. The substance of the application follows: Omaha Transit Company, designated herein Transit Co., was operating its route over and upon the streets of the city of Omaha, hereafter spoken of as the city, known and designated as Route No. 2, West Dodge Bus Line. The city had recently annexed certain territory to the west of the city limits as they existed at the date of a previous application, No. B-789, of the Transit Co. to the commission and thereby the city limits had been extended to the west and the annexed territory was within and a part of the city. The city and the traveling public made request that bus service be furnished to that part of the city newly within its limits. The proposed bus service extension of route No. 2 as stated in the application was from Seventy-second and Dodge Streets to Beverly Hills Plaza, Peony Park, and Seventy-fifth and Western Avenue Monday through Friday from 6:06 a. m. to 6:00 p. m.; from Seventy-second and Dodge Streets to Beverly Hills Plaza and Peony Park after 6:30 p. m. on weekdays and all day Sunday; and from Seventy-second and Dodge Streets to Country Side Village at Eighty-seventh and Shamrock Monday through Friday from 6:32 a. m. to 6:34 p. m. The application describes the definite route of each of the proposed extensions in detail. The descriptions of these are lengthy. They are not required to be repeated in this discussion. Paragraph No. 4 of the application was stricken and the prayer was amended to ask for permanent authority to extend route No. 2 into the area bounded by Western Avenue on the north, Ninetieth Street on the west, and Pacific Street on the south, also known as parcel No. 3, to provide the public with service within the area but it only requested temporary authority as to the exact routing and streets traversed in the area for 90 days from the commencement of the service in order to determine the routing

which would best serve the public convenience and necessity as they become known.

Lillian K. Briggs, administratrix of the estate of Leland Briggs, deceased, doing business as Loveland-Rockbrook Lines, hereafter designated Briggs, objected by pleading to the application of the Transit Co. The substance of her pleading follows: Briggs, as the legal representative of her deceased husband, had been operating as a common carrier in Nebraska under a certificate of public convenience and necessity issued by the commission to Leland S. Briggs, now deceased, and proceedings were pending before the commission seeking a transfer of the certificate to Lillian K. Briggs. Briggs has been engaged in transportation for hire of passengers and their baggage, express, and newspapers over routes in the suburban areas of Omaha. She has been and is operating and furnishing transportation services to the public over the routes and in the areas in which the Transit Co. seeks authority in this proceeding. She transports and delivers passengers to points in common with the presently authorized routes of the Transit Co. and the passengers are interchanged between the lines of Briggs and the lines of the Transit Co. for continuation of their transportation. The Transit Co. seeks authority herein to duplicate the services now performed by Briggs and the Transit Co. The authority sought by the Transit Co. is in the more desirable and profitable territory being served by Briggs and if granted will impair her revenues and her ability to continue the services she is now furnishing the public. Briggs has temporary authority until April 28, 1957, or until the further order of the commission because of a certificate of public convenience and necessity issued by the commission authorizing her to furnish service from all the areas described in the application of the Transit Co. to downtown Omaha and she should be permitted to perform such services without the addition of another competing carrier. Briggs asked the commission to

find that public convenience and necessity did not require the services proposed by the Transit Co. herein and that its application be denied.

The protest of George C. Steinert, doing business as Keystone-West Benson Bus Line, hereafter referred to as Steinert, to the application of the Transit Co. asserted that he had operated and was operating as a motor common carrier in Nebraska by virtue of a certificate of public convenience and necessity issued to him by the commission; that he transports for hire passengers and their baggage, express, and newspapers over authorized routes in the suburban areas of the city since the issuance of the certificate to him; that he had been and presently was operating in areas in which the Transit Co. sought authority in this proceeding; that he was furnishing transportation services on a permanent basis to the general public to and from points in which the Transit Co. was seeking authority; that he transported passengers and commodities to points in common with presently authorized routes of the Transit Co. where they were interchanged between the lines of Steinert and the lines of the Transit Co. for continuation of transportation; that the Transit Co. seeks authority to duplicate the services performed by it and Steinert through interchange; that such authority if granted the Transit Co. will impair the revenues of Steinert and destroy his ability to perform the services he has been furnishing the general public throughout the territory presently served by him; and that Steinert has been and is furnishing the transportation services under a certificate of public convenience and necessity authorizing temporary services from all areas described in the application of the Transit Co. to downtown Omaha and that the temporary authority commenced February 20, 1957, and continues until April 28, 1957, or until the further order of the commission. The protest asks that the commission find that public convenience and neces-

sity did not require the services proposed by the Transit Co. and that its application be denied.

The petition of intervention of the city asserts the following: The Transit Co. has a franchise granted it by the city August 31, 1954, by virtue of which the Transit Co. operates a transportation system within the city. The city extended its limits July 3, 1956, to the west from approximately Seventy-second Street by annexing property within the extended limits of the city and made the property a part of the city. The Transit Co. was granted authority by the city April 16, 1957, to extend its service and lines and to use streets in the newly annexed area to enable the Transit Co. to furnish the services to the area that was utilized by and available to the other residents of the city. The city has an interest in the outcome of the Transit Co. application involved in this proceeding in that persons residing in the area it seeks to serve and business enterprises in the newly annexed area are all residents of the city and should be afforded the benefits of the transportation system of the Transit Co. which is now available to the other residents of the city not within the annexed area. The city has received many requests from residents of the newly annexed area, business enterprises therein, and persons desiring to travel to and from the annexed area that the Transit Co. extend its lines into that area and provide mass transportation therein. If such transportation is not provided that area, the new industry therein and the development of the area will be impaired to the damage and detriment of the city. The city asks that the authority be granted by the commission to the Transit Co. as sought by its application.

The commission found that the service proposed by the applicant would be in direct competition with the present holders of certificates of public convenience and necessity and such competition would do substantial injury to existing carriers; that Briggs and Steinert are each presently operating as a common carrier in intra-

state commerce within the area in which the Transit Co. seeks authority to extend its bus lines; that the service proposed by it as stated in its application would compete for passengers with existing carriers and in some cases would duplicate routes now being served; that a large part of the revenue of Briggs and Steinert is obtained from passenger service in the area in which the Transit Co. proposes service; that the operations of appellees are profitable but neither of them has sufficient financial strength to withstand the loss of any substantial amount of revenue and it might be impossible for them to continue operations if they are forced to compete with the Transit Co., in which event a large area in which appellees operate would be without bus service; that the evidence does not indicate that the existing carriers cannot or will not fill the needs of the public for transportation service in the area described as parcel No. 3; that it has been the policy of the commission not to authorize competitive routes unless the existing carrier has failed to provide adequate service upon order of the commission or unless the carrier has indicated an unwillingness to provide the required service; that the applicant has not demonstrated a public need which would justify the granting of the application; that ordinarily an application will not be granted when the operation of the proposed service will necessarily incur a loss to the applicant; that the facts in the present case show that under the present rates it would be impossible for the Transit Co. to operate the proposed routes at a profit; that surrounding circumstances indicate that it is not in such an advantageous position that it can afford to continuously operate at a loss without endangering the ability to provide the public with adequate service; and that the present and future public convenience and necessity do not require the service proposed by the application of the Transit Co. The commission ordered that the application of the Transit Co. should be and it was denied. The motion for rehearing of the Transit Co.

and the motion for rehearing of the city were each denied. The Transit Co. prosecutes this appeal to test the legality of the orders of the commission.

The commission had exclusive original jurisdiction to hear and determine the application of the Transit Co. The sole issue in this appeal for consideration and decision is whether or not the order denying the application of the Transit Co. was unreasonable or arbitrary. Dalton v. Kinney, 160 Neb. 516, 70 N. W. 2d 464; Ferguson Trucking Co., Inc. v. Rogers Truck Line, 164 Neb. 85, 81 N. W. 2d 915.

The object and purpose of commission control of common carriers is to secure adequate, sustained service for the public at the lowest reasonable cost and to protect and conserve investments made for that purpose and in so doing primary consideration must be the public rather than individuals. In In re Application of Union P. R. R. Co., 149 Neb. 575, 31 N. W. 2d 552, there is this language: "The prime object and real purpose of Nebraska State Railway Commission control is to secure adequate sustained service for the public at minimum cost and to protect and conserve investments already made for that purpose, and in doing so primary consideration must be given to the public rather than to individuals." See, also, Houk v. Peake, 162 Neb. 717, 77 N. W. 2d 310.

The appellees Briggs and Steinert prior to and at the time the area referred to in the record as parcel No. 3 was annexed to and became a part of the city on July 3, 1956, had been and were conducting therein and in other adjacent suburban areas without the city common carrier services by transportation generally of passengers and commodities by authority of a certificate of public convenience and necessity issued to each of them. It is in the area of parcel No. 3, now part of the city, that the Transit Co. by its application, the basis of this proceeding, seeks authority to extend its motor bus routes and conduct its motor bus business as the franchised pub-

lic transportation utility within the city. When the area with which the application of the Transit Co. is concerned was annexed and made a part of the city, appellees were thereby disqualified to continue to serve the newly annexed area. It is not claimed by pleading or otherwise; neither is it established by proof that either of the appellees had been granted a franchise permitting them to use the streets or other public ways of the city of which it has control to conduct a passenger transportation business therein. This deficiency was and is a prohibition of any legal continued operation of the suburban buses of appellees within the city as urban buses. Appellees could of course continue to operate in their prior established character as suburban buses in the enlarged suburban areas created by the expansion of the city. This is conceded but it is not involved or of importance in this proceeding. However, the continued operation of appellees within the city automatically came within the periphery of all of the incidents, burdens, and benefits attached to the inhabitants of the annexed area stemming from the annexation of it. Any continued operation of appellees within the city after the annexation of parcel No. 3 was illegal and without right or lawful authority.

Article XII, section 2, of the Constitution of this state provides: "No such general law shall be passed by the legislature granting the right to construct and operate a street railroad within any city, town, or incorporated village without first requiring the consent of a majority of the electors thereof."

Lincoln Traction Co. v. Omaha, L. & B. Ry. Co., 108 Neb. 154, 187 N. W. 790, 28 A. L. R. 960, declares: "The suit here does not alone question the acts of another company, upon the ground that those acts are ultra vires of the other company's powers, * * * but the object of this injunction is to preserve plaintiff's right to carry on a street railway business, a right which must be based upon the consent of the electors of the city, and

which is, in its nature, exclusive as against every other company, seeking to take a part of that business by operating on streets where it has no legal right to go. * * * The Constitution * * * prohibits any city from granting the right to construct and operate a street railway upon the streets of a city without first obtaining the consent of a majority of the voters of such city."

Likewise it was said in an earlier decision, State ex rel. Lincoln Traction Co. v. Frost, 78 Neb. 325, 110 N. W. 986: "Construing these sections of the constitution and the statutes, we have held that there is no authority given to a city to grant charters to street railways; that the only authority given the city is to submit the proposition to the electors; for the consent of a majority of the electors is a condition precedent, on the happening of which depends the right to construct and maintain the railway. The grant by the legislature under general law is ineffectual to give street railways the right to operate upon the streets of a city, unless such company has obtained consent of a majority of the electors."

The Constitution speaks of the right to construct and operate a "street railroad" within a municipality. It is permissible in seeking the meaning of the constitutional provision to consider the mischief attempted to be avoided and remedied, the object sought to be accomplished, the scope of the remedy its terms imply, and to give it such interpretation as appears best calculated to effectuate its design. E. K. Buck Retail Stores v. Harkert, 157 Neb. 867, 62 N. W. 2d 288. It has been generally considered that the constitutional provision in this respect applies to all means of mass transportation in a municipality without regard to motive power or the method of its application. This has been recognized by this court.

Furstenberg v. Omaha & C. B. St. Ry. Co., 132 Neb. 562, 272 N. W. 756, states: "The jurisdiction to grant franchises in the city of Omaha was constitutionally re-

posed in the city under section 2, art. XII of the Constitution, and nothing precludes the city from granting further street railway or bus franchises at its pleasure."

State ex rel. Spokane United Rys. v. Department of Public Service, 191 Wash. 595, 71 P. 2d 661, considered a statute conferring authority upon the Department of Public Service which defines common carriers but did not mention or include in the definition motor buses for the carriage of persons and property. The court said: "It will be observed that there is no mention within this definition of motor busses for the carriage of persons or property. The question then is reduced to whether, motor busses not having been specially mentioned and other things being mentioned, the motor busses are excluded from the operation of the statute. * * * From the fact that, in defining common carriers, the statute mentioned street railroads and street railway companies, but did not mention motor busses, it does not necessarily follow that it was the legislative intent that motor busses should not come under the operation of the law. * * * When the extent and scope of the statute are considered, it becomes perfectly plain that it was the intention of the legislature, as above pointed out, to include within its reach all public service corporations, except where there was a special exemption * * *. The motor busses, as already stated, are performing exactly the same service as the street railway previously performed. The difference lies in that of the motive power or method of propulsion, and the further fact that motor busses run on rubber tires and street cars upon steel rails. But these differences are not of controlling importance."

In People's Transit Co. v. Louisville Ry. Co., 220 Ky. 728, 295 S. W. 1055, the court considered two sections of the constitution of that state in this manner: "It is first insisted by defendant that section 164 should be read into section 163, so as to confine the franchises and privileges mentioned in the former to the specific opera-

tions mentioned in the latter; i. e., to franchises for the conducting of only the named operations mentioned in the latter section, which are street railways, gas, water, steam-heating, telephone, or electric light companies, and that, since it is not engaged in any of those specifically named, it is not required to obtain the franchise mentioned in section 164. * * * we entertain grave doubt of its correctness, since to so hold would not only convict the members of the constitutional convention in adopting our Constitution of, at least, limited vision in preparing and enunciating in the fundamental law of the commonwealth a broad public policy relating to most important public utilities requiring extraordinary uses of the streets, and that at the same time confining the operation of such promulgated policy to only the known public utilities existing at that time. The members of the convention could not foresee the development of science or the accomplishments of inventive genius and there are cogent reasons for believing that in adopting section 163 the convention meant to apply its provisions and requirements to the results accomplished through and by the utilities expressly named therein, rather than confining them exclusively to such utilities as were expressly named. * * * it would not be a difficult task to find and cite most persuasive authority to sustain the proposition that it was the intention of the convention in adopting section 163, to require all such operating public utilities and furnishing in any manner or by any method any of the services rendered by any of the expressly named companies therein, to obtain the consent of the city in which it operates before it was authorized to do so, and which was so held by the learned trial judge in this case."

An indispensable prerequisite to the legal operation of a common carrier of transportation of passengers within a city in this state is that the owner thereof must have both a franchise granted by vote of the majority of the electors of the municipality and a certificate of

public convenience and necessity awarded and issued by the commission. The Constitution preserves to a municipality acting by its electors the power to grant to or withhold from anyone desiring to operate a transportation utility for the carriage of passengers for hire the privilege of entering the territory of the municipality and there conducting its business by use of its streets or public highways and the Constitution also vests in the commission, in the absence of special legislation, the power of regulation and control of the transportation utility as a common carrier in the exercise of the right secured to it by the franchise granted by the municipality. This is the effect of the decision in Furstenberg v. Omaha & C. B. St. Ry. Co., *supra,* and therein expressed in this language: "We must not permit a confusion between the jurisdiction of the city and the railway commission. There is a clear distinction between powers of a city to grant or withhold franchises, licenses or permits to use its streets * * * and the exclusive constitutional power of the railway commission to impose regulation and control over the city's common carriers. In re Yellow Cab & Baggage Co., 126 Neb. 138, 253 N. W. 80. Appellants recognize these two different forces of jurisdiction by admitting and contending that such permit already obtained is insufficient to authorize common carrier service in that a certificate of convenience and necessity from the railway commission is also required. These two precedent authorizations arise from two different jurisdictional authorities, and that both are necessary is not questioned." See, also, State ex inf. McKittrick v. Missouri Standard Telephone Co., 337 Mo. 642, 85 S. W. 2d 613; Holston River Electric Co. v. Hydro Electric Corp., 166 Tenn. 662, 64 S. W. 2d 509.

The commission has, in the absence of specific legislation, all the power of regulation of and control over common carriers which the people of this state could themselves exercise. However, power vested in the commission must be exercised in harmony with the pro-

visions of the Constitution of the state which control all branches of government. St. Louis & Meramec River R. R. Co. v. City of Kirkwood, 159 Mo. 239, 60 S. W. 110, 53 L. R. A. 300, considered a constitutional provision of that state, which in language and effect was like the provision of the Constitution of Nebraska above quoted, and a section of the statutes of the state and concluded: "It would be difficult to conceive of a more positive and unequivocal veto than that conferred upon the cities, towns and villages of this State by section 20 of article 12 of the Constitution, and section 2543, *supra,* to prevent the construction and operation of railroads upon their streets and highways, without their consent."

In State ex inf. McKittrick v. Missouri Standard Telephone Co., *supra,* the court said: "It is true that the Public Service Commission law vests in the Public Service Commission very extensive visitorial and regulatory powers over the conduct of the business of public utilities including telephone companies. But the Public Service Commission law does not authorize the Public Service Commission to grant to a public utility a franchise to use the streets of a city for the conduct of its business or to oust the utility from the use of a city's streets when the term of a franchise lawfully granted has expired. * * * The authority conferred upon the Public Service Commission to grant a certificate of public necessity and convenience to a telephone corporation * * * does not limit the authority of the city to grant franchises and to enforce ouster when the franchise granted has terminated, but merely imposes a limitation upon the right of the telephone company to exercise the granted franchise." See, also, State ex inf. Shartel v. Missouri Utilities Co., 331 Mo. 337, 53 S. W. 2d 394, 89 A. L. R. 607; Whitaker v. Louisville Transit Co. (Ky.), 274 S. W. 2d 391.

There are three common carriers concerned in this litigation. They each have a certificate of public con-

venience and necessity issued by the commission. The Transit Co. is the only one of the three which the evidence shows has a franchise from the city authorizing and obligating it to furnish transportation service to the general public within the city including parcel No. 3 which became a part of the city July 3, 1956, by the use of its streets and public ways for 25 years from and after April 3, 1955. The franchise was accepted by the Transit Co. and it has presumably performed its obligations thereunder. The franchise is a contract between the city and the Transit Co. Clough v. North Central Gas Co., 150 Neb. 418, 34 N. W. 2d 862. The Transit Co. is by the franchise obligated at all times to provide, maintain, and operate during its term an adequate motor bus and street transportation system and a high standard of service in and for the city within the present and future boundaries thereof and to manage its property in a prudent, diligent, and economical manner. Truesdale v. City of Newport, 28 Ky. L. 840, 90 S. W. 589. The city thereby granted to the Transit Co. for the term of the franchise authority to maintain and operate the service above described upon the streets and public ways of the city then existing or thereafter established in the city within the present or future boundaries thereof.

The Transit Co. was authorized April 16, 1957, by ordinance of the city to extend its service by the use of certain streets and public ways into the newly annexed areas for the purpose of performing the transportation service available to and used by all other residents of the city. The city intervened in the proceeding in support of the granting of the application of the Transit Co. made to the commission for authority to extend its service to the newly annexed area. The Transit Co. is qualified to assert and litigate the ineligibility of appellees to conduct a bus transportation service within the city including the newly annexed area because neither of them is possessed of a franchise from the city. The

fact that the franchise or the certificate of the Transit Co. is not exclusive is unimportant.

R. B. "Dick" Wilson, Inc. v. Hargleroad, 165 Neb. 468, 86 N. W. 2d 177, decided that a certificate holder could challenge the operation of another whose certificate was void: "It is true that a certificate of public convenience and necessity is not property * * *. It does not follow from this that certificate holders do not have the right to protest and receive protection against those who have without authority of law entered into operations within the field covered by their certificates."

Lincoln Traction Co. v. Omaha, L. & B. Ry. Co., *supra,* contains language appropriate to this discussion: "It is not necessary, in order that a street railway company question the authority of another street railway company to construct tracks upon the streets of a city, so as to handle business which the first company is lawfully carrying on, that the first company should have an exclusive franchise, but, where it has a lawful right to carry on a street railway business, its right is exclusive as against any person or company which attempts to operate in competition with it upon streets where the second company has no legal authority to go." It was legally appropriate for the Transit Co. and the city to contest the ineligibility of appellees to operate as common carriers within the city.

The commission found that the service proposed by the Transit Co. within the newly annexed area as a part of its general transportation operations in the city would be in competition with appellees, holders of certificates of public convenience and necessity, and it would do substantial injury to them because it would result in a duplication of routes being served by appellees; that it would constitute competition with them for passengers; and that any substantial loss of revenue from the operations of appellees might make it impossible for them to continue to operate, in which event the areas in which they operated would be without bus service. These

findings implicitly assumed that appellees had authority to operate as common carriers within the city. It is clear from the record that the commission gave no significance to the fact that the record is barren of evidence of such authority to either of appellees. It is undisputed that the city refused an application of Briggs for such authority. Steinert makes no claim that he had such authority or that he had attempted to secure it. The findings and order of the commission are a recognition of a right of appellees to carry on a common carrier business in the city in disregard of the constitutional provision concerning franchise authority to do so and are an attempted evasion of the police power of the city to control the occupancy and use of its streets and public ways. The granting of the application of the Transit Co. by the commission would not have infringed, prejudiced, or deprived appellees of any legal right because neither of them could legally operate in the area involved.

The Transit Co. and its predecessor, the Omaha & Council Bluffs Street Railway Company, have operated a public transportation service for passengers for hire within the city for more than 50 years, the latter until 1953 when the name of the corporation was changed to Omaha Transit Company. The corporation first established a bus line in 1928 and gradually increased use of buses until March 1, 1955, when it converted to an all-bus operation. It has since that time continued its business in Omaha by virtue of a franchise from the city and a certificate of public convenience and necessity issued by the commission. It proposed to extend one of its established routes, known as route No. 2, from Seventy-second and Dodge Streets into the newly annexed area referred to as parcel No. 3, one line extending from that point north of Dodge Street and one extending from that point south of Dodge Street. A bus is now operated west out Dodge Street on route No. 2 to Seventy-second Street every 15 minutes and it was proposed to

alternate buses from Seventy-second and Dodge Streets, one to the north of Dodge Street and the next one south of that street so that there would be 30-minute service on each of the lines operated in the newly annexed area. As shown by the evidence, this was to be regularly scheduled service Monday through Saturday from 6:06 a. m. to 6:00 p. m. and after 6:00 p. m. and all day Sunday the service was to be to Peony Park by way of Dodge Street to the shopping center of Beverly Hills Plaza through and to Eightieth across the street from the Peony Park entrance, returning east on Cass Street to Seventy-second Street, south to Dodge, and thence to the downtown area. That service was to be each 30 minutes and would continue until 12:30 a. m. The extended service the Transit Co. proposed, if allowed, would afford the public the same bus service to and from the newly annexed area and to and from any part of Omaha that is available to the other residents of Omaha for an identical charge. As shown by the evidence, the line south of Dodge Street would have similar service each 30 minutes Monday through Saturday from 6:32 a. m. to 6:34 p. m. The extended service proposed was regularly scheduled transportation with equipment presently used by the Transit Co. which is comparable to buses used in such cities as Milwaukee, Chicago, Denver, Kansas City, Cincinnati, and St. Louis. The Transit Co. utilizes 272 miles of lines within the city in the conduct of its business. It has proper equipment, a modern garage, repair and inspection facilities, and a modern automatic washer to keep the rolling stock clean. Its assets were in 1956 about $5,500,000. It was able, willing, and competent to perform the service proposed subject to any proper order of the commission.

A considerable area west of Seventy-second Street, known as parcel No. 3, was annexed to the city July 3, 1956. The estimated population thereof as of January 1, 1957, was more than 7,000 inhabitants. The area newly annexed to the city was definitely urban in char-

acter. There are schools, many places of business, and industries located therein. These include shopping centers, a loan and investment business, merchandising establishments, insurance buildings, offices of doctors and dentists, and the like. An insurance company was at the time of the hearing of the application constructing a building therein at a cost of about $1,600,000. The insurance company contemplated having about 200 employees in that location. Peony Park and its facilities are located in the area. The park has numerous employees and a very large number of persons who patronize that place of business. Many persons are employed in the area and a considerable part of them live elsewhere, some of them in Council Bluffs, who do not have private transportation and desire public carriage. The application of the Transit Co. was made to the commission because of requests made to it for the extended service by the mayor of the city, the West Side Council for Service, many persons who lived in or who were employed in the area, and numerous persons who were interested in business establishments therein.

The circumstances of this case are novel to this jurisdiction. A single mass transportation system providing carriage to the inhabitants of the city requested permission to extend an established route to serve newly annexed territory, now a part of the city, which had been suburban and served by individual bus operators. In considering the application of the Transit Co. conscious thought must be given to the prime object of commission control which is to secure adequate public service at minimum cost and to protect investments made for that purpose, and that the primary consideration must be the public rather than individuals. Furstenberg v. Omaha & C. B. St. Ry. Co., *supra*. If the extension is permitted, the residents of the annexed area would have 30-minute transportation service at fixed intervals so that they could travel to and from that area to any other part of the city for a single fare and, as to trans-

ferring passengers, 2 cents additional for a transfer, by an established company with adequate investment, facilities, and vehicles to maintain sustained service. There is no argument that it would not be the least possible cost. A consideration of conservation of investment already made should induce the giving of great weight to preserving the investment of the unitary mass transportation system of the city. The exact fact situation present has not been before this court but the principles which govern have been noticed and stated in previous decisions.

Publix Cars, Inc. v. Yellow Cab & Baggage Co., 130 Neb. 401, 265 N. W. 234, declared: " 'In requiring a proper service from a single system for a city or territory, in consideration for protecting it as a monopoly for all the service required and in conserving its resources, no economic waste results and service may be furnished at the minimum cost.' "

In re Application of Effenberger, 150 Neb. 13, 33 N. W. 2d 296, states: "The city of Bellevue, Offutt Field, and Fort Crook, under the facts shown, require service which is suburban in nature, although each is outside the corporate limits of the city of Omaha. They are within the metropolitan area of Omaha. The public interest involved is not confined to the city of Omaha but is a matter which is independent of arbitrary geographical limits. Municipal boundaries play a part in determining who should be permitted or required to perform common carrier service, but they are unimportant in determining public convenience and necessity."

This is not a situation where one carrier is requesting authority to be in competition with other carriers already in the field but rather it is one of a unitary mass transportation system of a city being allowed to extend one of its existing routes to a formerly suburban area which, because of development, has become an integral part of the city. It should be resolved on the basis of

public interest rather than as a choice between competing carriers.

Whitaker v. Louisville Transit Co., *supra,* considered a situation quite similar to that involved in the present case. The Louisiville Transit Company had for many years furnished public transportation in the city of Louisville, Kentucky, under a franchise from the city and a certificate of public convenience and necessity from the proper regulatory authority of the state. The franchise authorized the transit company to operate on the streets of the city and obligated it to provide city-wide transportation. An area was annexed to the city and the transit company applied for authority to extend its service into the newly annexed portion of the city. The Blue Motor Coach Lines operated in the area before its annexation by virtue of a certificate from the Department of Motor Transportation authorizing such service and the Blue Motor Coach Lines contended that it had a right to maintain service in the area it had previously served regardless of the annexation by the city. The transit company contended that because of its franchise from the city and its certificate from the Department of Motor Transportation, it alone had the right to render such service within the limits of the city. The court sustained the contention of the transit company and stated: "Where area being served by bus company holding certificate of public convenience and necessity was annexed by city whose bus service was provided by transit company operating under franchise authorizing it to operate over all streets and highways of city, right of transit company to extend its service to newly annexed area was superior to right of bus company to continue serving such area."

The terse statement of this court in In re Application of Effenberger, *supra,* that "Municipal boundaries play a part in determining who should be permitted or required to perform common carrier service * * *" indicates that this court is in accord with the reasoning

and logic of the Kentucky court as expressed in the above quotation from the decision of that court.

If a unitary common carrier serving the needs of a city is not allowed to expand its services into annexed areas of the city as it expands, the common carrier will be Balkanized and will not be able to provide the single-fare, rigidly scheduled mass transportation needed in every growing city and such a carrier will retrograde and become useless as the city grows and its business and population become more decentralized. The situation presented by this litigation was created by the growth and expansion of the city and not by the acts of either appellant or protestants but because of it the interest of the public can best be served by allowing the franchised unitary mass transportation system of the city to extend its service into the newly annexed area of it rather than denying the extension because of the existence of suburban carriers who are ineligible to furnish transportation within the area because of the absence of a franchise granted by the municipality to either of them. In re Application of Effenberger, *supra,* appropriately states: "That a direct service from these outlying districts to downtown Omaha on a faster schedule and without the necessity of transferring (or paying an additional fare) would be much more convenient for the users of the service must be conceded. * * * Competition which results in a duplicated service and a consequent reduction in revenue is economically wasteful and tends toward high fares and inefficient service."

The findings of the commission that ordinarily an application will not be granted when the operation of the proposed service will necessarily incur a loss to the applicant and that the operation of the proposed lines of travel in the annexed area will not in itself be profitable are not significant or a reason for denying the application of the Transit Co. It was bound by a franchise contract to operate adequate motor bus transportation where there was a public convenience and necessity to be served

in any part of the corporate limits of the city. The duty is imposed upon common carriers to provide service to all the public. This requires it to be furnished where it is unprofitable as well as where it is profitable. In re Application of Effenberger, *supra;* Dalton v. Kinney, *supra.* However, the operations of the Transit Co. may not be fragmentized as the commission has attempted in this instance. The operations of the Transit Co. must be considered as a unit in ascertaining whether or not they are profitable.

Appellees confidently assert that the Transit Co. has failed to legally establish that the authority it seeks to extend its service into the newly annexed area of the city is required by present or future public convenience and necessity. Implicit in the right of more than 7,000 residents of that area to have available to them the transportation of the Transit Co. of the same character furnished by it to the other residents of the city comparably situated is the existence of present and future public convenience and necessity. Additionally there is other substantial proof of that fact. Western Nebraska Express v. Pirnie, 159 Neb. 353, 67 N. W. 2d 342, states: "Public convenience and necessity may be found in operating economies and those things which contribute to expedition, public safety, efficiency, and convenience in operation. * * * The term public interest as used in the Motor Carrier Act of this state has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision for and the best use of transportation facilities."

The order of the commission denying the application of the Transit Co. was unreasonable and arbitrary. It should be and it is reversed and the cause is remanded to the commission.

REVERSED AND REMANDED.

JOSEPH L. PAVEL, APPELLANT, V. HUGHES BROTHERS, INC., A CORPORATION, APPELLEE.

94 N. W. 2d 492

Filed January 30, 1959. No. 34502.

1. **Workmen's Compensation.** The statute, section 48-141, R. R. S. 1943, authorizing a decrease or increase on the ground of incapacity due solely to the injury, limits the basis for the modification to that increase or decrease of incapacity which is due solely and only to that violence to the physical structure of the body which resulted from the accident, and which increase or decrease has occurred since the award was rendered.
2. ———. Upon an application to modify an award under the workmen's compensation statutes, the burden of proof rests upon the petitioner to establish by a preponderance of the evidence that the disability has increased, decreased, or terminated as alleged.
3. ———. A workman who is unable to perform or to obtain any substantial amount of labor, solely because of the accident and resulting injury, either in his particular line of work or in any other for which he is fitted, is totally disabled within the meaning of the workmen's compensation law.
4. ———. Disability under section 48-121, R. S. Supp., 1957, subdivisions (1) and (2), is defined by our statute in terms of employability and earning capacity rather than in terms of loss of bodily function.
5. **Appeal and Error.** The right of an appellee in an action to have reviewed a portion of a judgment or decree against him depends upon whether or not he has perfected a cross-appeal and has assigned error in relation thereto agreeable to the provisions of statute and the rules of this court.
6. **Workmen's Compensation.** 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.
7. ———. 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.
8. ———. The language of section 48-125, R. R. S. 1943, that "Whenever the employer refuses payment, or when the employer neglects to pay compensation for thirty days after injury, and proceedings are held before the compensation court, a reasonable attorney's fee shall be allowed the employee by the court,"

applies to the allowance of an attorney's fee in the compensation court.

9. ———. A petition to modify such an award cannot be used for the purpose of correcting judicial error, if any, in the original proceeding.

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

McKillip, Barth & Blevins, for appellant.

Norval Brothers and *Cline, Williams, Wright & Johnson,* for appellee.

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

SIMMONS, C. J.

This is a workmen's compensation case which plaintiff brings here for trial de novo under the established rules.

The trial court allowed compensation for temporary total disability up to March 20, 1957; it held that plaintiff had a 50 percent permanent partial disability to the body as a whole entitling him to compensation for a period of 239 weeks; it allowed certain medical expenses and denied others, and denied an attorney's fee; and it held that plaintiff's election to forego further surgery was reasonable.

On appeal here the defendant presents the contention that the original award of the compensation court was permanent and final, and subject only to a modification finding whether plaintiff's incapacity had decreased since the original award and, if so, then a determination of the extent of the disability due to the admitted accident and liability arising therefrom. We determine that contention adversely to the defendant.

Plaintiff contends here that the trial court erred in not finding that plaintiff was totally and permanently disabled; in disallowing certain medical expenses; and in disallowing the recovery of an attorney's fee.

We sustain these contentions, except as to the allowance of attorney's fee.

By the pleadings in the district court the defendant admitted the employment; the weekly wage; that plaintiff suffered an accident in the course of and arising out of the employment on January 10, 1956; and that it furnished medical and surgical services for two operations.

We take up first the contention advanced by the defendant. The transcript contains two awards of the compensation court. The first is the award of August 15, 1956. It, so far as important here, provided that if plaintiff desired surgery it should be performed within a period of 90 days from the date of the award; that defendant should pay the costs thereof; and that defendant should pay compensation at the rate of $30 per week until the plaintiff had recovered from such surgery, but in any event not to exceed the aggregate of 300 weeks. It further provided that if plaintiff should not have surgery performed within the 90-day period that then plaintiff should recover compensation at the rate of $6.37 a week, based on a 15 percent permanent partial disability for the balance of the 300 week period. In accord with section 48-141, R. R. S. 1943, it further provided that the award could be modified upon a showing of an increase or decrease of plaintiff's disability due solely to the injury.

The transcript also contains a modification of award order of the compensation court dated March 22, 1957. It recites that the matter came on for a modification of the award "on application of the defendant" filed March 2, 1957. The decree awarded the plaintiff $30 for one week temporary total disability from March 13, 1957 (the date of the hearing), and thereafter the sum of $8.49 per week for 239 weeks for a 20 percent permanent partial disability. It was further decreed that the award of August 15, 1956, was modified to conform to the award of March 22, 1957.

Defendant pleaded in the district court that it had tendered payments in accord with the modification award and at the trial offered evidence to that effect.

Defendant prayed that the award of August 15, 1956, be set aside and vacated and that it be discharged from further liability.

The appeal to the district court was under the procedure that provided for a trial de novo in that court.

Plaintiff pleaded the award of March 22, 1957, and alleged error in it. Defendant, by answer, admitted the award and pleaded that there had been a decrease of disability since the award of August 15, 1956; alleged that plaintiff was "not now" wholly disabled as a result of the accident; that plaintiff had had two separate operations for which it had paid; that plaintiff's disabilities resulted from congenital defects not related to the accident; that it had offered additional surgery which plaintiff refused; and that he had refused to follow medical advice designed to rehabilitate him.

It appears clearly then that the appeal to the district court and to this court rests essentially upon the modified award of March 22, 1957, which award rests on the application made by the defendant for a modification of the award of August 15, 1956.

The rule is: The statute, section 48-141, R. R. S. 1943, authorizing a decrease or increase on the ground of incapacity due solely to the injury, limits the basis for the modification to that increase or decrease of incapacity which is due solely and only to that violence to the physical structure of the body which resulted from the 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. See, also, Riedel v. Smith Baking Co., 150 Neb. 28, 33 N. W. 2d 287; Chadd v. Western Cas. & Sur. Co., 166 Neb. 483, 89 N. W. 2d 586.

In Chadd v. Western Cas. & Sur. Co., *supra,* we restated the rule that: "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." That rule was in accord with the fact situation, for there the plaintiff was the applicant for modification. However, in Riedel v. Smith Baking Co., *supra,* we held: "Upon an application to modify an award under the workmen's compensation statutes, the burden of proof rests upon the petitioner to establish by a preponderance of the evidence that the disability has increased, decreased, or terminated as alleged."

As a rule, then, the statement in Chadd v. Western Cas. & Sur. Co., *supra,* should refer to the applicant for a modification. Applied here, the defendant has the burden of establishing a decrease of incapacity and the plaintiff has the burden of showing an increase of incapacity under the limitation of the above rules.

It is patent that to give effect to these rules they must be held to include a change in the original award of amounts and period of compensation payments so as to be in accord with findings, if any, of an increase or decrease of incapacity.

There being no cross-appeal here, we are concerned only with the question of whether there has been an increase in disability since the award. We limit the evidence discussion to that question.

This brings us to the evidence here.

The findings of the award of August 15, 1956, were: "That on January 10, 1956, plaintiff was in the employ of the defendant as a laborer and while so employed and on said date and while engaged in the duties of such employment sustained an injury to his back as a result

of an accident arising out of and in the course of his employment by the defendant when, while moving some wooden planks he slipped and fell to the floor; that as a result of said accident and injury the plaintiff immediately became temporarily totally disabled and is still temporaily (sic) totally disabled and will continue to be temporarily totally disabled for an indefinate (sic) future period; that medical evidence indicates an operation to plaintiff's back is required to correct the painful condition existing in plaintiff's back."

The award further found, by inference at least, that plaintiff at that time had a temporary total disability, that if an operation were performed it decreed that he should receive an award based on a temporary total disability "until the plaintiff has recovered from such surgery and until temporary total disability ceases, but in any event not exceeding the aggregate of 300 weeks * * *."

The award did not undertake, in the event of an operation, to determine either the rate of disability or the compensation payable after "temporary total disability ceases." Of necessity that was a matter that depended on the results of an operation and was clearly left open for subsequent determination. This is made clear by the fact that the degree of disability and the amount of compensation was determined if no operation were had. An operation was had. No question is raised as to whether it was in compliance with the decree.

The question, then, is: Has his temporary total disability ceased and what is the extent of his disability following August 15, 1956?

This brings us to plaintiff's contention that the evidence shows that he is totally and permanently disabled from the compensable injury.

Plaintiff was an unmarried man, 50 years of age at the time of the accident, short of stature and obese. He had a seventh grade education. He had done farming in his younger years. For several years he had been

employed by defendant and performed heavy common labor. A few years before the accident here involved he had suffered a fall. This resulted in an operation removing the coccyx. It appears that recovery from that operation was satisfactory and that no condition resulted that hampered his ability to do hard common labor.

At the time of the accident plaintiff was working on an assembly line of a large oil tank where timbers were soaked in oil. The wooden planks were described as "8 by 12, 2 by 12, 4 by 12" and often were 40 feet in length. These planks came out of the oil vat onto a platform. Plaintiff and another employee, each at an end of a plank, picked them up and put them in piles. Plaintiff slipped and fell, and immediately suffered considerable pain.

On the following day he reported the accident to the defendant and was sent to a doctor. He was examined, X-rayed, and medicine was given. It stands undisputed in the record that the doctor told plaintiff he could do nothing more for him and that the defendant told him it would do no more.

Plaintiff then sought out and employed his own medical and surgical care. On February 3, 1956, he underwent surgery. A laminectomy of the fifth lumbar neural arch and a bilateral foramenotomy at the fifth lumbar interspace were carried out. At the time of the operation it was recognized that plaintiff had a spondylolisthesis Grade II with slipping of the fifth lumbar vertebral body forward on the first sacral segment. Plaintiff was advised to have a total laminectomy at the fifth lumbar neural arch with foramenotomy to decompress the nerve roots in an effort to relieve the pain radiating into the lower extremities. For medical reasons a spinal fusion could not be carried out at that time.

Following that operation plaintiff was unable to resume work of any kind and remained under medical care.

Such was plaintiff's condition when the award of August 15, 1956, was rendered making a finding of temporary total disability and giving the plaintiff an option to undergo further surgery. Plaintiff elected to receive additional surgery. On September 21, 1956, a spinal fusion from the fourth lumbar neural arch to the first sacral neural arch was performed. It was a "satisfactory procedure" surgically, but plaintiff's inability to work continued.

Following an examination by specialists on February 19, 1957, they questioned whether a fusion of the lumbosacral joint was effected, and reported lumbosacral strain with nerve root pressure and a "suspected pseudoarthrosis of lumbosacral fusion."

In March 1957, specialists reported (based on X-rays) that "Fusion not apparently complete between L4 and L5." That appears to have been the situation when the modification award of March 22, 1957, was made.

Plaintiff filed his petition on appeal in the district court on April 1, 1957. The matter was not brought to trial until March 17, 1958. In the intervening time plaintiff had been seeking further medical help.

In July 1957, plaintiff was examined by specialists of the Mayo Clinic. They felt that the patient "presented signs of root irritation," and found "evidence of a space-taking lesion in the canal at L-2 space." Surgery was recommended for this "at which time re-fusion of the spine should be done because of evidence of motion in all the lumbar segments."

On December 13, 1957, physicians in Omaha found a continuing lumbosacral region strain "with lumbar five and sacral one nerve pressure"; "a suspected pseudoarthrosis of lumbosacral fusion"; and "a suspicious mild spondylolisthesis" which "possibly * * * antedates his original injury" but which "may be aggravated by injury."

On December 17, 1957, plaintiff was examined by a specialist for the defendant. He found evidence of "a

region of pseudo-arthrosis" and definite motion of both the 4-5 and 5 sacral levels. He did not find evidence of a "true spondylolisthesis" although "degenerative osteoarthritic changes * * * sometimes gives rise to instability at the lumbosacral level, and susceptibility to strain." He further found that the removal of the posterior arch had no influence on his complaint of instability of his back. "Subsequent fusion has completely disintegrated, so that there is movement both the 4-5 level and the lumbosacral level." He found that no doubt this was a "source of considerable discomfort with any attempted heavy work." He recommended "a complete arthrodesis of this segment if possible."

Such was the evidence upon which the trial court found that the period of temporary total disability ended March 20, 1957; that he had at the time of the decree a 50 percent permanent partial disability to the body as a whole; and ordered compensation based thereon beginning March 20, 1957, and thereafter for a period of 239 weeks.

The opinions of the medical witnesses generally agree that plaintiff has a permanent disability. One of plaintiff's witnesses found "considerable disability for labor purposes" and estimated the disability at 50 percent permanent partial disability "of the body as a whole." This language is taken from a report made on December 16, 1957. However, in a report made May 21, 1957, he estimated "a 50% partial permanent disability on the orthopedic phases complicated by demonstrable neurological symptoms."

Defendant's expert witness stated in a written report of December 18, 1957, that the plaintiff was "disabled from any heavy work" and "insofar as moderately heavy work is concerned" he estimated the disability at 30 percent to 35 percent. He further stated that in the event of successful subsequent operation procedures the disability "should be reduced to about 20%." He confirmed this on direct examination as a witness. On

cross-examination he related this estimate to the condition that further surgery for a fusion would result in "solid stabilization."

In Miller v. Peterson, 165 Neb. 344, 85 N. W. 2d 700, we restated the established rule that "a workman who is unable to perform or to obtain any substantial amount of labor, solely because of the accident and resulting injury, either in his particular line of work or in any other for which he is fitted, is totally disabled within the meaning of the workmen's compensation law."

In Miller v. Peterson, *supra,* we had occasion to examine a contention that a court should hesitate to refuse to accept the findings of the medical experts as to the extent of the disability. We held that: "There seems to be an assumption that the ratio of functional loss, or loss from the medical viewpoint, is the same as loss of earning capacity or wage loss. If this were so it would be quite immaterial in what occupation an injured workman was engaged and to what extent he was unable to perform it or similar work because of his injury. Disability under subdivisions (1) and (2) of section 48-121, R. S. Supp., 1953, refers to loss of earning capacity and not to functional or medical loss alone." By quotation from Castle v. City of Stillwater, 235 Minn. 502, 51 N. W. 2d 370, we approved this language: "Thus, in defining total disability, losses in bodily function are not important in themselves, but are only important insofar as they relate to ability to earn an income."

What, then, is the evidence as to plaintiff's ability to perform labor and to earn an income in his particular line of work or in any other for which he is fitted?

The plaintiff, so far as adult occupation is concerned, has always engaged in common labor requiring the use of strong physical effort. He was engaged in that kind of labor for defendant. It does not appear that by education, training, or ability he is able to do anything else. Plaintiff's physician, a general practitioner, testified that "he is unable to perform what is usually termed com-

mon labor." Defendant's expert witness, in his written report of December 18, 1957, stated that plaintiff "is disabled from any heavy work." He made an estimate as to "moderately heavy work" and added "he could carry out duties of a sedentary or light nature, probably utilizing a brace support." He testified on cross-examination that: "I don't think a man like that should do 100 pound lifting." On redirect examination he testified that plaintiff could do lifting of "25, 30 pounds" and such work as farm work, welding, custodial work, "and things of that kind."

Based on the reasoning and conclusion of that case we hold that plaintiff has a permanent total disability, following temporary total disability; that he is entitled to compensation based thereon; and that the trial court erred in not so finding and decreeing. See, also, Haler v. Gering Bean Co., 163 Neb. 748, 81 N. W. 2d 152. In Elliott v. Gooch Feed Mill Co., 147 Neb. 309, 23 N. W. 2d 262, in the course of the opinion we said: "The plaintiff in the case at bar is an unskilled, or common, laborer. It has been shown that he can work, if at all, at the lightest kind of common labor, such as sitting down, with no heavy lifting. He is, therefore, what is called an 'odd lot' man, the nondescript in the labor market, with which industry has little patience, and rarely hires. Work, if he finds any that he can do, is casual and intermittent. He is utterly unable to do the work he did before this accident. Under these facts, we think we are justified in finding that in his present handicapped condition he is entitled to an award for total disability under the Nebraska Compensation Act."

This brings us to the contention that the trial court erred in not allowing certain medical expenses.

In the original award of August 15, 1956, it was provided that if the plaintiff elected to have further surgery that the reasonable costs thereof should be paid by the defendant. A like provision was in the modification award of March 22, 1957.

Plaintiff offered, and there was received in evidence, exhibits showing bills of doctors and institutions incurred subsequent to the second operation. The objection was that they were for charges for which the defendant was not responsible. The trial court allowed certain of the bills and disallowed others.

Defendant here argues that certain of the bills, which the trial court allowed, were not properly chargeable to it. Defendant does not cross-appeal. It asks here for affirmance of the judgment of the trial court. Under these circumstances we apply the rule that: "The right of an appellee in an action to have reviewed a portion of a judgment or decree against him depends upon whether or not he has perfected a cross-appeal and has assigned error in relation thereto agreeable to the provisions of statute and the rules of this court." Bastian v. Weber, 150 Neb. 709, 35 N. W. 2d 791.

The bill in dispute is that of the Mayo Clinic, as follows:

"Laboratory tests	$ 44.00
X-rays: chest, shoulder, cervical spine 2 lumbar spine, thoracic spine	94.00
Eye ophthalmoscopy	10.00
Neurology examination	25.00
Psychiatric examination	20.00
General examination and consultations	60.00
TOTAL	$253.00"

The trial court disallowed the item for laboratory tests, $44; allowed the bill for 4 X-rays of spine, $62.64, and disallowed the balance of $31.36; disallowed the eye ophthalmoscopy, $10; disallowed the psychriatric examination, $20; and disallowed two-thirds of the general examination and consultation examination, $40. The total of the disallowed items was $145.36.

No showing appears here as to the reason for the disallowance of these items in whole or in part. Defendant argues that there was nothing to show that they were necessary in connection with defendant's

treatment. The question of a third surgical operation was pending when the Mayo examination was made. It is obvious that the examination was made to eliminate as well as to determine causes of plaintiff's continued disability.

It may be pointed out that Dr. Gogela examined and reported on "cranial nerves"; eyes; "motor testing" for muscular weakness over the body; "sensory testing"; tests of plaintiff's arms and legs; and an "ophthalmoscopic examination." Dr. Webster, defendant's specialist, examined and reported on a general physical examination in which he excluded certain conditions as causative of plaintiff's disability.

We do not cite these other examinations on any theory of estoppel of the defendant, but rather to show that the physicians involved saw fit to examine to eliminate possible causes in order that they might arrive at an opinion as to causes. Plaintiff testified that he spent $55 for the trip to the Mayo Clinic. This expense was not allowed.

In Newberry v. Youngs, 163 Neb. 397, 80 N. W. 2d 165, we stated this rule: "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."

In Crable v. Great Western Sugar Co., 166 Neb. 795, 90 N. W. 2d 805, we restated this rule: " '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. * * * 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.' "

The holding must necessarily be that the Mayo Clinic bill should have been allowed in its entirety.

The travel expenses of $55 also should have been allowed under the reasoning in the Crable case that: "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."

Plaintiff further assigns as error the failure to allow an attorney's fee. He relies on the provision of section 48-125, R. R. S. 1943, that: "Whenever the employer refuses payment, or when the employer neglects to pay compensation for thirty days after injury, and proceedings are held before the compensation court, a reasonable attorney's fee shall be allowed the employee by the court."

We held in Werner v. Nebraska Power Co., 149 Neb. 408, 31 N. W. 2d 315, that the language above applied to the allowance of an attorney's fee in the compensation court. The record shows that the doctor, to whom defendant sent the plaintiff immediately after the injury, examined him, took X-rays, gave plaintiff some pills, and dismissed him. Plaintiff advised the defendant of that situation and defendant told him: "The company is through with you," and that they would not send him to any more doctors. Medically, thereafter, plaintiff was compelled to look to his own resources.

It appears, also, that defendant paid plaintiff compensation at the rate of $30 per week for some time.

On June 23, 1956, defendant wrote the plaintiff: "We feel we have paid you ample Compensation for your back injury, and are stopping the payments." Thereafter plaintiff filed his petition in the compensation court. This evidence would be ample to sustain a finding by the compensation court that defendant had "refused payment" of compensation, and to have sustained an award of attorney's fee in the compensation court. However, it does not appear that plaintiff sought such an allowance there, at or before the time of the award of August 15, 1956. Such an issue is not mentioned so far as this record discloses. It does appear that plaintiff in his petition on appeal alleged error in the modification award "for failure to allow plaintiff's attorney fees." He prayed for an additional award of attorneys' fees. The allowance of attorney's fee for the reason here given was within the power of the compensation court at the time the first award was made. It was not done. The application now comes too late under the rule that: "A petition to modify such an award cannot be used for the purpose of correcting judicial error, if any, in the original proceeding." Ludwickson v. Central States Electric Co., *supra*.

Accordingly the trial court did not err in not allowing the attorney's fee which plaintiff sought there.

The judgment of the trial court is reversed and the cause remanded with directions to render an award in accord with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

WILBUR L. VAN PATTEN ET AL., APPELLEES, V. CITY OF OMAHA, A MUNICIPAL CORPORATION, APPELLANT.
94 N. W. 2d 664

Filed February 6, 1959. No. 34388.

1. **Eminent Domain.** The procedure in condemnation is a matter of state-wide concern.

2. **Municipal Corporations.** When the Legislature has enacted a law affecting municipal affairs, but which are also of state-wide concern, such law takes precedence over any provisions in a home rule charter and the provisions of the charter must yield.
3. **Eminent Domain.** Eminent domain is the right or power to take private property for a public use.
4. ———. While this power may be delegated, it belongs to the state, is subject to its control and regulation, and is a matter of state concern.
5. ———. Condemnation is the procedure whereby this power is exercised.
6. ———. Since the power of eminent domain is an attribute of sovereignty and inherent in the state, only those agencies to whom the Legislature has delegated the power can exercise such right and it must be exercised only on the occasion, in the mode or manner, and by the agency prescribed by the Legislature.
7. **Municipal Corporations.** Section 14-373, R. R. S. 1943, provides that the city planning commission shall acquire or prepare a city plan and shall have power to carry out and maintain said city plan after its adoption by the city council. The section is limited to a "city plan," after its "adoption by the city council."
8. ———. Until the city plan is adopted by the city council, the planning commission is advisory to the city council, and the efficacy of its city plan depends on its being adopted by the city council.
9. ———. Neither section 14-373, R. R. S. 1943, nor section 14-374, R. R. S. 1943, places any requirement as to the time that may elapse between the preparing of the plan and its adoption by the council on the recommendation of the city planning commission, and action by the city council in implementing the plan.
10. ———. Section 14-374, R. R. S. 1943, applies to action within the provisions of the city plan of the planning commission that has been adopted by the city council.
11. ———. The recommendation provision of the city planning commission as stated in section 14-374, R. R. S. 1943, relates itself to the "shall have power to carry out" clause in section 14-373, R. R. S. 1943.
12. ———. The act does not directly refer to any other procedure of the planning commission for that purpose.
13. ———. The primary purpose of the recommendation provision of section 14-374, R. R. S. 1943, is not for the protection of the landowner, for it relates not only to the unwilling condemnee but also to the generous donor and the willing vendor of real property.
14. **Statutes.** It is the duty of the court, so far as practicable, to

give effect to the language of a statute and to reconcile the different provisions of it so they are consistent, harmonious, and sensible.

15. **Municipal Corporations: Eminent Domain.** Section 14-374, R. R. S. 1943, has applicability only to those condemnations within the provisions of a city plan that has been acquired or prepared by the city planning commission and which has been adopted by the city council as provided in section 14-373, R. R. S. 1943.
16. **Eminent Domain.** The power of eminent domain may be delegated by the Legislature, but because it is a sovereign power the Legislature cannot divest itself of the power or deprive itself of the right to repossess or reclaim its primary prerogative to exercise the power as it sees fit within the limitations contained in the Constitution.
17. **Municipal Corporations.** Reid v. City of Omaha, 150 Neb. 286, 34 N. W. 2d 375, and Ash v. City of Omaha, 152 Neb. 393, 41 N. W. 2d 386, considered and reconciled.

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

Herbert M. Fitle, Bernard E. Vinardi, Irving B. Epstein, Frederick A. Brown, and *Donald H. Erickson,* for appellant.

Gaines, Spittler & Moore, for appellees.

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

SIMMONS, C. J.

This is an action in condemnation brought by the city of Omaha. Wilbur L. and Phyllis L. Van Patten were the owners of the property when the proceedings began. The appeal here involves the correctness of a summary judgment granted by the trial court holding that the proceedings in condemnation were null and void. The city appeals.

This cause was argued and submitted to the court on June 4, 1958. On July 2, 1958, we set the cause down for reargument. We requested briefs on the question of the applicability of section 14-366, R. S. Supp., 1957, to the issue presented, and whether or not the

"upon recommendation" clause of section 14-374, R. R. S. 1943, applies also to the exercise of the powers granted by section 14-366, R. S. Supp., 1957. Briefs were filed. Reargument was had on September 16, 1958.

We reverse the judgment of the trial court and remand the cause for further proceedings.

We state the procedural and factual situation presented to the extent required to reach a decision in the matter.

On July 27, 1955, the city filed its petition in condemnation, describing three tracts of land all in Block 93, Original City of Omaha, and naming the Van Pattens as record owners and "joint tenants." The petition recited and attached ordinances of condemnation declaring the necessity of acquiring the property for street purposes from Tenth and Dodge Streets to Ninth Street and Capitol Avenue.

The county court appointed appraisers. The appraisers reported their proceedings and awarded damages.

The Van Pattens filed a motion to set aside the order appointing appraisers and the subsequent proceedings on the ground that two of the appraisers were not disinterested freeholders as required by section 76-706, R. S. Supp., 1953; for the further reason that two of the three tracts were not being appropriated for purposes authorized by statute; and for the further reason that as to one tract the proceedings were not in accord with section 14-366 to section 14-372, inclusive, R. R. S. 1943. In the alternative they moved for a dismissal of the proceedings. This motion was overruled.

The Van Pattens then appealed to the district court.

The Van Pattens, hereinafter called the plaintiffs, then filed their petition on appeal on December 28, 1955. In it they alleged and prayed for damages in the sum of $175,000 or that the proceedings be dismissed. In the petition they alleged that the proceedings were defective because (1) the appraisers were not qualified as required by law; (2) part of the property was not being

taken for public use; (3) the city had failed to enact the necessary ordinances; and (4) the county court in overruling the motion above set out had acted erroneously.

Pursuant to an order to make more definite and certain, the petition was amended but in matters not now important.

The city answered making certain admissions and, so far as important here, denying generally.

Plaintiffs then on June 11, 1956, filed a motion for summary judgment on the ground that the appraisers were not disinterested freeholders, and alleging a defect in the condemnation ordinance as to one tract. This motion was overruled July 23, 1956. It is not the motion directly involved in this appeal.

On September 18, 1957, the plaintiffs filed a motion to permit an amendment to the allegations of their petition that the condemnation proceedings were defective alleging that: "No recommendation of the City Planning Commission has been given or obtained, as required by R. R. S. 1943, 14-374."

On October 9, 1957, plaintiffs filed a motion for summary judgment on the ground that the condemnation proceedings were void because of failure to meet the requirements of section 14-374, R. R. S. 1943. This motion was supported by affidavit of plaintiffs' counsel. They moved for a dismissal of the proceedings. This is the motion directly involved in this appeal.

On October 11, 1957, the court sustained the motion to amend, which was done by interlineation.

Hearings on the motion for summary judgment began on October 29, 1957. On November 8, 1957, an additional affidavit was filed by the plaintiffs. The city on November 21, 1957, filed an affidavit as to the minutes of the Omaha Improvement Commission showing approval of the construction of the street through the property here involved.

On November 22, 1957, the trial court sustained the

motion for summary judgment on the ground that at no time had the city planning commission given its recommendation for such condemnation as required by section 14-374, R. R. S. 1943. It declared the proceedings null and void. The city filed a motion for a new trial which was overruled on December 4, 1957. The cause was appealed and the transcript filed here on January 14, 1958.

The evidence of the plaintiffs to sustain their position went generally to that of their attorney, the deputy city clerk, the secretary of the planning commission, and another witness that they had searched the records and could find no record of any recommendation of the city planning commission for the acquisition of the property here involved. Admittedly some of this evidence was limited as to scope in time covered and extent of search. The city's evidence went to the introduction of a charter amendment showing the creation of the Omaha Improvement Commission and the contention that it repealed the provisions of section 14-374, R. R. S. 1943, and that the Omaha Improvement Commission had given its approval.

On January 24, 1958, during term time, the city filed a motion to set aside the summary judgment and for a new trial on the ground of newly discovered evidence to the effect that the city planning commission had in fact on December 15, 1948, approved the construction of a major street plan which included the property here in question. Hearing was had on this motion. The city offered evidence to the effect that the city planning commission had approved a limited access highway beginning at Tenth Street and Capitol Avenue and running thence generally north for some distance to the airport. However, as admitted by the city at the hearing, the highway as approved stopped "a block short of the property in question." The court overruled this motion.

The supplemental transcript was filed here on March 7, 1958.

The parties here extensively brief many questions of

both adjective and substantive law. The importance of the basic issue here is such that we invoke the rule that we may at our option notice plain errors not assigned. Rule 8a2(4), Revised Rules of the Supreme Court.

In the pleadings and the briefs reference is made to the state statutes, with the exception of the evidence having to do with the Omaha Improvement Commission where the charter amendment is in evidence.

In 1922 the city of Omaha adopted as its home rule charter, Chapter 116, Laws 1921, in toto, under the provisions of Article XI, section 5, of the Constitution of Nebraska. See Papke v. City of Omaha, 152 Neb. 491, 41 N. W. 2d 751. As will be pointed out, this chapter included the statutory provisions to be presently considered. Threaded through the argument here is the assumption that the home rule charter controls, although as such it is not in this record and we have no way of determining its provisions as they existed at the time here involved.

In Nagle v. City of Grand Island, 144 Neb. 67, 12 N. W. 2d 540, we held that the procedure in condemnation is a matter of state-wide concern: "When the legislature has enacted a law affecting municipal affairs, but which are also of state-wide concern, such law takes precedence over any provisions in a home rule charter and the provisions of the charter must yield. * * * Eminent domain is the right or power to take private property for a public use. It belongs to the state and it may be exercised either directly by the legislature or through the medium of corporate bodies, which includes municipalities, or of individual enterprises to whom it sees fit to delegate such power in the public's interest. While this power may be delegated, it belongs to the state and subject to its control and regulation and is a matter of state concern. Condemnation is the procedure whereby this power is exercised. The exercise thereof may affect every property owner of the state in the matter

of his property being taken for a public purpose and fixing the compensation he is to receive therefor.

"Uniformity of this procedure, since it may affect every person in the matter of the ownership of his property and the compensation he is to receive, is a matter of state-wide concern and not of strictly municipal or local concern."

In State ex rel. Nelson v. Butler, 145 Neb. 638, 17 N. W. 2d 683, we held that: "* * * since the power of eminent domain is an attribute of sovereignty and inherent in the state, only those agencies to whom the legislature has delegated the power can exercise such right and it must be exercised only on the occasion, in the mode or manner, and by the agency prescribed by the legislature."

In Spencer v. Village of Wallace, 153 Neb. 536, 45 N. W. 2d 473, we held that: "* * * condemnation is a matter of state concern and in all cities of the first class the procedure therefor must be uniform and charter provisions must give way to the general laws governing it." See, also, State ex rel. Martin v. Cunningham, 158 Neb. 708, 64 N. W. 2d 465; Omaha Parking Authority v. City of Omaha, 163 Neb. 97, 77 N. W. 2d 862.

Obviously we are dealing here with a matter of state-wide concern. The statutes control.

We go to the question as to whether or not plaintiffs are entitled to judgment as a matter of law under the provisions of section 25-1332, R. R. S. 1943.

Section 14-373, R. R. S. 1943, provides in part: "In each city of the metropolitan class there shall be a board known as a city planning commission. Said commission shall acquire or prepare a city plan and shall have power to carry out and maintain said city plan after its adoption by the city council."

Section 14-374, R. R. S. 1943, upon which plaintiffs rely, provides in part: "Each city of the metropolitan class acting through its council upon recommendation of such city planning commission shall have the power

to acquire by gift, purchase or condemnation, real estate for establishing, laying out and enlarging, waterways, streets, bridges, boulevards, parkways, parks, playgrounds, sites for public buildings, and property for administrative, institutional, educational, and all other public uses, for reservations in and about and along and leading to any or all of the same."

Section 14-373, R. R. S. 1943, provides that the city planning commission shall acquire or prepare a city plan and shall have power to carry out and maintain said city plan after its adoption by the city council. The section is limited to a "city plan" after its "adoption by the city council." Obviously until the plan is adopted, the planning commission is advisory to the city council, and the efficacy of its city plan depends on its being adopted by the city council. Such is the plain language of the act.

Neither section 14-373, R. R. S. 1943, nor section 14-374, R. R. S. 1943, places any requirement as to the time that may elapse between the preparing of the plan and its adoption by the council on the recommendation of the city planning commission, and action by the city council in implementing the plan.

It is patent that section 14-374, R. R. S. 1943, applies to an action within the provisions of the city plan of the planning commission that has been adopted by the city council for it is given authority only as to the city plan. The recommendation provision of the city planning commission as stated in section 14-374, R. R. S. 1943, relates itself to the "shall have power to carry out" clause in section 14-373, R. R. S. 1943. That is its obvious primary purpose for the act does not directly refer to any other procedure of the planning commission for that purpose. It is also patent that the primary purpose of the recommendation provision of section 14-374, R. R. S. 1943, is not for the protection of the landowner, for it relates not only to the unwilling condemnee but also to

the generous donor and the willing vendor of real property.

It should be noted that this record contains no showing as to a city plan and no showing as to the adoption of the city plan by the council save the segmented portion relating to the arterial highway here involved.

We do not deem it necessary to decide whether the approval of the city planning commission was sufficient to meet the "recommendation" provision of section 14-374, R. R. S. 1943.

If, as plaintiffs contend, the land here involved is not within the provisions of the city plan as approved by the planning commission (assuming that there was such a plan which had been adopted by the city council), then plaintiffs are not entitled to judgment as a matter of law unless the provisions of section 14-374, R. R. S. 1943, apply to all powers of condemnation of real estate for the establishment of streets. This, however, as we point out would be a conclusion contrary to the plain purpose of the two sections when construed together.

Section 14-366, R. R. S. 1943, as originally enacted, provided in part: "The city council may purchase or acquire by the exercise of the power of eminent domain private property or public property which is not at the time devoted to a specific public use, for the following purposes and uses: (1) For streets, alleys, avenues, parks, parkways, playgrounds, boulevards, sewers, public squares, market places, and for other needed public uses or purposes authorized by this act, and for adding to, enlarging, widening or extending of any of the foregoing; * * *."

This is a general, broad grant of power. It was enacted in 1921 as a part of the same section, article, and chapter which included what are now sections 14-373 and 14-374, R. R. S. 1943. See Laws 1921, c. 116, Art. III, §§ 57, 57a, 57b, pp. 457, 460, 461.

The established applicable rule is: It is the duty of the court, so far as practicable, to give effect to the lan-

guage of a statute and to reconcile the different provisions of it so they are consistent, harmonious, and sensible. State v. Luttrell, 159 Neb. 641, 68 N. W. 2d 332.

Applying this rule here we necessarily conclude that section 14-374, R. R. S. 1943, has applicability only to those condemnations within the provisions of a city plan that has been acquired or prepared by the city planning commission and which has been adopted by the city council as provided in section 14-373, R. R. S. 1943.

This conclusion is fortified by the fact that the 1955 Legislature amended section 14-366, R. R. S. 1943, so as to extend the scope of the eminent domain powers granted by it. See Laws 1955, c. 21, § 2, p. 99, now § 14-366, R. S. Supp., 1957.

This amendment constitutes the latest expression of the legislative will. See Ledwith v. Bankers Life Ins. Co., 156 Neb. 107, 54 N. W. 2d 409. It brings the statute within the rule that the power of eminent domain may be delegated by the Legislature, but because it is a sovereign power the Legislature cannot divest itself of the power or deprive itself of the right to repossess or reclaim its primary prerogative to exercise the power as it sees fit within the limitations contained in the Constitution. State ex rel. Nelson v. Butler, *supra.*

It should also be pointed out that both as originally enacted (section 14-366, R. R. S. 1943), and as amended (section 14-366, R. S. Supp., 1957), the section specifically granted power to the city council to purchase or acquire by condemnation real property for the purpose of "extending" streets. Here the city was proceeding for the precise purpose of "extending" for a distance of one block the arterial highway to the airport. It was proceeding exactly and fully within the statutory grant of power contained in section 14-366, R. S. Supp., 1957.

Plaintiffs here place great reliance on our decision in Reid v. City of Omaha, 150 Neb. 286, 34 N. W. 2d 375, and contend that we there decided that condemnation for the purpose and under the circumstances here involved

must be made by the city council upon recommendation of the planning commission, and that the condemnation is invalid unless this requirement is satisfied.

The city cites Ash v. City of Omaha, 152 Neb. 393, 41 N. W. 2d 386. It contends that the two cases must be read together, and that when that is done they support the contentions of the city.

Reid v. City of Omaha, *supra,* came here on a general demurrer to plaintiffs' petition, presenting the question of whether a cause of action was stated.

It is to be remembered that section 14-366, R. S. Supp., 1957, specifically grants the power to acquire by "purchase" or "by the exercise of the power of eminent domain." Section 14-374, R. R. S. 1943, specifically grants the power to acquire "by gift, purchase or condemnation." That distinction must be kept in mind. In the opinion we said that plaintiffs' petition alleges "if said amount could be considered to be a gift, it became the duty of the city council to submit the matter to the planning commission of the city for its recommendation, as required by section 14-374, R. S. 1943." Later the opinion recites that the petition alleged that the tract of land was acquired by purchase and that no declaration of a gift to the city appeared in the petition. We then held: "Plaintiffs' petition alleges that the foregoing statutory provisions were not complied with and were violated, even assuming the amount contributed be considered to be a gift. The petition alleges that the matter was not submitted to the city planning commission, nor was its recommendation received. It is apparent the plaintiffs' petition states a cause of action in such respect." Reid v. City of Omaha, *supra.*

Plaintiffs contend that we there held that the recommendation of the city planning commission was required without regard to whether the city planning commission had acquired or prepared a plan involving the acquiring of the land there involved for park purposes

which had been adopted by the city council as specified in section 14-373, R. R. S. 1943.

The opinion is silent with reference to whether there was such a plan so adopted by the city council. The fact that it is not involved in the recital of allegations would indicate that it was not stressed as a matter for consideration.

Plaintiffs' premise could be correct if the Reid case alone is to be considered. However, the premise upon which plaintiffs rely disappears when Ash v. City of Omaha, *supra,* is considered. This opinion involves Reid v. City of Omaha, *supra,* after issues were made and trial was had.

We there pointed out that the city planning commission had approved and published a plan for the development of the land involved for playground and recreational purposes with a proviso not important here. The city council adopted the recommendation of the city planning commission. We held that the recommendation of the city planning commission was sufficient to meet the requirements of the city charter with reference to acquiring the land as a gift for park and playground purposes.

We restated our holding in Reid v. City of Omaha, *supra,* but conditioned its application to the obtaining of the recommendation of the city planning commission in those cases where there had been a city plan involving the precise project which had been adopted by the city council.

It is clear from both opinions that we were there dealing with a situation where there had been a city plan prepared by the city planning commission and adopted by the city council.

So construed the decisions in Reid v. City of Omaha, *supra,* and Ash v. City of Omaha, *supra,* are in harmony with our holding in the instant case.

It necessarily follows that the plaintiffs were not entitled to a judgment as a matter of law on the record

here made, and that the trial court erred in sustaining the motion for a summary judgment and in its rulings on the motion for a summary judgment, and on the motion for a new trial.

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

REVERSED AND REMANDED.

JOSEPH BEZDEK, APPELLANT, V. KENNETH PATRICK, APPELLEE.

94 N. W. 2d 482

Filed February 6, 1959. No. 34459.

1. **Automobiles.** A motorist entering an intersection from the right is in a favored position and has the right-of-way, other things being equal, but such fact does not relieve the driver of the favored automobile of the duty to exercise ordinary care to avoid an accident.
2. ———. It is the duty of the driver of an automobile when approaching an intersection to look for other automobiles approaching and to see those within the radius which denotes the limit of danger.
3. ———. The failure of the driver of an automobile upon approaching an intersection to look in the direction from which another automobile is approaching where, by looking, he could see and avoid a collision that resulted, is more than slight negligence, as a matter of law, and defeats recovery by him.
4. **Trial.** A trial court should eliminate immaterial and superfluous matters and submit to the jury by instructions only matters properly to be decided by it in arriving at its verdict.
5. **Negligence.** The words "slight" and "gross" as employed in the comparative negligence act of this state are comparative terms. The test the statute provides is not based upon absolute degree of negligence but rather upon a comparative test of the relative degrees of negligence between the parties. The negligence of the plaintiff or defendant is not to be evaluated as slight, gross, or otherwise, standing alone. The criterion by which the degree of negligence of plaintiff is to be measured is the extent thereof by comparison with the negligence of defendant.
6. **Appeal and Error.** It is error for the district court to include

in instructions to the jury allegations of fact made in a pleading in the cause which are without evidence tending to establish them.

7. **Negligence.** If a defendant is guilty of negligence as a matter of law and if it can be found that the plaintiff is guilty of only slight negligence under the circumstances of the case, the issue as to whether or not the negligence of defendant is gross in comparison therewith is a factual one for determination by the jury.

8. **Automobiles.** If the driver of an automobile approaching a favored street stops, looks, and sees an approaching vehicle on the favored street but incorrectly judges its speed or distance or for some other reason believes he can safely proceed and not experience a collision, the question of whether or not his conduct in proceeding into and attempting to cross the favored street constitutes contributory negligence is generally an issue of fact for the jury to determine.

9. ———. The requirement that the operator of an automobile stop before entering upon a favored street protected by stop signs does not grant exclusive privilege to travelers on the favored street or require those crossing it to do so at their peril, regardless of the duty of motorists on all public highways to obey traffic regulations and exercise due care to protect the rights of others.

10. ———. If a motorist on a nonfavored street stops at an intersection with a favored street when the intersection is clear of traffic and looks for approaching vehicles, acting as a reasonably prudent person in the exercise of due care would act in the belief that he has time and opportunity to safely cross, he is not liable for negligence because he attempts to do so.

11. ———. Before one entering an intersection protected by a stop sign can be held negligent, no statutory violation being shown, it must appear that the approaching motor vehicle was at a point which, after considering its speed, indicated it was within the limit of danger and that to proceed would be imprudent.

12. **Automobiles: Trial.** In the trial of an action concerning a collision of a truck and an automobile on an intersection of a favored street and a nonfavored street which involves issues of negligence and contributory negligence, the jury should be fully and precisely instructed as to the relative and reciprocal rights and duties of the operators of the motor vehicles in entering and using the intersection.

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

Mathews, Kelley & Stone and *Martin A. Cannon,* for appellant.

Crawford, Garvey, Comstock & Nye, for appellee.

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

BOSLAUGH, J.

Appellant for cause of action asserts he was on August 1, 1954, operating his automobile south on Sixtieth Street in Douglas County near the intersection of that street with L Street. He stopped at a stop sign and thereafter proceeded into the intersection. Appellee was then operating a stock truck east on L Street and was about 400 feet west of the intersection. Appellant traveled into the intersection and as he was leaving it to the south his automobile was struck with great force on its right side by the truck of appellee. The automobile of appellant was thrown to the east and north approximately 100 feet. Thereby the person of appellant was caused severe and painful injuries resulting in permanent disability of appellant and his automobile was damaged. The collision of the vehicles, the injuries, and the damage were proximately caused by the negligence of appellee because of his failure to keep a proper lookout for traffic; failure to have his truck under control; failure to grant the right-of-way to appellant; failure to apply the brakes of his truck in time to avoid a collision which he could have done; failure to do anything to avoid a collision and the injuries and damage to appellant when he saw or should have seen appellant in a position of peril; and because he operated his truck at a dangerous and unlawful speed under the circumstances of 60 miles per hour.

The answer of appellee was a denial of the claims of appellant and a plea that the contributory negligence of appellant in a degree more than slight was the cause of the collision. Appellee also interposed a counterclaim

in proper form for the damage to and the cost of necessary repairs to his truck caused and required, as appellee asserted, by the negligence of appellant consisting of his failure to yield the right-of-way to appellee, failure to have his automobile under control, failure to keep a proper lookout, failure to apply his brakes before the collision, and entering the intersection when there was an approaching vehicle near it and appellant knew or should have known that a collision would probably result. Appellee sought the dismissal of the claims of appellant and a recovery from him of the damages claimed by appellee. The reply of appellant denied the new matter in the pleading of appellee and appellant asserted that any damage alleged by appellee was the proximate result of his contributory negligence.

The result of the trial of the issues was a verdict for appellee on the cause of action alleged by appellant and for appellant on the counterclaim of appellee. The motion for a new trial made by appellant was overruled and a judgment was rendered denying any recovery to either of the parties.

Appellant drove his 1950 Studebaker automobile south on L Street to the stop sign on the west side of that street and north of Sixtieth Street. He stopped a short distance ahead of the sign. He looked east, south, and west. There was a service station west of the stop sign. He looked southwest on L Street as far as he had vision. He saw no vehicle approaching the intersection. He moved to the south an estimated distance of some 10 feet, looked to the west, and saw the truck coming toward the east on Sixtieth Street at least 350 feet west of the intersection at a location spoken of as a low place. He thought it would be safe for him to proceed into and across the intersection. He put his automobile in motion. He experienced difficulty when he attempted to shift from low gear to second gear and his efforts were unsuccessful. He was then going 3 to 5 miles per hour and was losing speed. He then put

the automobile in low gear. He again looked to the west; saw the truck far enough away, he thought, to permit him to safely continue across the intersection; and he attempted to do so at a speed of 3 to 10 miles per hour. The truck of appellee collided with the automobile of appellant south and slightly west of the center of the intersection. There was debris found by a member of the Safety Patrol who investigated the accident 7 feet 5 inches south and 3 feet 3 inches west of the center point of the intersection. The truck collided with the automobile of appellant on the right side from about the front wheel back to the front part of the door. The front of the automobile was not injured.

Sixtieth Street was 18 feet wide. L Street west of the intersection was 20 feet wide and east of the west line of the intersection it was 42 feet wide. The lines of the streets at the northwest boundary of the intersection were not at a right angle. They bounded a curve which commenced 50 feet west of the point which would have been the northwest corner of the intersection if the north line of L Street had been extended east to where it would have intersected the west line of Sixtieth Street if it had been extended south and continued to a point 44 feet north of the point above mentioned to the west line of Sixtieth Street. The south wall of the service station building was 34 feet north of the north line of L Street if extended east to the west line of Sixtieth Street and the stop sign was 44 feet north of the north line of L Street. There was no obstruction to the vision of anyone traveling east on L Street towards the intersection or of any vehicle on or approaching it after the vehicle was south of the south wall of the service station. There was a highway warning sign a considerable distance west of the intersection and south of Sixtieth Street. It exhibited the words: "Reduced Speed Zone, Congested Area." There was a sign to reduce speed to 45 miles per hour between the first sign and the intersection. The street

from the west to near the intersection was quite level but from there to the east there was a rather abrupt incline to the top of a hill a considerable distance to the east. Appellee was familiar with the streets, the intersection, and its surroundings.

Appellee, as he approached the intersection in the daytime between 4:30 and 5 o'clock in the afternoon of August 1, 1954, operated his loaded truck, according to his testimony, at a speed of 40 miles per hour without looking for traffic near or on the intersection until his truck collided with the automobile of appellant. Appellee testified he did not see the automobile of appellant until a moment before the collision.

The automobile of appellant because of the collision, as it was expressed by appellee, bounced off to the left. The rear of it was after the accident 53 feet east and about 11 feet north of the center of the intersection and the automobile was in the outside or north lane of L Street facing northeast. The truck continued directly east, after the collision, in L Street up the incline for 207 feet. Appellant testified the speed of the truck was about 60 miles per hour. The distance appellant traveled, according to the record, was about 54 feet while appellee traveled at least 350 feet. Appellee testified that he could have seen the automobile of appellant at any time after it was south of the south edge of the service station; that if he had seen appellant in the intersection, appellee could and would have reduced the speed of his truck and there would have been no collision of the vehicles; and that appellee had no explanation why he did not see appellant as he came to and traveled south in the intersection.

Appellee as he approached and entered the intersection did no act and made no observation of the situation therein for his protection or for the safety of anyone using the intersection. He did not have or maintain a lookout, he did not have his truck under control, neither did he decrease his speed. In short, he wholly

failed to comply with the requirement of the law that it is the duty of all persons to use due care in approaching an intersection. § 39-7,108, R. R. S. 1943. The fact that appellee approached and entered the intersection from the right and that it was protected on the north and south by stop signs on Sixtieth Street did not relieve him from the duty of observing due care and prudence to avoid an accident.

Barajas v. Parker, 165 Neb. 444, 85 N. W. 2d 894, declares: "A motorist entering an intersection from the right is in a favored position and has the right-of-way, other things being equal, but such fact does not do away with the duty of the driver of the favored automobile to exercise ordinary care to avoid an accident. * * * It is the duty of the driver of an automobile on approaching an intersection to look for other automobiles approaching and to see those within the radius which denotes the limit of danger."

Fairchild v. Sorenson, 165 Neb. 667, 87 N. W. 2d 235, states: "The failure of the driver of an automobile, upon approaching an intersection, to look in the direction from which another automobile is approaching, where, by looking, he could see and avoid the collision that resulted, is more than slight negligence, as a matter of law, and defeats a recovery."

The trial court in the charge he gave submitted the issues concerning the counterclaim to the jury with the advice that if it found certain recited things to be true, the appellee was entitled to a verdict against appellant for the amount of damages the jury found he has sustained. This was error. The appellee was, under the circumstances of this case, guilty of negligence as a matter of law and he could not in any event have a recovery on the counterclaim he pleaded against the appellant.

It is said in Pankonin v. Borowski, *ante* p. 382, 93 N. W. 2d 41: "This was evidence appellee did not have or maintain a proper lookout, or that if he did he failed

to see an approaching vehicle that was in plain sight, and that he did not have his vehicle under proper control. Even a traveler who has the right-of-way and is approaching an intersection may not on that account disregard the surrounding circumstances. He is not thereby relieved from the duty of exercising ordinary care to avoid an accident. * * * 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 being operated with due care."

A like situation was considered and decided in Cappel v. Riener, *ante* p. 375, 93 N. W. 2d 36, by this language: "Appellant could not have recovered in any event on his cross-petition because of what has been herein determined. The cross-petition should not have been presented to the jury. It, as the case developed, contained matter which was entirely immaterial but it could and it may have defeated appellee on his cause of action. A trial court should eliminate immaterial and superfluous matters and submit to the jury by instructions only matters properly to be decided by it in arriving at its verdict."

Appellant contests the correctness of instruction No. 19 given to the jury on the subject of comparative negligence. He claims that it is incorrect because the jury was not thereby advised that any contributory negligence of appellant to constitute a defense must have been the proximate cause or proximately contributed to the cause of the damage of appellant. This challenge may not prevail because in another part of the charge the trial court told the jury that a litigant claiming contributory negligence of the adverse party had the burden to establish it by a preponderance of the evidence and also by a preponderance of the evidence that the contributory negligence was the proximate cause or the proximate contributing cause of the accident. The instructions must be considered as a whole and when this is done it is clear the alleged omission asserted by ap-

pellant does not exist. Griess v. Borchers, 161 Neb. 217, 72 N. W. 2d 820.

The last paragraph of instruction No. 19 to the jury advised it that: "By 'slight negligence' is meant small or little negligence. By 'gross negligence' is meant great or excessive negligence; it may be said to exist when there is an absence of slight care in performance of duty." Section 25-1151, R. R. S. 1943, is in part as follows: "In all actions brought to recover damages for injuries to a person or to his property caused by the negligence of another, the fact that the plaintiff may have been guilty of contributory negligence shall not bar a recovery when the contributory negligence of the plaintiff was slight and the negligence of the defendant was gross in comparison * * *." The test this provides and requires is not based upon absolute degrees of negligence but rather upon a comparative test of the relative degrees of negligence between the parties. The negligence of the plaintiff or defendant is not to be evaluated as slight, gross, or otherwise, standing alone. The criterion by which the degree of negligence is to be measured is the extent thereof by comparison with the negligence of defendant. The words "slight" and "gross" as employed in this statute are comparative terms and the requirement of them is that the negligence of the parties must be compared one with the other in determining an issue of slight and gross negligence. Roby v. Auker, 151 Neb. 421, 37 N. W. 2d 799; Murray v. Pearson Appliance Store, 155 Neb. 860, 54 N. W. 2d 250; Allen v. Kavanaugh, 160 Neb. 645, 71 N. W. 2d 119. The objection made to the last paragraph of the instruction is valid. It was foreign to the case and should have been omitted.

The charge of the trial court to the jury permitted it to find that the appellant was guilty of negligence which proximately caused or contributed to the cause of the collision if he failed to keep his automobile under proper control, or if he failed to keep a proper lookout,

or if he failed to apply his brakes immediately prior to the collision. There was no evidence of absence of control of appellant of his automobile that could in any way have been considered negligence or that contributed to the collision. He was operating an automobile he bought when it was new, he owned and operated it 4 years, it was in good condition, and it had been operated without difficulty. Appellant had driven it a considerable distance the day of but before the accident without any mechanical or operational problem. The automobile was stopped at the stop sign near the intersection. It then moved forward in low or first gear. Its speed was 3 to 5 miles per hour. The gas was increased and appellant attempted to put the automobile in second gear. He was unable, from an unknown cause, to engage that gear. The speed of the automobile was decreased and he returned it to low or first gear. This consumed some time. It delayed his passage across the intersection. He attained a maximum speed of 10 miles per hour as he proceeded south in the intersection until much of his automobile was south of the center of it. It was there the truck of appellee collided with the automobile of appellant. The truck was about 350 feet west of the intersection when appellant approached the intersection after delaying at the stop sign. The automobile was in unobstructed view of the appellee at all the time after it moved south a short distance from the stop sign. The control that is required of a motorist is such as will prevent the collision with another vehicle not being operated negligently. The difficulty appellant experienced with his transmission kept him in the intersection longer than he had a right to expect. He could and did expect the operator of the truck to exercise due care to avoid an accident even to stopping if necessary. Appellant may not be charged with knowledge that appellee for no reason at all did not see appellant in the intersection and crossing the lane of travel of appellee. McCulley v. Anderson, 119 Neb.

105, 227 N. W. 321. There was no fault of appellant shown to have caused his inability to engage the second gear of the automobile. The charge of negligence of appellant consisting of absence of control by him of his automobile should not have been submitted to the jury. As to the charge that appellant did not keep a proper lookout, there is no dispute of the testimony that he looked from where he could see, that he saw the truck when it was not less than 350 feet west of the intersection, and generally watched it until the collision occurred. The charge appellant failed to have and maintain a proper lookout is unfounded. The automobile of appellant had proceeded to and had entered the south lane of L Street when the collision occurred. He was attempting to clear the intersection. He thought he could and under the circumstances he had a right to try. It is clear that the application of the brakes on the automobile of appellant immediately before the collision would not have been beneficial but such an act would have made certain that the automobile would have been struck by the truck. There was no evidence to support or justify this charge of negligence. The allegation in the pleading of appellee and included in the instructions to the jury to the effect that "after defendant had entered the intersection from the west plaintiff entered the same from the north, and, without stopping and without applying his brakes, came into the path of defendant's truck" should have been omitted from the instructions. They are each contrary to the evidence. It is error for the district court to include in instructions to the jury allegations of fact made in a pleading in the cause which are without evidence tending to establish them. Fuss v. Williamson, 159 Neb. 525, 68 N. W. 2d 139; Bramhall v. Adcock, 162 Neb. 198, 75 N. W. 2d 696.

Appellant asserts that appellee was guilty of negligence as a matter of law; that appellant was free from contributory negligence; and because thereof the trial

court should have withdrawn all issues from the jury except the question of the amount of the damages appellant had sustained as the result of the injuries he suffered in the collision. Appellant is correct in his assertion that appellee was guilty of negligence as a matter of law. Appellant is incorrect in reference to the issue of his contributory negligence. This issue should be submitted to the jury as a factual matter for its determination under proper instructions.

Blanchard v. Lawson, 148 Neb. 299, 27 N. W. 2d 217, discussed in this manner two instructions given on the subject of comparative negligence, the correctness of which was challenged by plaintiff: "No complaint is made of their substance but plaintiff contends that they had no application. He does so upon the asserted premise that their subject, comparative negligence, was not strictly an issue because defendant's own evidence established his negligence as a matter of law. In other words, plaintiff argues that under the evidence, the trial court should have submitted to the jury only the question of the degree of plaintiff's negligence. The record does not disclose that plaintiff ever made any such request of the trial court by tendered instructions or otherwise, but in any event, to have submitted the issues in the manner now proposed by plaintiff would have been erroneous. That is true, because under the comparative negligence statute, section 25-1151, R. S. 1943, even if it could be said that defendant was guilty of negligence as a matter of law, * * * and it could be found that plaintiff was guilty of only slight negligence, the question whether or not defendant's negligence was gross in comparison therewith would still be a factual one for determination by the jury."

If the driver of an automobile approaching a favored street stops, looks, and sees an approaching vehicle on the favored street but incorrectly judges its speed or distance or for some other reason assumes he can safely proceed and not experience a collision, the question

of whether or not his conduct in proceeding into and attempting to cross the favored street constitutes contributory negligence is usually an issue of fact for the jury to determine. Borcherding v. Eklund, 156 Neb. 196, 55 N. W. 2d 643; Bezdek v. Patrick, 164 Neb. 398, 82 N. W. 2d 583.

The requirement that the operator of an automobile stop before entering upon a favored street protected by stop signs does not grant the exclusive privilege to travelers on the favored street or require those crossing it to do so at their peril, regardless of the duty of motorists on all public highways to obey traffic regulations and exercise due care to protect the rights of others. If a motorist on a nonfavored street stops at an intersection with a favored street when the intersection is clear of traffic and looks for approaching vehicles, acting as a reasonably prudent person in the exercise of due care would act in the belief that he has time and opportunity to safely cross, he is not liable for negligence because he attempts to do so. McCulley v. Anderson, *supra;* Borcherding v. Eklund, *supra.*

The right of a motorist on a favored street to assume that a vehicle on a nonfavored street will be brought to a stop before it enters an intersection of the streets and will not proceed until the motorist has passed does not permit the motorist to claim the right-of-way when he is too far from the intersection to be entitled to it. The fact the motorist is on a favored street does not relieve him from the duty of exercising due care to avoid an accident. McCulley v. Anderson, *supra;* Bezdek v. Patrick, *supra.*

Before one entering an intersection protected by a stop sign can be held negligent, no statutory violation being shown, it must appear that the approaching motor vehicle was at a point which, after considering its speed, indicated it was within the limit of danger and that to proceed would be imprudent. Meyer v. Hartford Bros. Gravel Co., 144 Neb. 808, 14 N. W. 2d 660.

In the trial of an action concerning a collision of a truck and an automobile on an intersection of a favored street and a nonfavored street which involves issues of negligence and contributory negligence the jury should be fully and precisely instructed as to relative and reciprocal rights and duties of the operators of the motor vehicles in entering and using the intersection. McCulley v. Anderson, *supra*.

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

REVERSED AND REMANDED.

FRANK GILCRIST, APPELLEE, V. ANDY WRIGHT ET AL., APPELLEES, IMPLEADED WITH WILLIAM A. EHLERS ET AL., APPELLANTS, WILLIAM A. EVANS ET AL., INTERVENERS-APPELLEES.

94 N. W. 2d 476

Filed February 6, 1959. No. 34462.

1. **Mechanics' Liens.** Where a person performs labor or furnishes materials for the improvement of a house, pursuant to a contract with the owner thereof, such person has 4 months from the completion of the work or the furnishing of the materials in which to file a mechanic's lien.
2. ———. The lien of a mechanic or laborer attaches at the commencement of the furnishing of material or at the commencement of the performance of labor by him on the property on which a lien is claimed.
3. ———. Under the Nebraska statute there are no priorities among liens for material furnished or labor performed where the liens are of the same class and attach to the same estate.
4. ———. A mechanic's lien has priority over a mortgage if work was commenced or materials furnished before the mortgage was filed for record.
5. ———. On foreclosure of a mechanic's lien the plaintiff may take a personal judgment against the person liable for the debt.
6. **Usury.** The defense of usury is personal to the borrower and his sureties and privies. One who takes title to mortgaged prop-

erty may not, in the absence of fraud, assert usury as a defense to the mortgage which the usurious note was given to secure.

7. **Mortgages.** In order for a mortgage on real estate to merge in the title, there must be an identity of ownership in the mortgage and the fee title.

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

W. A. Ehlers, for appellants.

Kelley & Grant, for appellee Gilcrist.

Davis & Pittman, Peter E. Marchetti, L. W. Hopkins, and *McCulloch, Leigh & Koukol,* for appellees Wright et al.

Marks & Clare, for interveners-appellees.

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

CARTER, J.

The plaintiff brought this action to foreclose a mechanic's lien on Lot 4, Block 3, Hulst Addition to the city of Omaha, in the amount of $860. William A. Evans and Allen D. Evans, a partnership, intervened and prayed for the foreclosure of a mechanic's lien for $635 on the same property. Robert W. Fitzpatrick filed his answer and cross-petition, and prayed for the foreclosure of a mechanic's lien for $249 on the same property. The defendants, Andy Wright and Iola B. Wright, James Fruits and Mary Fruits, and William A. Ehlers and Margaret C. Ehlers, were owners of the property at various times involved in the litigation. Fred Minor and Thelma Minor are alleged to have some interest in the litigation by virtue of a mortgage for $5,000 given to them by James and Mary Fruits. Earnest Wiggins is alleged to have an interest in the litigation by virtue of a partial assignment in the amount of $1,770 of a mortgage for $4,750 executed by Andy and Iola Wright to

James Fruits. The defendant William A. Ehlers filed an answer and cross-petition. In the cross-petition Ehlers alleged that the Pound Abstract Company failed to include in the abstract of title to the property here involved the recorded mortgage for $4,750 given by the Wrights to Fruits and the partial assignment of $1,770 of such mortgage to Wiggins. He asks a judgment for damages sustained by him if loss is shown to have resulted from such failure. The Pound Abstract Company made no appearance, summons is not shown to have been made upon it, and no issues raised by Ehlers against the Pound Abstract Company were determined by the court. Ehlers alleged the invalidity of the mechanics' liens, that the $5,000 mortgage assigned to him by Fred and Thelma Minor did not merge in the title subsequently acquired by Margaret C. Ehlers and William A. Ehlers as joint tenants, and that the note in the amount of $1,770 secured by an assignment in that amount of the $4,750 note and mortgage given by the Wrights to James Fruits was usurious and wholly unenforcible. Fred and Thelma Minor made no appearance, and the court found that they had no interest in the litigation. From a decree of the trial court determining the ownership of the property and the validity and priority of liens thereon, and the personal liability therefor, the defendants Ehlers have appealed.

The evidence shows the following facts as to the ownership of the property. In October 1955, Fruits negotiated with W. Irving Wilkie for the purchase of two vacant lots, including the one here involved. About the same time he negotiated with Wilkie for the purchase of two houses which Fruits intended to move onto the lots and, after rehabilitating them, to offer them for sale. On or about October 13, 1955, Fruits sought out the defendant Andy Wright as a prospective purchaser of the lot here involved and one of the houses which was to be moved upon it. On October 20, 1955, Wright entered into an agreement to purchase the property

after it was placed in condition for occupancy for the sum of $5,750. In completing the transaction with Wilkie and Wright, Fruits caused the title to the lot to be placed in Wright by a deed from Wilkie to Wright which was recorded on November 17, 1955. As a part of the transaction Wright paid Fruits $1,000 in cash and executed a note and mortgage to Fruits in the amount of $4,750, the mortgage being dated November 11, 1955, and recorded on November 17, 1955. On the same day Fruits gave Wiggins a note for $1,770 and secured it by assigning the $4,750 mortgage to him to the extent of $1,770. On September 19, 1956, the Wrights deeded the property to Mary Fruits, the wife of James Fruits. On October 1, 1956, Mary and James Fruits executed a note and mortgage to Fred and Thelma Minor in the amount of $5,000 which was recorded on October 2, 1956. On October 1, 1956, the Minors assigned the $5,000 mortgage to William A. Ehlers for a stated consideration of $5,000 but which was in fact $3,333.36. On December 27, 1956, the Fruits entered into a land contract with the Wrights whereby the latter purchased the property for the sum of $7,300, subject to the mortgage of $5,000 given by Fruits to the Minors and which they assigned immediately to Ehlers. On January 4, 1957, the Fruits conveyed the property to Margaret C. Ehlers and William A. Ehlers as joint tenants. On the same day the Fruits assigned the land contract they had with the Wrights to Margaret C. Ehlers for an actual consideration of $800. It will be observed therefore that the title to the property was in the Wrights from November 17, 1955, to September 19, 1956; from September 19, 1956, to January 4, 1957, the title was in Mary Fruits; and since January 4, 1957, the title was in Margaret C. Ehlers and William A. Ehlers as joint tenants.

The plaintiff filed a mechanic's lien on the property on which it was shown that he had performed work and furnished materials in the amount of $1,060 upon

which $200 had been paid. The lien states that the work was commenced on March 15, 1956, and completed on December 29, 1956. The lien was filed on February 15, 1957.

The evidence shows that the lien was the result of two agreements entered into by plaintiff with the defendant James Fruits. The first agreement was made on or about March 1, 1956. It consisted of an offer to install water service in each of three houses including the property involved herein for the sum of $160 on each house. The evidence shows that this work was completed on or before July 30, 1956. It is clear that the work performed under this agreement was not a basis for a mechanic's lien for the reason that it was not filed within 4 months after performing the work or furnishing materials as required by the mechanic's lien law, the only claim of lien having been filed on February 15, 1957. See § 52-103, R. S. Supp., 1955.

The second agreement between plaintiff and Fruits was entered into on or about August 15, 1956. The work was shown to have been completed on December 29, 1956. It is not disputed that the work was performed and the materials provided in accordance with the agreement. The claimed lien was filed within time to the extent of $700.

At the time the foregoing agreements were entered into, and until September 19, 1956, the title to the property was in the Wrights. Fruits made the agreements pursuant to understandings with the Wrights that the work would be done as part of the consideration they paid for the property. Andy Wright was at the site of the property numerous times during the progress of the work. He in fact prescribed the amount of work to be done. The sale price of the property was based primarily on the extent of the work required by the Wrights in fixing up the property. The work covered by the claimed lien was completed after September 19, 1956, when Mary Fruits took title. She had full knowledge

of the existing situation and permitted the work to be completed. Under these circumstances the mechanic's lien was valid to the extent of $700 and the Wrights and James Fruits are personally liable for its payment. We conclude, however, that no basis exists for holding Mary Fruits, Margaret C. Ehlers, and William A. Ehlers personally liable for the amount owing to the plaintiff for the reason that they did not contract for or assume the indebtedness. Plaintiff is entitled to a personal judgment against Andy Wright, Iola B. Wright, and James Fruits in the amount of $860 and to the foreclosure of his mechanic's lien to the extent of $700 of such amount.

The interveners Evans filed a mechanic's lien on the property on which it was shown that they had performed work and furnished materials in the amount of $635. The lien states that the work was commenced on September 25, 1956, and was completed on November 23, 1956. The lien was filed on January 23, 1957.

The evidence shows that Fruits entered into an oral agreement with Evans to perform work and provide a furnace and heating accessories on September 25, 1956, and that the work was commenced the next day. The evidence shows that it was completed on November 23, 1956. During the period the materials were furnished and the work was performed, the title of the property was in Mary Fruits. The evidence shows that she had full knowledge of the work being done and that James Fruits, her husband, was acting in her behalf. The mechanic's lien is valid in the amount of $635. A personal judgment for such amount against James and Mary Fruits was properly granted. The personal judgment entered by the trial court against Andy Wright, Iola B. Wright, William A. Ehlers and Margaret C. Ehlers is erroneous in that they, or any one of them, did not contract or assume such indebtedness.

The defendant Robert W. Fitzpatrick filed a mechanic's lien on the property on which it was shown that he had

performed work and furnished materials in the amount of $249. The lien states that the work was commenced on August 6, 1956, and completed on January 14, 1957. The lien was filed on May 6, 1957.

The evidence shows that Fruits entered into an agreement with Fitzpatrick to perform work and furnish electrical materials in July 1956. The work was commenced on or about August 1, 1956, and was completed on January 14, 1957. From July 1956 to September 19, 1956, the title to the property was in the name of Andy and Iola B. Wright. From September 19, 1956, to January 4, 1957, the title was in Mary Fruits. After January 4, 1957, the title was in William A. Ehlers and Margaret C. Ehlers as joint tenants. The lien was in all respects valid in the amount of $249. Fitzpatrick was entitled to a personal judgment against Andy Wright, Iola B. Wright, and James Fruits. The personal judgment entered against Mary Fruits, William A. Ehlers, and Margaret C. Ehlers is erroneous in that they or any one of them did not contract or assume such indebtedness.

We conclude that plaintiff Gilcrist has a valid mechanic's lien in the amount of $700 which became a lien on August 15, 1956. Interveners Evans have a valid lien in the amount of $635 which became a lien on September 25, 1956. The defendant Fitzpatrick has a valid lien in the amount of $249 which he claimed became a lien on August 6, 1956. The attaching date of a mechanic's lien is the date on which materials are first furnished or labor first performed by the person claiming the lien. Henry & Coatsworth Co. v. Fisherdick, 37 Neb. 207, 55 N. W. 643; Krotter & Sailors v. Pease, 161 Neb. 774, 74 N. W. 2d 538.

On foreclosure of a mechanic's lien the plaintiff may take a personal judgment against the person liable for the debt. McHale v. Maloney, 67 Neb. 532, 93 N. W. 677.

Whether or not a husband is the agent of the wife in contracting an indebtedness resulting in the filing of a mechanic's lien against her property is a question of

fact to be determined as other like questions. Rust-Owen Lumber Co. v. Holt, 60 Neb. 80, 82 N. W. 112, 83 Am. S. R. 512. The evidence sustains a finding that James Fruits was the agent of Mary Fruits, his wife, in contracting for the improvement of her property during the time she held the legal title to it.

The defendant Earnest Wiggins claims a first lien on the property by virtue of a note for $1,770 and interest, secured by an assignment of the $4,750 mortgage executed by the Wrights in favor of James Fruits, such assignment being for a stated consideration of $1,770. The defendant Ehlers contends that the $1,770 note is usurious and therefore wholly void. The trial court held the $1,770 note to be usurious and decreed a first lien in favor of Wiggins for $1,300 without interest, the $1,300 being the actual consideration for the $1,770 note. Wiggins cross-appealed from this part of the decree of the district court, asserting among other things that he is entitled to a first lien for $1,770 and interest as provided in the note. Wiggins asserts further that Ehlers is not in privity with James Fruits and cannot raise the issue of usury.

The $4,750 mortgage was recorded on November 17, 1955, and the assignment of the mortgage for $1,770 was recorded on the same date. Defendant Ehlers testified that he obtained an abstract of title which he examined prior to his purchase of the $5,000 mortgage from the Minors and that the $4,750 mortgage and the $1,770 assignment thereof were not shown thereon. This in no manner affects the rights of Wiggins under the assignment for $1,770.

The mortgage for $4,750 from the Wrights to James Fruits was a valid subsisting mortgage when it was assigned to Wiggins in the amount of $1,770. When James Fruits and Mary Fruits conveyed the property to Margaret C. Ehlers and William A. Ehlers on January 4, 1957, by warranty deed, they conveyed all of their interest in the property, including their interest in the

$4,750 mortgage. It could not, of course, operate as a conveyance of the interest of Wiggins obtained by the assignment to him of a $1,770 interest therein. The trial court correctly decreed that Wiggins had a first lien on the property by virtue of the assignment of the mortgage to him.

The evidence shows that James Fruits borrowed $1,300 from Wiggins and was required to make a note to Wiggins for $1,770 with interest at 1 percent per annum. The note was clearly usurious. The only party raising the question of usury was Ehlers who had purchased the $5,000 mortgage from the Minors and subsequently obtained title to the property as a joint tenant with his wife.

We are convinced that the defendants Ehlers cannot properly raise the defense of usury. In a case very similar on its facts, this court said: "The plea of usury as a defense is personal to the borrower and his sureties and privies. * * * The answers of the parties named wholly failed to show that they stand in the relation of sureties or privies to the borrower, and therefore that they are entitled to avail themselves of the defense of usury. So far as appears they are mere purchasers of the equity of redemption. Where there is a failure to plead a material fact - one necessary to show a cause of action - the law presumes that it does not exist." Cheney v. Dunlap, 27 Neb. 401, 43 N. W. 178, 5 L. R. A. 465. This rule was recently discussed and approved in Commonwealth Trailer Sales, Inc. v. Bradt, 166 Neb. 1, 87 N. W. 2d 705. In the Commonwealth Trailer Sales case we held in effect that, in order to question the validity of a usurious contract, the right must be based on the original debtor's right. There is nothing in the record in the instant case to show that Ehlers stood in the shoes of James Fruits as debtor on the $1,770 note. The defense of usury fails because it was not interposed by a party entitled to make the same. The trial court erred in decreeing a lien on the property to Wig-

gins for $1,300 without interest. The lien of Wiggins should have been for $1,770 with interest as provided by the terms of the note.

The defendant Ehlers complains of the holding of the trial court that the $5,000 mortgage which he purchased from the Minors was merged in the fee title held by William A. Ehlers and Margaret C. Ehlers as joint tenants. There were no liens intervening from the time Ehlers purchased the mortgage and the date Margaret C. Ehlers and William A. Ehlers as joint tenants obtained title to the property. We do not think the decree of the trial court was correct in holding that the mortgage was merged in the fee under these circumstances. There was not an identity of ownership of the mortgage and the fee title. Nor does the evidence indicate any intent on the part of the owners of the fee title that the mortgage was to be merged in the fee title. We conclude therefore that the mortgage for $5,000 held by William A. Ehlers was not merged in the fee title held by Margaret C. Ehlers and William A. Ehlers as joint tenants. For a general discussion of the subject of merger, see Downing v. Hartshorn, 69 Neb. 364, 95 N. W. 801, 111 Am. S. R. 550; Citizens State Bank v. Petersen, 114 Neb. 809, 210 N. W. 278; Edney v. Jensen, 116 Neb. 242, 216 N. W. 812; Lincoln Joint Stock Land Bank v. Barnes, 143 Neb. 58, 8 N. W. 2d 545.

We conclude that the fee title to the property here involved is in Margaret C. Ehlers and William A. Ehlers as joint tenants, subject to the land contract between the Fruits and the Wrights dated December 27, 1956, which was subsequently assigned by the Fruits to Margaret C. Ehlers on January 4, 1957. The defendant Earnest Wiggins has a first mortgage lien on the property for $1,770 and interest, with a priority date of November 17, 1955.

The priority of the three mechanic's liens requires the consideration of this court. Under the mechanic's lien statute of this state there are no priorities among

mechanic's lienholders for materials furnished or labor performed where the liens are of the same class and attach to the same estate. The three liens in the instant case are of equal priority and on foreclosure, if the avails of sale are insufficient to pay the liens in full, the lienholders should be paid on a pro rata basis. Henry & Coatsworth Co. v. Fisherdick, *supra*. The mechanic's liens of Gilcrist, Evans, and Fitzpatrick are therefore of equal priority and, in effect, constitute a second lien on the property.

The defendant William A. Ehlers has a lien on the property for the amount due on his $5,000 mortgage which is subject to the liens of Wiggins, Gilcrist, Evans, and Fitzpatrick.

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

REVERSED AND REMANDED WITH DIRECTIONS.

PERKINS COUNTY HIGH SCHOOL DISTRICT, APPELLEE, V. RUTH REES MCQUISTON, AS COUNTY SUPERINTENDENT OF PERKINS COUNTY, NEBRASKA, ET AL., APPELLEES, SCHOOL DISTRICT NO. 29 OF CHASE COUNTY, NEBRASKA, ET AL., INTERVENERS-APPELLANTS.

94 N. W. 2d 663

SUPPLEMENTAL OPINION

Filed February 13, 1959. No. 34386.

APPEAL from the district court for Perkins County: VICTOR WESTERMARK, JUDGE. On motion for rehearing. See *ante* p. 330, 93 N. W. 2d 32, for original opinion. *Former opinion modified. Motion for rehearing overruled.*

Beatty, Clarke, Murphy & Morgan, Donald W. Pederson, and *Frank E. Piccolo, Jr.,* for appellants.

Marti, O'Gara, Dalton & Sheldon, for appellee Perkins County High School Dist.

W. C. Conover and *H. W. Curtis,* for appellees McQuiston et al.

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

YEAGER, J.

On further consideration of this case and the presentation of the motion for rehearing the conclusion reached is that the opinion fails to correctly respond in one area to facts as disclosed by the record. The purpose of this supplemental opinion is to provide a proper response.

In paragraph 11 of the opinion it is effectually declared that the plaintiff had the right to maintain the action to enjoin the county superintendents from erecting a new school district. This was not on the ground that it was a party in interest to the severance of areas from its control, but that it had the right to become a party to protect and preserve property, as distinguished from land area, belonging to the plaintiff.

The principle announced has application where there is property to be protected and preserved. See, Rowe v. Ray, 120 Neb. 118, 231 N. W. 689, 70 A. L. R. 1056; Ruwe v. School Dist., 120 Neb. 668, 234 N. W. 789. In this case however there is no disclosure that there was property of the plaintiff to protect and preserve, hence the plaintiff was not a real party in interest and therefore was without right to maintain action to test the constitutionality of the statutes involved.

Accordingly paragraph 11 and the third point of the syllabus are withdrawn. Also the last paragraph of the opinion is withdrawn and the following is substituted therefor:

"The decree of the district court therefore is reversed and the cause remanded with directions to deny injunction and to dismiss the action."

Other matters presented by the motion for rehearing are without merit.

FORMER OPINION MODIFIED.
MOTION FOR REHEARING OVERRULED.

MILTON KLEIN, APPELLANT, V. CARL WILSON, APPELLEE, H. P. LAU AND COMPANY ET AL., INTERVENERS-APPELLEES.
94 N. W. 2d 672

Filed February 13, 1959. No. 34436.

1. **Appeal and Error.** Errors sufficient to cause the granting of a new trial must be errors prejudicial to the rights of the unsuccessful party.
2. **Negligence: Trial.** Ordinarily, contributory negligence is a question for the jury; but, where there is no basis in the evidence for a finding of contributory negligence, it is error to instruct on the subject and thereby to submit to the jury an issue which is outside the evidence.
3. ———: ———. Where different minds may reasonably draw different conclusions or inferences from the adduced evidence, or if there is a conflict therein, 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.
4. **Trial.** It is the province of the jury to harmonize the testimony insofar as that is possible, and in case of conflict to decide as to the weight to be given the testimony of the various witnesses.
5. **Witnesses: Trial.** Triers of fact have the right to test the credibility of witnesses and to weigh their undisputed parol testimony against the facts and circumstances in evidence from which a conclusion may properly be drawn that the witness was mistaken.
6. **Negligence: Trial.** In a case where, under the law and facts, the submission of the issue of contributory negligence and a comparison thereof with negligence of the opposing party to ascertain what damages, if any, shall be allowed is proper, the determination of the amount of damages is for the jury.
7. **Juries.** A juror is not permitted to state to his fellow jurors, while they are considering their verdict, facts within his personal knowledge and not given in evidence; and if the statements relate

to the matter in dispute and influence the jury in arriving at a verdict, such statements constitute prejudicial error.

8. **Juries: Appeal and Error.** In a case where a motion for new trial is made on the ground of misconduct of a juror, a question of fact is thereby presented, in the first instance, for determination by the trial court; and its decision thereon will not be disturbed on appeal unless it is clearly wrong.

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

Dryden & Jensen, for appellant.

O. A. Drake and *Joseph H. McGroarty,* for appellee.

Hamer, Tye & Worlock, for interveners-appellees.

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

YEAGER, J.

This is an action for damages for personal injuries and for damage to property instituted by Milton Klein, plaintiff and appellant, against Carl Wilson, defendant and appellee, on account of alleged negligence on the part of the defendant, growing out of the collision of an automobile owned and operated by plaintiff and a truck owned and operated by the defendant. The defendant by answer denied that he was negligent and affirmatively pleaded that the collision was caused by negligence of plaintiff which was more than slight. The defendant also filed a counterclaim in which he pleaded that the collision was caused by the negligence of plaintiff and that as a consequence thereof he suffered personal injuries and damage to his truck. He sought a recovery of damages on account thereof from the plaintiff. By reply the claim of defendant was denied. A petition of intervention was filed by two additional parties but their status is of no importance in the matters presented by this appeal. Accordingly no further reference will be made to them.

The action and cross-action were tried to a jury.

The jury returned a verdict in favor of plaintiff on his cause of action for $500. The defendant, by the verdict, was denied a recovery on his counterclaim. Judgment was rendered on the verdict. The plaintiff filed a motion for new trial which was overruled. From the judgment and the order overruling the motion for new trial the plaintiff appealed.

The plaintiff has set forth four assignments of error which he contends are grounds for reversal. The first which will be considered here is an assertion that the court erred in failing to sustain plaintiff's motion for directed verdict at the close of defendant's evidence and at the close of all the evidence in the case. The bill of exceptions indicates that such a motion was made only at the close of defendant's evidence. However this is of no importance. Even if the motion at the time made was validly based and erroneously overruled, that ruling may not be treated now as a ground for reversal of the judgment. The reason is that the plaintiff obtained from the jury by its verdict without direction precisely what he sought by his motion.

The situation is controlled by the following rule: "Errors sufficient to cause the granting of a new trial must be errors prejudicial to the rights of the unsuccessful party." Greenberg v. Fireman's Fund Ins. Co., 150 Neb. 695, 35 N. W. 2d 772. See, also, Clouse v. St. Paul Fire & Marine Ins. Co., 152 Neb. 230, 40 N. W. 2d 820, 15 A. L. R. 2d 1008; Dixon v. Coffey, 161 Neb. 487, 73 N. W. 2d 660; § 25-1142, R. R. S. 1943.

By another assignment of error the plaintiff contends that the court erred in giving two instructions. By these two instructions the court submitted to the jury the question of whether or not plaintiff's negligence caused the collision or contributed thereto, the manner in which the evidence on that subject should be weighed and considered, and the appropriate conclusions which should be reached depending upon the determination of this question as to cause.

The question of whether or not the collision was proximately caused by negligence of the plaintiff requires no consideration beyond a reminder that this question was decided favorably to the plaintiff by the jury and on principles already stated no cause for complaint by the plaintiff remains.

By the discussion of this assignment of error the plaintiff effectually asserts that the collision was caused solely by the negligence of the defendant, but notwithstanding this, the court submitted the question of contributory and comparative negligence which was pleaded in the answer to the jury. The determination on this question and the assignment of error next to be considered requires a review of the testimony disclosed by the record.

Of course if there was no evidence to sustain a finding that the plaintiff was guilty of negligence which proximately contributed to this collision, it was error to submit that issue to the jury. In Bay v. Robertson, 156 Neb. 498, 56 N. W. 2d 731, it was said: "Ordinarily, contributory negligence is a question for the jury; but, where there is no basis in the evidence for a finding of contributory negligence, it is error to instruct on the subject and thereby to submit to the jury an issue which is outside the evidence." See, also, Strnad v. Mahr, 165 Neb. 628, 86 N. W. 2d 784.

In Pierson v. Jensen, 150 Neb. 86, 33 N. W. 2d 462, it was said: "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." See, also, Hammond v. Morris, 147 Neb. 600, 24 N. W. 2d 633; In re Estate of Kinsey, 152 Neb. 95, 40 N. W. 2d 526.

On August 4, 1954, at about 8:35 a.m., plaintiff was driving an automobile north on a street in Kearney,

Nebraska, known as the fair ground road. At the same time the defendant was driving a truck east on Thirty-ninth Street, also in Kearney, Nebraska. The two streets intersected. The traveled portions of the two streets had a gravel surface as did the intersection. The dimensions of the graveled portion of the intersection or the streets do not clearly appear. It appears however that at all times of importance in the consideration of this case each of the parties was traveling to the right of the center of the street in his direction of travel. There is evidence that at about the time mentioned the left front corner of plaintiff's automobile and the right front corner of defendant's truck came into collision in the southeast quadrant of the intersection and not far from the center thereof. There is evidence that after the collision plaintiff's automobile moved eastward about 11 feet and faced northeast where it stopped, and that the truck moved in a northeasterly direction and came to rest about 65 feet from the point of collision in a borrow pit on the east side of the fair ground road. The plaintiff testified that he looked to the west and when he was 25 to 30 feet from the intersection he saw the truck of the defendant at which time the truck was about 75 feet west and coming down the middle of the road; that the truck did not reduce its speed; that it was moving at a speed of 25 to 30 miles an hour; that defendant was looking to the northeast and not in the direction from which plaintiff was approaching; that plaintiff entered the intersection first; and that as soon as he saw the defendant he applied his brakes and attempted to stop but was unable thereby to avoid the collision. In addition to this testimony of plaintiff, the plaintiff adduced testimony of the defendant from a deposition taken before the trial wherein the defendant stated that at the time of the collision he was going around 25 miles an hour; that he could see to the south about 60 feet when he was about 60 feet west of the intersection; and that he was

looking at a tractor to the northeast and never saw plaintiff's automobile until it hit the front wheel of his truck.

On the trial the defendant testified in substance that he approached the intersection from the west at a speed of from 20 to 25 miles an hour; that he looked to the south at which time the plaintiff was about 90 to 100 feet to the south and was approaching at the rate of 50 to 60 miles an hour; that he entered the intersection before the plaintiff; that it was not true that he failed to look south before the collision; that when he saw the plaintiff he applied his brakes but not sharply because he intended to go straight on through; and that he supposed he could have stopped before he got into the intersection if he had put on his brakes sharply. The plaintiff and defendant were the only witnesses to the accident.

As results of the collision the automobile and the truck were damaged. There was testimony that the damage to plaintiff's automobile amounted to $745.87. He had medical expense in the amount of $109.

There is evidence that both the plaintiff and the defendant were injured. The injuries to defendant, if any, as is true of the damage to the truck, do not require consideration herein.

The plaintiff testified that immediately following the accident he had pain in his back which had continued up to the time of the trial; that he had lost no time from his occupation; and that his salary had not been reduced. He testified however that his activities had been circumscribed in that he was no longer able as before to engage in strenuous physical pursuits or to actively engage in horseback riding, an activity in which he engaged before, and that the pain disturbed his rest and sleep. Testimony of his wife indicates that he complained of pain, "Oh, within a matter of a few months after the accident." He saw a doctor, according to his testimony, first in October 1955. He saw this doctor

only once. In April 1956, he saw an orthopedist. He gave this doctor a history of the accident and described the pain in his back. This doctor, according to plaintiff's testimony, saw him thereafter about once a month. The doctor found objectively nothing wrong with the back or any of its supporting structures, and X-rays disclosed no injury. He did prescribe a support. The doctor gave it as his opinion that plaintiff's pain and resultant restriction of action was caused by the injury received on August 4, 1954, and that thereby he had suffered permanent partial disability of from 5 to 10 percent.

There is evidence, as has been made to appear, that the plaintiff was from 90 to 100 feet to the south when the defendant was much nearer the intersection; that the defendant entered the intersection first; and evidence from which a jury could infer, if the plaintiff was as far away as the defendant contended that he was when defendant saw him, and the plaintiff was traveling at the speed claimed for himself, the defendant could reasonably have passed through the intersection. From this illustration it appears that the court was justified in concluding that there was evidence of contributory negligence on the part of the plaintiff sufficient for submission of that issue to the jury. No error was committed in so doing.

By the next assignment of error to be considered the plaintiff asserts that the smallness of the verdict returned indicates that it was rendered under the influence of passion and prejudice and is not based on the facts as disclosed by the record. As pointed out the amount awarded was $500.

It was the duty of the jury to consider and weigh all of the evidence and, with regard to testimony, to give it such weight as in its judgment it was entitled to receive. With regard to damage to the automobile the jury was not required to accept the estimate fixed by the witnesses. As to personal injuries to plaintiff

it was not bound to accept the version given by plaintiff's witnesses. The controlling principles are contained in the following stated rules:

"It is the province of the jury to harmonize the testimony in so far as that is possible, and in case of conflict to decide as to the weight to be given the testimony of the various witnesses." Langdon v. Loup River Public Power Dist., 144 Neb. 325, 13 N. W. 2d 168. See, also, Bowers v. Pixley, 111 Neb. 698, 197 N. W. 410; Wahlgren v. Loup River Public Power Dist., 139 Neb. 489, 297 N. W. 833; Arman v Structiform Engineering Co., 147 Neb. 658, 24 N. W. 2d 723.

"Triers of fact have the right to test the credibility of witnesses and to weigh their undisputed parol testimony against the facts and circumstances in evidence from which a conclusion may properly be drawn that the witness was mistaken." Patrick v. Union Central Life Ins. Co., 150 Neb. 201, 33 N. W. 2d 537. See, also, Teresi v. Filley, 146 Neb. 797, 21 N. W. 2d 699.

The jury had the right to cause the amount of the verdict to depend upon the application of either or both of these rules. If it did so, and there is nothing in the record to justify a conclusion that it did not, it cannot be said that the verdict was the result of passion and prejudice.

As has been indicated, the court properly submitted the question of contributory negligence of the plaintiff and the matter and manner of comparison thereof with negligence of the defendant. No complaint is made that any rule of construction or application submitted to the jury was improper.

The rule for guidance in this area is substantially the following: In a case where, under the law and the facts, the submission of the issue of contributory negligence and a comparison thereof with negligence of the opposing party to ascertain what damages, if any, shall be allowed is proper, the determination of the amount of damages is for the jury. See, Wortman v. Zimmer-

man, 119 Neb. 682, 230 N. W. 588; Tempel v. Proffitt, 122 Neb. 249, 240 N. W. 285; Blanchard v. Lawson, 148 Neb. 299, 27 N. W. 2d 217.

The size of the verdict may well have been arrived at by a finding of contributory negligence and an application of this rule for comparison. There is nothing in this, if from it the amount of the verdict flowed, which would justify a determination that the verdict was the result of passion and prejudice.

No theory is presented as a basis for a conclusion that the verdict was the result of passion and prejudice other than those inhering in the foregoing discussion. It follows that this assignment may not be sustained.

By the next and last assignment of error to be considered it is contended that there was misconduct of the jury after retirement and submission of the case which requires a reversal of the judgment. Evidence of the alleged misconduct was adduced at the hearing in the district court on the motion for new trial. It appeared in testimony of Dick M. Binder, one of the jurors. The substance of this testimony given in response to questions was that he recalled that Mr. Eddy, another juror, stated that he conducted experiments with his car as to stopping on graveled highways to see "how long—how much distance it took him to stop at a given rate of speed"; that he made a statement as to the distance required but he did not remember what the statement was; that it was made at the table but he did not know if the entire jury heard it or not; that he did not know if the statement was made before or after submission; and that he heard Mr. Crowley, another juror, make a statement in which he said he made experiments at a given rate of speed to see how far it would take him to stop. The witness said that he did not think the statements influenced his verdict.

The rule applicable to situations such as this is as follows: "A juror will not be permitted to state to his fellow jurors, while they are considering their verdict,

facts within his personal knowledge and not given in evidence. If such facts relate to a matter in dispute and influence the jury in arriving at a verdict, it constitutes prejudicial error." Scherz v. Platte Valley Public Power & Irr. Dist., 151 Neb. 415, 37 N. W. 2d 721.

The foregoing makes it clear that the making of statements of fact by jurors which are not in evidence is error and is to be condemned. It also makes it clear that statements so made, to be ground for reversal, must have influenced the jury in arriving at a verdict.

In Schwank v. County of Platte, 152 Neb. 273, 40 N. W. 2d 863, a case involving a situation similar to the one being considered here, this court said: "This court has only recently reaffirmed the rule that where a motion for new trial presents a question or questions of fact which are in dispute, the trial court becomes the judge of such questions of fact, and his decision thereon will not be disturbed on appeal unless clearly wrong. * * * We conclude that the trial court did not err in its refusal to grant a new trial for the alleged misconduct of jurors."

In this case, as in that one, the showing as to misconduct is not sufficient to justify a finding by this court that the trial court erred in refusing to grant a new trial on the ground of misconduct of jurors.

Having found no prejudicial error the judgment of the district court should be and it is affirmed.

AFFIRMED.

WENKE, J., participating on briefs.

NOEL COVER, APPELLANT, V. PLATTE VALLEY PUBLIC POWER AND IRRIGATION DISTRICT, A PUBLIC CORPORATION, APPELLEE.
95 N. W. 2d 117

Filed February 13, 1959. No. 34465.

1. **Negligence: Trial.** An act of God must be the sole proximate cause of damages about which plaintiff complained without

concurrent negligent participation of defendant, and in order for defendant to recover a verdict, he has the burden of proving such an alleged defense by a preponderance of the evidence.

2. **Appeal and Error.** Where on appeal findings of fact are made which become the law of the case and there is a remand for a new trial, on such retrial, such findings are binding on the parties, the trial court, and this court, unless on the retrial the facts relating to the issues upon which the findings were made are materially and substantially different from those adduced on the former trial, and the burden of showing a difference shall rest upon the party making the claim.
3. **Witnesses.** 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 assumptions upon which it is based are shown to be true.
4. **Trial: Appeal and Error.** The trial court should direct and this court should set aside a verdict if the evidence is undisputed or if the evidence, though conflicting, is so conclusive that it is insufficient to justify a verdict or sustain a judgment.
5. **Costs.** A determination that "all costs are taxed" to a party means only the costs of the appeal to this court. The direction does not include costs in the trial court save in those situations where, by appropriate language, the trial court costs as well as the appeal costs are taxed in our order.

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

Baskins & Baskins, for appellant.

Crosby & Nielsen and *Stewart & Stewart,* for appellee.

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

SIMMONS, C. J.

This is an action for damages occasioned by floodwaters. It is the second appeal. In Cover v. Platte Valley Public Power & Irr. Dist., 162 Neb. 146, 75 N. W. 2d 661, we reversed a judgment for the defendant and remanded the cause for a new trial. The cause was tried a second time. It resulted in a verdict and judgment for the defendant. Plaintiff appeals.

We reverse the judgment of the trial court and remand the cause with directions for a retrial limited to the issue of plaintiff's damages.

Plaintiff here assigns and argues as prejudicial error remarks of the trial judge in the presence of the jury; the admission of opinion and conclusion evidence of witnesses; the overruling of plaintiff's motion for a directed verdict on all issues save that of the amount of damages; that the verdict is the result of passion and prejudice and the disregard of material evidence; in certain instructions given; and the taxing of costs.

We find it necessary to determine only the assigned errors for the failure to direct a verdict and to the taxing of costs.

We refer to our former opinion in this case for a statement of the issues and the general factual situation which produced this litigation. The opinion cites certain antecedent litigation involving the same matters in part. We do not deem it necessary to repeat those matters here.

We held on the previous appeal that the 42-inch drain, which defendant placed under its canal for the passage of the waters that might be reasonably anticipated to drain through it, was factually and as a matter of law inadequate, and that the defendant was negligent in the construction and maintenance of it. The evidence here does not appear to be different than that recited in the former opinion. It is not contended that it is. It is sufficient here to point out that the cross-section square-foot capacity of the 42-inch drain was 9.62 square feet. The evidence here also is that the cross-section square-foot capacity of Spring Creek from bank to bank immediately to the north of defendant's structure is shown to be 212½ square feet and at a distance of 300 feet below defendant's canal it is 213 square feet. So we start here with the negligence of defendant in the construction and maintenance of the drain determined as a matter of law.

The defendant here relies on an act of God as a defense. We held in the former opinion that: "An act of God must be the sole proximate cause of damages about which plaintiff complained without concurrent negligent participation of defendant, and in order for defendant to recover a verdict, he has the burden of proving such an alleged defense by a preponderance of the evidence."

It is patent that evidence of an act of God is not alone sufficient to constitute a defense. The defendant must prove in addition thereto that the act of God was the sole proximate cause of the damages about which plaintiff complains and that it is free from concurrent negligent participation in the proximate cause.

The defendant here advances the contention that we determined the question of the sufficiency of the evidence in the previous opinion. It does not cite the rule, now followed, as stated in Callahan v. Prewitt, on rehearing, 143 Neb. 793, 13 N. W. 2d 660: "* * * where on appeal findings of fact are made which become the law of the case and there is a remand for a new trial, on such retrial, such findings are binding on the parties, the trial court and this court, unless on the retrial the facts relating to the issues upon which the findings were made are materially and substantially different from those adduced on the former trial, and that the burden of showing a difference shall rest upon the party making the claim."

We held that at the first trial there was ample competent evidence requiring the submission of the defense of an act of God to the jury. Our holding did not go to the precise question here of that act being the sole proximate cause. It does not appear from the opinion that such a question was submitted to the trial court nor to this court.

An examination of the former opinion reveals clearly that after we had determined that the evidence was sufficient to require submission of the defense of an act of God to the jury we thereafter determined that the trial

court failed to properly submit the issue that the act of God was the sole proximate cause of plaintiff's damage. We neither discussed nor decided the sufficiency of the evidence to go to the jury on that matter. It accordingly is a subject for review here.

We start here with the accepted fact that there was ample competent evidence which required submission of the defense of an act of God to the jury. We recognize that plaintiff challenges the admissibility of certain parts of that evidence. As we view the case it is not necessary to determine that assignment.

We go to the question of whether or not there was ample evidence to take to the jury the question of whether the act of God was the sole proximate cause of plaintiff's damages.

We give the defendant the benefit of the rule that all questions of fact and all inferences reasonably deducible therefrom must be resolved in defendant's favor.

There are parts of two quarter sections of land here involved. The sheep pens where the alleged damage occurred are on the west quarter section. The quarter sections are separated by a county road. Spring Creek meanders generally north and south through the east quarter section. To the north of the two pieces of land is a county road running east and west. The two pieces of land are bordered on the south by defendant's canal.

The siphon under defendant's canal runs from the lowest point in the bed of Spring Creek. It opens into the bed of Spring Creek in a ditch made by defendant, and after about 300 feet enters the natural bed of the stream where it flows ultimately to the river to the south. The elevations of the two pieces of land, of Spring Creek, and the siphon are in evidence and without dispute.

The flow level (the bottom of the siphon) at its north end is at an elevation of 2,474 plus feet. The bottom elevation of Spring Creek at that point is shown to be 2,473 plus feet. The bottom of Spring Creek at a distance

of 300 feet south of the canal where the cross-section measurement was taken is shown to be 2,473 plus feet.

The elevation of the banks of the bed of Spring Creek above the defendant's canal is shown to be 2,478 plus feet on the west and 2,479 plus feet on the east.

The elevation of the north bank of the defendant's canal is shown to be 2,483 plus feet above the siphon.

The elevation of the land to the east of Spring Creek and contiguous to defendant's canal is shown to be 2,480 plus feet.

The elevation of the county road between the two pieces of land and opposite the sheep pens is shown to be 2,484 feet and 2,481 feet at the south, with two exceptions. At a place about half way down from the north and again nearer the south end of the pens, the elevation of the road is shown to be between 2,480 and 2,481 feet. These constitute the swales to which witnesses referred.

Parts of two sheep pens at the southeast end of the yards are shown to have been on ground with an elevation of 2,480 to 2,481 feet. The remainder of plaintiff's lands is shown to have been at elevations of 2,481 feet sloping upward to 2,485 feet at the northwest corner of the area where pens were located. It may be stated that these elevations were made by a survey had in 1950, over 2 years after the flood here involved. There is no contention that they do not reflect the elevations as they existed in June 1947 when the flood occurred.

From this evidence it appears certain that waters coming down Spring Creek would escape through the siphon to the extent it permitted, and that the excess would be held back first in the natural channel of Spring Creek and then pond in the area north of the canal of defendant. The depth of that ponding would increase so long as waters came down Spring Creek in excess of the flow-out of the siphon and until some other outlet appeared or the excess flowage stopped. It is undisputed that on the morning of June 22, 1947, after the rainfall

had largely ceased, the water from the ponded area was running east along the north bank of defendant's canal. The conclusion is inescapable that the ponded water to the north of defendant's canal was then more than 5 feet above the flow line of the siphon and more than 2½ feet above the top of the siphon.

The evidence is without dispute that there was no substantial ponding of water south of defendant's canal at any time.

The evidence is also without dispute that on the morning of June 22, 1947, largely the whole area of the east piece of land was under water.

It is also in evidence without dispute that on that morning water began to flow upon plaintiff's land and the water came from the southeast and east, entering first across the two swales of the road above mentioned. To reach plaintiff's land where two pens were located that water had to be in excess of 5 feet above the flow line of the siphon, and to reach the remaining lands that were flooded it had to be in excess of 6 feet above the flow line of the siphon.

It is also undisputed that the natural drop of the level of Spring Creek from the county road to the north to defendant's canal was about 5 feet. It is in evidence by an expert witness for plaintiff and an expert witness for defendant that the main channel of floodwaters follows the thread of the stream and works its way by slower degrees to the flood plane areas on either side. This evidence points to the conclusion that the flow of the water onto plaintiff's lands was compelled by the elevation of the water in the ponded area.

This conclusion is fortified by the testimony of witnesses for the plaintiff that on the morning of June 22, 1947, water was flowing south along the north and south roadway and commingling at one of the swales with waters coming in from the east and southeast. That is the only evidence that we find in this record that any direct flow floodwaters reached plaintiff's land

without having first become a part of the waters in the ponded area above defendant's canal.

We are here mindful of the conclusion of the expert witness for the defendant that direct flow floodwaters of necessity must have reached plaintiff's land. Were it so, it would be but a part of the waters that caused plaintiff's alleged damage. However, that opinion has no foundation in fact upon which it can be based.

The rule is: "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 assumptions upon which it is based are shown to be true." Pueppka v. Iowa Mutual Ins. Co., 165 Neb. 781, 87 N. W. 2d 410.

The expert witness based his conclusion on the testimony of a witness for the plaintiff that on the morning of June 22, 1947, the water was from 1½ to 2 feet above the east and west roadway where it intersected with the north and south road at the northwest corner of the east piece of land here involved, and that the road east from that point was under water for a little way east of the Spring Creek canal. He added the depth of the water at that point to the elevation of the *railroad spur* at that point as shown by the 1950 survey. He thereby reached an elevation figure 4 feet above the elevation of the bank of defendant's canal, and concluded that the canal did not have any influence on the backing of water under those conditions. He did not conclude that it would be a direct flow onto plaintiff's lands. He said the water would continue to run southward. Obviously that would put it running into the ponded area.

The fault with this conclusion is this: The flood occurred in 1947. The elevation of the roadway was determined as it existed in 1950. It is in evidence, without dispute, that the road was elevated and the borrow pits lowered in 1948. We find no evidence as to the elevation of that roadway at the time of the flood. It of necessity follows that his conclusion based on a fact

figure as to the elevation of the road, not shown to be true, has no probative force.

We are also mindful of the testimony of defendant's expert witness given in answer to a hypothetical question. His conclusion was that the "underpass structure" of defendant's canal did not have any effect on the flood damages claimed by the plaintiff. This witness had testified as to the extent of the rainfall in the drainage area of Spring Creek; to the rainfall to the west and east of the area involved; to the increased high water level in the Platte River following the storm as shown by the gauges south of Cozad; and to the increased discharge of waters in the river.

The witness was specifically referred to that evidence as a foundation for his expert opinion. Obviously that evidence could have a bearing on the question of whether the storm constituted an act of God. It had no bearing on the question of whether plaintiff's damages were in part caused by the ponding of the waters north of defendant's canal to a height sufficient to cause those ponded waters to flood plaintiff's lands.

Under the rule last above cited the evidence has no probative force on the question here being determined.

This conclusion is reinforced by the testimony of this witness on cross-examination. He testified that none of the water in the river ever reached the plaintiff's lands; and that the underpass was insufficient "to take care of the drainage water that came down there." He admitted that if there had been a larger structure opening under the canal the water would "get away * * * faster," and that would be "the only effect it would have." Here then is testimony by defendant's witness that the small and inadequate opening caused the ponded water to remain north of the canal a longer time than it would have done had an adequate structure been provided. Here it is to be remembered that plaintiff's claim of damages rests not alone on the flooding, but on the fact that the floodwaters remained

in his pens for a period of 3 days or more with the consequent losses based on inability to feed and care for his sheep during that time.

The witness' evidence is that the term "stabilized condition of a watercourse" means that time when the surface of a stream and the bed of the stream are parallel. Or stated otherwise, it means that time when the inflow and outflow are equal. On that basis the witness appears to conclude that when the water reached a stabilized condition the structure of the defendant would have no effect because the inflow and the outflow would be equal. This conclusion ignores the obvious fact that the stabilized condition was not had until the ponded water reached a level sufficiently high so as to permit the water passing through the siphon and to the east along the north side of defendant's canal to equal the floodwaters coming from the north. The height of the ponded water before and when that stabilized condition was reached would, and obviously did, cause the waters to flow westward upon plaintiff's lands. It is the height of the water, whether stabilized or not, that is the important fact question here.

The basis of the witness' opinion also ignores the obvious fact that had there been an adequate outlet under defendant's canal, the stabilized condition would have been reached at a lower level; that there would have been less or no flooding of plaintiff's land; and that any waters reaching plaintiff's land would have receded more quickly.

We deem the conclusion inescapable that the evidence is wholly insufficient to sustain a jury's verdict that the sole proximate cause of plaintiff's damage was an act of God.

In Pueppka v. Iowa Mutual Ins. Co., *supra,* we held: "The trial court should direct and this court should set aside a verdict if the evidence is undisputed or if the evidence, though conflicting, is so conclusive that it is insufficient to justify a verdict or sustain a judgment."

Accordingly we hold that the trial court erred in not sustaining plaintiff's motion for a directed verdict leaving only the issue of the amount of plaintiff's damage, if any, to be submitted to the jury. The judgment of the trial court is reversed and the cause remanded for a new trial limited to the issue of plaintiff's alleged damages.

One other matter requires attention. In our previous decision reversing the judgment and remanding the cause we determined that: "All costs are taxed to defendant." The trial court in its judgment in this action taxed costs to the plaintiff in the sum of $1,067.56. Plaintiff in his brief asserts that this included all costs in the trial court up to the time of the first appeal and the costs of the first appeal.

The defendant by brief concedes the contention to be true and states that it is a matter for the district court and upon a motion for retaxing costs being filed, same should be retaxed according to the mandate of this court.

Error being conceded, we direct that the costs be retaxed according to the mandate. We point out that a determination that "all costs are taxed" to a party means only the costs of the appeal to this court. The direction does not include costs in the trial court save in those situations where, by appropriate language, the trial court costs as well as the appeal costs are taxed in our order.

All costs of this appeal are likewise taxed to the defendant.

REVERSED AND REMANDED WITH DIRECTIONS.

IN RE ESTATE OF JOHN OLSON, DECEASED.
CARL CHRIST, JR., ADMINISTRATOR OF THE ESTATE OF BEATRICE NELSON, DECEASED, APPELLANT, V. ANNA NELSON, ADMINISTRATRIX OF THE ESTATE OF JOHN OLSON, DECEASED, ET AL., APPELLEES.

95 N. W. 2d 128

Filed February 13, 1959. No. 34485.

1. **Trial: Appeal and Error.** In an appeal from an order directing a verdict and dismissing an action, the party against whom the verdict was directed 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. **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.
3. ———. In an action where the evidence produced by the plaintiff is not sufficient to support a verdict in his favor, it is the duty of the trial court to direct a verdict for the defendant.
4. **Master and Servant: Payment.** If a domestic servant has received stated sums periodically over a period of years in payment of wages for his services and a claim for additional compensation therefor is not made during his lifetime or during the lifetime of his employer, there arises a presumption that claimant has been paid in full for such services, which presumption must be rebutted by competent evidence adduced in plaintiff's behalf in order to make a prima facie case.
5. **Payment.** Questions as to presumption of payment and rebuttal thereof are for the jury on conflicting evidence, but where the facts are undisputed the sufficiency of the evidence to rebut a presumption of payment may become a question of law for the court.

APPEAL from the district court for Cheyenne County: JOHN H. KUNS, JUDGE. *Affirmed.*

Jack R. Knicely, for appellant.

Swenson, Erickson & Westering and *Thorpe & Babcock,* for appellees.

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

CHAPPELL, J.

Plaintiff, Carl Christ, Jr., as administrator of the estate of Beatrice Nelson, deceased, appealed from the county court of Cheyenne County to the district court from the disposition of a claim filed October 25, 1957, in the estate of John Olson, deceased. Such claim sought to recover the reasonable value of services as a housekeeper allegedly rendered for John Olson during his lifetime by Beatrice Nelson, from January 1931 to April 1954, prior to her last illness and death May 22, 1954, less amounts paid to and expended for Beatrice Nelson by John Olson, who died June 20, 1957.

Plaintiff's petition on appeal, as far as important here, alleged that Beatrice Nelson during her lifetime rendered services as a housekeeper for John Olson at his request during the aforesaid period; alleged that the reasonable value thereof was a total of $31,620; admitted that John Olson had paid Beatrice Nelson and had expended for her a total of $6,913.66, to be applied thereon; and sought recovery of $24,706.34 together with interest and costs, in conformity with plaintiff's claim theretofore filed in and disposed of by the county court.

Defendants, Anna Nelson as administratrix de bonis non with the will annexed of the estate of John Olson, deceased, and a brother of John Olson who was a beneficiary under his will, executed January 11, 1957, filed an answer. Therein, as far as important here, they admitted that such a claim had been filed in the county court; admitted that $4,713.66 had been paid over to Beatrice Nelson, deceased, by John Olson, deceased, during his lifetime; and admitted that John Olson had paid the medical and hospital expenses incurred by Beatrice Nelson during her last illness and the expenses for her funeral in the sum of $2,200, which by calculation makes a total sum of $6,913.66 paid to or for Beatrice Nelson by John Olson. Such answer specifically denied each and every other allegation of plaintiff's petition, and alleged that if any services were rendered by

Beatrice Nelson for John Olson for which compensation was due, same was fully paid for during the lifetime of John Olson. The answer also alleged that Beatrice Nelson died May 22, 1954, and John Olson died June 20, 1957, and if any claim of Beatrice Nelson existed for services rendered by her for John Olson, same should have been made during his lifetime. Plaintiff's reply was a general denial.

Upon trial to a jury and at conclusion of plaintiff's evidence, defendants' motion for directed verdict was sustained, and plaintiff's claim was dismissed for insufficiency of the evidence to support a verdict for plaintiff. Plaintiff's motion for new trial was thereafter overruled, and he appealed, assigning as far as important here that the trial court: (1) Erred in sustaining defendants' motion for directed verdict; and (2) erred in overruling plaintiff's motion for new trial. We do not sustain the assignments.

There are numerous well-established rules of law which are applicable and controlling in cases such as that at bar. In Bryant v. Greene, 164 Neb. 15, 81 N. W. 2d 580, we reaffirmed that: "In an appeal from an order directing a verdict and dismissing an action, the party against whom the verdict was directed is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence."

In Fairmont Creamery Co. v. Thompson, 139 Neb. 677, 298 N. W. 551, this court held: "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."

In Gunn v. Coca-Cola Bottling Co., 154 Neb. 150, 47 N. W. 2d 397, this court held: "In an action where the evidence produced by the plaintiff is not sufficient to

support a verdict in his favor, it is the duty of the trial court to direct a verdict for the defendant."

As stated in In re Estate of Benson, 128 Neb. 138, 258 N. W. 60: "The burden of proof was on claimant. She was required to make a prima facie case—one in which the adduced evidence, standing alone, warranted the finding of facts to be proved." In other words, the general rule in cases where claimant seeks to recover the reasonable value of services rendered under an implied contract, the burden is upon such claimant to prove, in order to make a prima facie case, that he rendered services for defendant at his request or that they were knowingly accepted by him and the reasonable value of such services less the amount, if any, already paid therefor. In that connection also, the general rule is that: "Where an administrator pleads that a claim against him was paid in full during the life of the decedent, the burden is on him to prove that defense." In re Estate of Johnson, 144 Neb. 372, 13 N. W. 2d 412.

Be that as it may, the character and quantum of proof required of claimant in order to make a prima facie case in those situations wherein claimant and defendant or decedent have a family relationship, claimant is required to rebut by competent evidence the presumption that the services were rendered gratuitously. See In re Estate of Baker, 144 Neb. 797, 14 N. W. 2d 585, 155 A. L. R. 950. Likewise also, in cases comparable with that at bar, wherein Beatrice Nelson received stated sums periodically as wages and no claim for additional compensation as a housekeeper was made by her for 25 years during the lifetime of herself and John Olson, and none was made by the administrator of her estate until 3 years and 5 months after her death, and 4 months after the death of John Olson, courts generally hold that there is a presumption that claimant, a domestic servant, has been fully paid for her services, which presumption must be rebutted by competent evidence adduced in claimant's behalf in order to make a prima

facie case. In that connection, it is elementary that the burden of proof never shifts but the duty to go forward with and adduce evidence to overcome a presumption rests upon the party against whom the presumption arises. Reasons for the latter rule were discussed at length in Kucaba v. Kucaba, 146 Neb. 116, 18 N. W. 2d 645.

As stated in 56 C. J. S., Master and Servant, § 121, p. 563, citing authorities: "The presumption that services have been rendered gratuitously or else that they have been fully paid for is especially applicable to domestic servants * * * who make no demand for further payment until a considerable period after the termination of their services. Such a presumption may be rebutted, however, by evidence tending to show that the services were rendered with an understanding between the parties that they were to be paid for, or that no payment had been made, as, for example, where the employee demands payment and the employer promises to pay at some future time." See, also, 39 C. J., Master and Servant, § 262, p. 189; 71 C. J., Work and Labor, § 111, p. 132; 24 C. J., Executors and Administrators, § 1120, p. 401; 98 C. J. S., Work and Labor, § 48, p. 795, citing authorities.

As stated in 34 C. J. S., Executors and Administrators, § 370, p. 104, citing authorities: "Where services have been fully paid for in the lifetime of decedent, there cannot, of course, be any further recovery on that account against the estate; where claimant has received a stated sum periodically in payment of wages, * * * the presumption is against a larger allowance, unless decedent is shown to have agreed accordingly; * * *." As otherwise stated in § 370, p. 106, citing authorities: "However, a claim withheld, or not made or presented, until after the death of the person to whom the services were rendered is viewed with suspicion, or at least is not favored; the presumption obtains that payment was made or that it was not intended to demand payment;

and evidence to establish the claim must be other than mere loose declarations, and must clearly and distinctly establish a contract between claimant and decedent." See, also, 24 C. J., Executors and Administrators, § 878, p. 279.

As said in 34 C. J. S., Executors and Administrators, § 452, p. 286, citing authorities: "Particularly strong and convincing proof is required where the claim is stale, or where the services extended over a considerable period and no demand for compensation was ever made during decedent's lifetime, or where there are any circumstances connected with the claim tending to render it improbable or suspicious." See, also, In re Pierson's Estate, 282 Mich. 411, 276 N. W. 498.

As stated in 70 C. J. S., Payment, § 125, p. 337, citing authorities: "A verdict may be directed where there is no material conflict in the evidence tending to show payment or nonpayment, or where the evidence is insufficient to justify submission of the issue to the jury, or where a presumption of payment arises from lapse of time and the evidence is such that a contrary verdict would be set aside; * * *." See, also, § 126, p. 337, wherein it is said, citing authorities: "Questions as to presumption of payment and rebuttal thereof are for the jury on conflicting evidence, but where the facts are undisputed the sufficiency of the evidence to rebut a presumption of payment may become a question of law for the court."

In the light of the foregoing authorities, we have examined the record which, as summarized, discloses the following relevant and material evidence adduced by plaintiff: One witness testified that from 1929 to 1942 the going wage rate for housekeepers in an eight-room family home where he lived with his wife and four children was about $30 a month and board and room. However, he admitted that he had no experience in placing or employing housekeepers in homes where there were no children and wife as was the situation at

bar. Another witness testified that from 1942 to 1945, during the war, the going wage rate for housekeepers who stayed in homes where there were children or where there was a wife who was an invalid needing care or who was unable to do the work, was $25 to $35 or $40 a week, but after the war, from 1945 to 1954, the rate dropped back down to $25 or up to $35 a week. However, he admitted that wage rates for housekeepers depended upon ability of the employee and the particular circumstances and conditions of the employer. He also admitted that he had no experience in placing or employing housekeepers for bachelors in a situation such as that at bar.

In that connection, Beatrice Nelson, who had only a fourth-grade education, was a Swedish immigrant who came to this country in 1915. Sometime subsequently she married and lived as a housewife with her husband and their son, an only child, in their home in Omaha. Her husband died in 1926, and about harvest time in 1927 she and her teen-age son, Lawrence Nelson, visited with her sister and her sister's husband at Gurley, Nebraska. Her brother-in-law was informed by John Olson, who lived on a farm northeast of Sidney, that he was searching for a cook during the harvest and threshing season. In that situation, the brother-in-law suggested that Beatrice Nelson, his sister-in-law, who was not related to John Olson, might accept such employment. Shortly thereafter she was so employed during the harvest and threshing season of 1927 and thereafter returned to her home and employment in Omaha. During the harvest season of 1928 she returned to John Olson's farm and did the same work during that period, then went back to Omaha. In the harvest season of 1929 she again returned to John Olson's farm where she did the housekeeping and continued to do so from that time until her last illness and death May 22, 1954. John Olson and Beatrice Nelson first lived in a three-room house, having a kitchen and two bedrooms. In

June 1930, a new five-room house was constructed. It had a kitchen, living room, dining room, and two bedrooms with bath between. There they lived amicably and had friendly social relations with their neighbors and friends. Beatrice Nelson performed her duties as a good housekeeper until her last illness and death. Thereafter John Olson survived her for some 3 years, and died June 20, 1957.

In that connection, there is no evidence whatever in this record that Beatrice Nelson was not entirely satisfied with her employment by John Olson, or with the compensation she admittedly received therefor. From the harvest season in 1929 until May 22, 1954, the date of her death, a period of some 25 years, Beatrice Nelson never made any claim or demand upon John Olson for additional compensation or indicated to him or complained to any other person that he ever owed her any delinquent balance or had failed in any manner to pay her in full for her services. Nor does the record contain any indication that John Olson promised or agreed to pay Beatrice Nelson anything at a later date or that he intended to defer payment for any reason whatsoever. As a matter of fact, plaintiff's evidence at the trial affirmatively discloses that in 1950 John Olson told a close friend: "* * * that Mrs. Nelson was well taken care of." Also, in August or September 1956, John Olson told a near neighbor and close friend: "He said he had paid her and taken * * * a receipt for all wages he had paid her, and had the receipts * * * that he had paid her those wages," and "had a receipt for them." All of such statements tend to explain why Beatrice Nelson continued to be John Olson's housekeeper for 25 years without making any demand for additional compensation.

Also, after Beatrice Nelson's death on May 22, 1954, neither the administrator of her estate nor any one else ever made any claim upon John Olson that he owed Beatrice Nelson or her estate any additional compensation for her services until after John Olson's death June

20, 1957, and until the claim here involved was filed in his estate on October 25, 1957, some 3 years and 5 months after Beatrice Nelson's death. Such claim, filed by the administrator of Beatrice Nelson's estate, gave John Olson credit for having paid to or for Beatrice Nelson some $6,913.66, and as a matter of course she received board and room throughout the entire period of her employment.

Thus, because of the delay and failure of Beatrice Nelson and the administrator of her estate for 28 years and 5 months to present any claim for additional compensation until after John Olson was dead, all direct evidence of their relationship to each other, their agreement and its terms, and the fact of payment in full, had been lost. However, under the circumstances presented in this case, we clearly have a presumption of payment in full which plaintiff was required to rebut by competent evidence, but plaintiff failed to do so. Rather, evidence adduced by plaintiff, as heretofore and hereafter recited, supported the presumption that Beatrice Nelson had been paid in full during her lifetime.

In that connection, after John Olson's death, some one found some admittedly incomprehensive documents among his belongings. They were offered and received in evidence. They consisted of three loose-paper statements, three receipt books, and the first sheet of a book record containing entries made by Beatrice Nelson, which recited that she had received from other sources, or that John Olson had paid her, certain amounts upon different dates between April 5, 1931, and March 23, 1954. The three statements were identified as exhibit Nos. 2, 3, and 4. Exhibit Nos. 2 and 3 failed to disclose from whom she got a total of $241.50, or what it was paid for, or indicated that any balance was unpaid. Exhibit No. 2 shows that she got $20 from April 5, 1931, to October 20, 1936, and $125 between February 23, 1937, and May 7, 1937. Exhibit No. 3 shows that she got $96.50 March 1, without designating any year. Ex-

hibit No. 4 shows that in a "John Olson Accounting from 1931 Paid the 16 January for chickens 22.16." The three receipt books, exhibit Nos. 7 through 7n, 8 through 8i, and 9 through 9c, show that at intervals between May 5, 1948, and March 23, 1954, Beatrice Nelson received a total of $2,695 from John Olson, and no receipt shows any balance due or unpaid by him. In other words, Beatrice Nelson received an average of $37.95 a month, plus board and room during that period. The record book kept by Beatrice Nelson contained exhibit Nos. 5 and 5a. Exhibit No. 5 was the front of the first sheet, and exhibit No. 5a was the back thereof. They show that at intervals of one or two or more months Beatrice Nelson received payments from John Olson of from $30 to $260. All such payments amounted to a total of $4,420 received between November 13, 1943, and March 23, 1954, and such record sheets show no balance due or remaining unpaid by John Olson. In other words, Beatrice Nelson received an average of $35.36 a month and board and room during that period. Also, if the sum of $2,200 admittedly paid by John Olson for Beatrice Nelson's medical, hospital, and funeral expenses, is added to $4,420, then John Olson admittedly paid to or for her the sum of $6,620, which was an average of $52.96 a month and board and room during the period from November 13, 1943, to May 22, 1954, the date of Beatrice Nelson's death.

In connection with the exhibits aforesaid, plaintiff frankly admitted that they came into his possesion from his lawyer about late October or early November 1957; that there might have been other records showing payments which were not in his possession; that he never examined Beatrice Nelson's belongings and no one else claimed to have done so; that there could be other records of her accounts which were not found; and that as such administrator he had never paid any of Beatrice Nelson's medical, hospital, or funeral expenses.

It should be pointed out also that plaintiff admitted

that he was appointed administrator of Beatrice Nelson's estate at the request of his cousin, Lawrence Nelson, who was the only child and sole heir at law of his mother, Beatrice Nelson. Lawrence Nelson, who lived in Denver, Colorado, had been a truck driver some 22 years at the time of this trial, and without dispute had been bequeathed a legacy of $3,000 under the probated will of John Olson, deceased.

In the light of the foregoing evidence, and authorities heretofore cited, we conclude that the judgment of the trial court should be and hereby is affirmed. All costs are taxed to plaintiff.

AFFIRMED.

HUBERT K. DANIELSON ET AL., APPELLEES, V. CITY OF BELLEVUE ET AL., APPELLANTS.
95 N. W. 2d 57

Filed February 20, 1959. No. 34421.

1. **Municipal Corporations: Taxation.** The legislative power and authority delegated to a city of the first class to construct local improvements and levy assessments for payment thereof is to be strictly construed and every reasonable doubt as to the extent or limitation of such power is resolved against the city and in favor of the taxpayer.
2. ———: ———. The publications and notices pursuant to the requirements of sections 16-617 and 16-619, R. R. S. 1943, are mandatory and jurisdictional steps without which an ordinance never becomes effective.
3. ———: ———. By the passage of the provisions of sections 16-617 and 16-619, R. R. S. 1943, and related statutory provisions, the legislative intent was that a city of the first class, in the exercise of the power granted by these provisions, is required to declare in the ordinance the kind or kinds of improvement which is proposed and to give notice thereof by publication of the ordinance.
4. ———: ———. An ordinance purporting to create a local public improvement district pursuant to sections 16-617 and 16-619, R. R. S. 1943, and related statutory provisions, but which

fails to declare the kind of improvement proposed in the ordinance, is invalid.

APPEAL from the district court for Sarpy County: JOHN M. DIERKS, JUDGE. *Affirmed in part, and in part reversed and remanded.*

John E. Rice and *Gross, Welch, Vinardi & Kauffman,* for appellants.

A. Sheppard Taylor, for appellees.

Wells, Martin, Lane, Baird & Pedersen, amici curiae.

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

YEAGER, J.

This is an action by Hubert K. Danielson and Margaret Danielson, husband and wife, plaintiffs and appellees, who are the owners of Lot 1, Block 183, City of Bellevue, Sarpy County, Nebraska, against the City of Bellevue, a first class city, located in Sarpy County, Nebraska, and the mayor of the city of Bellevue, defendants and appellants, to enjoin the defendants from proceeding further with the grading and surfacing of Twenty-ninth Avenue in the city of Bellevue which is located adjacent to the above-described lot belonging to the plaintiffs.

The case was tried to the court and a decree was rendered which granted the relief prayed by plaintiffs. From the decree the defendants have appealed.

The case was tried on the pleadings, a stipulation of facts, and certain exhibits which were introduced on the trial. Other matters have been discussed in the briefs but the parties have by their stipulation limited the issues which are submitted for consideration and determination as follows: "That the sole issues to be considered in this action shall be legality of the formation or creation of Street Improvement District No. 165 based upon Nebraska R. S. 1943, Reissue of 1953,

sections 16-617 and 16-619 and the authority of the city of Bellevue to make any change in grade of 29th Avenue without first assessing and determining the damages, if any, to the property of abutting property owners, in accordance with Section 16-615." The present designation of these provisions is sections 16-615, 16-617, and 16-619, R. R. S. 1943.

By the petition it is pleaded that on February 7, 1957, the city council of the city of Bellevue enacted an ordinance by which street improvement district No. 165, among other districts, was created. The ordinance creating district No. 165 has not been set forth at large or by specific description in the petition or in any other pleading. It was brought to the attention of the court only by a publication of notice of the passage of the ordinance creating district No. 165. This was received pursuant to an offer made by the defendants wherein it was stated that it was a true copy of the ordinance. In the light of this it is deemed that the ordinance is properly here for consideration. The part describing district No. 165 is as follows:

"The following street shall be improved:

"29th Avenue from the east line of Van Buren Street to the west line of Wayne Street.

"Section 3. The limits and boundaries of Street Improvement District No. 165, and improvements to be made therein, are defined and established as follows:

"Commencing at the northwest corner of Lot 3, Block 183 in the City of Bellevue; thence south to a point on the south city limits; thence east along the south city limits to a point directly south of the southeast corner of Lot 12, Block 120; thence north to the northern corner of Lot 10, Block 120; thence west to the point of beginning."

One basis of the claimed right of plaintiffs to injunction is that this portion of the ordinance, which is the sole portion relating to district No. 165, is insufficient to create an improvement district such as is contemplated

by sections 16-617 and 16-619, R. R. S. 1943, and is illegal and void. The sections are as follows:

"The mayor and council shall have power to pave, repave, gravel or macadamize any street, streets, alley, alleys, or any part of any street, streets, alley or alleys, in said city, and for that purpose to create suitable paving, repaving, graveling or macadamizing districts, which shall be consecutively numbered; and such work shall be done under contract." § 16-617, R. R. S. 1943.

"The mayor and council shall first, by ordinance, create a paving, graveling or other improvement district or districts. The mayor and clerk shall, after the passage, approval, and publication of such ordinance, publish notice of the creation of any such district or districts one time each week for not less than twenty days in a daily or weekly newspaper of general circulation published in the city." § 16-619, R. R. S. 1943.

It has been pleaded and so stipulated that in order to effectuate the improvement contemplated it becomes necessary to change the grade in the district. In this connection it is contended that after the ordinance requiring a change in the grade for the improvement was adopted and before any change could be made, it became the duty of the city to obtain the consent in writing of the owners of the lots or land abutting upon the street who represent the front footage thereon, and not then until the damages to property shall be assessed could the change be made. It is stipulated that the requirements contended for in this connection were not complied with by the city. The basis for the contention is section 16-615, R. R. S. 1943, reading in part as follows:

"The mayor and council shall have power by ordinance to establish the grade of any street, avenue, or alley in the city. When the grade of any street, avenue, or alley shall have been established, the grade of all or any part shall not be changed unless the consent in writing of the owners of the lots or land abutting upon

the street, or part of a street, where such change of grade is to be made, who represent a majority of the foot frontage thereon, is first obtained and not then until the damages to property owners which may be caused by such change of grade shall have been assessed and determined. The damages shall be ascertained and determined as provided in sections 76-704 to 76-724. * * * Provided, no street, avenue, or alley shall be worked to such grade or change of grade until the damages so assessed shall be tendered to such property owners or their agents."

On this basis, as we interpret, the plaintiffs insist that the steps taken to effect the change were illegal and that further steps should be enjoined.

It therefore becomes necessary to examine the ordinance in the light of the statutory provisions to which attention has been directed and ascertain whether or not the plaintiffs are entitled to the relief which they seek in this action.

The results flowing appropriately from this examination must conform to certain established rules found in the decisions of this court. In Chicago, St. P., M. & O. Ry. Co. v. City of Randolph, 163 Neb. 687, 81 N. W. 2d 159, the following appears: "The legislative power and authority delegated to a city to construct local improvements and levy assessments for payment thereof is to be strictly construed and every reasonable doubt as to the extent or limitation of such power and authority is resolved against the city and in favor of the taxpayer." See, also, Manners v. City of Wahoo, 153 Neb. 437, 45 N. W. 2d 113; Chicago & N. W. Ry. Co. v. City of Omaha, 156 Neb. 705, 57 N. W. 2d 753; Chicago & N. W. Ry. Co. v. City of Seward, 166 Neb. 123, 88 N. W. 2d 175.

In Chicago, St. P., M. & O. Ry. Co. v. City of Randolph, *supra,* in considering the validity of section 17-511, R. R. S. 1943, relating to cities of the second class and villages, this court said: "The publications and

notices provided for in section 17-511, R. R. S. 1943, are mandatory and jurisdictional steps without which an ordinance never becomes effective."

Section 17-511, R. R. S. 1943, extends to cities of the second class and villages the same powers with reference to the creation of improvement districts as do sections 16-617 and 16-619, R. R. S. 1943, to the city of Bellevue, a city of the first class. In reason therefore what was said in that case with reference to jurisdictional steps is applicable to a jurisdictional attack upon proceedings taken by a city of the first class to create an improvement district.

In making this examination it is found that section 16-617, R. R. S. 1943, contains a grant of power to pave, repave, gravel, or macadamize streets and alleys and parts thereof. It provides that the exercise of the power is dependent upon the creation of "suitable paving, repaving, graveling or macadamizing districts, which shall be consecutively numbered." It is required that the work shall be done under contract.

Section 16-619, R. R. S. 1943, implements section 16-617, R. R. S. 1943, by requiring that the creation of districts shall be by ordinance and the publication of such ordinance for not less than 20 days.

The provisions of these and other sections of the statute make it clear that the intention of the Legislature was that a city of the first class, in the exercise of the power granted by these provisions, was required to declare in the ordinance the kind or kinds of improvement which was proposed and to give notice thereof by publication of the ordinance. We have already pointed out that a grant of power such as is contained here must be strictly construed against the city.

Section 16-620, R. R. S. 1943, contains the following: "If the owners of the record title representing more than fifty per cent of the foot frontage of the property abutting or adjoining * * * shall file with the city clerk, within twenty days from the first publication of said

notice, written objections to the paving, repaving, graveling, or macadamizing of a district, said work shall not be done in said district under said ordinance, but said ordinance shall be repealed."

By this section property owners are given the right to object, and with particularity to "paving, repaving, graveling, or macadamizing." By the ordinance and its publication however the owners here had no opportunity, or at least no reasonable opportunity, to object in these areas since neither the ordinance nor the publication made any reference whatever to paving, repaving, graveling, or macadamizing or in fact anything else which the city proposed to improve or perform in the district.

Accordingly it must be said that the ordinance purportedly creating the improvement district is invalid.

As has been pointed out, by their petition the plaintiffs sought to enjoin the action taken and proposed for improvement under the ordinance also on the ground that it was violative of section 16-615, R. R. S. 1943. On the trial the court granted injunctive relief also on this ground. In their brief the plaintiffs have specifically abandoned any claim for relief on this basis and have consented to a reversal of the decree in this respect. Accordingly the decree to this extent should be reversed.

This is not to say however that the contention of the petition in this respect is not meritorious. The only purpose is to say the matter is not presented for decision by this court.

The decree of the district court is in all respects affirmed except the portion which grants injunctive relief based on section 16-615, R. R. S. 1943. As to that part it is reversed. All costs are taxed to the defendants.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED.

WENKE, J., participating on briefs.

WILLIAM L. CRUNK, APPELLEE, V. KENNETH GLOVER, APPELLANT.

95 N. W. 2d 135

Filed February 20, 1959. No. 34463.

1. **Negligence.** The owner of a place of business to which the public is invited is required to exercise reasonable care to have and maintain the premises where the business is operated in a reasonably safe condition for the use of persons who properly enter and are upon the premises.
2. **Appeal and Error.** A litigant is restricted in this court to the theory of the case on which it was presented to and tried in the trial court.
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 determine it and decide the case as a matter of law.
4. **Animals.** One who harbors a wild, vicious, and dangerous animal such as a bear, though he is not the owner of it, is responsible for injuries caused by it while on the premises where it is kept to the same extent as he would have been if he had been the owner of the animal.
5. ———. It is not necessary to produce evidence that the owner or harborer had knowledge of the vicious nature of the wild animal causing the injury as he is conclusively presumed to have such knowledge.
6. **Evidence.** In an action for personal injury if there is evidence tending to establish that the injury is permanent, tables of life expectancy are admissible in evidence.
7. ———. A statement made under the immediate force of circumstances and not as an afterthought is a part of the res gestae.

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

Wellensiek & Morrissey, for appellant.

Tyler & Frerichs, for appellee.

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

BOSLAUGH, J.

The gist of the statements of appellee as a basis for the recovery of damages because of the asserted negligence of appellant is as follows: Appellant is and has

been for several years the owner and operator of a sale barn near Nebraska City where public sales of livestock and merchandise have been conducted. Livestock is placed in pens in the barn which the public is permitted to pass and is invited to inspect prior to when it is offered for sale. Appellant on and prior to August 3, 1957, kept a bear in one of the pens. It was, as appellant knew, untamed, savage, vicious, and dangerous, and when confined its natural propensity for mischief and viciousness was intensified. Appellant failed to confine the bear other than in the pen which had openings large enough that it could put its jaw and forelegs through them and contact anyone passing through the barn or standing near the pen. Appellee at about 1:15 p. m., August 3, 1957, was in the west portion of the part of the sale barn where the pens were located observing the unloading of livestock not owned by him. The livestock moved toward appellee in the aisle or passageway in which he was standing and he was forced to move to one side. He was without knowledge or notice that there was a bear on the premises. He stepped to the west near a wooden pen and while facing toward the east placed his right hand on the pen near the northeast corner to support himself. Immediately the bear, without warning, viciously seized and bit off the end of the third finger of the right hand of appellee. The injury and damages suffered by him were proximately caused by the negligence of appellant consisting of his failure to confine the animal in such a manner as to prevent it from injuring any person, including appellee, outside the enclosure where it was kept; his keeping the bear in a situation on the premises which did not prevent it from coming in contact with anyone properly on the premises; and his failure to provide effective and reasonable precaution to protect the public, including appellee, from the vicious and dangerous proclivity of the bear and the hazards involved in the location and manner of the confinement of the bear. Appellee was a

farmer 67 years of age. The first phalange of the right third finger of appellee was amputated. He, because of his injury, experienced pain, suffering, and permanent disability. He was compelled to incur expense for medical and hospital services and for the service of other persons to perform work in the farming operations of appellee which he was prevented from doing because of his injury. He asked the recovery of damages in a specified amount.

The answer of appellant denied the claims of appellee and specifically denied that appellant was a keeper of the bear at any of the times specified by appellee. The new matter asserted by appellant was that the bear was a domesticated animal, peaceful, gentle, friendly, and companionable. It was confined on August 3, 1957, in a pen the only exposed side of which was covered with wire mesh screen with openings of about one-half inch on which was a sign which plainly and readily gave notice to all persons of the presence of the bear in the pen. There were proper safeguards provided by appellant for the protection of all persons who might be near to the pen from injury by the bear. The pen containing the bear was in an area of the sale barn where it was not necessary for any person attending a sale to go to inspect livestock which would be offered for sale. Appellee was a trespasser in the area, knew the bear was there, placed his finger in the opening of the enclosure to play with it, and because thereof received the alleged injuries of which he complains. Any injuries appellee suffered were caused by his negligence consisting of his placing himself in a position of peril, placing his finger in the side of the pen where it could be reached by the bear, and his failure to observe and heed the notice of the presence of the bear.

The reply of appellee denied the contents of the answer except statements thereof not in conflict with matters appellee had alleged, and asserted that the wire mesh screen was only on a part of the front of the pen where

the bear was kept, did not extend to the corners of the front of it or on either side of it, and the portion which was screened had the screen on the inside of the wooden pen where it was not visible to anyone passing the pen and was not visible to appellee.

The verdict was for appellee. The motion for new trial by appellant was denied and judgment was rendered in accordance with the verdict. This appeal seeks to defeat the judgment.

The record contains substantial evidence tending to sustain the verdict and judgment. Appellant and his wife were the owners of a sale barn, hereafter referred to as the barn, for about 10 years before the incident which is the basis of this action. The manager of the barn was appellant. A public sale was generally conducted in it each Saturday commencing at 12:30 p. m. and occasionally a sale was held there more frequently than once each week. The sales were generally advertised in the Nebraska City daily paper and by other mediums. The public was invited to the place of business of appellant to inspect the property to be offered for sale and to attend the sale thereof. The property offered and sold consisted primarily of machinery, livestock, and articles of merchandise. The livestock was confined in pens in the barn before the sale commenced and it was subject to inspection by anyone who desired to do so. There had been no restriction on anyone entering and being in any part of the barn on the day of any sale before it was commenced or during the sale. The management had invited the pubic to do the things mentioned and never prohibited anyone from doing so except when it was temporarily necessary because of moving livestock from one location in the barn to another and to and from the sale ring where they were sold. The invitation by the management to the public to enter and move about in the barn had been accepted and enjoyed by many persons.

The front of the barn was to the south. There was a

door in the south end of the barn located about the middle of it from east to west. It opened in what is spoken of in the record as an aisle or alleyway. It will be called an alley herein. It was about 8 feet wide and extended from the south door to the north part of the barn. It ended at the south wall of a cattle pen which extended north to the north wall of the barn. There was a passageway from the alley toward the northwest between the southwest corner of the cattle pen spoken of above and the northeast corner of the pen in which the offending bear, which was an actor in the happening that occasioned this litigation, was confined. This passageway extended to two loading docks with a small pen between them located in the northwest area of the barn. The livestock brought to the barn was unloaded by use of the docks and the small pen between them was used to confine any animal desired to be temporarily isolated for some purpose. The pens for the hogs were east of the alley in the southeast area of the barn except the last hog pen was divided and the west part of it was used to retain small calves. The pens in which cattle were confined were north of the hog pens and in the northeast part of the barn. The cattle pens extended to the north wall of the barn and were all east of the alley. Adjacent to the alley on the west extending from the south end of the barn to the south wall of the bear pen were three office rooms; a space for the auction box, the auctioneer, and the scale man; and a space for the indoor scale. The sale ring and the seats for persons attending the sale were to the extreme west in the sale barn. West of the pen in which the bear was kept was an office for the veterinarian.

The south wall of the bear pen was about 10 feet long, the west wall was about 9 feet long, and the east wall was 5 feet long. There was a diagonal or northeast wall from the end of the east wall northwest to near the north end of the west wall. The space between the northwest end of the diagonal wall and the west wall was

occupied by a gate. The floor of the bear pen was concrete. The top of it was a solid floor of an area above it in which hay and feed were stored. The south and west walls of the pen were made of lumber and the east wall was metal. They had no openings. The diagonal or northeast side of the pen was fitted with a fence or wall made of 2 x 6's spiked to supports. The first 2 x 6 was about 2 inches above the concrete floor. The opening between the first and second 2 x 6 was about 2½ inches and the succeeding spaces between the timbers increased until the last one near the top was about 5 inches in width. The inside of the 2 x 6's was covered with hailstone wire with openings of one-half inch except it did not extend entirely to the northwest part of the northeast wall. The space where it was absent was about 2 feet wide at that end. There was an opening at the northeast corner of the pen about 30 inches from the floor. It was 2 inches wide and 4 inches long. This was to accommodate a slide-board latch about 1 inch wide and 12 inches long used to fasten a swinging gate of a pen north and east of the bear pen when the gate was fully opened. It was by this means fastened at the northeast corner of the bear pen when the gate was fully opened. There was a sign on a plywood board about 11 inches wide at one end and 14 or 16 inches wide at the other end which was fastened near the top of the northeast wall on the outside of the pen 7 or 7½ feet from the floor. There were written on the board by use of a red crayon usually utilized to mark cattle in letters 3 inches in height the words: "Bear—Danger." There was no other information concerning the bear being on the premises attached to or within the premises except that which might have been deduced from the character of the enclosure in which the bear was confined. The bear was black and weighed about 300 pounds.

Appellee had been at the barn and in the back part of it and had attended sales there probably two dozen times

throughout the years before he suffered the injury he complains of in this case. He went to the barn at about 12:30 the afternoon of Saturday, August 3, 1957, for the purpose of ascertaining if he could purchase a young calf. He knew there was to be a sale there that afternoon. He went to the south door. It was in two parts. The lower part was closed and latched. It was not locked. He entered and proceeded north down the alley to the pen where calves were generally yarded. There were 5 or 6 calves in the pen. He looked them over and then viewed some hogs and went farther north in the area. In the back part of the barn he saw some stock that was being unloaded into the barn. There were no baby calves of the kind he was looking for among the stock. When he ascertained this he started back towards the south door. He had gone some distance when he stopped, laid his hand on something he thought was a wall, and at the same time something grabbed him. He said immediately in the hearing of men standing nearby in the area: "What they got in that pen?" and the men, or one of them, said: "There's a bear in there." Appellee looked down and said: "Well, he just bit my finger off." Appellee was immediately taken to a doctor.

There was no sign at the south door and appellee saw no sign on or in the barn that day. He had probably been in the barn and in the parts that he visited that day as many as 24 times on different occasions and each time he had seen persons in the building near where the bear was kept. He had seen on each visit from one to as many as a dozen persons appearing to be inspecting stock and engaged in conversation. There were several men in the alley when the bear injured appellee August 3, 1957. It was quite dark around where the bear was kept. Appellee had no notice, information, or knowledge that there was a bear kept in the barn at any time until after he was injured August 3, 1957, when someone nearby in answer to the inquiry what was in the pen stated that there was a bear in there.

The wire attached to the northeast wall of the bear pen did not extend entirely to the northwest end of it. It lacked doing so by about 2 feet and there was no wire on the gate at the northwest part of the pen. There were openings in the material of which the gate was made. At the northeast corner of the bear pen there was a space between the wire and the east metal wall. It was 2 inches wide and 4 inches long and about 2½ feet from the floor. It was at that place appellee had his hand when he thought he was putting it on a wall and when he was injured. Appellee made an inspection of the barn on, he thinks, Monday, August 5, 1957. That was when he learned about the opening in the wire on the northeast wall of the pen, the wire on the northeast wall of the pen, the sign attached to that wall, and many other facts concerning the pen in which the bear was kept. He then learned the sign that was posted on the wall was of a character and in such a position that it would probably not have been seen by anyone a stranger to it by walking past it in the passageway along the diagonal side of the pen. If one had approached the side of the pen from the northeast it is probable the sign might have been seen. The distance of it from the floor made vision of it improbable to one who had no knowledge it was there. When appellee, his attorney, and Ernest Davis were near the northeast corner of the pen on August 5, 1957, the bear put one of his feet through the opening in the wall above described and raked it down one of the legs of Ernest Davis. He was then standing about 1 foot or 1½ feet from the wall of the pen.

A witness testified he was at the barn June 16, 1957, to remove some pigs and a calf he bought the day before. He was there about 8:30 or 9 o'clock in the forenoon. It was Sunday and there was no one in the barn. When he opened a gate to let the stock out of the pen in which they were yarded he stepped back and as he did so something grabbed him by one of the legs of his pants.

He looked in the pen which was behind him and saw the bear there. The witness was probably a foot from the bear pen. He did not know that there was a bear in the barn. The bear caused a couple of scratches on the leg of the witness. He had no way of knowing whether the bear was being playful or desirous of doing damage.

There was testimony that a witness heard an employee of appellant on August 3, 1957, between 11:30 a. m. and 12 noon state to two men, strangers to the witness, who were walking towards the bear pen to stay away from it because the bear had been vicious lately. The witness said the bear had been making a lot of noise in the pen on that occasion.

The bear was purchased at the barn from a stranger by Russell Glover in the latter part of October 1956. He was the owner of the bear while it was kept at the barn. He bought the feed and he cared for the bear. When he could not do so he arranged for Rose Schalk to feed and look after the bear. Russell Glover was a trucker. He owned and operated his trucks. He also raised and sold Shetland ponies. He owned 40 of them. He was not, insofar as the record shows, interested in any way in the barn operated by appellant. Russell Glover arranged with appellant for permission to confine the bear in the barn and keep it there until he made other arrangements. The bear was, with the knowledge and consent of appellant, kept in the barn from the time it was purchased in October of 1956 until it was disposed of in October 1957. Appellant secured or permitted his picture to be taken with the bear a week or 2 weeks after it was purchased. He was shown in the picture feeding the bear the contents of a bottle by holding the bottle so that the bear could consume its contents. The bear was trained to some extent. It was said the bear could perform 16 tricks. Appellant at various times during the period when the bear was kept in the barn exhibited it in the sale ring during sales

for the entertainment of the persons attending them. This was done to create good public relations and liven up the bidding at the sale. Appellant said he had fun with the bear. It apparently enjoyed drinking pop from a bottle. When appellant had a bottle the bear would follow him without a leash or anything of that nature. Appellant told of a special sale of new merchandise brought by a man from Omaha. The sale got "draggy." The sale was interrupted and appellant equipped himself with a bottle of pop and the bear followed him to the sale ring and performed for the sale attendants. There was an employee of appellant who showed the bear on a few occasions in the sale ring. The bear was not led or controlled by a collar, chain, rope, or any equipment of that kind. It was always led or controlled with a bottle of pop. The bear was useful to the business, according to the testimony of appellant. He said people were interested in seeing anything of that nature which was attractive and that is helpful to business. It helps solve the problem of getting people to attend the sales. There were many people who came to the barn to see the bear.

The finger of appellee that was injured on August 3, 1957, is referred to in the record as the index finger, the third finger, and the fourth finger of his right hand. It was the finger on the right hand that was next to his little finger. It was severed at the distal or last joint. Appellee called on his doctor immediately following the accident, was sent to a hospital, lockjaw serum was administered to him, and his hand was operated on that afternoon. The operation consisted of cutting back the bone sufficiently to get covering of the end of the amputated finger and closing the finger in a proper manner. The danger of inflammation or infection in the injured membrane from the bite of an animal was much greater than from a cut in the flesh. The injured member was treated and dressed 7 times from the date of the injury to September 13, 1957. The doctor

examined the hand 4 days before the trial of this case was commenced.

Appellee experienced inflammation in the finger. This resulted in stiffness in the surrounding area and this has an influence on the strength of the hand as long as the infection persists in the finger which is demonstrated by the presence of stiffness. Appellee was not able to bring the affected finger down completely when the doctor last saw the hand March 14, 1958. Appellee complained then that the end of the finger was tender, the finger was stiff, and appellee had to exercise care about exposing it to cold. He could not tolerate cold in that finger as in his other fingers. The circulation in the finger is impaired and this is why it gets cold. The strength of the hand was then and will be definitely affected and will be demonstrated in such efforts as attempting to climb a ladder, milking a cow, and things of that sort. The decreased strength was caused by the loss of membrane. The full extent and duration or persistence of disability could not be definitely determined. The condition might improve but only time will tell. In any event appellee will have some permanent disability. He was subjected to pain and suffering and he was caused expense for medical and hospital services and some expense in employing others to perform the work he would have done in his farming operations.

Appellee had the verdict in the trial court. In considering and deciding the sufficiency of the proof to sustain the verdict for him the evidence must be viewed most favorably towards him, controverted matters must be resolved in his favor, and he must have the benefit of any reasonable inference deducible therefrom. Werner v. Grabenstein, 165 Neb. 231, 85 N. W. 2d 297. It is because of this that only the evidence tending to support the verdict is noted in the foregoing recitation and evidence contradictory of it has been disregarded.

Appellant argues that the verdict for appellee rests

on conjecture and speculation because of absence of proof as to how the finger was injured and that there is no evidence it was bitten off by the bear. The circumstances disclosed by the evidence as recited above are sufficient to justify if not to compel a conclusion that appellee was injured by the bear. The jury found that was the fact and the proof sustains the verdict. Equally important are the allegations of the answer which amount to an admission of that fact. The answer says appellee knew the bear was in the pen because of which he went to it, found an opening in it through which he placed his finger and invited the bear to play with appellee, "and the alleged injury which the plaintiff received and which he complains of in his petition was received when he put his finger into the pen." The argument made in this respect is contradicted by the proof and the answer.

Appellant asserts that the case of appellee must fail for the reason that he was guilty of contributory negligence as a matter of law by placing himself in a position of obvious danger without taking precautions which a reasonably prudent man would have observed under the circumstances. The court submitted the issue of contributory negligence of appellee to the jury and it resolved the issue favorably to him. Appellee was invited to be where he was in a place of business open to the public. He had a right to assume it was reasonably safe and free from hazards. Perrine v. Union Stock Yards Co., 81 Neb. 790, 116 N. W. 776; Luther v. Farmers Union Cooperative Assn., 119 Neb. 676, 230 N. W. 662. Appellee had no notice, information, or knowledge of the presence of a wild, vicious animal therein. He was not charged with assuming he might have a finger bitten off by a bear while he was there. The trial court made a more favorable submission in this respect than appellant was entitled to have. The record would not have supported a finding of contributory negligence of appellee. The issue concerning it

should have been eliminated from the case by the trial court. However, the appellant cannot complain because it was submitted to the jury.

The discussion in this case is more extensive than the condition of the record requires. It extends to such question as the doctrine of absolute liability of an owner or keeper of a wild animal for injuries inflicted by it as opposed to the view that the basis of the liability of the owner or keeper of a wild animal for injuries inflicted by it is negligence in the manner or place of keeping the animal as in the instance of actions of personal injury generally. It is fortunately not necessary or proper in the status of this case to consider the conflicting authorities concerning the nature of the liability of such an owner or keeper for an injury done by a wild animal. Negligence of appellant was made the basis of the cause of action by the specifications of the petition. Appellee considered the case to be one for a tort sounding in negligence. He requested the court by a proposed instruction to advise the jury that it must find appellant guilty of negligence in one or more of the respects charged against him by appellee as a condition of any liability of appellant to appellee. The parties each asked the court to include in its charge to the jury that the law imposed upon the keeper of a wild animal the duty of exercising "a high degree of care" and to keep the animal in such a place and in such a manner as to prevent it from injuring any person; and that failure in that regard was a prerequisite of the liability of the keeper of the animal for injury caused by it. The trial court acceded to these requests and accordingly charged the jury. The parties may not complain effectively of the action of the court which they induced. A litigant is restricted in this court to the theory of the case on which it was presented to the trial court. If a trial has been had on the theory presented by the pleadings, the case will be treated in this court on that identical basis. If a certain theory on any issue is relied upon

by the parties at the trial as the proper one, it will be adhered to on an appeal whether or not it is correct. Twenty Club v. State, *ante* p. 37, 91 N. W. 2d 64; Ring v. Duey, 162 Neb. 423, 76 N. W. 2d 433; Bohmont v. Moore, 141 Neb. 91, 2 N. W. 2d 599.

The evidence reviewed above permitted the jury to find that appellant was negligent in the place and the manner in which the bear was kept, with his knowledge, consent, and participation, in one or more of the specifications of negligence pleaded in the petition of appellee. The trial court could not have properly decided the case as a matter of law as appellant requested at the trial and as he argues should be done in this court. If a litigant who had the burden of proof produced evidence sufficient to sustain a finding for him, the trial court could not disregard it and decide the case as a matter of law. Long v. Whalen, 160 Neb. 813, 71 N. W. 2d 496; Stanley v. Ebmeier, 166 Neb. 716, 90 N. W. 2d 290.

Appellant complains because the trial court did not permit the jury to determine whether or not he was the keeper of the bear at the time of the injury to appellee. The petition charged that appellant kept the bear in a pen in the barn. The proof without dispute is that the bear was in a pen of the barn from the time he was purchased, for many months thereafter, and at the time of the injury important to this case, with the knowledge, consent, and participation of appellant. The record does not speak of the owner of the bear being at the barn or doing anything concerning the bear except he sometimes fed it, how often is not shown, provided the feed for the bear, and arranged with another to feed it the major portion of the time when the owner was not there. There is silence as to any other act directly involving the bear by the owner. Appellant had fun with the bear. He got in the picture with the bear when it was taken by a representative of the daily paper in Nebraska City a short time after the

bear was purchased. Appellant took the bear from its pen into the sale ring during sales and exhibited it for the entertainment of the persons attending the sales to whom appellant expected to make sales of property. The bear was useful in the business of appellant. It was used as a promotional incident of the business. An employee of appellant showed the bear in the sale ring on one or two occasions. The bear was on and in the property of appellant and he could have compelled the removal of the bear at any time. Appellant was in control of the bear and the property and without any doubt or question harbored the bear while it was in Nebraska City for about 1 year. The ownership of the bear is not important in this case.

Manger Bros. v. Shipman, 30 Neb. 352, 46 N. W. 527, considered these facts: Manger Bros. were in business. They operated a butcher shop. A younger brother obtained a pet wolf or coyote, kept it there some months, and then went to another state. He left the coyote with his brothers. It was on occasion tied in front of the place of business and at other times in the back yard adjacent to the place of business of the brothers. Complaint was made of its presence and the brothers were asked to remove it. They disclaimed ownership and made no effort to dispose of the coyote. One of the brothers claimed that it was owned by an employee. The brothers testified they had no knowledge the wolf was kept in the back yard but the court said that was a matter for the jury. The verdict was for the plaintiff and in affirming the judgment entered thereon the court said: "That the injuries inflicted on the defendant in error were of a very serious character is shown by all the testimony, and that these were inflicted by the wolf in question, and it is clearly shown that this wolf was kept on the premises of the Manger Bros. and fed with meat from the shop. These were circumstances which it was the duty of the jury to weigh with the testimony of the Manger Bros., as showing what

was actually done by them in the premises, either personally or by their employees. The damages are not excessive and there is sufficient testimony to sustain the verdict."

Miller v. Reeves, 101 Wash. 642, 172 P. 815, declares: "A person harboring a vicious dog, knowing its vicious propensities, is liable in damages for injuries it may cause, although not its owner." It is said in the opinion in that case: "That a person harboring a vicious animal, knowing of its vicious propensities, although not its owner, is liable in damages for the injuries it may cause another, is well settled by the authorities. In the English case of McKane v. Wood, 5 C. & P. 1, it is said: 'The harboring a dog about one's premises, or allowing him to resort there, is a sufficient keeping of the dog to support this form of action.' In 3 Corpus Juris, 106, the rule is laid down in this language: 'A man may own an animal and yet not be its keeper. The word "keeper" is equivalent to "the person who harbors." Harboring means protecting, and one who treats a dog as living at his house, and undertakes to control his actions, is the owner or keeper within the meaning of the law.' "

In Hayes v. Miller, 150 Ala. 621, 43 So. 818, 124 Am. S. R. 93, 11 L. R. A. N. S. 748, the defendant Kelly was leading a wolf by means of a chain in a street of a town when it bit and wounded the plaintiff. Kelly was accompanied by the defendant Hayes who was held by the court to have been in possession of the animal. The judgment was against Hayes because Kelly died before the trial of the case. The court said: "A person in possession of a wolf in the street of a city is liable for injuries sustained by the bite of such animal whether the person in possession of same is the owner or not."

In Malloy v. Starin, 113 App. Div. 852, 99 N. Y. S. 603, it is stated: "It is claimed by the defendant, however, that he was neither the owner nor the keeper of

the bear, and that it was not in a place to which the public had access. That he was not the owner of the bear is manifest, but that it was in the custody and under the control of the defendant's servants is also clear. * * * It was in his keeping."

Vredenburg v. Behan, 33 La. Ann. 627, announces the rule on this subject by quoting from Sherman and Redfield on Negligence, pp. 227 and 228, as follows: " 'One who harbors a dangerous animal on his premises, though not his owner in any sense, is nevertheless responsible for injuries committed by it while on or near his premises, to the same extent as if he owned it.' "

In 2 Am. Jur., Animals, § 64, p. 741, it is stated: "In an action for injuries inflicted by a dog it is not essential that the defendant be the actual owner, as in law the keeper or harborer of a dog is charged with the same duty to restrain it, if he is aware of its propensity to commit injuries, that is imposed on an owner of the animal, and it is well settled that at common law one who harbors or keeps a dog with knowledge of its vicious nature is liable for the injuries caused by it." See, also, City of Tonkawa v. Danielson, 166 Okl. 241, 27 P. 2d 348; Barber v. Hochstrasser, 136 N. J. Law 76, 54 A. 2d 458; Hayes v. Smith, 62 Ohio 161, 56 N. E. 879; Annotation, Ann. Cas. 1914B 606; Annotation, 11 L. R. A. N. S. 748.

It is not necessary to prove that the owner or harborer had knowledge of the vicious nature of the wild animal causing the injury as he is conclusively presumed to have such knowledge. Hayes v. Miller, *supra;* Malloy v. Starin, *supra;* Vredenburg v. Behan, *supra;* Annotation, 69 A. L. R. 511.

Appellant objected to the offer of the tables of life expectancy and he argues that there was error in admitting them in evidence. There was evidence that appellee had suffered permanent injury. It does not appear that the admission of the tables was prejudicial to appellant or that the trial court abused its discre-

tion in that regard. Their admission was not erroneous. Henry v. City of Lincoln, 97 Neb. 865, 151 N. W. 933; Lyons v. Joseph, 124 Neb. 442, 246 N. W. 859; Bresley v. O'Connor, Inc., 163 Neb. 565, 80 N. W. 2d 711.

Appellee testified over objection that immediately after he was injured he said in the hearing of some men who were standing nearby: "What they got in that pen?" Someone answered: "There's a bear in there." Whereupon appellee said: "Well, he just bit my finger off." Appellant contends that the inquiry of appellee and his statement above quoted were self-serving and inadmissible. Appellant does not object to the statement of a bystander: "There's a bear in there." The statements of appellee were made under the immediate force of the circumstances and not as an afterthought. They related to facts which are otherwise established in the record beyond dispute. They were part of the res gestae. The court did not abuse its discretion in admitting the evidence. Bowers v. Kugler, 140 Neb. 684, 1 N. W. 2d 299, states: "The res gestae statement must be made under the immediate force of circumstances, and not as an afterthought." See, also, Suhr v. Lindell, 133 Neb. 856, 277 N. W. 381.

The judgment should be and it is affirmed.

AFFIRMED.

GENERAL CREDIT CORPORATION, APPELLEE, V. IMPERIAL CASUALTY AND INDEMNITY CO., APPELLANT.

95 N. W. 2d 145

Filed February 20, 1959. No. 34489.

1. **Contracts.** Where words or other manifestations of intention bear more than one reasonable meaning an interpretation is preferred which operates more strongly against the party from whom they proceed, unless their use by him is prescribed by law.
2. **Insurance.** This rule finds frequent application in regard to policies of insurance, which are ordinarily prepared solely by

the insurance company, and therefore, the words of the policies are construed most strongly against it.

3. ———. The provision in a policy of insurance that in case the lessee, mortgagor, or owner shall neglect to pay any premium due under a policy the lienholder shall, on demand, pay the same, is a condition which requires the lienholder to pay the premium on the insurance involved from and after the date of the demand if the lienholder desires to keep the insurance in force.

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

Stiner & Boslaugh, for appellant.

Conway & Irons and *John N. Marvel,* for appellee.

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

SIMMONS, C. J.

Plaintiff, as a lienholder, brought this action to recover the amount allegedly due it for damages sustained to two automobiles. The action is on a policy of insurance issued by the defendant to the Service Trucking Company. There was a loss payable clause attached to the policy as follows: "Loss or damage, if any, under the policy shall be payable as interest may appear to General Credit Corp. Hastings, Nebraska and this insurance as to the interest of the Bailment Lessor, Conditional Vendor or Mortgagee or Assignee of Bailment Lessor, Conditional Vendor or Mortgagee (herein called the Lienholder) shall not be invalidated by any act or neglect of the Lessee, Mortgagor or Owner of the within described automobile nor by any change in the title or ownership of the property; provided, however, that the conversion, embezzlement or secretion by the Lessee, Mortgagor or Purchaser in possession of the property insured under a bailment lease, conditional sale, mortgage or other encumbrance is not covered under such policy, unless specifically insured against and premium paid therefor; and provided, also, that in case the Lessee,

Mortgagor or Owner shall neglect to pay any premium due under such policy the Lienholder shall, on demand, pay the same."

To the policy was also attached two separate endorsements covering two automobiles and providing that loss should be paid to the insured and the plaintiff as their interests may appear. The premium for the insurance on each automobile was separately stated as $86. The total premium on the policy was stated as $6,701.43. Plaintiff alleged collision damage to the two automobiles totalling $2,016.44, alleging that its insurable interest exceeded the amount of the damages sustained.

Defendant answered admitting the issuing of the policy and the insurance involved, and that the limit of liability for each loss is the reasonable cost of repairs less $50 or the actual value of the automobile less $50, whichever is lower.

Defendant further alleged that there is due it the sum of $1,786.86 unpaid premium; that pursuant to the clause above quoted it had made demand on the plaintiff for that amount and plaintiff had refused to pay it; and that there was due the defendant from the plaintiff the sum of $1,786.86 to which it is entitled to judgment or to have that sum deducted from any amount the plaintiff may be entitled to recover from the defendant. So stated it appears that defendant seeks to recover the unpaid premium on the principal policy, i.e., it is a claim for the payment of a premium.

The cause was tried on a stipulation of facts. It was stipulated that the reasonable cost of repairs to the two automobiles less deductible amount was $1,839.20, that being less than the actual cash value at the time of the losses; and that plaintiff's insurable interest was in excess of that amount.

It was also stipulated that the policy and endorsements were in full force and effect at the time of loss.

We construe the stipulation to mean that plaintiff, as against the defendant, was entitled to recover $1,839.20.

The facts as to defendant's claim against the plaintiff were also stipulated. There was an unpaid premium due on the policy of $1,786.86 which included $45.92 on the vehicles in which plaintiff had an insurable interest and $1,740.94 on certain vehicles in which plaintiff had no insurable interest. It was further stipulated that "after the said losses had occurred and the policy had been canceled" the defendant had demanded the sum of $1,786.86 from the plaintiff.

A jury was waived. The trial court awarded plaintiff judgment for $1,839.20 with interest and costs. It denied recovery to the defendant.

Defendant appeals.

As stated by defendant the appeal here presents primarily the question of whether the language in the loss payable clause "provided, also, that in case the Lessee, Mortgagor or Owner shall neglect to pay any premium due under such policy the Lienholder shall, on demand, pay the same" is a condition or a covenant.

We conclude that it is a condition and affirm the judgment of the trial court.

In 44 C. J. S., Insurance, § 356(d), p. 1335, the status of the decisions on the matter is stated as follows: "There is a conflict of authority on the question whether or not a mortgagee is liable for premiums on a policy containing a clause, usually referred to as a standard mortgage clause, declaring that the policy shall not be invalidated as to the mortgagee's interest by any act or neglect of the mortgagor, 'provided' in case the mortgagor shall neglect to pay any premium the mortgagee shall, on demand, pay it. Some authorities have held that such clause embodies a contract or covenant on the part of the mortgagee to pay the premium on failure of the mortgagor to pay it. Other authorities have held that such clause, or a similar one, imports a condition merely, and not a covenant, and that the mortgagee is not liable for the premium, if he does not continue the policy, * * *."

In 36 Am. Jur., Mortgages, § 329, p. 852, the rule is stated as follows: "It is clear that a mortgagee is liable for insurance premiums where he contracts for the insurance or makes an express promise to pay therefor. In the absence of such contract or promise, however, the question of the liability of a mortgagee for premiums for insurance on the mortgaged property is one as to which the authorities are in conflict. This conflict results principally from a division of opinion on the question whether a mortgage clause attached to the policy, upon which the contention that the mortgagee is liable for the premiums is based, is to be considered as constituting a condition of the mortgagee's right to recover or a covenant imposing a personal obligation. In some cases, it is held that such a clause does not merely prescribe a condition on performance of which the mortgagee might entitle himself to the benefits of the insurance, but contains an express promise by the mortgagee to pay the premium in case of default by the mortgagor, where the policy is delivered to and accepted by the mortgagee."

The question is the subject of annotations in 47 A. L. R. 1126, 56 A. L. R. 679, and 83 A. L. R. 105. The annotation in 47 A. L. R. on page 1126 follows the opinion in Farnsworth v. Riverton Wyoming Refining Co., 35 Wyo. 334, 249 P. 555. Of that decision the annotation says: "* * * the opinion in the latter case leaves little, if anything, to be said upon the subject under annotation, so far as adjudicated opinion is concerned. A more exact, exhaustive, and thoroughly analytical discussion of the authorities can scarcely be imagined." This case is repeatedly followed by later decisions in other jurisdictions in holding that the clause constitutes a condition and not a covenant. The effect of this decision is that the default of the mortgagor brought the condition of the policy into full force and effect as a separate contract between the insurance company and the mortgagee subject to a condition subsequent, to wit, the payment

of the premium on demand on penalty of losing rights prospectively if the demand were not complied with, but under no obligation to pay the premium if the mortgagee preferred to let the policy lapse. The annotation in 56 A. L. R. on page 679 follows the opinion in Whitehead v. Wilson Knitting Mills, 194 N. C. 281, 139 S. E. 456, where the clause was held to be a condition. The opinion states: "We concur in the opinion of the majority of the courts that the clause in question is a condition and not a contract or covenant. To hold otherwise would be to render the mortgagee liable for such premiums even after its interest in the mortgaged premises had expired, either by foreclosure or payment of the mortgage." The opinion also states: "According to the clear weight of authority in other jurisdictions, where the clause in question has been construed, it is held to be a condition, and not a covenant. In fact, in but two cases has a contrary conclusion been reached, and they have not been followed in the more recent decisions." The annotation in 83 A. L. R. on page 105 follows the opinion in Stoddart v. Black, 134 Kan. 838, 8 P. 2d 305, a case which held the clause to create a covenant on the part of the mortgagee to pay the premium on the condition named. We shall discuss this case later herein. The annotation states: "While the cases are in irreconcilable conflict, according to the clear weight of authority,—as shown by the earlier annotations,—such language is to be construed as a condition only, and not as a covenant."

In 2 Cooley's Briefs on Insurance (2d Ed.), Premiums and Assessments, ch. VIII, § 2(f), p. 1517, it is stated: "A question of some interest has arisen as to the liability of the mortgagee for premiums under the standard mortgage clause. This clause, making the policy payable to the mortgagee as his interest may appear, declares in substance that the policy as to the interest of the mortgagee shall not be invalidated by any act or neglect of the mortgagor, but that, in case the mortgagor or owner

shall neglect to pay any premium due, the mortgagee shall, on demand, pay the same. In some of the earlier cases construing this clause it was held that the clause was, in effect, a covenant or an absolute promise on the part of the mortgagee to pay the premium on the mortgagor's default, and not a mere condition, on the performance of which he might, at his option, entitle himself to the benefits of the clause. * * * But the later cases have rejected this doctrine, and have held that the provision for payment of premiums by the mortgagee is not an absolute promise on the mortgagee's part to pay the premiums, but merely makes such payment a condition to his recovery."

In Restatement, Contracts, § 260, p. 373, it is stated: "If in an agreement words that state that an act is to be performed purport to be the words of the person who is to do the act, the words are interpreted, unless a contrary intention has been manifested, as a promise by that person to perform the act. If the words purport to be those of a party who is not to do the act they are interpreted, unless a contrary intention has been manifested, as limiting the promise of that party by making performance of the act a condition." In the comment it is said: "b. If a contract is clearly unilateral as is the case with many if not most policies of insurance, the answer to the question to whom must the language be attributed admits of no doubt. In such a contract only one party speaks, and that is the covenantor or promisor. Any clause, therefore, in a policy of insurance, requiring any act to be done by the insured, will make that act a condition of the covenant or promise of insurance."

A discussion citing the above statement in Restatement is made by Williston in his work on contracts. 3 Williston on Contracts (Rev. Ed.), § 672, p. 1930. He states: "The matter has been well expressed by Professor Langdell: 'Moreover, the words of such a clause will have, in fact, a different meaning, according to the

party who uses them. If they are used in a contract by the party who is to do the act, they plainly import that he binds himself to do it; while, if they are used by the party for whose benefit the act is to be done, they fairly mean that he will require it to be done, i.e., that his own obligation shall be conditional upon its being done. How then shall it be ascertained to whom the language of such a clause is to be imputed? If the contract be clearly unilateral (e.g., a policy of insurance), of course the answer to this question admits of no doubt. In such a contract only one party speaks, and that is the covenantor or promisor. Any clause, therefore, in a policy of insurance, requiring any act to be done by the insured, will be a condition of the covenant or promise of insurance, though its language may more naturally import a covenant or promise by the insured.' "

It is stated in 14 Appleman, Insurance Law and Practice, § 7842, p. 39, that: "One of the most puzzling results reached by the courts arises in connection with the type of mortgage clause which has been variously termed the 'standard', 'New York', or 'union' clause. It will be recalled from the previous discussion that this clause gives great rights to the mortgagee and protects him under circumstances where the mortgagor would receive no indemnification. However, in return for that special protection, the mortgagee is to pay upon demand, if the mortgagor defaults, such premiums as may be due. This would seem to be clear in itself, to be fair, based upon a proper consideration, and to be an agreement of the mortgagee arising through his request of the loss payable clause, acceptance of the policy, or silent acquiescence. However, the vast majority of courts have reached the somewhat surprising conclusion that such agreement to pay is not a covenant on the part of the mortgagee to pay premiums which can be enforced by the insurer, but is merely a condition to his right to recover the insurance proceeds. Mortgagees are not to be blamed for striving to achieve this result, as it places

them in the enviable position of being able to harvest a crop without first sowing seed."

We state his reasons with the comment that the courts do not seem to have been of like mind.

Appleman further states: "Elsewhere it has been stated that such proviso embodies a conditional promise of the mortgagee to pay premiums." Here he cites only Baker v. Fargo Building & Loan Assn., 64 N. D. 317, 252 N. W. 42. We discuss that case later herein.

We now go to the decisions.

It is stated in the text and some of the decisions that the clause is a New York standard clause.

Coykendall v. Blackmer, 161 App. Div. 11, 146 N. Y. S. 631, was an action to recover premiums. The court referred to the clause here involved as being a "New York Standard" clause. It held the clause to be a condition and not a covenant and that if the mortgagee, on demand, failed or refused to pay the premium he was "no longer" entitled to avail himself of the provisions of the policy.

The same question again arose in St. Lawrence County Farmers' Ins. Co. v. Thompson, 150 Misc. 532, 270 N. Y. S. 898, where this clause was held to be a condition and not a covenant. The court in doing so followed the Coykendall decision. The decision was affirmed in 242 App. Div. 747, 274 N. Y. S. 1007, by the appellate division of the Supreme Court, and in 266 N. Y. 604, 195 N. E. 220, by the Court of Appeals.

In John N. Acuff Co. v. Bankers Trust Co., 157 Tenn. 99, 7 S. W. 2d 52, the court held that the clause was not a covenant but a condition. It cited only as authority Farnsworth v. Riverton Wyoming Refining Co., *supra,* and quoted from the A. L. R. annotation.

We have already referred to Whitehead v. Wilson Knitting Mills, *supra,* where the Supreme Court of North Carolina held the clause to be a condition and not a covenant.

In Commercial Union Assur. Co., Ltd. v. Burlington

County Trust Co., 11 N. J. Misc. 404, 166 A. 479, the district court of New Jersey held the clause to be a condition, a promise of the mortagee to pay the premium if it chose to do so and continue the insurance.

In Margolies v. Providence Bank (Pa.), 44 District and County Reports 88, the court following the decision in Farnsworth v. Riverton Wyoming Refining Co., *supra,* held that the mortgagee was not liable to the insurers for premiums unless the mortagee assumed the liability after notice that the premiums were in default.

In Wharen v. Markle Banking & Trust Co., 145 Pa. Super. 99, 20 A. 2d 885, the Superior Court of Pennsylvania held that the provision was not a covenant but a condition giving effect to the secondary contract between the insurer and the mortgagee. It cited 2 Cooley's Briefs on Insurance (2d Ed.), Premiums and Assessments, ch. VIII, § 2(f), p. 1517, and 26 C. J., Fire Insurance, § 115, p. 113.

In Prudential Ins. Co. v. Franklin Fire Ins. Co., 180 S. C. 250, 185 S. E. 537, the court held: "* * * the provision that 'the mortgagee shall, on demand, pay' the premium, is a condition and not a covenant. That is to say—the language so construed does not create such a contract or covenant on the part of the mortgagee as would support a cause of action in behalf of the insurer for the recovery from the mortgagee of the unpaid premium."

In Schmitt v. Gripton, 77 Cal. App. 429, 247 P. 505, the District Court of Appeal held that the provision was to be construed most strongly against the insurer and held that the clause was a condition and not a covenant that would require payment by the mortgagee in the absence of an express or implied promise.

In George H. Olmstead & Co. v. Metropolitan Life Ins. Co., 118 Ohio St. 421, 161 N. E. 276, the court was called upon to construe the clause. It cited the Kansas and North Dakota cases, holding the clause to be a covenant. It then cited many cases holding the clause to

be a condition. It then held: "Without analyzing, approving, or disapproving the logic of these several decisions or attempting to say where the weight of authority prevails, the fact that such respectible authority is in irreconcilable conflict, and was so long prior to the execution of the insurance contracts here under consideration, coupled with the fact that the lower courts in the instant case are in disagreement as to whether the clause is a covenant or a condition, presents such persuasive argument of the ambiguity of the clause that if this court were in accord as to the unambiguity of the clause it would hesitate to so declare. However, if this clause were here for consideration as an initial question, we could not find it to be otherwise than ambiguous. Having reached the conclusion that the clause is ambiguous, and reasonably as susceptible to a construction as a condition as it is to a construction as a covenant, no other course presents itself than a construction most strongly against the party that selected the language and most favorably toward the party sought to be charged by it."

We now go to the decisions of the two courts that hold such a clause to be a covenant.

St. Paul Fire & Marine Ins. Co. v. Upton, 2 N. D. 229, 50 N. W. 702, construed the clause to be a promise of the mortgagee to pay the insurance premium in case of the failure of the mortgagor to pay it. The case was decided in 1891. The writers agree it is the initial decision of the courts on this matter.

In Boston Safe Deposit & Trust Co. v. Thomas, 59 Kan. 470, 53 P. 472, the Supreme Court of Kansas construed the clause to be a covenant and not a condition, following and citing the North Dakota decision.

In 1930 the Court of Appeals of Georgia decided Security Ins. Co. v. Eakin, 41 Ga. App. 257, 152 S. E. 606. It quoted from and followed the North Dakota and Kansas cases above cited.

In 1932 the Supreme Court of Kansas again had the

question before it in Stoddart v. Black, *supra.* The court, citing its previous decision and the North Dakota decision, refused to overrule its previous holding. The court then discussed the meaning of the word "provided." It then cited and quoted from Security Ins. Co. v. Eakin, *supra.* It agreed there was diversity of opinion in the courts but saw no reason to change its previous construction of the clause. In 1934 the Supreme Court of North Dakota had the same question again before it in Baker v. Fargo Building & Loan Assn., *supra.* It was asked to overrule its decision in St. Paul Fire & Marine Ins. Co. v. Upton, *supra.* It cited and quoted at length from the Kansas case of Stoddart v. Black, *supra,* and from the Georgia case of Security Ins. Co. v. Eakin, *supra.* It adhered to its earlier decision and said that if a change was desirable that appeal should be made to the Legislature.

Then in 1933 the Supreme Court of Georgia decided Asher v. Union Assur. Soc., 177 Ga. 662, 170 S. E. 786. The court held that the clause was not a covenant but merely a condition. It cited many of the cases herein referred to and held its ruling to be in accord with the weight of authority.

The Court of Appeals of Georgia then "overruled on review" Security Ins. Co. v. Eakin, *supra.* Asher v. Union Assur. Soc., 47 Ga. App. 620, 171 S. E. 238.

It would appear then that less than 2 years after the Supreme Court of Kansas had relied on the Georgia case, the court that wrote it had overruled it, and the Supreme Court of Georgia had announced a rule contra to that of Kansas. It would appear also that at the time the Supreme Court of North Dakota filed its opinion in Baker v. Fargo Building & Loan Assn., *supra,* in which it relied on the Georgia case, the Georgia case had been overruled 2 months prior thereto.

It is quite apparent from the above authorities that courts have found the clause here involved to be subject to diametrically different constructions. We con-

clude as did the Supreme Court of Ohio in George H. Olmstead & Co. v. Metropolitan Life Ins. Co., *supra,* that the authorities present persuasive authority that the clause is ambiguous and that "no other course presents itself than a construction most strongly against the party that selected the language and most favorably toward the party sought to be charged by it."

To this reasoning may be added the fact that the diversity of construction has existed in the decisions of the courts for many years, and yet the defendant continued to use the language that has caused the diverse decisions as to its meaning. In some of the opinions above cited it is suggested that had defendant desired to make certain of a construction that this clause was a covenant, a simple change in language could have expressed that purpose clearly. It did not do so.

It is stated in Restatement, Contracts, § 236, p. 328, that: "Where words or other manifestations of intention bear more than one reasonable meaning an interpretation is preferred which operates more strongly against the party from whom they proceed, unless their use by him is prescribed by law."

This language is in accord with our decisions. See 4 Nebraska Digest, Contracts, Key No. 155.

Commenting on the rule Restatement says: "This rule finds frequent application in regard to policies of insurance, which are ordinarily prepared solely by the insurance company, and therefore, the words of the policies are construed most strongly against it." Restatement, Contracts, § 236, p. 330.

We conclude then that the clause here involved is a condition and that the condition requires the plaintiff to pay the premium on the insurance involved from and after the date of the demand if plaintiff desires to keep the insurance in force. Such a conclusion is in accord with the authorities above cited that construe this language to be a condition.

It being stipulated here that the insurance was in full

force and effect when the losses involved occurred and that the demand of the defendant to pay the premium was not made until after the losses had occurred and the policy had been canceled, it must necessarily follow that plaintiff is entitled to judgment for the loss proven and is not required to pay the premium demanded.

It has been noted that of the premium demanded, $45.92 was on vehicles in which plaintiff had an insurable interest and $1,740.94 was on vehicles in which plaintiff had no insurable interest. Plaintiff not being required to pay any premium, it is not necessary to decide whether plaintiff, in the event this were a covenant, would be required to pay only the $45.92 or the total of the two items. However, in order that our decision may not be misconstrued as relating to the entire demand in the event a covenant is presented later, we point out that the only authority we have found on that matter is Stoddart v. Black, *supra,* which holds that where a covenant exists, the obligation to pay extends only to the interest of the mortgagee. See, 14 Appleman, Insurance Law and Practice, § 7842, p. 40; 44 C. J. S., Insurance, § 356, p. 1336; 36 Am. Jur., Mortgages, § 329, p. 853.

Defendant in its statement of questions involved advises us that the issue here is: Is this clause a condition or a covenant?

We have examined the authorities and determined that it is a condition.

Defendant in its argument concedes that the clause constitutes a condition and not a covenant. We have examined the authorities on that question in order to determine the obligations that attach in each instance. Defendant then says: "If the language of the Loss Payable Clause constitutes a condition, then there is no liability upon the appellee for failure to pay any premium due upon demand and the only consequence is that the appellee cannot enforce the policy as against the appellant. If the language constitutes a covenant, then

the appellee becomes liable for any premium due upon demand and the appellant has only a right of set-off. * * * It is the contention of the appellant that the appellee's breach or failure to perform the condition in the policy is a complete defense to the action by the appellee upon the policy. * * * the fact that the policy in this case had been cancelled at the time the demand for payment of premiums due by the mortgagee was made is of no importance. Also, the fact that the loss had already occurred is of no importance since the policy does not specify when the demand should be made. The purpose of the demand is simply to notify the mortgagee that the premium is unpaid and that the company intends to hold the mortgagee liable for the premium. If the mortgagee fails to comply with the demand, then a condition of the policy has been broken * * *."

Defendant would have us construe the condition so that upon demand being made it becomes an absolute covenant to pay.

Defendant would make the demand for payment of the premium retroactive. The stipulation does not show that there were any payments due at the time the losses occurred. As pointed out it is stipulated that the policy was in full force and effect when the losses occurred.

Defendant would have us attach to the condition the obligations that result from a covenant and would escape the obligations that result from a condition. That it cannot do.

The judgment of the trial court is affirmed.

AFFIRMED.

HARRY GRAVES, APPELLANT, V. RICHARD J. BEDNAR, APPELLEE.

95 N. W. 2d 123

Filed February 20, 1959. No. 34495.

1. **Army and Navy: Continuances.** The intent of the Soldiers' and Sailors' Civil Relief Act of 1940 is that stays granted solely on

account of the serviceman's military service be terminated at the expiration of the period specified in the act.

2. ———: ———. The extent of the stay is limited to the period of military service and 3 months thereafter or any part of such period.

3. ———: ———. The determination of an application under section 521, 50 U. S. C. A., Appendix, of the Soldiers' and Sailors' Civil Relief Act, depends on the facts and circumstances of each case.

4. ———: ———. Section 521, 50 U. S. C. A., Appendix, of the Soldiers' and Sailors' Civil Relief Act, cannot be construed to require a continuance on a mere showing that the defendant was in the military service. The act clearly requires that there be a present and not a mere anticipatory danger.

APPEAL from the district court for Douglas County: JAMES M. FITZGERALD, JUDGE. *Reversed and remanded with directions.*

Theodore L. Kowalski and *Norman Denenberg,* for appellant.

William P. Mueller and *Kennedy, Holland, DeLacy & Svoboda,* for appellee.

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

SIMMONS, C. J.

This action involves an alleged cause of action for damages. It comes here on appeal from an order of the trial court granting the defendant a continuance under the provisions of the Soldiers' and Sailors' Civil Relief Act, 50 U. S. C. A., Appendix, § 521, p. 545.

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

Plaintiff's petition was filed October 23, 1953. He alleged a collision occurring October 6, 1953, between a motorcycle he was operating and an automobile defendant was operating. Plaintiff sought recovery of damages to person and property. Defendant answered on November 23, 1953. He denied negligence, alleged contributory negligence, and denied liability.

It appears that the defendant was ordered to active duty with the United States Army on July 2, 1954, and either entered on active duty then or in September 1954, for a period of 3 years.

The cause was stipulated for trial in December 1953. Defendant's deposition was taken by plaintiff on April 24, 1954, at which time he was represented by counsel. In November 1954, it was announced that the case would have to be set specially. Plaintiff then, through 1955 and 1956, made repeated informal efforts without success to get the defendant to agree on a date of trial.

During all of this time it appears that the defendant was in the United States at Fort Benning, Georgia; at school in Virginia; and at Aberdeen, Maryland. He came home to Omaha at Christmas time in 1954. He was in Omaha again for his father's funeral in November 1955, and again at Christmas time in 1956 for his wedding. It does not appear that he contacted his counsel when at home on those occasions. We find no showing that counsel contacted him during any of this period.

Defendant was sent on military duty to France in January 1957. At some period—the time is not shown—defendant became a commissioned officer in the regular army, and determined to make army service a career.

On June 17, 1957, the cause was set for trial in regular sequence after pre-trial conference.

On September 10, 1957, defendant filed a motion for continuance, claiming the benefits of the Soldiers' and Sailors' Civil Relief Act, 50 U. S. C. A., Appendix, § 521, p. 545. He offered three affidavits in support of the motion. One was that of his counsel that it would be prejudicial to defendant's rights to try the cause in defendant's absence. Defendant offered his own affidavit dated September 3, 1957, that he was then on duty in France with the Procurement Branch of the Judge Advocate Division and with the additional duty

of acting as trial counsel of General Courts Martial; that his wife was pregnant and expecting delivery of a child in October 1957; that he was living apart from other Americans in a rural area without telephone service, and several miles from a medical facility; that his wife would depend on his services at the time of delivery of the child; and that it would create a "serious conflict" with his military duties and "operate as an unreasonable hardship" for him to journey to the United States "in the next several months."

He offered also the affidavit of an "Asst AG Personnel Officer," dated September 3, 1957, to the effect that defendant was then serving in Europe and was scheduled to return to the United States in January 1960.

Plaintiff moved to quash the motion for a continuance. On September 19, 1957, the trial court denied the motion to quash and the motion for continuance was sustained "until such time as the defendant is able to return to the United States to participate in the trial of the case."

Plaintiff filed a motion for a new trial.

During the pendancy of that motion the plaintiff moved for an order setting the case for trial at the "top of the list of cases ready for trial." Defendant moved to quash this motion. Hearing was had on that motion. On December 18, 1957, the trial court sustained the motion to quash.

On June 17, 1958, hearing was had on the plaintiff's motion for a new trial. The factual matters herein recited were offered in evidence at that time. The court in effect re-examined the entire matter. The motion was overruled.

Plaintiff appeals.

Section 521 of the Soldiers' and Sailors' Civil Relief Act, 50 U. S. C. A., Appendix, p. 545, provides: "At any stage thereof any action or proceeding in any court in which a person in military service is involved, either as plaintiff or defendant, during the period of such

service or within sixty days thereafter may, in the discretion of the court in which it is pending, on its own motion, and shall, on application to it by such person or some person on his behalf, be stayed as provided in this Act [sections 501-548 and 560-590 of this Appendix], unless, in the opinion of the court, the ability of plaintiff to prosecute the action or the defendant to conduct his defense is not materially affected by reason of his military service."

Section 524 of the Soldiers' and Sailors' Civil Relief Act, 50 U. S. C. A., Appendix, p. 577, provides in part: "Any stay of any action, proceeding, attachment, or execution, ordered by any court under the provisions of this Act [sections 501-548 and 560-590 of this Appendix] may, except as otherwise provided, be ordered for the period of military service and three months thereafter or any part of such period, * * *."

In Kindy v. Koenke, 216 F. 2d 907, it was held that: "The intent of the Soldiers' and Sailors' Civil Relief Act of 1940 is that stays granted solely on account of the serviceman's military service be terminated at the expiration of the period specified in the Act." The extent of the stay is limited to "the period of military service and three months thereafter *or any part of such period* * * *." (Emphasis supplied.)

The order of the trial court continuing this case "indefinitely" as it is expressed in one order or "until such time as the defendant is able to return to the United States to participate in the trial of the case" is clearly an order beyond the discretionary power of the trial court and beyond the limitation provided in section 524 of the Soldiers' and Sailors' Civil Relief Act, 50 U. S. C. A., Appendix, p. 577. It accordingly must be and is set aside.

The above conclusion requires a reversal of the trial court's order and a remand of the cause. It does not solve the problem of getting this cause set for trial and tried. We go then to the question of whether or not

defendant was entitled to a stay under the Soldiers' and Sailors' Civil Relief Act on the showing made.

In Sullivan v. Storz, 156 Neb. 177, 55 N. W. 2d 499, 34 A. L. R. 2d 1142, we held that the determination of an application under section 521, 50 U. S. C. A., Appendix, of the Soldiers' and Sailors' Civil Relief Act, depends on the facts and circumstances of each case.

When the court ruled on this motion in September 1957, it had a showing as to the defendant that his wife was expecting delivery of a child in October 1957, and his presence was required there; and that his return to the United States "in the next several months" would be an "unreasonable hardship." The unreasonable hardship contention obviously relates to the wife's condition. Within the normal course of things that problem would have been removed within a few weeks of the date of the affidavit. There is no showing or contention here that it was not so removed. In any event at the time the court re-examined this question in June 1958, the time of the expected birth as well as the "next several months" from September 3, 1957, had both passed. So the fact showing of unreasonable hardship necessarily had no bearing on the final determination of this matter. Whatever validity that reason may have had, it was but a temporary situation and had ceased when the order was entered from which this appeal was taken.

The only other reason advanced for preventing the cause being set for trial is that the defendant is on military duty in France and is scheduled to rotate to the continental United States during January 1960. There is no showing or contention that he has applied for leave to return to the United States for the trial of this cause and of necessity therefrom no showing that he has been unable to secure leave.

In Sullivan v. Storz, *supra*, we stated: "Obviously the question of a leave to attend trial would not arise until a trial date had been set. Just as obviously the

defendant has not asked for leave nor undertaken to explore that situation. He has prevented the case being set for trial, an obvious preliminary to such a request. He relies upon the fact that he is in the military service as the basis of preventing this cause coming to trial."

We held: "Section 521, 50 U. S. C. A., Appendix, of the Soldiers' and Sailors' Civil Relief Act cannot be construed to require a continuance on a mere showing that the defendant was in the military service. * * * The act clearly requires that there be a present and not a mere anticipatory danger."

As was said by the Supreme Court of Minnesota in Luckes v Luckes, 245 Minn. 141, 71 N. W. 2d 850, 54 A. L. R. 2d 384, in considering affidavits in support of a motion for stay under the Soldiers' and Sailors' Civil Relief Act, a court may attach significance not only to what an affiant said but what he failed to say. Accordingly we consider the fact that defendant is silent either on his asking for leave to attend trial or his ability to secure such leave.

In Stalcup v. Ruzic, 51 N. M. 377, 185 P. 2d 298, this situation was presented: A damage action for personal injuries in an automobile collision was brought against three defendants. Plaintiff secured a judgment. One defendant asserted error in the court's denial of a continuance under the act here being considered. The opinion recites that defendant was forced "to defend at a time when he was in Germany as a member of the United States Army." In affirming a denial of a continuance the court said: "The motion did not show that any attempt had been made to procure leave for appellant so that he could be present at the trial. In fact, any showing of diligence on his part is wholly lacking, * * *."

In Sharp v. Grip Nut Co., 116 Ind. App. 106, 62 N. E. 2d 774, the court said: "Courts should be alert to extend to service men the full measure of protection

afforded by the Act. It has been said, the Act must be liberally construed to protect those in the military service, and that the discretion vested in trial courts is not to be withheld on nice calculations as to whether prejudice may result from absence, or absence result from the service. * * * With that statement no one could disagree, but the man in service must himself exhibit some degree of good faith and his counsel some degree of diligence."

We bear in mind that this cause of action arose before defendant's military service began. It was at issue on November 23, 1953. Depending on whether defendant entered military service in July or September 1954, this cause was pending and at issue either 7 or 9 months before military service began. Thereafter defendant remained in the continental United States until January or February 1957. During that time he was in Nebraska within the jurisdiction of the court on three occasions. It does not appear that he contacted his counsel on any of these occasions. It was not until September 1957, almost 4 years after the alleged cause of action against him arose, that he sought to stay proceedings under the Soldiers' and Sailors' Civil Relief Act.

We call attention, then, to Glick Cleaning & Laundry Co. v. Wade, 206 Ark. 8, 172 S. W. 2d 929, where a continuance under the act was refused on the ground that defendant did not use due diligence to procure an adjudication of his rights at a time when it could be done. The court, affirming the judgment of the trial court, discussed the matter of intentional procrastination, the absence of a showing of effort made in good faith to respond to orderly processes of the court, and the fact that defendant did not apply for leave or show that deferment was refused. In that case the defendant was a lawyer. Here the defendant is a law school graduate and engaged in legal duties in the army. The court then said: "By this we do not mean to say that if

duty should call to the service one who has a suit pending, such litigant may place his personal interest before the national need. The exact contrary is true. What is intended is that when, as here, a man knows weeks in advance that his application for a commission will probably be accepted, and that he will be called at a known date, there is a dual duty of making ready for induction and of facilitating work of the court in the forum where such defendant's litigable interests are pending."

Defendant here relies on Rutherford v. Bentz, 345 Ill. App. 532, 104 N. E. 2d 343. The facts there are distinguishable from the instant case. There an automobile collision happened on June 9, 1949. Defendant, a soldier, was not in Illinois when the suit was started, and was on his way to Korea. Service upon defendant as a "nonresident" was made on the Secretary of State. Defendant "wired" the judge that he was in military service on Guam and requested protection of his rights under the Soldiers' and Sailors' Civil Relief Act. A guardian ad litem for defendant was appointed to defend. Judgment was for the plaintiff. The opinion does not show the dates involved except that of the accident. However, the cause was determined in the court on appeal 2½ years after the accident. The fact elements there are not comparable to the long and inexcusable delay occasioned here.

Defendant relies on Register v. Bourquin, 203 La. 825, 14 So. 2d 673. There the automobile accident occurred on July 27, 1942. Suit was brought September 30, 1942. Defendant entered the armed services in December 1942. The motion for stay was filed March 9, 1943. Stay was granted. The question was determined on writ of certorari by the Supreme Court on June 21, 1943, less than a year after the occurrence of the accident. The factual reasons for the court's judgment are not set out. It is patent that the act was

not being used for the purpose of delay, after all other means of delay had been exhausted.

Defendant relies on Davis v. Wyche, 224 N. C. 746, 32 S. E. 2d 358. This also was an automobile accident case. The accident occurred October 19, 1940. Defendant entered the service in February 1941. Suit was brought in April 1941. In October 1942, the defendant filed a motion for a stay. He was then in the military service in England. A hot war was then in progress. He returned to the United States and to the "Carolinas" in November and December 1943. He had been in combat service and was then under such physical disability as to justify a postponement. Later he was stationed in Kansas. In June 1944, when the hot war was still in progress, the trial court continued the cause. Its judgment was affirmed. We need do no more than recite the facts of that case to show that it has no controlling effect on the instant case.

We find that the evidence of record does not sustain the granting of a continuance under the Soldiers' and Sailors' Civil Relief Act.

We reverse the order of the trial court and remand the cause with directions to set the cause down for trial at a definite date and to try the issues presented within 90 days from the date of the mandate herein unless hereafter on proper procedures an adequate showing is made justifying a stay.

It is to be remembered that the purpose of the act is to protect rights and is not to grant immunity from liability.

REVERSED AND REMANDED WITH DIRECTIONS.

DOLORES LUCILLE WORKMAN ET AL., APPELLANTS, V. CLARA D. WORKMAN, EXECUTRIX OF THE ESTATE OF LEWIS M. WORKMAN, DECEASED, ET AL., APPELLEES, IMPLEADED WITH DELLOUISE WORKMAN CARROLL, APPELLANT.

95 N. W. 2d 186

Filed February 20, 1959. No. 34500.

1. **Equity: Infants.** A court of equity with notice or knowledge of the facts should protect the rights of minors who are not properly or adequately represented when their rights are involved in pending litigation.
2. **Parties.** If a complete determination of a controversy in litigation cannot be had without the presence of other parties, the court should require them to be made parties to the case.
3. **Equity.** When equity acquires jurisdiction of an action, it will retain it for all purposes until the litigation is completely and finally determined.
4. **Trial: Judgments.** A motion for summary judgment is not a substitute for a demurrer, a motion to dismiss, or for judgment on the pleadings. It is a new procedure which may be used in certain cases where other procedural steps are not effective.
5. ———: ———. The movant, in order to obtain a summary judgment, must show that there is no genuine issue of fact and that he is entitled to a judgment as a matter of law.
6. **Abatement and Revival.** Pending litigation involving a cause of action which survives the death of a party thereto may be revived in the manner provided by law and prosecuted to final judgment in the court which has jurisdiction of the action.
7. **Pleading.** A motion for judgment on the pleadings attacks pleadings in a cause for deficiency in the substance of them and presents only a question of law.
8. ———. A motion of that character admits the truth of all well-pleaded facts in the pleadings of the opposing party and reasonable inferences therefrom and necessarily admits, for the purposes of the motion, the untruth of the allegations of the movant insofar as they have been controverted.

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

Perry, Perry & Nuernberger and *Crosby, Pansing & Guenzel,* for appellants.

Max Kier and *Richard Berkheimer,* for appellees.

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

BOSLAUGH, J.

This appeal is a challenge of the correctness of a summary judgment in favor of Frank M. Workman; a summary judgment in favor of Clara D. Workman, executrix of the estate of Lewis M. Workman, deceased; a judgment on the pleadings in favor of Clara D. Workman, Apartment Supply House, Apartments, Inc., Capitol Enterprises, Inc., Capitol Investment Co., and Capitol Land & Investment Co.; and a judgment of dismissal of the action as to the named parties in favor of whom the judgments were rendered. The motions for summary judgment and the motion for judgment on the pleadings were each submitted and decided without evidence offered in support of any of them and there is no bill of exceptions in the record of this appeal that contains anything material or important to any of the motions or any of the judgments rendered as above described. The correctness of the action of the court in rendering the judgments must be determined from a consideration only of the pleadings of the parties affected as they were on the date the motions were sustained and the judgments were rendered.

The third amended and supplemental petition of appellants contains these allegations: Dolores Lucille Workman is the duly appointed and qualified guardian of Joseph, Robert, and Francine Workman, minor children of Dolores Lucille Workman and Frank M. Workman. Dellouise Workman Carroll is a sister of the minors. Frank M. Workman, hereafter referred to by his name or as Workman, is a son of Lewis M. Workman and Clara D. Workman. Apartment Supply House was a partnership with Lewis M. Workman and Clara D. Workman as its members. The latter is the surviving partner and is operating under the trade name of Apartment Supply House. Capitol Enterprises, Inc., Apart-

ments, Inc., Capitol Investment Co., and Capitol Land & Investment Co. are corporations and each of them is used by Workman for the purpose of receiving property and proceeds of property pursuant to a scheme and device adopted by Workman to defraud appellants and Dellouise Workman Carroll by which Workman is attempting to reduce his marital estate and place it in the name of his parents or corporate entities apparently owned by his parents but actually owned by Workman. The last two corporations have each received the apparent title to property to further the scheme and device and are operated to defraud appellants for the benefit of Workman.

All issues between Dolores Lucille Workman, hereafter designated Mrs. Workman or by complete name, and her former husband, Workman, have been finally determined and settled except as to the cause of action alleged in the third amended and supplemental petition herein by which the gift made by Workman and Mrs. Workman to their children is attempted to be made effective and such cause of action is reserved in Mrs. Workman as a donor entitled to assert that the gift in which she joined of assets to the Workman trust be rendered and adjudicated fully effective. The scheme and device of Workman to defraud Mrs. Workman of her interest in the property of the marital estate which she owned or in which she had an interest consisted in part in Workman making leases of corporate real estate to his parents or to Clara D. Workman individually for improvident rentals to enable the income from real estate to be diverted and appropriated before it reached the corporations or trusts, and the retention of actual control, use, and ownership of the property by Workman whether the nominal title appears in his parents or in corporate entities. The frauds, devices, and schemes were planned, adopted, and practiced for the purpose of preventing the gift of Mrs. Workman and Workman

to their children hereinbefore named from being effective.

In the time between October and December 1949, Workman fraudulently represented to Mrs. Workman that it was desirable and to their interest that conveyances of real estate owned jointly by them as husband and wife and operated as a business partnership should be made to corporations to save income and federal estate taxes and to plan the disposition of their estates; that notwithstanding the conveyances the real estate would remain their property for all practical purposes; that the income and rentals from it would be available to them during their lifetime; and that the children would be benefited by the transfer to the extent the income was not needed by the grantors. Mrs. Workman relied upon the trust relationship existing between her and her husband because of their marital status, their partnership relationship, and the specific representations made to her as aforesaid, and because thereof she joined Workman in deeds of real property in the city of Lincoln, as described in detail in exhibit C, made a part of the pleadings of appellants herein, to Capitol Investment Co., and as described in detail in exhibit D, attached to and made a part of the pleading of appellants herein, to Capitol Land & Investment Co.

The capital stock of the grantees last described is deposited in the Workman trust of which Continental National Bank of Lincoln is trustee and Frederick J. Patz is cotrustee. Workman, in fraud of appellants and with apparent acquiescence of the trustees, has managed the real estate composing the assets of the corporations and the corporations so that little or no profit has accrued to them and no dividends have been declared or if any have, they have been inadequate and disproportionate to the actual earnings and net worth of the corporations, all of which is a purposeful carrying out by Workman and others participating with him in

said conspiracy, scheme, and fraud. The continuation of said operation is not to the best interest of the trust and is a direct contradiction of the instrument drafted and purportedly executed establishing the trust. Appellants have no adequate remedy at law and a decree of the court should be rendered directing the trustees, or someone in their stead selected and empowered by the court, to exercise their rights and duties as holders of the corporate stock of the corporations; removing the management thereof from Workman; cancelling the fraudulent lease or leases of the real estate to Lewis M. Workman, Clara D. Workman, and Apartment Supply House; and directing the declaration of dividends upon the corporate stock for the preservation and improvement of the property and the trust estate.

In furtherance of the conspiracy and fraudulent scheme the parents of Workman as individuals and as Apartment Supply House and Workman as the alleged president of Capitol Investment Co. made a lease to the premises described in exhibit C as item No. 1, known as 1111 to 1119 H Street, for an inadequate, unreasonable, and fraudulent rental for a period of 10 years commencing July 1, 1950. The parents of Workman are named as lessees and by virtue thereof accruing rentals from the real estate described in the lease in excess of $17,000 per year were transferred or apparently transferred to the parents of Workman for a consideration of less than $3,300 per year. The lease is fraudulent and should be annulled and Lewis M. Workman and Clara D. Workman, the named lessees, should be required to account for the proceeds received by them from said fraudulent lease. A part of the proceeds accruing to the lessees on account of the lease has been invested in property in the name of the lessees or in corporations organized by lessees which are Apartments, Inc., and Capitol Enterprises, Inc.

In furtherance of the conspiracy and fraudulent scheme the parents of Workman as individuals and as

Apartment Supply House and Workman as the alleged president of Capitol Land & Investment Co. made a lease to the premises described in exhibit D as item No. 1, known as 429 to 447 South Twelfth Street in Lincoln and 1132 to 1143 K Street in that city, for an inadequate, unreasonable, and fraudulent rental for a term of 10 years commencing July 1, 1950. The parents of Workman are named as lessees and by virtue thereof accruing rentals from the real estate described in the lease in excess of $26,000 per year were apparently transferred to the parents of Workman for a consideration of less than $6,780 per year. The lease is fraudulent and should be annulled and Lewis M. Workman and Clara D. Workman, the named lessees, should be required to account for the proceeds received by them from said fraudulent lease. A part of the proceeds accrued to the lessees on account of the lease has been invested in property in the name of the lessees or in corporations organized by appellees which are Apartments, Inc., and Capitol Enterprises, Inc.

The parents of Workman, in furtherance of the conspiracy to defraud appellants as above alleged, organized Capitol Enterprises, Inc., and paid rentals to it from said property in the name of corporations whose stock is owned by the Workman trust as aforesaid and with the fraudulently acquired assets have purchased specifically described real estate in Douglas County. The parents of Workman took title under the fraudulent arrangement to specifically described real estate located in Lancaster County. In furtherance of the conspiracy to defraud, the parents of Workman organized Apartments, Inc., and paid to it rentals from the real estate and corporations whose stock is owned by the Workman trust as above recited and with the fraudulently acquired assets have purchased specifically described real estate located in Platte County.

Workman occupied a fiduciary relationship to appellants by virtue of his status as husband of Mrs. Work-

man, father of their children, the holder of a power of attorney from Mrs. Workman, and as legal guardian of his children. The transactions described are void except the transfers of property as gifts to the children above referred to and to the Workman trust. The leases of the property hereinbefore described were entered into because of the conspiracy of Workman, his parents, and the four corporate entities organized, directed, and controlled by the individual conspirators, and said three individuals and four corporations acted in reference to the leases for the sole and only purpose of reducing the marital estate of Workman and rendering the gifts to his children and the Workman trust ineffective. Demand has been made upon the Continental National Bank of Lincoln and Frederick J. Patz as trustees of the Frank M. Workman trust to institute and prosecute the causes of action herein stated but the trustees have failed and neglected to take any action. The prayer of appellants is for relief appropriate because of the allegations contained in the third amended and supplemental petition.

Lewis M. Workman died July 31, 1955, and the action was revived as to him in the name of Clara D. Workman, special administratrix of the estate of the deceased, and thereafter a second revivor of the action was had as to the deceased in the name of Clara D. Workman as executrix of the estate of the deceased.

The answer of Clara D. Workman as executrix of the estate of Lewis M. Workman, deceased, and as an individual, Apartment Supply House, Frank M. Workman, Apartments, Inc., Capitol Enterprises, Inc., Capitol Investment Co., Capitol Land & Investment Co., and Dellouise Workman Carroll, contains the following: A denial of all of the allegations of appellants not admitted and the following admissions: Clara D. Workman is the widow of Lewis M. Workman, deceased, and is the executrix of his estate, proceedings for the administration of which are pending in the county court of Lancas-

ter County. Apartment Supply House was a trade name under which Lewis M. Workman and Clara D. Workman held title to property. Frank M. Workman is the divorced husband of Dolores Lucille Workman and the father of Joseph, Robert, and Francine Workman and Dellouise Workman Carroll. Apartments, Inc., Capitol Enterprises, Inc., Capitol Investment Co., and Capitol Land & Investment Co. are Nebraska corporations. Continental National Bank and Frederick J. Patz were trustees of the Workman trust but the latter has resigned as such trustee. Frank M. Workman and his wife were divorced by decree of the district court for Lancaster County and all requirements of the decree have been performed to the time of the making of the answer. The creation of the Workman trust by Frank M. Workman and Dolores Lucille Workman was admitted and property was placed therein at the time of its creation and subsequent thereto by Frank M. Workman.

The answer contains allegations of new matter as follows: The leases referred to in the third amended and supplemental petition of appellants were entered into for an adequate consideration; are reasonable, fair, and just; and should be sustained. The appointment of Dolores Lucille Workman as guardian is not final. An appeal therefrom is pending in the district court for Lancaster County and because thereof she is without capacity to maintain this action. The cause of action alleged in the third amended and supplemental petition is foreign as to parties, subject matter, and causes of action from that presented in the original petition in this case and constitutes a departure from the original action. The action as to Clara D. Workman, executrix of the estate of Lewis M. Workman, deceased, may not be maintained because the jurisdiction of the district court for Lancaster County would be appellate only and no claim was filed in the county court of that county in the estate of the deceased. The time to file claims against the estate has expired and all claims are barred. The

third amended and supplemental petition fails to state a cause of action against Frank M. Workman. All controversy between him and his former wife has been settled and satisfied by their stipulation in writing filed in this cause on December 30, 1957. Mrs. Workman is neither a necessary or proper party to this action and there is a misjoinder of parties by reason thereof. Any claims by Mrs. Workman against any of the adverse parties are barred by the statute of limitations. The appellees prayed a dismissal of the action.

The answer of The Continental National Bank of Lincoln admitted many of the allegations of the third amended and supplemental petition of appellants, denied those concerning which it had no information, and contained the following new matter: The bank and Frederick J. Patz were trustees of the Workman trust and the bank denied that it had participated and acquiesced in any scheme, fraud, or conspiracy as described in the pleading of appellants, or otherwise. Mrs. Workman, following the commencement of this suit, demanded that the bank take steps to cancel the leases referred to in her third amended and supplemental petition. The bank did not comply with her demand. The prayer of its answer is that it be found not to have participated or acquiesced in any scheme of fraud or conspiracy; that the court determine the respective rights of the parties in and to the property and proceeds thereof described in the pleading of appellants; and for costs, including a reasonable fee for their attorney.

The reply of appellants to the answers contains a denial of all allegations in the answers which are not admissions of allegations of the pleading of appellants and the reply alleges matters claimed to constitute Dolores L. Workman guardian of her minor children and that she is authorized to appear for them in this action.

Dellouise Workman Carroll, by permission of the court, withdrew as a party to the answer and all other pleadings in which she had previously joined and made

a separate answer in the case in which she admitted and alleged all the allegations of the third amended and supplemental petition of appellants and adopted and made said allegations her answer in the case. The prayer of her answer was for specific and general relief in accordance with the allegations thereof.

One of the reasons given by the trial court for the rendition of summary judgment in favor of Workman was that by stipulation made by him and Mrs. Workman all controversies upon which relief could be granted in respect to her were settled and disposed of except such claims as she has or asserts in behalf of her minor children and in that regard she has no cause of action individually and any powers she claims as guardian of them were suspended by an appeal from her appointment which is pending.

The stipulation by Workman and Mrs. Workman filed in this case in the district court December 30, 1957, specified the trial of the action which was to commence December 3, 1957, should be postponed for the purpose of affording the parties to the stipulation an opportunity to make the settlement therein set forth of the issues of the present action involving payments required to be made by Workman to Mrs. Workman individually. It was provided therein that the Frank M. Workman trust should be revoked and that the action should be dismissed as to Capitol Apartments, Inc., Capitol Real Estate Co., and Continental National Bank, trustee of the Frank M. Workman trust, "but as to said defendants only." The stipulation accomplished the objects above noted. It also significantly contained a provision that when the dismissal was accomplished as above required, "* * * either party may amend their petition or answer to clarify the issues * * * and the issues shall be subject to trial upon the merits forthwith upon the request of either of the parties hereto."

Thereafter appellants filed their third amended and supplemental petition containing the charges above re-

cited against Workman without an objection from him and somewhat later he joined in an extensive answer to the third amended and supplemental petition of appellants. He was, more than 3 months after the stipulation was made, a party to a motion to strike a paragraph of the reply of appellants. The stipulation contains no statement or inference that any cause of action alleged in the third amended and supplemental petition of appellants was intended to be or was settled, disposed of, or barred as to Workman. The stipulation by its terms affirmatively disputes any such intention or effect of it and his conduct in reference to this case thereafter as above recited establishes and convinces that he had no idea, belief, or intention that the stipulation disposed of the pending cause of action as to him. Any cause of action alleged in the third amended and supplemental petition of appellants exists in every respect as though the stipulation had never been made.

The reply of Mrs. Workman as guardian of the minor children makes allegations that challenge the effectiveness of the appeal that appellees claim was taken from the appointment of the mother of the children as their guardian and the allegations thereof contest the right of appellees to interpose the objection that the appointment of the guardian was by an appeal suspended. There is an issue in this respect. The mother of the minor children above named made an application, defective in form and indefinite in expression, for the purpose apparently of advising the trial court that a contention was made by appellees that an appeal had been taken from the appointment of Mrs. Workman as guardian of the minor children; that the appeal was pending; that her authority as guardian was thereby suspended; that it was alleged and claimed by appellees that the minor children were not parties to the litigation and this resulted in there being no party plaintiff who had sufficient interest to prosecute the action; and that because thereof she desired, as next friend of the minor

children, to make them plaintiffs in the action by her as their next friend. The application of Mrs. Workman in this respect was filed and called to the attention of the court. A hearing thereof was requested and refused several days before the motions for summary judgment and the motion for judgment on the pleadings were heard by the court. The application for leave to make the minors plaintiffs by their mother as next friend was not heard but the case was disposed of while it was pending by summary judgments, judgment on the pleadings, and a judgment of dismissal "without prejudice to the rights of the Workman children" except as to Clara D. Workman as executrix of the estate of Lewis M. Workman, deceased, and the dismissal of the case as to her as executrix was with prejudice.

Any rights of Dellouise Workman Carroll, the adult sister of the minors, in the subject matter of this litigation were identical with the rights of her minor brothers and sister therein. The adult sister was given leave by the trial court, before the motions of appellees were heard and the judgments were rendered, to file a pleading. She did and in it she admitted all allegations of the third amended and supplemental petition and adopted and made them by reference a part of her pleading, the prayer of which is for specific and general relief in accordance with those allegations. Her pleadings also resisted any summary judgment, judgment on the pleadings, or judgment of dismissal of the case.

It was error for the court to refuse permission for the minor children above named to become parties to this case by their mother as their next friend.

In 27 Am. Jur., Infants, § 101, p. 823, this language appears: "In all suits or legal proceedings, of whatever nature, in which the personal or property rights of a minor are involved, the protective powers of a court of chancery may be invoked whenever it becomes necessary fully to protect such rights. If such proceedings are instituted and it appears to the court that

the infant is unrepresented by anyone fully charged with the power and duty of protecting his interests, it is the duty of the court to appoint a guardian ad litem for the minor. But the court's duty does not end here. The minor, in such an action, becomes a ward of the court of chancery, and the chancellor himself is, in legal contemplation, the infant's guardian."

In Jones v. Hudson, 93 Neb. 561, 141 N. W. 141, 44 L. R. A. N. S. 1182, this court said: "A court of equity, if cognizant of the facts, should, on its own motion, protect the rights of minors, when involved in litigation to which they are not parties." See, also, In re Will of Jaeger, 218 Wis. 1, 259 N. W. 842, 99 A. L. R. 738; 27 Am. Jur., Infants, § 113, p. 833.

In this state an action of an infant must be brought by his guardian or next friend and when such an action is brought by a guardian of the infant, the court has power, for cause, to substitute the next friend in place of the guardian. § 25-307, R. R. S. 1943. The district court has authority to and it should appoint a guardian ad litem or permit their next friend to appear for unrepresented, interested infants. Cass v. Pense, 155 Neb. 792, 54 N. W. 2d 68.

The beneficiaries of the arrangement made by Workman and Mrs. Workman as pleaded in the third amended and supplemental petition are their children, three of whom are minors. It follows they are necessary parties to the litigation as a condition of a full and final determination of the controversy alleged in this case. This is especially true if, as appellees contend, Mrs. Workman does not have capacity to be a proper plaintiff in the case, which it is not now necessary to determine. The Code of Civil Procedure declares if a determination of the controversy cannot be had without the presence of other parties, the court must order them to be brought into the litigation. § 25-323, R. R. S. 1943. Smith v. Shaffer, 29 Neb. 656, 45 N. W. 936, declares: "When it appears that all the parties necessary to a proper and

complete determination of an equity cause were not before the district court, the supreme court may remand the cause for the purpose of having such parties brought in." See, also, Cunningham v. Brewer, on rehearing, 144 Neb. 218, 16 N. W. 2d 533; Burke Lumber & Coal Co. v. Anderson, 162 Neb. 551, 76 N. W. 2d 630.

Any right of the minors by their next friend to have timely intervened in the case did not curtail the power of the court to have them brought before it if their presence was necessary to a proper determination of the litigation. Brown v. Brown, 71 Neb. 200, 98 N. W. 718, 115 Am. S. R. 568.

This is an action in equity and it is an ancient doctrine that when equity once acquires jurisdiction it will retain it for all purposes until the controversy has been completely and finally determined. Hardt v. Orr, 142 Neb. 460, 6 N. W. 2d 589.

The trial court was wrong in not permitting or requiring Joseph Workman, Robert Workman, and Francine Workman, minors, by their next friend, Dolores Lucille Workman, to be made plaintiffs in this case with leave to them to file, within a reasonable time, any additional pleading deemed necessary to present the rights they claimed in the subject matter of this action.

That no cause of action is alleged in the third amended and supplemental petition against Workman was another reason given by the trial court for the summary judgment rendered in favor of Workman. This is not important as a reason for the action of the court because a motion for a summary judgment is not a proper method to challenge the sufficiency of a petition to state a cause of action. In Healy v. Metropolitan Utilities Dist., 158 Neb. 151, 62 N. W. 2d 543, this court said: "A motion for a summary judgment is not a substitute for a motion to dismiss, a demurrer, or a judgment on the pleadings. It is a new procedure which may be used

in certain cases where other procedural steps are not effective."

That there is no genuine issue as to any material fact was an additional basis given by the trial court for the entry of summary judgment in favor of Workman. There is an issue in this case as to whether or not Workman has, by conspiracy, fraud, and misrepresentation, wrongfully and illegally by various schemes, means, and methods, with the participation and assistance of individuals and corporate entities joined in the action as parties, intercepted, diverted, and misappropriated property, income therefrom, and proceeds of property, contrary to the arrangement alleged to have been made by Workman and Mrs. Workman because of which she joined Workman in conveyances of real estate to corporations managed and controlled by Workman for the purpose of thereby accomplishing a trust status of the property and accruals therefrom for the benefit of the children of Workman and Mrs. Workman. The primary object of the action is not to administer the alleged trust or its assets but to get into the trust the assets which it is alleged were intended to constitute the trust estate so that it can be administered by a trustee or other proper agency for the purposes and benefits of the alleged beneficiaries, without control, management, or interference of Workman who, it is alleged, is a defaulting creator of a trust willfully, fraudulently, and corruptly for the purpose of defeating it and that he may enjoy the property and income therefrom and personally profit thereby.

There is a genuine issue of fact in this case and Workman is not entitled to judgment as a matter of law. In order to obtain a summary judgment the movant must show that there is no genuine issue of fact and that he is entitled to judgment as a matter of law. Johns v. Carr, *ante* p. 545, 93 N. W. 2d 831.

The reasons given by the trial court for the rendition of summary judgment in favor of Clara D. Workman, executrix of the estate of Lewis M. Workman, de-

ceased, are in substance that the jurisdiction of the district court was appellate only in respect to her; that no claim was filed in the county court in the proceedings for the administration of the estate of Lewis M. Workman, deceased, in respect to the cause of action asserted in the present case; that claims against the estate are barred; and that there is no genuine issue in this case as to any material fact.

This action was commenced April 8, 1955. Lewis M. Workman was then made a party to the case. He died July 31, 1955. This action was, upon stipulation to which the representative of the estate of the deceased was a party, revived against Clara D. Workman, special administratrix of the estate of the deceased. An amended and supplemental petition was filed and thereafter a revivor of the action was had by stipulation, to which the representative of the estate of the deceased was a party, against Clara D. Workman, executrix of the estate of the deceased. The cause of action alleged survived the death of Lewis M. Workman, an original defendant in the case. §§ 25-1401 and 25-1402, R. R. S. 1943. Procedure for revivor is provided by statute upon the death of a litigant in a cause pending in his lifetime if the cause of action did not abate upon his death. §§ 25-1406, 25-1407, and 25-1411, R. R. S. 1943; Murray v. Omaha Transfer Co., 95 Neb. 175, 145 N. W. 360, 7 A. L. R. 1343; Murray v. Omaha Transfer Co., on rehearing, 98 Neb. 482, 153 N. W. 488, 7 A. L. R. 1343; Wilfong v. Omaha & C. B. St. Ry. Co., 129 Neb. 600, 262 N. W. 537. The failure to file a claim against the estate of Lewis M. Workman, deceased, is not significant in this litigation.

It is alleged in the third amended and supplemental petition that Lewis M. Workman conspired with, participated in, and assisted Frank M. Workman in the fraudulent and unlawful acts charged against him. There is a genuine issue of fact in this case in that regard, and what is said above in this respect concerning

the summary judgment rendered in favor of Frank M. Workman is applicable to the summary judgment rendered in favor of Clara D. Workman as executrix of the estate of Lewis M. Workman, deceased. She was not entitled to a summary judgment as a matter of law.

The motion for judgment on the pleadings by Clara D. Workman, Apartment Supply House, Apartments, Inc., Capitol Enterprises, Inc., Capitol Investment Co., and Capitol Land & Investment Co. was sustained by the district court because it found, among other things, that the cause of action alleged in the third amended and supplemental petition was an entirely new and different cause of action from the one alleged in the original petition and that the former is a complete departure from the latter. This is true and would have been a matter of procedural importance if it had been properly and timely presented. There might have been significant objections if promptly made to the fact that additional plaintiffs were added whose claimed rights varied from those asserted by the single original plaintiff; likewise as to the manner in which the named defendants accumulated in the litigation, the greater part of whom were not alleged to have been affected by or concerned in the original cause of action. However, three amended and supplemental petitions were filed without an objection that any of them presented a cause of action different from that contained in the original petition. There was a stipulation of the parties after the first amended and supplemental petition was filed for revivor of the case because of the death of Lewis M. Workman and revivor was had without objection from anyone for any reason. There was a stipulation after the second amended and supplemental petition was filed by which the trial date of the case was postponed to permit Workman and Mrs. Workman to settle issues in the case between them concerning payments to be made by the former to the latter. This stipulation provided permission for the filing of amended plead-

ings and for trial of the issues in the case forthwith upon request as therein stated. The third amended and supplemental petition was filed and answers were interposed thereto by appellees without objection that there was a departure of the cause of action therein alleged from the original cause of action except as hereinafter stated. There is no pleading by any party exhibited by the record in this case that there was a defect of parties or a misjoinder of parties or an improper joinder of causes of action. The first mention of departure from the original cause of action is in the answer of Workman and others filed after the stipulation which provided for amended pleadings in accordance with which the third amended and supplemental petition was filed. Any objection on the basis of departure was waived by the conduct of the appellees long prior to the appearance of the motion for judgment on the pleadings.

A judgment on the pleadings is not appropriate to present the objection of a departure. A motion of this character attacks the pleadings for a deficiency of substance and presents a question of law. It admits the truth of all well-pleaded facts in the pleadings of the opposing party and reasonable inferences therefrom and necessarily admits, for the purposes of the motion, the untruth of the allegations of the movant insofar as they have been controverted. Brown v. Royal Highlanders, 140 Neb. 54, 299 N. W. 467; International Harvester Co. v. County of Douglas, 146 Neb. 555, 20 N. W. 2d 620; Board of Trustees of York College v. Cheney, 160 Neb. 631, 71 N. W. 2d 195; 41 Am. Jur., Pleading, § 335, p. 520.

The court sustained the motion for judgment on the pleadings and rendered a judgment of dismissal of the case "without prejudice to the rights of the Workman children." The third amended and supplemental petition stated a cause of action and the action of the trial court may not be sustained.

The summary judgment in favor of Frank M. Workman; the summary judgment in favor of Clara D. Workman as executrix of the estate of Lewis M. Workman, deceased; the judgment on the pleadings in favor of Clara D. Workman, Capitol Supply House, Apartments, Inc., Capitol Enterprises, Inc., Capitol Investment Co., and Capitol Land & Investment Co.; and the judgment of dismissal of the case should be and they each are hereby reversed, and the cause is remanded with directions to the district court for Lancaster County to permit Joseph Workman, Robert Workman, and Francine Workman, minors, by their next friend, Dolores Lucille Workman, to become parties plaintiff to this action and that leave be granted them to file, within a reasonable time, any additional proper pleading they may desire.

REVERSED AND REMANDED WITH DIRECTIONS.

SIMMONS, C. J., participating on briefs.

BERT E. MATZKE ET AL., APPELLANTS, V. BOARD OF EQUALIZATION OF MADISON COUNTY, NEBRASKA, APPELLEE.

95 N. W. 2d 61

Filed February 20, 1959. No. 34511.

1. **Taxation: Appeal and Error.** An appeal to the district court from action of the county board of equalization is heard as in equity, and upon appeal therefrom to this court it is tried de novo.
2. **Taxation.** To secure a reduction in the assessed valuation of tangible property it must be demonstrated by evidence that the assessment is grossly excessive, or that its value has not been fairly and proportionately equalized, and is the result of arbitrary or unlawful action.
3. ———. Where the evidence shows that the actual value of tangible property for assessment purposes was arbitrarily determined, without explanation or justification of the formula used, the actual value thus fixed is not supported by competent evidence.

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

Daniel D. Jewell, for appellants.

Vincent J. Kirby and *Eugene C. McFadden,* for appellee.

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 Madison County affirming the actual valuation placed on appellants' property in the amount of $28,685.

The appellants Matzke are the owners of the property involved in this litigation, the legal description of which is correctly described in the pleadings. The property is located within the corporate limits of the city of Norfolk at the intersection of South Third Street and Northwestern Avenue. The property is located in a business area approximately 1 mile and 3 blocks south of the main business district of Norfolk, which area has deteriorated because of economic factors to such an extent that it is described as having the appearance of a ghost town. The building occupies the full width of the land at the front. It is 143 feet long, and is 45 feet wide for 49 feet and 35 feet wide the balance of its length. The building is a two-story building with a basement. Its exterior walls were constructed with brick. The interior walls, floors, and roof were wood construction. The building contains 33 sleeping rooms, a lobby, 8 baths, 25 lavatories, a sink, and a water heater. The building is heated with steam from a boiler fueled with a coal stoker. The main part of the building was constructed in 1911 and the remaining part in 1914.

The building was constructed as a hotel and used as such for many years. In April 1954, the Matzkes purchased the property and its contents for $20,000. The

purchase price was on a basis of $13,000 for the building and the land, and $7,000 for personal property in it. The Matzkes continued to operate the property as a hotel until December 3, 1956, when it was converted into a nursing home. It has a capacity to care for 41 patients. On March 1, 1957, there were 10 patients in the home, the most that had occupied the nursing home to that date. When the case was tried in January 1958, there were 35 patients in the home. The gross income from occupants of the home was in excess of $3,500 per month when the case was tried. In addition to the Matzkes, 11 persons work at the home. The Matzkes made improvements on the building in excess of $3,000. Matzke testified that the market value of the property on March 1, 1957, was $15,504.35.

The evidence of appellee is substantially as follows: By a fixed formula the replacement cost of the building was determined to be $94,881. The building was depreciated 52 percent of its replacement cost on account of its age, the building being approximately 43 years old. The physical value of the building was determined to be $45,542. A functional depreciation of 40 percent was taken off on account of the location of the property and the irregularity of its occupancy, leaving a valuation of $27,325. To this was added the value of the real estate in the amount of $1,360, thus fixing the actual value at $28,685.

The case will be tried de novo in this court as an equitable proceeding. The burden of proof is upon the taxpayer to establish his contention that his property has been valued in an amount greater than its actual value, or that his property has not been fairly and proportionately equalized with all other property, resulting in a discriminatory assessment. Newman v. County of Dawson, *ante* p. 666, 94 N. W. 2d 47.

The evidence of the plaintiffs is sufficient, standing alone, to sustain a finding that the property involved had an actual value of $15,500 on March 1, 1957. The

question for determination is the sufficiency of the evidence of the county board of equalization to sustain an actual value of $28,685 as determined by it.

The evidence of the county board of equalization is that the actual value of the property was determined by a formula which was uniformly and impartially applied. By this formula the replacement cost of the building was fixed at $94,881. The building was 43 years old. The evidence is that the useful life of the building was 50 years. Any use in excess of 50 years is dependent upon its care and the extent of the repairs made upon it. There is no evidence in this record as to the upkeep of the building over the years. The evidence indicates that the building had run down considerably during the years it was unprofitably operated as a hotel. In its calculations the county board of equalization allowed a physical depreciation of 52 percent on account of age. There is no showing in the record to explain or justify a physical depreciation of only 52 percent on a 43-year-old building with a useful expectancy of 50 years. The physical depreciation of the building by 52 percent was the result of arbitrary action by the county board of equalization. LeDioyt v. County of Keith, 161 Neb. 615, 74 N. W. 2d 455; Newman v. County of Dawson, *supra*. The only basis in the record on which the building could be depreciated on account of age produces a depreciated value, under the formula employed, which would result in an actual value less than $15,500, the actual value established by the plaintiffs.

In Newman v. County of Dawson, *supra*, we approved a formula for determining the value of tangible property for taxation purposes where it was shown to comply substantially with section 77-112, R. S. Supp., 1955, and had been uniformly and impartially applied. But where the formula applied requires the use of an arbitrary figure to arrive at a result, the result is as arbitrary as the figure itself. In the instant case the

county board of equalization allowed a physical depreciation of 52 percent on the building because of its age. Since the building was 43 years of age with a use expectancy of 50 years, the physical depreciation of 52 percent is not shown to have any reasonable relation to the depreciation of the reproduction cost on account of age. We realize, of course, that a building which has completed its use expectancy may be of considerable actual value. Reproduction cost less depreciation is but one element of the statutory formula for determining actual value. But the physical depreciation of a building on account of age may not be exclusively asserted in the evidence on the basis of its age as compared with its use expectancy, and then allowed on an arbitrary basis not shown by the evidence to have any relation to its age or the depreciation resulting therefrom. A formula for determining the value of tangible property for taxation purposes must tend to produce the result required by section 77-112, R. S. Supp., 1955, when applied uniformly and impartially. Where it appears that an arbitrary basis is used which is not uniformly applied to all tangible property the result is an arbitrary one. It will not sustain a valuation for tax purposes.

We conclude that the actual value of the property fixed by the county board of equalization is the result of arbitrary action and is not sustained by the evidence. We find that the evidence sustains a valuation of $15,-500. The judgment of the district court is reversed and the cause remanded with directions to enter a decree fixing the actual value of plaintiffs' property in the amount of $15,500.

REVERSED AND REMANDED WITH DIRECTIONS.

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Abatement and Revival.

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Actions.

1. A lessee of real estate has, by virtue of his lease, capacity to contest an action brought against him to deprive him of his leasehold. *Maas v. Platte Valley Public Power & Irr. Dist.* 124
2. The wrongful death statute creates a new cause of action unknown to the common law, and it should not be extended beyond the fair import of the language used. *Mabe v. Gross* 593
3. The phrase "next of kin" in the wrongful death statute means the class of persons nearest in degree of blood surviving the deceased. In its practical use it means, ordinarily, those persons who take the personal estate of the deceased person under the statute of descent. *Mabe v. Gross* 593
4. A presumption of pecuniary loss exists in favor of one legally entitled to service or support from one killed by the wrongful act of another. *Mabe v. Gross* 593
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6. Where a presumption of pecuniary loss obtains, the extent of the pecuniary loss must be left to the good judgment and common sense of the jury after it has considered all the evidence and circumstances in the case. *Mabe v. Gross* 593

Adverse Possession.

1. The claim of title to land by adverse possession must be proved by actual, open, exclusive, and continuous possession under a claim of ownership for the statutory period of 10 years. The possession

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2. One claiming ownership of real estate by adverse possession must recover upon the strength of his title and not because of a possible weakness in the interest or title of his adversary. *Maas v. Platte Valley Public Power & Irr. Dist.* 124

3. A person claiming title by adverse possession must, to establish it, prove open, notorious, exclusive, continuous, and adverse possession of the real estate for the full period of 10 years. *Maas v. Platte Valley Public Power & Irr. Dist.* 124

4. There must be privity shown between adverse claimants of land before the possession of one may be tacked to the possession of the other for the purpose of completing title by adverse possession. *Maas v. Platte Valley Public Power & Irr. Dist.* 124

5. If one by mistake as to the boundary line enters upon and takes possession of land of another, claiming it as his own to a definite and certain boundary by an actual, open, exclusive, and continuous possession thereof under such claim for 10 years or more, he acquires title thereto by adverse possession. *Konop v. Knobel* 318

6. The fact that a person never actually claimed to own a disputed tract of land and that his use and possession of it were based on a mistaken belief as to the boundary line of the tract is not a controlling factor in determining whether his possession was adverse. *Konop v. Knobel* 318

7. The possession of the occupant is not less adverse because he took and had possession of it innocently and through mistake. It is the visible and exclusive possession with intention to possess the land occupied under the belief that it is the possessor's own that constitutes its adverse character. *Konop v. Knobel* 318

8. The visible and exclusive possession of the occupant under such circumstances is notice to all interested persons that his possession is adverse. *Konop v. Knobel* 318

9. The assertion by a litigant that he did not claim to own land beyond the true boundary line, the actual location of which was unknown to him, is not conclusive if such statement is inconsistent

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11. To establish a prescriptive right to an easement, all the elements of a prescriptive use and enjoyment must be established by clear, convincing, and satisfactory evidence. *Wemmer v. Young* 495

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1. One who harbors a wild, vicious, and dangerous animal such as a bear, though he is not the owner of it, is responsible for injuries caused by it while on the premises where it is kept to the same extent as he would have been if he had been the owner of the animal. *Crunk v. Glover* 816
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3. While declarations made in opening statements of attorneys and preserved in a bill of exceptions may not be used as evidence in determining issues in a case, it is proper to refer to them for the purpose of ascertaining the theory on which the case was presented. *Twenty Club v. State* 37
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5. An order of the railway commission granting a rehearing after the case has been decided on the

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6. On appeal to the Supreme Court from an order of the railway commission, while acting within its jurisdiction, the question for determination is whether or not the order is arbitrary and unreasonable. *Chicago & N. W. Ry. Co. v. Save the Trains Assn.* 61

7. The Supreme Court, in the exercise of its appellate jurisdiction, may not receive evidence originally tendered therein to sustain or defeat a judgment of the trial court. *Haswell v. State* 169

8. A district judge is without authority to allow and settle a bill of exceptions not prepared in the manner and within times fixed by the applicable statute. *Oak v. Griggs* 239

9. A bill of exceptions must be prepared, served, returned, settled, and allowed in accordance with the statute which is mandatory. *Oak v. Griggs* 239

10. In the absence of a bill of exceptions, no question may be considered on appeal, a determination of which requires an examination of evidence produced at the trial. *Oak v. Griggs* 239

11. If there is no bill of exceptions, it will be presumed in the Supreme Court that any issues of fact presented by the pleadings necessary to justify the judgment were sustained by evidence and that they were correctly decided. *Oak v. Griggs* 239

12. Where, in a contempt proceeding, the trial court does not pass upon the guilt or innocence of the defendant, but enters a decree materially enlarging the extent of the relief granted by a previous decree which had become final, the procedure for review is by appeal. *Rose v. Vonderfecht* 276

13. A judgment of an equity court, unsupported by any competent evidence but based solely upon speculative or conjectural evidence, cannot stand and requires reversal by the Supreme Court. *Finnern v. Bruner* 281

14. Instructions must be considered and construed together. If they are not sufficiently specific in some respects, it is the duty of counsel to offer requests for instructions that will supply the omission. Unless this is done, the judgment will not ordinarily be reversed for such defects. *Tate v. Borgman* 299

15. A proceeding for the probate of a will of a deceased person is in rem. A person affected thereby may appeal from a final order of the county court to

the district court without regard to whether or not he appeared and contested the probate of the will in the county court. One so appealing is necessarily limited on the appeal to the issues presented to the county court. *Gleason v. Poore* 312

16. The district court has no power to hear the contest of a will except on an appeal of such proceedings from the county court. The county court has original exclusive jurisdiction of the probate of wills and the contest thereof in the first instance. *Gleason v. Poore* 312

17. 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. *Plummer v. Fie* 367

18. It is not within the province of the Supreme Court to resolve conflicts in or to weigh evidence. If there is a conflict in the evidence, the court in reviewing the judgment rendered will presume that controverted facts were decided by the trial court in favor of the successful party and the findings will not be disturbed unless clearly wrong. *Plummer v. Fie* 367

19. If contributory negligence is pleaded as a defense but there is no proof thereof, it is prejudicial error to submit the issue of contributory negligence to the jury. *Pankonin v. Borowski* 382

20. It is the duty of the trial court to instruct the jury upon all material issues raised by the pleadings and supported by competent evidence. Ordinarily it is error to submit issues which are outside the scope of the pleadings. *Mapledge Corp. v. Coker* 420

21. Where a default has been regularly entered, it is largely within the discretion of the trial court to say whether the defendant shall be permitted to come in afterwards and make his defense and, unless an abuse of discretion is made to appear, the Supreme Court will not interfere. *Willie v. Willie* 449

22. An appeal from an order of the district court granting or denying a motion for a judgment notwithstanding the verdict requires the Supreme Court to consider the entire record and to determine whether it does or does not justify the action of the district court. *Mimick v. Beatrice Foods Co.* 470

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25. When different instructions are given on the same subject, they should be considered together. If they fairly submit the case, the judgment will not be reversed for indefiniteness or ambiguity in one of the instructions. *Norman v. Sprague* 528

26. The true meaning of an instruction will be determined not from a sentence or clause alone but by a consideration of all that is said on the subject. *Norman v. Sprague* 528

27. If instructions are not sufficiently specific in some respects, it is the duty of counsel to offer requests for instructions that will supply the omission. Unless that is done, the judgment will not ordinarily be reversed for such defects. *Norman v. Sprague* 528

28. It is error for a trial court to instruct the jury on an issue made by the pleadings in the cause which is not supported by evidence. *Phillips v. State* 541
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29. An appeal of a cause from the district court must be considered and decided by the Supreme Court on the basis of the information contained in the record presented which, if properly authenticated, imports absolute verity. *Johns v. Carr* 545

30. Rule stated as to procedure on appeal where trial court grants new trial and gives no reason for doing so. *Hert v. City Beverage Co., Inc.* 557

31. Before an error requires a reversal it must be prejudicial to the rights of the party against whom it was made. *Hert v. City Beverage Co., Inc.* 557

32. Where a party has sustained the burden and expense of a trial and has succeeded in securing the verdict 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. *Hert v. City Beverage Co., Inc.* 557

33. The question of the amount of damage is one solely for the jury and its action in this respect will not be disturbed on appeal if it is supported by evidence and bears a reasonable relationship to the elements

of injury and damage proved. *Hert v. City Beverage Co., Inc.* 557

34. If a jury has considered the duration and severity of pain and suffering and has manifested by a verdict a reasonable attitude thereto in fixing damages, the verdict will be upheld on appeal. *Hert v. City Beverage Co., Inc.* 557

35. An information questioned for the first time on appeal must be held sufficient unless so defective that by no construction can it be said to charge the offense for which accused was convicted. *Nelson v. State* 576

36. Except as to jurisdiction, questions not presented to nor passed on by the trial court will not be considered on appeal. *Lash v. Erisman* 606

37. The function of assignments of error is to set out the issues presented on appeal. They serve to advise the appellee of the questions submitted for determination. They also advise the Supreme Court of the issues which are submitted for decision. *Pulliam v. State* 614

38. In order that assignments of error as to the admission or rejection of evidence may be considered, appropriate reference must be made to the specific evidence against which objection is urged. *Pulliam v. State* 614

39. In a criminal case, the Supreme Court will not interfere with a verdict of guilty, based upon conflicting evidence, unless it is so lacking in probative force that it is insufficient to support a finding of guilt beyond a reasonable doubt. *Pulliam v. State* 614

40. The credibility of witnesses and the weight of their testimony are for the jury to determine in a criminal case, and the conclusion of the jury should not be disturbed unless it is clearly wrong. *Pulliam v. State* 614

41. The giving of an instruction which submits to the jury the existence or nonexistence of a fact material to the issues in the case on trial, when no evidence has been introduced which would support a finding of its existence, is error. *Pulliam v. State* 614

42. It is error to give an instruction which assumes a controverted material fact upon which there is a conflict of testimony. *Pulliam v. State* 614

43. An appeal to the district court from action of the county board of equalization is heard as in equity,

and upon appeal therefrom to the Supreme Court it is tried de novo. *Newman v. County of Dawson* 666
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44. Where the evidence shows that the assessed value of tangible property has been determined by a formula in substantial compliance with the tax statute, which has been uniformly and impartially applied, such assessed value will not ordinarily be disturbed on appeal on evidence indicating a mere difference of opinion as to such valuation. *Newman v. County of Dawson* 666
45. Rule stated as to essentials necessary to secure a reduction in assessed value of tangible property. *Newman v. County of Dawson* 666
46. The Supreme Court will take judicial notice of the fact that a bill of exceptions was not prepared, served, returned, or settled and allowed within the time provided by statute, and therefore cannot be considered on appeal. *State ex rel. Line v. Kuhlman* 674
47. A bill of exceptions must be reduced to writing within 40 days from the time notice of appeal is filed with the clerk of the district court unless time is extended. *State ex rel. Line v. Kuhlman* 674
48. Where no extension of time is granted, a bill of exceptions must be prepared within 40 days after the filing of the notice of appeal, it must be served on the adverse party within 50 days thereafter, it must be examined and returned by the adverse party within 60 days, and it must be settled and allowed within 70 days. These limitations as to time are mandatory and they may not be waived. *State ex rel. Line v. Kuhlman* 674
49. Exceptions are reduced to writing within the meaning of statute on the day the court reporter certifies the draft of the bill of exceptions in the case. *State ex rel. Line v. Kuhlman* 674
50. The bill of exceptions shall be served on the adverse party within 10 days after the time prescribed for preparation thereof, or within 10 days after extension of time for that purpose. *State ex rel. Line v. Kuhlman* 674
51. The bill of exceptions shall be returned by the adverse party within 10 days. *State ex rel. Line v. Kuhlman* 674
52. The aggregate time allowed for the performance of any of the statutory steps is not shortened or advanced by completing any of the steps enumerated

in advance of the time limited by statute. *State ex rel. Line v. Kuhlman* 674

53. An extension of time may be had for any of the steps in connection with securing a bill of exceptions. The extension is limited by the statute to the terms appearing in such order, and where the extension granted is less than 40 days, or the extension is circumscribed by other conditions or limitations, the limitations of time contained therein and the conditions of the order must be complied with. *State ex rel. Line v. Kuhlman* 674

54. An extension of time for the preparation of the bill of exceptions is directly provided for by statute. Such extension operates to extend the time for taking the other steps required by statute. *State ex rel. Line v. Kuhlman* 674

55. An extension of time for one of the later separate mandatory steps does not relate back to nor extend the time fixed by statute for the previous procedures. *State ex rel. Line v. Kuhlman* 674

56. The design of the statute is to allow a fixed time within which a bill of exceptions must be reduced to writing, served on the adverse party, returned, and submitted to the trial judge for settlement and allowance. The trial judge is without authority to allow a bill of exceptions not prepared in the manner and within the times fixed. *State ex rel. Line v. Kuhlman* 674

57. In the absence of a bill of exceptions there is no question of fact determined by the district court for review in the Supreme Court. No question will be considered, a determination of which necessitates an examination of evidence produced in the district court. *State ex rel. Line v. Kuhlman* 674

58. In the absence of a bill of exceptions it is presumed that an issue of fact presented by the pleadings was established by the evidence, that it was correctly decided, and the only issue that will be considered on appeal is the sufficiency of the pleadings to support the judgment. *State ex rel. Line v. Kuhlman* 674

59. The right of an appellee in an action to have reviewed a portion of a judgment or decree against him depends upon whether or not he has perfected a cross-appeal and has assigned error in relation thereto agreeable to the provisions of statute and the

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62. The rule of the law of the case, arising out of former appeal, stated. *Cover v. Platte Valley Public Power & Irr. Dist.* 788

63. The trial court should direct and the Supreme Court should set aside a verdict if the evidence is undisputed or if the evidence, though conflicting, is so conclusive that it is insufficient to justify a verdict or sustain a judgment. *Cover v. Platte Valley Public Power & Irr. Dist.* 788

64. On an appeal from an order directing a verdict and dismissing an action, the party against whom the verdict was directed 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. *Christ v. Nelson* 799

65. A litigant is restricted in the Supreme Court to the theory of the case on which it was presented to and tried in the trial court. *Crunk v. Glover* 816

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1. The intent of the Soldiers' and Sailors' Civil Relief Act of 1940 is that stays granted solely on account of the serviceman's military service be terminated at the expiration of the period specified in the act. *Graves v. Bednar* 847

2. The extent of the stay under the Soldiers' and Sailors' Civil Relief Act is limited to the period of military service and 3 months thereafter. *Graves v. Bednar* 847

3. The determination of an application for continuance under the Soldiers' and Sailors' Civil Relief Act depends on the facts and circumstances of each case. *Graves v. Bednar* 847

4. The Soldiers' and Sailors' Civil Relief Act cannot be construed to require a continuance on a mere showing that the defendant is in the military service.

The act clearly requires that there be a present and not a mere anticipatory danger. *Graves v. Bednar* 847

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1. Misconduct of an attorney indicative of moral unfitness for the profession sufficient to deny an applicant admission to the bar, even if the act is not committed in a professional capacity, constitutes a ground for disbarment. *State ex rel. Nebraska State Bar Assn. v. Tibbels* 247
2. As a general rule a conviction of a felony or misdemeanor involving moral turpitude is conclusive evidence warranting disbarment. *State ex rel. Nebraska State Bar Assn. v. Tibbels* 247
3. Generally, a judgment of conviction of a felony or misdemeanor involving moral turpitude rendered upon a plea of nolo contendere is conclusive upon a lawyer in a disciplinary proceeding, and is sufficient to authorize the court to impose discipline where a rule of court provides that a lawyer convicted of such an offense may be disbarred. *State ex rel. Nebraska State Bar Assn. v. Tibbels* 247
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1. Where a proper foundation has been laid, a qualified expert may give his opinion as to the speed of an automobile, based on the length of skid marks made by it when brakes were applied. *Tate v. Borgman* 299
2. Various factors, such as skid marks, distance traveled after impact, and force of impact, constitute pertinent evidence in arriving at an estimate of the rate of speed of an automobile. *Tate v. Borgman* 299
3. An allegation of negligence of a specific number of miles per hour as the speed of an automobile as constituting excessive speed does not limit the

pleader to proof of that speed. He may prove a lesser rate as negligence. *Tate v. Borgman* 299

4. The lawfulness of the speed of an automobile within the prima facie limits fixed by statute is determined by the further test of whether the speed was greater than was reasonable and prudent under the conditions then existing. *Tate v. Borgman* 299
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5. A party is only required to have his automobile under such reasonable control as to be able to avoid a collision with other vehicles whose drivers exercise due care. Complete control which is such as will prevent collision by the anticipation of negligence on the part of another in the absence of warning or knowledge is not required. *Tate v. Borgman* 299

6. The validity of a prior judgment of conviction of the operator of a motor vehicle for traffic violations cannot be collaterally attacked in an appeal to review mandatory and ministerial actions of the Director of the Department of Motor Vehicles in revoking the license of such person to operate a motor vehicle in this state. *Bradford v. Ress* 338

7. The statutory rule of right-of-way at intersections is applicable where automobiles collide in an ordinary street intersection and there is no evidence of a substantial difference in speed. *Cappel v. Riener* 375

8. Automobiles approach an intersection at approximately the same time whenever they are in such relative position that upon appraisal of all factors it should appear to a man of ordinary prudence approaching from the left that there is danger of collision if he fails to yield the right-of-way. *Cappel v. Riener* 375

9. The driver of an automobile entering an intersection of two streets is obligated to look for approaching automobiles and to see any vehicle within that radius which denotes the limit of danger. *Cappel v. Riener* 375
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10. If the driver of an automobile entering an intersection looks for approaching vehicles but fails to see one which is favored over him under the rules of the road, he is guilty of negligence as a matter of law. *Cappel v. Riener* 375

11. The driver of an automobile approaching or entering an intersection is required to see another automobile

approaching or entering the intersection which has been favored with the right-of-way under the statutory rules of the road and a failure to see such favored automobile is negligence as a matter of law. *Cappel v. Riener* 375

12. A motor vehicle which has entered an intersection or is passing through it at a lawful speed has the right-of-way over a motor vehicle approaching the intersection from a different direction into the path of the first vehicle. *Pankonin v. Borowski* 382

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14. The duty of a guest riding in an automobile is to use care in maintaining a lookout commensurate with that of an ordinarily prudent person under like circumstances. A guest is not required to use the same degree of care as devolves upon the driver. *Pankonin v. Borowski* 382

15. Duty of guest riding in a motor vehicle to warn driver of known approaching danger stated. *Pankonin v. Borowski* 382

16. Where the circumstances proved show with reasonable certainty that the impact of two vehicles involved in an accident occurred on defendant's left-hand side of the center of the highway, the evidence is sufficient to go to the jury on the question of defendant's negligence. *McAlexander v. Estate of Lewis* 524

17. In such situation the plaintiff is not required by proof to eliminate all possibility that the accident may have happened otherwise in order to present a case for the jury. *McAlexander v. Estate of Lewis* 524

18. In an action under motor vehicle guest statute, a guest must prove by the greater weight of the evidence the gross negligence of the host and that it was the proximate cause of the accident and injury. *Olson v. Shellington* 564

19. Gross negligence within the meaning of the motor vehicle guest statute means great and excessive negligence or negligence in a very high degree. It indicates the absence of slight care in the performance of duty. *Olson v. Shellington* 564
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20. Gross negligence within the meaning of the motor vehicle guest statute has also been defined as an

entire failure to exercise care or the exercise of so slight a degree of care as to justify the belief that there was an indifference to the safety of others. *Olson v. Shellington* 564

21. Elements necessary to support a finding of gross negligence stated. *Olson v. Shellington* 564

22. It is not indispensable to establish gross negligence that it be shown that protest by the guest or others was made to the operator of the automobile because of his conduct or omission prior to the time of the accident. *Olson v. Shellington* 564

23. The failure of the driver of an automobile to maintain a proper lookout when driving at high speed at nighttime on a country road with a restricted lighted distance ahead of him is an important consideration in determining whether or not gross negligence existed as a proximate cause of the accident. *Olson v. Shellington* 564

24. It is the duty of a driver of an automobile at night on a highway to proceed so that his headlights will mark out the traveled road. *Olson v. Shellington* 564

25. The speed of an automobile may be unlawful even though it is within the statutory prima facie limits if it is unsafe or it is greater than is reasonable or prudent under the existing conditions. *Olson v. Shellington* 564

26. Where the undisputed evidence shows that a collision between two motor vehicles was due solely to the negligence of the defendant, it is the duty of the trial court to direct a verdict against him on the issue of liability. *Mabe v. Gross* 593

27. Under the guest statute, the liability of a driver while driving under the influence of intoxicating liquor is a distinct ground of liability from that of the driver based upon gross negligence in the operation of a motor vehicle. *O'Neill v. Henke* 631

28. Liability for damage caused by the driving of a motor vehicle while under the influence of intoxicating liquor is on a parity with liability for damage caused by gross negligence in the operation thereof. *O'Neill v. Henke* 631

29. The driving of a motor vehicle by one under the influence of intoxicating liquor fully responds to all the elements necessary to constitute gross negligence under the provisions of the motor vehicle guest statute. *O'Neill v. Henke* 631

30. The existence of gross negligence must be deter-

mined from the facts and circumstances in each case. *O'Neill v. Henke* 631

31. The question of gross negligence is for the jury where the evidence relating thereto is conflicting and where reasonable minds might draw different conclusions. *O'Neill v. Henke* 631

32. It is not necessary in all cases that the operator of a motor vehicle be aware of impending danger in order to hold him guilty of gross negligence, but that is a circumstance which should be considered. *O'Neill v. Henke* 631

33. A violation of statutes regulating the use and operation of motor vehicles upon the highways is not negligence per se, but evidence of negligence which may be taken into consideration with all the other facts and circumstances in determining whether or not negligence is established thereby. *O'Neill v. Henke* 631

34. Excessive speed of a motor vehicle does not necessarily establish gross negligence, although it is a factor to be considered. *O'Neill v. Henke* 631

35. As a general rule it is negligence as a matter of law for a motorist to drive a motor vehicle on a highway in such a manner that he cannot stop in time to avoid a collision with an object within the range of his vision. *O'Neill v. Henke* 631

36. A driver of a motor vehicle is legally obligated to keep such a lookout that he can see what is plainly visible before him and he cannot relieve himself of that duty. In conjunction therewith, he must so drive his motor vehicle that when he sees the object he can stop his motor vehicle in time to avoid it. *O'Neill v. Henke* 631

37. Exceptions have been recognized to the general rule where the object or obstruction or depression is the same color as the roadway and for that reason, or for other sufficient reasons, cannot be observed by the exercise of ordinary care in time to avoid a collision. *O'Neill v. Henke* 631

38. When the view of the driver of a motor vehicle is obstructed, whether by reason of a grade or otherwise, the speed of the motor vehicle should be so reduced that the motor vehicle can be stopped within the distance the driver can see ahead. *O'Neill v. Henke* 631

39. What is a reasonable speed is necessarily largely dependent on the situation and the surrounding cir-

cumstances, it being obvious that a speed which would be safe, reasonable, and proper in some places and under some circumstances might be highly dangerous, unreasonable, and improper in other places and under other circumstances. *O'Neill v. Henke* 631

40. The driver of a motor vehicle on a public highway is required to operate it upon the right half of the highway unless it is impracticable to do so. *O'Neill v. Henke* 631

41. Evidence as to drinking intoxicants within a reasonable time prior to an accident is a circumstance to be considered in determining whether or not a driver of a motor vehicle is guilty of gross negligence. *O'Neill v. Henke* 631

42. The emergency rule cannot be successfully invoked by either party in a negligence case unless there is competent evidence to support a conclusion that a sudden emergency actually existed, and then it cannot be successfully invoked by one who has brought that emergency upon himself by his own acts or who has not used due care to avoid it. *O'Neill v. Henke* 631

43. Statute providing for certification of conviction under motor vehicle statutes requires that a certified abstract of the judgment be sent to the Director of the Department of Motor Vehicles only in cases where the accused is convicted or his bail forfeited. *State ex rel. Line v. Kuhlman* 674

44. A motorist entering an intersection from the right is in a favored position and has the right-of-way, other things being equal, but such fact does not relieve the driver of the favored automobile of the duty to exercise ordinary care to avoid an accident. *Bezdek v. Patrick* 754

45. The failure of the driver of an automobile upon approaching an intersection to look in the direction from which another automobile is approaching where, by looking, he could see and avoid a collision that resulted, is more than slight negligence, as a matter of law, and defeats recovery by him. *Bezdek v. Patrick* 754

46. Duty of driver of an automobile approaching a favored street stated, and effect thereof in applying the doctrine of contributory negligence declared. *Bezdek v. Patrick* 754

47. The requirement that the operator of an automobile

stop before entering upon a favored street protected by stop signs does not grant exclusive privilege to travelers on the favored street or require those crossing it to do so at their peril. *Bezdek v. Patrick* 754

48. If a motorist on a nonfavored street stops at an intersection with a favored street when the intersection is clear of traffic and looks for approaching vehicles, acting as a reasonably prudent person in the exercise of due care would act in the belief that he has time and opportunity to safely cross, he is not liable for negligence because he attempts to cross the street. *Bezdek v. Patrick* 754

49. Before a motorist entering an intersection protected by a stop sign can be held negligent, no statutory violation being shown, it must appear that the approaching motor vehicle was at a point which, after considering its speed, indicated it was within the limit of danger and that to proceed would be imprudent. *Bezdek v. Patrick* 754

50. The jury should be fully and precisely instructed as to the relative and reciprocal rights and duties of the operators of the motor vehicles in entering and using an intersection of a favored and a nonfavored street. *Bezdek v. Patrick* 754

Bailments.

1. A bailment is the delivery of personalty for some particular purpose, upon a contract, express or implied, that after the purpose has been fulfilled it shall be redelivered to the person who delivered it or otherwise dealt with according to his directions, or kept until he reclaims it, as the case may be. *Mimick v. Beatrice Foods Co.* 470

2. A bailor is not liable to third persons for their injuries resulting from the bailee's negligent use of the property bailed. *Mimick v. Beatrice Foods Co.* 470

3. In the absence of special agreement, a bailor is under no duty or obligation to inspect or repair the property bailed while it is in possession of the bailee, and if there is a contract to repair upon notice that repairs are necessary, a duty to repair does not arise until notice is given. *Mimick v. Beatrice Foods Co.* 470

Carriers.

The requirements of the Motor Carrier Act do not apply to common carriers of petroleum products by

pipe line. *Toronto Pipe Line Co. v. Camerland Pipelines Co., Inc.* 201

Constitutional Law.

1. Property may be as effectively taken without due process of law by long-continued and unreasonable delay in putting an end to railway commission orders on the application of an injured party, which have become confiscatory, as by an express affirmance of them. *Chicago & N. W. Ry. Co. v. Save the Trains Assn.* 61
2. Where it appears that there is no public necessity present for the operation of passenger trains daily in each direction between two points within the state, and that such trains can be operated only at great loss to the railroad company, an order of the railway commission requiring their operation is arbitrary and unreasonable, and amounts to a confiscation of the railroad company's property without compensation. *Chicago & N. W. Ry. Co. v. Save the Trains Assn.* 61
3. Due process of law was met where notice of action taken was given, opportunity to object afforded, and opportunity for judicial review by proceeding in error provided. *Perkins County High School Dist. v. McQuiston* 330
4. The fixing of a scale of wages by a city to be paid by a successful contractor at a public letting constitutes the taking of the private property of the taxpayer without due process of law. *Philson v. City of Omaha* 360
5. The words "street railroad" as used in the Constitution apply to all means of mass transportation of passengers for hire in a municipality without regard to the motive power employed. *Omaha Transit Co. v. Briggs* 703

Contempt.

1. It is mandatory that the record of conviction for direct contempt must contain a statement of the facts upon which the court relied in adjudging the contemner guilty. *Tastee Inn, Inc. v. Beatrice Foods Co., Inc.* 264
2. A court reviewing the record of conviction for direct contempt must be able to determine from the record of the conviction thus made if a contempt was committed and if the court which made the

adjudication had authority to impose punishment therefor. *Tastee Inn, Inc. v. Beatrice Foods Co., Inc.* 264

3. A statement of conclusions of the court in the record of a contempt proceeding is unimportant and insufficient to sustain a conviction. *Tastee Inn, Inc. v. Beatrice Foods Co., Inc.* 264

4. A contempt proceeding is in its nature criminal and no presumption or intendment is indulged to sustain a conviction. *Tastee Inn, Inc. v. Beatrice Foods Co., Inc.* 264

5. In a proceeding for direct contempt, guilt must be established beyond a reasonable doubt to justify a conviction. *Tastee Inn, Inc. v. Beatrice Foods Co., Inc.* 264

6. A conviction under contempt proceedings can only be reviewed in the Supreme Court by the filing of a petition in error as in a criminal case. *Rose v. Vonderfecht* 276

7. Where, in a contempt proceeding, the trial court does not pass upon the guilt or innocence of the defendant, but enters a decree materially enlarging the extent of the relief granted by a previous decree which had become final, the procedure for review is by appeal. *Rose v. Vonderfecht* 276

Continuances.

1. The intent of the Soldiers' and Sailors' Civil Relief Act of 1940 is that stays granted solely on account of the serviceman's military service be terminated at the expiration of the period specified in the act. *Graves v. Bednar* 847

2. The extent of the stay under the Soldiers' and Sailors' Civil Relief Act is limited to the period of military service and 3 months thereafter. *Graves v. Bednar* 847

3. The determination of an application for continuance under the Soldiers' and Sailors' Civil Relief Act depends on the facts and circumstances of each case. *Graves v. Bednar* 847

4. The Soldiers' and Sailors' Civil Relief Act cannot be construed to require a continuance on a mere showing that the defendant is in the military service. The act clearly requires that there be a present and not a mere anticipatory danger. *Graves v. Bednar* 847

Contracts.

1. A contract must be construed as a whole giving force and effect to all of its provisions. *Lonsdale v. Union Ins. Co.* 56
2. A contract will ordinarily be construed according to the law of the place where the contract is made. *Exstrum v. Union Casualty & Life Ins. Co.* 150
3. In the interpretation of a writing which is intended to state the entire agreement, preliminary negotiations between the parties may be considered in order to determine their meaning and intention, but not to vary or contradict the plain terms of the instrument. *O. C. Hirsch Constr. Co. v. Peterson* 295
4. Where a written contract is the basis of an action and neither party asks for a reformation thereof, it is the duty of the court to ascertain its meaning and enforce it accordingly. *Plummer v. Fie* 367
5. One party to a contract cannot declare a forfeiture for failure of the other party to strictly perform its conditions unless he is in position to perform on his part. *Plummer v. Fie* 367
6. Where words or other manifestations of intention bear more than one reasonable meaning, an interpretation is preferred which operates more strongly against the party from whom they proceed, unless their use by him is prescribed by law. *General Credit Corp. v. Imperial Cas. & Indemnity Co.* 833

Corporations.

The officers of a corporation are responsible for its acts. In a suit for fraud the law will look through the corporation to the officers who acted in the matter, and the officers who so acted are proper parties defendant. *Allied Building Credits, Inc. v. Damicus* 390

Costs.

A determination by the Supreme Court that "all costs are taxed" to a party means only the costs of the appeal. The direction does not include costs in the trial court save in those situations where, by appropriate language, the trial court costs as well as the appeal costs are taxed in the order. *Cover v. Platte Valley Public Power & Irr. Dist.* 788

Counties.

1. By county of legal settlement, as the term is used

in statute, is meant the county in which a person had a residence at the time of becoming incompetent. *County of Kearney v. County of Buffalo* 117

2. The duties and obligations of counties with relation to claims for support by one county against another of mentally ill persons in state hospitals are controlled by statute. *County of Kearney v. County of Buffalo* 117

Courts.

1. Juvenile courts do not have the sole or exclusive jurisdiction of children under 18 years of age who have violated our laws. *Fugate v. Ronin* 70
2. The county attorney is not limited by the Juvenile Court Act in any way in his duty to file proper complaints against wrongdoers and prosecute the same. *Fugate v. Ronin* 70
3. Mandatory transfer to juvenile court from justices of the peace and police magistrate courts is required only in criminal matters which the latter courts have authority to adjudicate. *Fugate v. Ronin* 70
4. In the absence of any conflicting decision by any other intermediate court of appeal or by the Supreme Court of a state, a decision of an intermediate court of appeal of such state must be accepted by the parties and by the courts of a sister state as stating the law of the state where the decision was made. *Exstrum v. Union Casualty & Life Ins. Co.* 150
5. Only the county court has authority in the first instance to consider and adjudicate a claim against the estate of a decedent. *Oak v. Griggs* 239
6. Where exclusive jurisdiction of a subject matter is constitutionally conferred on county courts, the district court will be deemed to have no original jurisdiction in the premises. *Oak v. Griggs* 239
7. The county court, and not the district court, has original jurisdiction to hear and adjudicate a cause of action for money only existing against a person at the time of his death. *Jamerson v. Dillon Realty Co.* 354

Criminal Law.

1. Every person accused of crime should have a fair and impartial trial. *Conkling v. DeLany* 4
2. In order to review alleged errors occurring during the trial of a criminal case, such errors must be

pointed out in the motion for a new trial and a ruling obtained thereon. *Ysac v. State* 24

3. If the punishment for an offense is committed to the discretion of the court, to be exercised within prescribed limits, a sentence within the limits of the statute will not be disturbed in the absence of an abuse of discretion. *Ysac v. State* 24
Haswell v. State 169

4. A preliminary hearing on a felony charge is not a "case" within the meaning of the Juvenile Court Act. *Fugate v. Ronin* 70

5. Evidence in a criminal case is not rendered inadmissible because it was obtained in an irregular or illegal manner. *Haswell v. State* 169

6. A violation of the constitutional guarantee concerning search and seizure does not render evidence acquired thereby inadmissible on the trial of a criminal case against the person from or concerning whom the evidence was procured. *Haswell v. State* 169

7. The inclusion in an otherwise proper instruction defining reasonable doubt that it does not mean the possibility that the accused may be innocent does not make the instruction prejudicially erroneous. *Haswell v. State* 169

8. It is a proper charge to the jury in a criminal case that the burden of proof never shifts, but, as to all defenses which the evidence tends to establish, the burden is on the State throughout the trial to prove the defendant guilty beyond a reasonable doubt. *Haswell v. State* 169

9. The crime of issuing a no-fund check upon a bank with intent to defraud, knowing at the time that the maker or drawer had no account or deposit in such bank, is a felony involving moral turpitude. *State ex rel. Nebraska State Bar Assn. v. Stanosheck* 192

10. Effect of plea of nolo contendere stated. *State ex rel. Nebraska State Bar Assn. v. Stanosheck* 192

11. A judgment of conviction of a felony or misdemeanor involving moral turpitude rendered upon a plea of nolo contendere is conclusive upon a respondent lawyer in a disciplinary proceeding. *State ex rel. Nebraska State Bar Assn. v. Stanosheck* 192

12. Venue need not be established by direct evidence, nor in the words of the complaint or information. If from the facts in evidence the only rational conclusion which can be drawn is that the offense was

committed in the city or county alleged, the proof is sufficient. *State v. Bouwens* 244

13. The courts of the county where an offense is committed have jurisdiction of the subject matter of the cause and jurisdiction to try the accused for the crime charged. *State v. Furstenau* 439

14. Unless a change of venue from the court of the county where the offense was committed is had in the manner provided by law, the accused cannot be tried lawfully in any other county of the state. *State v. Furstenau* 439

15. The law confers jurisdiction of the subject matter. *State v. Furstenau* 439

16. An accused cannot waive the venue provided by law, nor select the court where he is to be tried. *State v. Furstenau* 439

17. 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. *Starkweather v. State* 477
Pulliam v. State 614

18. It is not error to refuse instructions requested by defendant where the court on its own motion has given the substance of such requests. The trial court is not required to instruct in the exact language of a requested instruction. If the point is covered by an instruction couched in proper terms, it meets all the requirements of the law. *Starkweather v. State* 477

19. Ordinarily, error cannot be predicated on an instruction given at the request of the complaining party. *Starkweather v. State* 477

20. Where a timely motion for new trial on the ground of newly discovered evidence has been filed, the district court has jurisdiction to hear and make a determination upon the motion notwithstanding error proceedings are pending in the Supreme Court on the conviction. *Smith v. State* 492

21. A plea of not guilty is a waiver of all defects in an information that can be reached by a motion to quash. *Nelson v. State* 576

22. Defects or omissions in the indictment or in the mode of finding the indictment, which are of such a fundamental character as to make the indictment wholly invalid, are not subject to waiver by the accused. *Nelson v. State* 576

23. Defects and omissions which run only to the form in which the various elements of the offense are stated, or to the fact that the pleading is inartificially drawn, are waived by not objecting thereto in some appropriate manner in the preliminary stages of the proceeding, or, as to some matters, before determination of the issue on the merits. *Nelson v. State* 576

24. In criminal cases, it is not the province of the court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Those matters are for the jury. *Pulliam v. State* 614

25. In a criminal case, the Supreme Court will not interfere with a verdict of guilty, based upon conflicting evidence, unless it is so lacking in probative force that it is insufficient to support a finding of guilt beyond a reasonable doubt. *Pulliam v. State* 614

Crops.

In an action for damages by floodwaters, the burden of proof is on the plaintiff to show that the construction of the facilities complained of caused or increased the overflow or in some manner contributed thereto, together with the nature and extent thereof, and the amount of damages caused thereby. *Wischmann v. Raikes* 251

Damages.

1. In an action for damages by floodwaters, the burden of proof is on the plaintiff to show that the construction of the facilities complained of caused or increased the overflow or in some manner contributed thereto, together with the nature and extent thereof, and the amount of damages caused thereby. *Wischmann v. Raikes* 251

2. Where a verdict in an action for damages is excessive and it appears to have been returned under the influence of passion and prejudice, it is the duty of the court to set aside the verdict and grant a new trial. *Hert v. City Beverage Co., Inc.* 557

3. The question of the amount of damage is one solely for the jury and its action in this respect will not be disturbed on appeal if it is supported by evidence and bears a reasonable relationship to the elements of injury and damage proved. *Hert v. City Beverage Co., Inc.* 557

4. There is no established monetary measure for pain and suffering. *Hert v. City Beverage Co., Inc.* 557
5. If a jury has considered the duration and severity of pain and suffering and has manifested by a verdict a reasonable attitude thereto in fixing damages, the verdict will be upheld on appeal. *Hert v. City Beverage Co., Inc.* 557

Death.

1. The wrongful death statute creates a new cause of action unknown to the common law, and it should not be extended beyond the fair import of the language used. *Mabe v. Gross* 593
2. The phrase "next of kin" in the wrongful death statute means the class of persons nearest in degree of blood surviving the deceased. In its practical use it means, ordinarily, those persons who take the personal estate of the deceased person under the statute of descent. *Mabe v. Gross* 593
3. A presumption of pecuniary loss exists in favor of one legally entitled to service or support from one killed by the wrongful act of another. *Mabe v. Gross* 593
4. Where it is shown that the next of kin sustained such a relationship to the deceased that the law imposes upon him a duty to support them and that practical ability existed to enable him to perform that duty, a pecuniary loss is established and its extent is a question for the jury. *Mabe v. Gross* 593
5. Where a presumption of pecuniary loss obtains, the extent of the pecuniary loss must be left to the good judgment and common sense of the jury after it has considered all the evidence and circumstances in the case. *Mabe v. Gross* 593

Deeds.

1. Delivery of a deed is largely a question of intent to be determined from the facts and circumstances of each case. *Johns v. Carr* 545
2. Any acts or words showing intention of the grantor to deliver and the grantee to accept a deed are sufficient to constitute a delivery of it. *Johns v. Carr* 545
3. The recording of a deed in the manner provided by law is generally evidence of the delivery and acceptance of the deed if the conveyance is beneficial to the grantee. *Johns v. Carr* 545

4. Assent of the grantee is not an essential element of the delivery of a deed; neither is it necessary that the grantee have knowledge of the deed prior to the death of the grantor. *Johns v. Carr* 545

Divorce.

1. A decree awarding alimony and child support does not become dormant by lapse of time and the defense of the statute of limitations is not available to defeat recovery of delinquent payments. *Finnern v. Bruner* 281
2. Payment of stipulated sums for child support become vested in the payee as they accrue. The courts of this state are without authority to reduce the amounts of such accrued payments by modification of the original decree or otherwise. *Finnern v. Bruner* 281
3. If requirements for residence within the state have been complied with, the district court has jurisdiction to hear and determine an action for divorce in any county in the state where the parties, or one of them, resides. *Willie v. Willie* 449
4. The moving party who seeks to vacate a divorce decree has the burden of proving the grounds charged, including the falsity of allegations of residence within the jurisdiction of the court by a preponderance of evidence, and where this burden is not sustained, a refusal to vacate the decree is proper. *Willie v. Willie* 449
5. By statute, either party to a divorce action may, within 6 months of the date of rendition of a decree, make application to have the decree set aside or modified. The granting of such an application rests in the sound judicial discretion of the trial court, and must not be permitted to produce an unconscionable result. *Willie v. Willie* 449
6. What constitutes good reason for setting aside a decree of divorce or what constitutes an unconscionable result prohibiting it depends upon the facts and circumstances of each particular case. *Willie v. Willie* 449

Domicile.

1. By county of legal settlement, as the term is used in statute, is meant the county in which a person had a residence at the time of becoming incompetent. *County of Kearney v. County of Buffalo* 117

2. Intention and bodily presence are essential elements in the establishment or change of residence. *County of Kearney v. County of Buffalo* 117
3. As a general rule persons under legal disability or restraint, or persons in want of freedom, are incapable of losing or gaining a residence, domicile, or settlement by acts controlled by others. *County of Kearney v. County of Buffalo* 117
4. Residence in a community is determined by intention of the parties. *Willie v. Willie* 449
5. A wife is not prevented from having a residence separate and apart from that maintained by her husband. *Willie v. Willie* 449
6. A person does not change his legal residence by removal to a new dwelling place without an intention to make the new dwelling place his home as of the present moment rather than in the future. *Willie v. Willie* 449
7. One's legal residence is where he has his established home, and to which when absent he intends to return. To effect a change there must not only be a change of residence, but a present intention to permanently abandon the former residence. *Willie v. Willie* 449
8. The residence of a person in the military service of his country is in no way affected by such service. He does not abandon or lose the residence he had when he entered such service by being required to live at certain army posts in other states or countries. *Willie v. Willie* 449

Drains.

It is the duty of those who build structures across natural drainways to provide for the natural passage through such obstructions of all waters which may be reasonably anticipated to drain there. *Walla v. Oak Creek Township* 225

Easements.

1. In determining the nature and extent of an easement established by a final decree of a court, the court is bound by the language of such decree and the inferences that can reasonably be drawn therefrom. *Rose v. Vonderfecht* 276
2. The use and enjoyment which will create title by prescription to an easement are substantially the same in quality and characteristics as the adverse

possession which will give title to real estate. *Wemmer v. Young* 495

3. To establish a prescriptive right to an easement, all the elements of a prescriptive use and enjoyment must be established by clear, convincing, and satisfactory evidence. *Wemmer v. Young* 495

4. 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 user for a period of 10 years. *Wemmer v. Young* 495

5. An alleged easement that is too indefinite for a determinate description cannot be established and protected by a court of equity. *Wemmer v. Young* 495

Eminent Domain.

1. Where persons are shown to be familiar with the particular land in question, they may be permitted as witnesses in condemnation proceedings to testify as to the value of the tract immediately before and immediately after the appropriation. *Twenty Club v. State* 37

2. An appraiser in condemnation proceedings may testify as any other witness when the proper foundation is laid, but in no event should evidence of the award of the appraisers be admitted as evidence to go to the jury. *Twenty Club v. State* 37

3. The general rule in condemnation cases is that the burden of showing the damages which the landowner or lessee will suffer rests upon him while the burden is on the condemner to show matters which tend to reduce or mitigate damages. *Twenty Club v. State* 37

4. 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. *Phillips v. State* 541

5. Special benefits are those which arise from the peculiar relation of the land in question to the public improvement. *Phillips v. State* 541

6. 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. *Phillips v. State* 541

7. A public highway regularly established by the county authorities under the law existing in 1895 must be regarded as taking land to the full width required by statute, notwithstanding the fact that the petition for the highway and the order establishing the same does not mention the width of the road. *Bredehoft v. County of Platte* 603

8. Where compensation has been once paid for the establishing of a public road, an owner of property adjoining the road may not again recover damages for such taking on the theory that the compensation paid was erroneously determined. *Bredehoft v. County of Platte* 603

9. The procedure in a condemnation proceeding is a matter of state-wide concern. *Van Patten v. City of Omaha* 741

10. Eminent domain is the right or power to take private property for a public use. *Van Patten v. City of Omaha* 741

11. While the power of eminent domain may be delegated, it belongs to the state, is subject to its control and regulation, and is a matter of state-wide concern. *Van Patten v. City of Omaha* 741

12. Condemnation is the procedure whereby the power of eminent domain is exercised. *Van Patten v. City of Omaha* 741

13. Since the power of eminent domain is an attribute of sovereignty and inherent in the state, only those agencies to whom the Legislature has delegated the power can exercise such right. It must be exercised only on the occasion, in the mode or manner, and by the agency prescribed by the Legislature. *Van Patten v. City of Omaha* 741

14. Statute designated has applicability only to those condemnations within the provisions of a city plan that has been acquired or prepared by the city planning commission and which has been adopted by the city council. *Van Patten v. City of Omaha* 741

15. The power of eminent domain may be delegated by the Legislature, but because it is a sovereign power the Legislature cannot divest itself of the power or deprive itself of the right to repossess or reclaim its primary prerogative to exercise the power as it sees fit within the limitations contained in the Constitution. *Van Patten v. City of Omaha* 741

Equity.

1. Where a court of equity has obtained jurisdiction of a cause for any purpose, it will retain it for all, and will proceed to a final determination of the case, adjudicate all matters in issue, and thus avoid unnecessary litigation. *Wischmann v. Raikes* 251
2. "Final determination" refers and relates to all matters which became issuable under the pleadings or the presentation to the court. *Wischmann v. Raikes* 251
3. In applying the doctrine of laches the true inquiry should be whether the adverse party has been prejudiced by the delay. *Finnern v. Bruner* 281
4. Laches does not, like limitation, grow out of the mere passage of time; but it is founded upon the inequity of permitting the claim to be enforced—an inequity founded upon some change in the condition or relation of the parties. *Finnern v. Bruner* 281
5. The defense of laches is available only when it has become inequitable to enforce the claimant's right. It is not available to one who has caused or contributed to the cause of delay or to one who has had it within his power to terminate the action. *Finnern v. Bruner* 281
6. A court of equity with notice or knowledge of the facts should protect the rights of minors who are not properly or adequately represented when their rights are involved in pending litigation. *Workman v. Workman* 857
7. When equity acquires jurisdiction of an action, it will retain it for all purposes until the litigation is completely and finally determined. *Workman v. Workman* 857

Evidence.

1. A foreign law or rights thereunder must be proved like any other fact, in the absence of which the law of the forum is ordinarily applied. *Exstrum v. Union Casualty & Life Ins. Co.* 150
2. Evidence in a criminal case is not rendered inadmissible because it was obtained in an irregular or illegal manner. *Haswell v. State* 169
3. The Supreme Court, in the exercise of its appellate jurisdiction, may not receive evidence originally tendered therein to sustain or defeat a judgment of the trial court. *Haswell v. State* 169
4. Proof by a preponderance of the evidence is all that is required in any civil action; but when a

litigant seeks to overcome by parol evidence the presumption arising from the express terms of a conveyance and from the relations of the parties concerned therein, the quality of the evidence must be clear, satisfactory, and convincing. *Hein v. W. T. Rawleigh Co.* 176

5. Courts will not take judicial notice that certain streets are located within the territorial limits of an unnamed city for the purpose of fixing venue. *State v. Bouwens* 244

6. Courts will take judicial notice of the streets, squares, and public grounds of a city, their location and relation to one another, and the direction they run as shown by an official map of a city. But judicial notice thereof will not be taken to establish venue. *State v. Bouwens* 244

7. In the interpretation of a writing which is intended to state the entire agreement, preliminary negotiations between the parties may be considered in order to determine their meaning and intention, but not to vary or contradict the plain terms of the instrument. *O. C. Hirsch Constr. Co. v. Peterson* 295

8. Where a proper foundation has been laid, a qualified expert may give his opinion as to the speed of an automobile, based on the length of skid marks made by it when brakes were applied. *Tate v. Borgman* 299

9. Various factors, such as skid marks, distance traveled after impact, and force of impact, constitute pertinent evidence in arriving at an estimate of the rate of speed of an automobile. *Tate v. Borgman* 299

10. Declarations against interest cannot be annulled or explained away by counter declarations. *Vermaas v. Fagan* 465

11. 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. *Johns v. Carr* 545

12. An admission made in a pleading on which the trial is had is a judicial admission and constitutes a waiver of all controversy so far as the adverse party desires to take advantage of it. It is therefore a limitation of the issues. *Johns v. Carr* 545
Lash v. Erisman 606

13. A judicial admission is a formal act done in the course of judicial proceedings which is a substitute for evidence, thereby waiving and dispensing with

production of evidence by conceding for the purposes of litigation that the subject of the admission is true. *Johns v. Carr* 545

14. In an action for personal injury if there is evidence tending to establish that the injury is permanent, tables of life expectancy are admissible in evidence. *Crunk v. Glover* 816

15. A statement made under the immediate force of circumstances and not as an afterthought is a part of the res gestae. *Crunk v. Glover* 816

Executions.

1. The issuance and return of an execution without a levy of it is sufficient, as against the judgment debtor, to prevent the judgment from becoming dormant; but to preserve the priority of the judgment lien as against good faith creditors and purchasers, it is necessary that an actual levy of the execution be made. *Hein v. W. T. Rawleigh Co.* 176

2. If an execution is issued on a judgment and delivered to a sheriff and it is by him returned unsatisfied, the law presumes that the officer did his duty in reference thereto and the execution in such case is duly "sued out." It is immaterial in such a case that the creditor requested the return of the execution. *Hein v. W. T. Rawleigh Co.* 176

Executors and Administrators.

1. Only the county court has authority in the first instance to consider and adjudicate a claim against the estate of a decedent. *Oak v. Griggs* 239

2. A claim in an estate proceeding is every species of liability which the representative of an estate of a decedent may be required to pay from the general assets of the estate. *Oak v. Griggs* 239

3. Proceedings to administer the estate of a decedent are in rem and every person interested therein, either as heir, creditor, or otherwise, is a party thereto whether or not he is named or appears therein or is absent therefrom. *Oak v. Griggs* 239

4. The county court, and not the district court, has original jurisdiction to hear and adjudicate a cause of action for money only existing against a person at the time of his death. *Jamerson v. Dillon Realty Co.* 354

Forfeitures.

1. Forfeitures are not looked upon with favor by the courts, and will not be created by intendment nor enforced unless the court is compelled upon the facts and law to do so. *Plummer v. Fie* 367
2. One party to a contract cannot declare a forfeiture for failure of the other party to strictly perform its conditions unless he is in position to perform on his part. *Plummer v. Fie* 367

Franchises.

1. A franchise for the sale of gas granted by a city of the second class, which subsequently becomes a city of the first class, to a public service corporation is made with the right of regulation of rates to be charged for gas a part of the contract. *Nebraska Natural Gas Co. v. City of Lexington* 413
2. Rules of law set out in two prior cases controlled disposition of this case. *Natural Gas Distr. Co. v. City of Ogallala* 602
3. The Constitution prohibits granting a right to operate a common carrier passenger service upon the streets of a city without first obtaining the consent of a majority of the electors of the city. The effect of a franchise is stated. *Omaha Transit Co. v. Briggs* 703
4. A franchise accepted and performed in whole or in part by a grantee of it becomes a contract between the city and the grantee. *Omaha Transit Co. v. Briggs* 703

Fraud.

1. Essential elements of action in damages for false representations stated. *Allied Building Credits, Inc. v. Damicus* 390
2. The officers of a corporation are responsible for its acts. In a suit for fraud the law will look through the corporation to the officers who acted in the matter, and the officers who so acted are proper parties defendant. *Allied Building Credits, Inc. v. Damicus* 390

Frauds, Statute of.

1. The implied contract created by failing to protest against increase in rental does not arise until the new year begins and is not therefore violative of the statute of frauds with reference to agreements not

to be performed within 1 year. *Heckman v. Walker* 216
2. Oral agreements to transfer real estate are ordinarily not enforcible under the statute of frauds because not made in writing. Even if proved they are not enforcible unless there has been such performance as the law requires. *Vermaas v. Fagan* 465
3. The things done which are claimed to constitute performance must be such as are referable solely to the oral agreement sought to be enforced, and not from some other relation. *Vermaas v. Fagan* 465
4. Nothing will be considered as performance which does not put the party asserting it in a situation amounting to a fraud upon him unless the oral agreement is fully performed. Equity interferes in such cases only to prevent fraud or unconscionable advantage. *Vermaas v. Fagan* 465

Gifts.

Where title to property is placed by one spouse in the other spouse, the law indulges a presumption of a gift without regard to which one furnished the consideration in the acquisition of the property. *Hein v. W. T. Rawleigh Co.* 176

Habeas Corpus.

A certificate of good time by the Board of Control, based on an erroneous computation under earned-good-time statutes, is subject to correction and will not afford a prisoner a basis for release in a habeas corpus proceeding. *State ex rel. Menard v. Nichols* 144

Highways.

1. The statutory rule of right-of-way at intersections is applicable where automobiles collide in an ordinary street intersection and there is no evidence of a substantial difference in speed. *Cappel v. Riener* 375
2. Automobiles approach an intersection at approximately the same time whenever they are in such relative position that upon appraisal of all factors it should appear to a man of ordinary prudence approaching from the left that there is danger of collision if he fails to yield the right-of-way. *Cappel v. Riener* 375
3. The driver of an automobile entering an intersection of two streets is obligated to look for approaching automobiles and to see any vehicle within that

radius which denotes the limit of danger. *Cappel v. Riener* 375
4. If the driver of an automobile entering an intersection looks for approaching vehicles but fails to see one which is favored over him under the rules of the road, he is guilty of negligence as a matter of law. *Cappel v. Riener* 375
5. The driver of an automobile approaching or entering an intersection is required to see another automobile approaching or entering the intersection which has been favored with the right-of-way under the statutory rules of the road and a failure to see such favored automobile is negligence as a matter of law. *Cappel v. Riener* 375
6. A motor vehicle which has entered an intersection or is passing through it at a lawful speed has the right-of-way over a motor vehicle approaching the intersection from a different direction into the path of the first vehicle. *Pankonin v. Borowski* 382
7. The driver of a motor vehicle on a public highway is required to operate it upon the right half of the highway unless it is impracticable to do so. *O'Neill v. Henke* 631

Homesteads.
1. It is the policy of the Supreme Court and of courts generally to give a liberal construction to the homestead law for the purpose of protecting and preserving the home for those who would be benefited by its provisions. *Sanne v. Sanne* 683
2. Under the homestead statute, the homestead interest of a married person cannot be conveyed or encumbered unless the instrument by which it is conveyed or encumbered is executed and acknowledged by both the husband and wife. *Sanne v. Sanne* 683
3. A married man cannot by his own act or neglect deprive his wife of her property rights in the homestead either by his conveyance or encumbrance or by permitting a judgment by confession to be rendered against him for his individual debt, and such judgment cannot be made a lien on his wife's interest in the homestead. *Sanne v. Sanne* 683
4. When a husband and wife reside upon homestead property and the wife is divorced from the husband but is awarded such property, the wife may continue to claim a homestead interest therein. *Sanne v. Sanne* 683

5. A homestead, as defined by statute, once established is presumed to continue as such, and the burden of providing a waiver, loss, or abandonment thereof is upon the party asserting such waiver, loss, or abandonment. *Sanne v. Sanne* 683
6. Under the homestead law in force in this state, a judgment is a lien only on the debtor's interest in lands, impressed with the character of a homestead, in excess of $2,000. *Sanne v. Sanne* 683
7. The extent of a homestead is to be determined by the claimant's interest in the land and not by the fee simple value of the premises. In determining his homestead interest, valid mortgages and other liens are to be deducted from the value of the land and not from the $2,000 homestead exemption. *Sanne v. Sanne* 683

Homicide.
1. To constitute murder in the first degree, it is necessary that the killing be purposely and maliciously done with deliberate and premeditated malice. When there is evidence of those facts, the jury's verdict in finding the act to be murder in the first degree is conclusive, in the absence of prejudicial error otherwise. *Starkweather v. State* 477
2. When guilt of murder in the first degree is once determined, the primary duty to fix the penalty rests upon the jury. *Starkweather v. State* 477

Husband and Wife.
1. Where title to property is placed by one spouse in the other spouse, the law indulges a presumption of a gift without regard to which one furnished the consideration in the acquisition of the property. *Hein v. W. T. Rawleigh Co.* 176
2. A wife is not prevented from having a residence separate and apart from that maintained by her husband. *Willie v. Willie* 449

Improvements.
1. Respective rights of vendor and vendee stated where vendor fails and refuses to carry out oral contract of sale of real estate. *Wlaschin v. Affleck* 403
2. The right of vendee to recover for improvements is based on the ground that the vendor, through whose fault the contract failed, ought not to obtain the enhanced value given to his property by money,

work, labor, and material of the vendee without making compensation therefor. *Wlaschin v. Affleck* 403

Indictments and Informations.

1. To charge a statutory offense, the information or complaint must contain a distinct allegation of each essential element of the crime as defined by the law creating it, either in the language of the statute or its equivalent. *Nelson v. State* 576
2. The general rule is that a defect in the manner of charging an offense is waived if, upon being arraigned, the defendant pleads to the general issue, provided the information contains no jurisdictional defect and is sufficient to charge an offense under the law. *Nelson v. State* 576
3. An information questioned for the first time on appeal must be held sufficient unless so defective that by no construction can it be said to charge the offense for which accused was convicted. *Nelson v. State* 576
4. A plea of not guilty is a waiver of all defects in an information that can be reached by a motion to quash. *Nelson v. State* 576
5. Defects or omissions in the indictment or in the mode of finding the indictment, which are of such a fundamental character as to make the indictment wholly invalid, are not subject to waiver by the accused. *Nelson v. State* 576
6. Defects and omissions which run only to the form in which the various elements of the offense are stated, or to the fact that the pleading is inartificially drawn, are waived by not objecting thereto in some appropriate manner in the preliminary stages of the proceeding, or, as to some matters, before determination of the issue on the merits. *Nelson v. State* 576

Infants.

1. Juvenile courts do not have the sole or exclusive jurisdiction of children under 18 years of age who have violated our laws. *Fugate v. Ronin* 70
2. The county attorney is not limited by the Juvenile Court Act in any way in his duty to file proper complaints against wrongdoers and prosecute the same. *Fugate v. Ronin* 70
3. Mandatory transfer to juvenile court from justices of the peace and police magistrate courts is re-

quired only in criminal matters which the latter courts have authority to adjudicate. *Fugate v. Ronin* 70

4. A court of equity with notice or knowledge of the facts should protect the rights of minors who are not properly or adequately represented when their rights are involved in pending litigation. *Workman v. Workman* 857

Injunction.

1. Generally the granting of an injunction where an issue of damages has not been tendered is not a bar to an action at law for damages caused by the wrong enjoined. *Wischmann v. Raikes* 251
2. Injunction is available to test the constitutionality of a statute providing for the establishment of a new high school district. *Perkins County High School Dist. v. McQuiston* 330
3. An established high school district is a proper party to maintain an action to enjoin proceedings to remove an area from such established district on the ground that the legislative act providing for the removal is unconstitutional. *Perkins County High School Dist. v. McQuiston* 330
4. A partner may not by injunction deprive another partner of his possession of the partnership property and his rights in the management of the partnership business. *Hauke v. Frey* 398

Insane Persons.

The duties and obligations of counties with relation to claims for support by one county against another of mentally ill persons in state hospitals are controlled by statute. *County of Kearney v. County of Buffalo* 117

Insurance.

1. An insurance policy should be construed in the same manner as any other contract in order to give effect to the intent of the parties at the time it was made. *Lonsdale v. Union Ins. Co.* 56
2. The language used in an insurance policy should be considered not in accordance with what the insurer intended the words to mean, but what a reasonable person in the position of insured would have understood them to mean. *Lonsdale v. Union Ins. Co.* 56
3. If the contract was prepared by the insurer and

contains provisions reasonably subject to different interpretations, one favorable to the insurer and one advantageous to the insured, the one favorable to the latter will be adopted. *Lonsdale v. Union Ins. Co.* 56

4. In the absence of statutory provisions to the contrary, insurance companies have the same right as individuals to limit their liability and to impose whatever conditions they please upon their obligations, not inconsistent with public policy. *Lonsdale v. Union Ins. Co.* 56
5. Under applicable Illinois law a certificate of insurance which was issued to an employee by insurer under master policy of group life insurance, and which differed from master policy in several respects, constituted a part of the insurance contract. *Exstrum v. Union Casualty & Life Ins. Co.* 150
6. Where the provisions of a contract of insurance are in conflict, or subject to more than one interpretation, the provision or interpretation most favorable to the insured will ordinarily be adopted. *Exstrum v. Union Casualty & Life Ins. Co.* 150
7. When a time is fixed in a policy of hail insurance for the giving of notice of a loss for which indemnity is claimed which is reasonable in character, it will generally be regarded as a condition precedent to be complied with before a recovery can be had. *Farmers Mutual Hail Ins. Co. v. Leonard* 260
8. Where circumstances render the performance of an act within a stipulated time impossible, the act may be done within a reasonable time or within the time stipulated after the cause preventing prior compliance ceases to exist. *Farmers Mutual Hail Ins. Co. v. Leonard* 260
9. Where good health at the date of issuance is a condition precedent to the assumption of liability by the insurer, the plaintiff has the burden of proving that the insured was in good health on the date of issuance of the policy. *Gallentine v. World Ins. Co.* 429
10. The delivery of an accident and health insurance policy, the acceptance of premiums, and the treatment of the policy by the insurer and the insured as a contract raises a presumption that insured was in good health on the date of the issuance of the policy. *Gallentine v. World Ins. Co.* 429
11. The insurer may produce evidence to rebut the evi-

dence introduced by the plaintiff to the effect that the insured was in good health at the date of the issuance of the policy, but the burden of proof does not shift to the defendant to disprove the same as an affirmative defense. *Gallentine v. World Ins. Co.* 429

12. Where the evidence introduced by the insurer is wholly insufficient to rebut the evidence of the plaintiff that the plaintiff was in good health at the date of the issuance of the policy, it is not error for the trial court to direct a verdict in favor of the plaintiff. *Gallentine v. World Ins. Co.* 429
13. Where a policy of accident and health insurance provides that it shall not take effect if the insured be not in good health but the premiums shall be returned, the insurer, to defend under this provision, must allege and prove a return or a tender of the premiums. *Gallentine v. World Ins. Co.* 429
14. Policies of insurance, which are ordinarily prepared solely by the insurance company, are construed more strongly against it. *General Credit Corp v. Imperial Cas. & Indemnity Co.* 833
15. The provision in a policy of insurance that in case the lessee, mortgagor, or owner shall neglect to pay any premium due under a policy the lienholder shall, on demand, pay the same, is a condition which requires the lienholder to pay the premium on the insurance involved from and after the date of the demand if the lienholder desires to keep the insurance in force. *General Credit Corp. v. Imperial Cas. & Indemnity Co.* 833

Intoxicating Liquors.

1. Liquor cannot be lawfully sold by the drink outside the corporate limits of cities and villages. Insofar as selling and dispensing liquor by the drink is concerned, the country outside the boundaries of incorporated cities and villages is dry territory. *State ex rel. Fitzgerald v. Kubik* 219
2. The maintenance of a place where liquor is habitually brought by others to be there consumed, with the encouragement of the owner who profits from the sale of "set-ups," constitutes a public nuisance when such place is operated in territory in which sales by the drink are prohibited. *State ex rel. Fitzgerald v. Kubik* 219
3. Under the guest statute, the liability of a driver

while driving under the influence of intoxicating liquor is a distinct ground of liability from that of the driver based upon gross negligence in the operation of a motor vehicle. *O'Neill v. Henke* 631

4. Intoxicating liquor generally includes and means any liquor intended for use as a beverage, or capable of being so used, which contains alcohol in such a percent that it will produce some degree of intoxication when inbibed in a quantity that may practically be drunk. *O'Neill v. Henke* 631
5. The distinctive characteristic of all intoxicating liquors is that they contain alcohol; that they are capable of being consumed as a beverage; and that when so used, they will produce intoxication to some extent in the usual and common acceptation of the term. *O'Neill v. Henke* 631
6. The term under the influence of intoxicating liquor means that a person has lost to an appreciable degree the normal control of his body or mental faculties, and to that extent there is an impairment of the capacity to think and act correctly and efficiently. *O'Neill v. Henke* 631
7. Liability for damage caused by the driving of a motor vehicle while under the influence of intoxicating liquor is on a parity with liability for damage caused by gross negligence in the operation thereof. *O'Neill v. Henke* 631
8. The driving of a motor vehicle by one under the influence of intoxicating liquor fully responds to all the elements necessary to constitute gross negligence under the provisions of the motor vehicle guest statute. *O'Neill v. Henke* 631
9. Evidence as to drinking intoxicants within a reasonable time prior to an accident is a circumstance to be considered in determining whether or not a driver of a motor vehicle is guilty of gross negligence. *O'Neill v. Henke* 631

Joint Tenancy.

1. The creation as well as the continued existence of an estate in joint tenancy requires a unity of possession, a unity of interest, a unity of time, and a unity of title in all who have an interest in such estate. *Hein v. W. T. Rawleigh Co.* 176
2. Any act of a joint tenant which destroys one or more of its necessarily coexistent unities operates as a severance of the joint tenancy and extinguishes

the right of survivorship. *Hein v. W. T. Rawleigh Co.* 176

3. The meaning of the phrase by the moiety or half and by the whole is that joint tenants are seized of the entire estate for the purposes of tenure and survivorship but of only a particular part or interest for the purpose of immediate alienation. *Hein v. W. T. Rawleigh Co.* 176

Judges.

A party has a right to have his case heard and determined by a judge who is not disqualified by interest from hearing and determining it. *Conkling v. DeLany* 4

Judgments.

1. The issuance and return of an execution without a levy of it is sufficient, as against the judgment debtor, to prevent the judgment from becoming dormant; but to preserve the priority of the judgment lien as against good faith creditors and purchasers, it is necessary that an actual levy of the execution be made. *Hein v. W. T. Rawleigh Co.* 176
2. If an execution is issued on a judgment and delivered to a sheriff and it is by him returned unsatisfied, the law presumes that the officer did his duty in reference thereto and the execution in such case is duly "sued out." It is immaterial in such a case that the creditor requested the return of the execution. *Hein v. W. T. Rawleigh Co.* 176
3. Real estate acquired by a judgment debtor subsequent to the rendition of judgment against him is subject to the lien of the judgment at the time the title thereto vests in the debtor. *Hein v. W. T. Rawleigh Co.* 176
4. A grantee of the judgment debtor, who has actual or constructive notice of the judgment, takes the real estate subject to and charged with the lien of the judgment. *Hein v. W. T. Rawleigh Co.* 176
5. The defense of res judicata becomes available when a question of fact has been put directly in issue between the same parties or their privies and an adjudication is had thereon. *Wischmann v. Raikes* 251
6. Generally the granting of an injunction where an issue of damages has not been tendered is not a bar to an action at law for damages caused by the wrong enjoined. *Wischmann v. Raikes* 251

7. After the final adjournment of the term of court at which a judgment has been rendered, the court has no authority or power to vacate or modify the judgment except for the reasons stated and within the time limited by statute. *Rose v. Vonderfecht* 276
8. In determining the nature and extent of an easement established by a final decree of a court, the court is bound by the language of such decree and the inferences that can reasonably be drawn therefrom. *Rose v. Vonderfecht* 276
9. In a proceeding to vacate a judgment the applicant must allege facts sufficient to show that the failure to secure a just decision at the former hearing was not attributable to his own fault or want of due diligence. *Gleason v. Poore* 312
10. The validity of a prior judgment of conviction of the operator of a motor vehicle for traffic violations cannot be collaterally attacked in an appeal to review mandatory and ministerial action of the Director of the Department of Motor Vehicles in revoking the license of such person to operate a motor vehicle in this state. *Bradford v. Ress* 338
11. Where a default has been regularly entered, it is largely within the discretion of the trial court to say whether the defendant shall be permitted to come in afterwards and make his defense and, unless an abuse of discretion is made to appear, the Supreme Court will not interfere. *Willie v. Willie* 449
12. A judgment rendered in an action does not affect or bind a person who was not a party to the action. *Wemmer v. Young* 495
13. The prerequisites of granting a summary judgment are that the movant demonstrate that there is no genuine issue of fact in the case and that he is entitled to judgment as a matter of law. *Johns v. Carr* 545
Clearwater Elevator Co. v. Hales 584
Workman v. Workman 857
14. In considering a motion for summary judgment the court should view the evidence in the light most favorable to the party against whom it is directed. *Clearwater Elevator Co. v. Hales* 584
15. The court examines the evidence on motion for summary judgment, not to decide any issue of fact presented, but to discover if any real issue of fact exists. If there is a genuine issue of fact

to be determined, a summary judgment may not be properly entered. *Clearwater Elevator Co. v. Hales* 584

16. A motion for summary judgment is not a substitute for a demurrer, a motion to dismiss, or for judgment on the pleadings. It is a new procedure which may be used in certain cases where other procedural steps are not effective. *Workman v. Workman* 857

Juries.

1. A juror is not permitted to state to his fellow jurors, while they are considering their verdict, facts within his personal knowledge and not given in evidence. If the statements relate to the matter in dispute and influence the jury in arriving at a verdict, such statements constitute prejudicial error. *Klein v. Wilson* 779
2. In a case where a motion for new trial is made on the ground of misconduct of a juror, a question of fact is thereby presented, in the first instance, for determination by the trial court. The decision thereon will not be disturbed on appeal unless it is clearly wrong. *Klein v. Wilson* 779

Landlord and Tenant.

1. A lessee of real estate has, by virtue of his lease, capacity to contest an action brought against him to deprive him of his leasehold. *Maas v. Platte Valley Public Power & Irr. Dist.* 124
2. A tenant is entitled to exclusive possession and use of the demised premises in the absence of reservations or restrictions in his lease. *Maas v. Platte Valley Public Power & Irr. Dist.* 124
3. Where a landlord notifies his tenant for a fixed term that in case he holds over beyond the term he must pay a specified increased rental, the tenant will become liable for such rental if he in fact holds over, and either remains silent with reference to the notice, or fails to express his nonassent to the terms thereof. *Heckman v. Walker* 216

Libel and Slander.

1. An action for libel must be commenced within 1 year of the publication of the defamatory matter that constitutes the basis for the action. *Tennyson v. Werthman* 208
2. To be sufficient to charge a cause of action for

libel which does not contain an allegation of special damage, a petition must aver a publication which is libelous per se. *Tennyson v. Werthman* 208

3. A demurrer to a petition charging a libel admits the allegations of the petition and the implications following naturally from the publication. *Tennyson v. Werthman* 208

4. The language of an alleged libel should be interpreted in its ordinary and popular meaning according to the sense in which it would be understood by the readers to whom it was addressed. *Tennyson v. Werthman* 208

5. Any language, the nature and meaning of which are to impute to a person the commission of a crime or to subject him to public ridicule, ignominy, or disgrace, is libelous per se. *Tennyson v. Werthman* 208

Liens.

A lien upon chattel property, though valid, is not evidence of ownership of the property by the lienholder. *Mapledge Corp. v. Coker* 420

Limitations of Actions.

1. The statute of limitations applies to claims by one county against another for maintenance of incompetent persons in state hospitals. *County of Kearney v. County of Buffalo* 117

2. An action for libel must be commenced within 1 year of the publication of the defamatory matter that constitutes the basis for the action. *Tennyson v. Werthman* 208

3. The statute of limitations is not tolled as to an amended petition which alleges a new and different cause of action but runs until the filing of that pleading. *Tennyson v. Werthman* 208

Master and Servant.

Rule stated as to presumption of payment of wages for services of domestic servant extending over a period of years, where claim is made for additional compensation after death of employer. *Christ v. Nelson* 799

Mechanics' Liens.

1. Where a person performs labor or furnishes materials for the improvement of a house, pursuant to a contract with the owner thereof, such person has

4 months from the completion of the labor or the furnishing of the materials in which to file a mechanic's lien. *Gilcrist v. Wright* 767

2. The lien of a materialman or laborer attaches at the commencement of the furnishing of material or at the commencement of the performance of labor by him on the property on which a lien is claimed. *Gilcrist v. Wright* 767

3. Under the Nebraska statute there are no priorities among liens for material furnished or labor performed where the liens are of the same class and attach to the same estate. *Gilcrist v. Wright* 767

4. A mechanic's lien has priority over a mortgage if work was commenced or materials furnished before the mortgage was filed for record. *Gilcrist v. Wright* 767

5. On foreclosure of a mechanic's lien the plaintiff may take a personal judgment against the person liable for the debt. *Gilcrist v. Wright* 767

Mortgages.

In order for a mortgage on real estate to merge in the title, there must be an identity of ownership in the mortgage and the fee title. *Gilcrist v. Wright* 767

Motor Carriers.

1. To transport passengers within a city, a common carrier must have both a franchise from the city and a certificate of public convenience and necessity from the railway commission. *Omaha Transit Co. v. Briggs* 703

2. A common carrier of passengers in a city under a franchise from it and under a certificate of public convenience and necessity issued by the railway commission has capacity to litigate the ineligibility of anyone who without authority of law has engaged in operation as a common carrier within the city. *Omaha Transit Co. v. Briggs* 703

3. Where transit company held both a franchise and certificate of public convenience and necessity, while bus company held only a certificate of public convenience and necessity, right of transit company to operate in city was superior. *Omaha Transit Co. v. Briggs* 703

4. Municipal boundaries play a part in determining who should be permitted or required to perform

common carrier services within the municipality. *Omaha Transit Co. v. Briggs* 703
5. The duty is imposed upon a common carrier to provide service to all the public and this requires it to be furnished where it is unprofitable as well as where it is profitable. *Omaha Transit Co. v. Briggs* 703
6. Public convenience and necessity may be found in operating economies and those things which contribute to expedition, public safety, efficiency, and convenience in operation. *Omaha Transit Co. v. Briggs* 703
7. The term public interest as used in the Motor Carrier Act has direct relation to the adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provisions for the best use of the transportation facilities. *Omaha Transit Co. v. Briggs* 703

Municipal Corporations.
1. The right of regulation of rates by a second class city is a part of a franchise for the sale of gas. *Kansas-Nebraska Natural Gas Co. v. City of St. Edward* 15
2. The power of regulation of rates of a public utility rests in the Legislature until such time as it is delegated to a proper body. *Kansas-Nebraska Natural Gas Co. v. City of St. Edward* 15
3. The fact that the delegation of the power to another body occurs after the granting of the franchise is not material. *Kansas-Nebraska Natural Gas Co. v. City of St. Edward* 15
4. In order to establish a case against a defendant for violation of a city ordinance it is necessary to show that the offense was committed within the area in which the ordinance is effective. *State v. Bouwens* 244
5. Courts will not take judicial notice that certain streets are located within the territorial limits of an unnamed city for the purpose of fixing venue. *State v. Bouwens* 244
6. Courts will take judicial notice of the streets, squares, and public grounds of a city, their location and relation to one another, and the direction they run as shown by an official map of a city. But judicial notice thereof will not be taken to establish venue. *State v. Bouwens* 244
7. The fact that defendant was arrested by police-

men in the city of Lincoln is not proof that the offense was committed within the territorial limits of the city of Lincoln. *State v. Bouwens* 244

8. A home rule charter is a grant of power to a city and not a limitation of general power. The grant of power is to be construed strictly against the public officials of a home rule charter city. *Philson v. City of Omaha* 360

9. Where a home rule charter specifies the method for exercising a granted power, such method constitutes the measure of the power. *Philson v. City of Omaha* 360

10. The provisions of a home rule charter requiring that contracts for public works be awarded upon a public letting to the lowest responsible bidder are intended to secure unrestricted competition among bidders, to eliminate fraud and favoritism, and to avoid excessive cost. *Philson v. City of Omaha* 360

11. An ordinance which permits bidding on a public works contract only by contractors who agree to pay a minimum wage prescribed by the city is void as being in contravention of the home rule charter requiring that all public works be awarded by contract to the lowest responsible bidder. *Philson v. City of Omaha* 360

12. An ordinance fixing a scale of wages to be paid by all contractors bidding on a public works contract cannot be sustained as an implementation of a fair labor standard adopted by statute which provides that no less than going wages for like labor shall be paid by the contractor at the time and place the work is performed. *Philson v. City of Omaha* 360

13. By statute, all ordinances, by-laws, acts, regulations, rules, and proclamations, existing and in force in any city at the time of its incorporation as a city of the first class, remain in full force and effect after such incorporation until the same are repealed or modified by such city. *Nebraska Natural Gas Co. v. City of Lexington* 413

14. A franchise for the sale of gas granted by a city of the second class, which subsequently becomes a city of the first class, to a public service corporation is made with the right of regulation of rates to be charged for gas a part of the contract. *Nebraska Natural Gas Co. v. City of Lexington* 413

15. Rules of law set out in two prior cases controlled

disposition of this case. *Natural Gas Distr. Co. v. City of Ogallala* 602

16. The Constitution prohibits granting a right to operate a common carrier passenger service upon the streets of a city without first obtaining the consent of a majority of the electors of the city. The effect of a franchise is stated. *Omaha Transit Co. v. Briggs* 703

17. The authority of a city to control the use of its streets is not limited by the power granted to the railway commission to issue certificates of public convenience and necessity. *Omaha Transit Co. v. Briggs* 703

18. A common carrier of passengers in a city under a franchise from it and under a certificate of public convenience and necessity issued by the railway commission has capacity to litigate the ineligibility of anyone who without authority of law has engaged in operation as a common carrier within the city. *Omaha Transit Co. v. Briggs* 703

19. When the Legislature has enacted a law affecting municipal affairs, but which is also of state-wide concern, such law takes precedence over any provisions in a home rule charter and the provisions of the charter must yield. *Van Patten v. City of Omaha* 741

20. By statute, it is provided that the city planning commission in cities of the metropolitan class shall prepare a city plan and shall have power to carry out and maintain said city plan after its adoption by the city council. The statute is limited to a "city plan," after its "adoption by the city council." *Van Patten v. City of Omaha* 741

21. Until a city plan is adopted by the city council, the planning commission is advisory to the city council, and the efficacy of its city plan depends on its being adopted by the city council. *Van Patten v. City of Omaha* 741

22. No limitation is made by statute as to the time that may elapse between the preparing of a city plan, its adoption by the council on the recommendation of the city planning commission, and action by the city council in implementing the plan. *Van Patten v. City of Omaha* 741

23. Action within the provisions of a city plan of the planning commission applies only where it has been adopted by the city council. *Van Patten v. City of Omaha* 741

24. The recommendation of the city planning commission relates itself to the "shall have power to carry out" clause in statute governing cities of the metropolitan class. *Van Patten v. City of Omaha* 741
25. The statute designated does not directly refer to any other procedure of the planning commission for that purpose. *Van Patten v. City of Omaha* 741
26. The primary purpose of the recommendation provision of statute designated is not for the protection of the landowner, for it relates not only to the unwilling condemnee but also to the generous donor and the willing vendor of real property. *Van Patten v. City of Omaha* 741
27. Statute designated has applicability only to those condemnations within the provisions of a city plan that has been acquired or prepared by the city planning commission and which has been adopted by the city council. *Van Patten v. City of Omaha* 741
28. Legislative power delegated to a city to construct local improvements and to levy special assessments is to be strictly construed. Doubt as to the extent of the power is to be construed against the city. *Danielson v. City of Bellevue* 809
29. The publications and notices required by statute are mandatory and jurisdictional steps without which an ordinance never becomes effective. *Danielson v. City of Bellevue* 809
30. By statute a city of the first class is required to declare by ordinance the kind of improvement which it proposes to make and to give notice thereof by publication of the ordinance. *Danielson v. City of Bellevue* 809
31. An ordinance purporting to create a local public improvement district which fails to declare the kind of improvement proposed in the ordinance is invalid. *Danielson v. City of Bellevue* 809

Negligence.

1. An allegation of negligence of a specific number of miles per hour as the speed of an automobile as constituting excessive speed does not limit the pleader to proof of that speed. He may prove a lesser rate as negligence. *Tate v. Borgman* 299
2. The lawfulness of the speed of an automobile within the prima facie limits fixed by statute is determined by the further test of whether the speed was greater than was reasonable and prudent under the

conditions then existing. *Tate v. Borgman* 299
O'Neill v. Henke 631

3. A party is only required to have his automobile under such reasonable control as to be able to avoid a collision with other vehicles whose drivers exercise due care. Complete control which is such as will prevent collision by the anticipation of negligence on the part of another in the absence of warning or knowledge is not required. *Tate v. Borgman* 299
4. If contributory negligence is pleaded as a defense but there is no proof thereof, it is prejudicial error to submit the issue of contributory negligence to the jury. *Pankonin v. Borowski* 382
5. The burden of proving a cause of action is not sustained by evidence from which negligence can only be surmised or conjectured. *Mimick v. Beatrice Foods Co.* 470
6. Negligence is a question of fact and may be established by circumstantial evidence. *McAlexander v. Estate of Lewis* 524
7. In proving a case by circumstantial evidence the law requires that the facts and circumstances proved, together with all inferences that may be reasonably drawn therefrom, shall indicate with reasonable certainty the negligent act of which complaint is made. *McAlexander v. Estate of Lewis* 524
8. Where the circumstances proved show with reasonable certainty that the impact of two vehicles involved in an accident occurred on defendant's left-hand side of the center of the highway, the evidence is sufficient to go to the jury on the question of defendant's negligence. *McAlexander v. Estate of Lewis* 524
9. In such situation the plaintiff is not required by proof to eliminate all possibility that the accident may have happened otherwise in order to present a case for the jury. *McAlexander v. Estate of Lewis* 524
10. An issue of gross negligence is for the jury if the evidence relating thereto is conflicting and reasonable minds might arrive at different conclusions. *Olson v. Shellington* 564
11. When the evidence is resolved most favorably to the existence of gross negligence and thus the facts are determined, the inquiry of whether they support a finding of gross negligence is one of law. *Olson v. Shellington* 564

12. Gross negligence within the meaning of the motor vehicle guest statute means great and excessive negligence or negligence in a very high degree. It indicates the absence of slight care in the performance of duty. *Olson v. Shellington* 564
O'Neill v. Henke 631
13. Gross negligence within the meaning of the motor vehicle guest statute has also been defined as an entire failure to exercise care or the exercise of so slight a degree of care as to justify the belief that there was an indifference to the safety of others. *Olson v. Shellington* 564
14. Elements necessary to support a finding of gross negligence stated. *Olson v. Shellington* 564
15. It is not indispensable to establish gross negligence that it be shown that protest by the guest or others was made to the operator of the automobile because of his conduct or omission prior to the time of the accident. *Olson v. Shellington* 564
16. The failure of the driver of an automobile to maintain a proper lookout when driving at high speed at nighttime on a country road with a restricted lighted distance ahead of him is an important consideration in determining whether or not gross negligence existed as a proximate cause of the accident. *Olson v. Shellington* 564
17. It is the duty of a driver of an automobile at night on a highway to proceed so that his headlights will mark out the traveled road. *Olson v. Shellington* 564
18. The speed of an automobile may be unlawful even though it is within the statutory prima facie limits if it is unsafe or it is greater than is reasonable or prudent under the existing conditions. *Olson v. Shellington* 564
19. More than one act of negligence may in combination amount to gross negligence within the motor vehicle guest statute. *Olson v. Shellington* 564
20. One who creates an emergency by his own negligent conduct will not be excused for his failure to pursue the safer of two courses open to him, and he will ordinarily be held guilty of negligence as a matter of law. *Mabe v. Gross* 593
21. The existence of gross negligence must be determined from the facts and circumstances in each case. *O'Neill v. Henke* 631
22. The question of gross negligence is for the jury

where the evidence relating thereto is conflicting and where reasonable minds might draw different conclusions. *O'Neill v. Henke* 631

23. It is not necessary in all cases that the operator of a motor vehicle be aware of impending danger in order to hold him guilty of gross negligence, but that is a circumstance which should be considered. *O'Neill v. Henke* 631

24. A violation of statutes regulating the use and operation of motor vehicles upon the highways is not negligence per se, but evidence of negligence which may be taken into consideration with all the other facts and circumstances in determining whether or not negligence is established thereby. *O'Neill v. Henke* 631

25. Excessive speed of a motor vehicle does not necessarily establish gross negligence, although it is a factor to be considered. *O'Neill v. Henke* 631

26. As a general rule it is negligence as a matter of law for a motorist to drive a motor vehicle on a highway in such a manner that he cannot stop in time to avoid a collision with an object within the range of his vision. *O'Neill v. Henke* 631

27. A driver of a motor vehicle is legally obligated to keep such a lookout that he can see what is plainly visible before him and he cannot relieve himself of that duty. In conjunction therewith, he must so drive his motor vehicle that when he sees the object he can stop his motor vehicle in time to avoid it. *O'Neill v. Henke* 631

28. Exceptions have been recognized to the general rule where the object or obstruction or depression is the same color as the roadway and for that reason, or for other sufficient reasons, cannot be observed by the exercise of ordinary care in time to avoid a collision. *O'Neill v. Henke* 631

29. When the view of the driver of a motor vehicle is obstructed, whether by reason of a grade or otherwise, the speed of the motor vehicle should be so reduced that the motor vehicle can be stopped within the distance the driver can see ahead. *O'Neill v. Henke* 631

30. What is a reasonable speed is necessarily largely dependent on the situation and the surrounding circumstances, it being obvious that a speed which would be safe, reasonable, and proper in some places and under some circumstances might be

highly dangerous, unreasonable, and improper in other places and under other circumstances. *O'Neill v. Henke* 631

31. The emergency rule cannot be successfully invoked by either party in a negligence case unless there is competent evidence to support a conclusion that a sudden emergency actually existed, and then it cannot be successfully invoked by one who has brought that emergency upon himself by his own acts or who has not used due care to avoid it. *O'Neill v. Henke* 631

32. A verdict should not be directed, or a cause of action dismissed, or a judgment entered notwithstanding the verdict, unless the court can definitely determine that the evidence of defendant's negligence, when taken as a whole, fails to reach such degree of negligence that is considered gross. *O'Neill v. Henke* 631

33. Where the evidence of negligence falls within the area where reasonable minds can differ as to whether or not it establishes gross negligence then the determination of that question is for the jury and, absent prejudicial error otherwise, the verdict of the jury must prevail. *O'Neill v. Henke* 631

34. In a negligence action, the burden is on the plaintiff to show that there was a negligent act or omission, and that it was the proximate cause of the plaintiff's injury. *Weston v. Gold & Co.* 692

35. The basis of the doctrine of res ipsa loquitur is stated. *Weston v. Gold & Co.* 692

36. The doctrine of res ipsa loquitur proceeds on the theory that the plaintiff is unable to specify the particular act of negligence which caused the injury. If the petition alleges particular acts of negligence, the doctrine of res ipsa loquitur cannot be applied. *Weston v. Gold & Co.* 692

37. Before the doctrine of res ipsa loquitur can be applied it must appear that the negligent cause or thing which produced the injury complained of was wholly and exclusively in the possession and under the control or management of defendant. *Weston v. Gold & Co.* 692

38. Rules for application of the comparative negligence statute stated. *Bezdek v. Patrick* 754

39. If a defendant is guilty of negligence as a matter of law and if it can be found that the plaintiff is guilty of only slight negligence under the circum-

stances of the case, the issue as to whether or not the negligence of defendant is gross in comparison therewith is a factual one for determination by the jury. *Bezdek v. Patrick* 754

40. Where there is no basis in the evidence for a finding of contributory negligence, it is error to instruct on the subject and thereby to submit to the jury an issue which is outside the evidence. *Klein v. Wilson* 779

41. Where different minds may reasonably draw different conclusions or inferences from the adduced evidence, or if there is a conflict therein, 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. *Klein v. Wilson* 779

42. Where the submission of the issue of contributory negligence and a comparison thereof with negligence of the opposing party is proper, the determination of the amount of damages is for the jury. *Klein v. Wilson* 779

43. To constitute a defense, an act of God must be the sole proximate cause of damages without concurrent negligent participation of defendant, and in order for defendant to recover a verdict, he has the burden of proving such an alleged defense by a preponderance of the evidence. *Cover v. Platte Valley Public Power & Irr. Dist.* 788

44. The owner of a place of business to which the public is invited is required to exercise reasonable care to have and maintain the premises in a reasonably safe condition for the use of persons who properly enter and are upon the premises. *Crunk v. Glover* 816

New Trial.

1. A new trial should not be granted on the ground of newly-discovered evidence unless it is made to appear that the newly-discovered evidence is material and that it could not by the exercise of reasonable diligence have been discovered and produced at the trial. *Ysac v. State* 24

2. Where newly-discovered evidence is merely cumulative and is not of so controlling a character that it will probably change the verdict, it is not sufficient to justify the granting of a new trial. *Ysac v. State* 24

3. Where a verdict of a jury is clearly against the

weight and reasonableness of the evidence it will be set aside and a new trial granted. *Twenty Club v. State* 37

4. An appeal from an order of the district court granting or denying a motion for a judgment notwithstanding the verdict requires the Supreme Court to consider the entire record and to determine whether it does or does not justify the action of the district court. *Mimick v. Beatrice Foods Co.* 470
5. Where a timely motion for new trial on the ground of newly discovered evidence has been filed, the district court has jurisdiction to hear and make a determination upon the motion notwithstanding error proceedings are pending in the Supreme Court on the conviction. *Smith v. State* 492
6. Newly discovered evidence is not sufficient reason for a new trial if diligence before the trial would have produced notice or knowledge of the alleged recently discovered evidence. *Wemmer v. Young* 495
7. Rule stated as to procedure on appeal where trial court grants new trial and gives no reason for doing so. *Hert v. City Beverage Co., Inc.* 557
8. Where a party has sustained the burden and expense of a trial and has succeeded in securing the verdict 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. *Hert v. City Beverage Co., Inc.* 557
9. Where a verdict in an action for damages is excessive and it appears to have been returned under the influence of passion and prejudice, it is the duty of the court to set aside the verdict and grant a new trial. *Hert v. City Beverage Co., Inc.* 557

Nuisances.

The maintenance of a place where liquor is habitually brought by others to be there consumed, with the encouragement of the owner who profits from the sale of "set-ups," constitutes a public nuisance when such place is operated in territory in which sales by the drink are prohibited. *State ex rel. Fitzgerald v. Kubik* 219

Officers.

A ministerial act is one performed in response to a duty which has been positively imposed by law and its performance required at a time and in a manner

or upon conditions which are specifically designated, the duty to perform under the conditions specified not being dependent upon the officer's judgment or discretion. *State ex rel. Line v. Kuhlman* 674

Pardons.

1. The maximum credit that can be allowed for earned good time under statute is limited to 2 months for each year. *State ex rel. Menard v. Nichols* 144
2. A certificate of good time by the Board of Control, based on an erroneous computation under earned-good-time statutes, is subject to correction and will not afford a prisoner a basis for release in a habeas corpus proceeding. *State ex rel. Menard v. Nichols* 144

Parties.

1. School districts of the classes involved in this action as such were not real parties in interest in proceedings to organize and create a new high school district. *Perkins County High School Dist. v. McQuiston* 330
2. If a complete determination of a controversy in litigation cannot be had without the presence of other parties, the court should require them to be made parties to the case. *Workman v. Workman* 857

Partnership.

1. The existence and scope of a partnership may be evidenced by written or oral agreement, or implied by the conduct of the parties. *Hauke v. Frey* 398
2. A partner may not by injunction deprive another partner of his possession of the partnership property and his rights in the management of the partnership business. *Hauke v. Frey* 398
3. As a general rule one partner may not maintain an action against his copartner on account of a partnership transaction where there has been no settlement of the partnership accounts and business. *Hauke v. Frey* 398

Payment.

1. Rule stated as to presumption of payment of wages for services of domestic servant extending over a period of years, where claim is made for additional compensation after death of employer. *Christ v. Nelson* 799

2. Questions as to presumption of payment and rebuttal thereof are for the jury on conflicting evidence, but where the facts are undisputed the sufficiency of the evidence to rebut a presumption of payment may become a question of law for the court. *Christ v. Nelson* 799

Pleading.

1. An issue not raised by the pleadings and proof in the district court cannot be raised for the first time in the Supreme Court. *Lonsdale v. Union Ins. Co.* 56
Lash v. Erisman 606
2. An amended pleading which amplifies, expands, clarifies, or elaborates with greater fullness of detail than was alleged in the original pleading does not state a new and different cause of action. *Tennyson v. Werthman* 208
3. In deciding the correctness of a ruling on a demurrer to a pleading, only allegations of fact in the pleading to which it is directed may be considered. *Tennyson v. Werthman* 208
4. To be sufficient to charge a cause of action for libel which does not contain an allegation of special damage, a petition must aver a publication which is libelous per se. *Tennyson v. Werthman* 208
5. A demurrer to a petition charging a libel admits the allegations of the petition and the implications following naturally from the publication. *Tennyson v. Werthman* 208
6. When a defendant demurs to the evidence or moves for a dismissal at the close of plaintiff's evidence, he thereby admits plaintiff's testimony to be true together with every conclusion which may be reasonably drawn therefrom. *Jamerson v. Dillon Realty Co.* 354
7. Scope of admission of general demurrer stated. *Nebraska Natural Gas Co. v. City of Lexington* 413
8. 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. *Nebraska Natural Gas Co. v. City of Lexington* 413
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. *Johns v. Carr* 545

10. An admission made in a pleading on which the trial is had is a judicial admission and constitutes a waiver of all controversy so far as the adverse party desires to take advantage of it. It is therefore a limitation of the issues. *Johns v. Carr* 545
Lash v. Erisman 606

11. A judicial admission is a formal act done in the course of judicial proceedings which is a substitute for evidence, thereby waiving and dispensing with production of evidence by conceding for the purposes of litigation that the subject of the admission is true. *Johns v. Carr* 545

12. The doctrine of res ipsa loquitur proceeds on the theory that the plaintiff is unable to specify the particular act of negligence which caused the injury. If the petition alleges particular acts of negligence, the doctrine of res ipsa loquitur cannot be applied. *Weston v. Gold & Co.* 692

13. A motion for judgment on the pleadings attacks pleadings in a cause for deficiency in the substance of them and presents only a question of law. *Workman v. Workman* 857

14. A motion for judgment on the pleadings admits the truth of all well-pleaded facts in the pleadings of the opposing party and reasonable inferences therefrom. It necessarily admits, for the purposes of the motion, the untruth of the allegations of the movant insofar as they have been controverted. *Workman v. Workman* 857

Pledges.

Unsecured creditors of a pledgor of chattels are entitled to have the lien of the pledge agreement foreclosed as required by law. A sale or transfer of the pledged chattels otherwise than as the law provides is no protection to those participating in the transfer or sale. *Mapledge Corp. v. Coker* 420

Prohibition.

1. The common law writ of prohibition is available to litigants in this state. Jurisdiction to grant the same is lodged in the district courts. *Conkling v. DeLany* 4

2. The writ of prohibition is an extraordinary writ issued by a superior court to an inferior judicial

tribunal to prevent the latter from exceeding its jurisdiction. *Conkling v. DeLany* 4
3. Ordinarily prohibition cannot be resorted to when the ordinary and usual remedies provided by law are adequate and available. *Conkling v. DeLany* 4
4. The function of a writ of prohibition has been extended to cover situations where, even though the inferior tribunal has jurisdiction, the superior court deems it necessary and advisable to issue the writ to prevent palpable and irremediable injustice. *Conkling v. DeLany* 4
5. Prohibition may, in the court's discretion, be granted in a proper case where the remedy by appeal or error is not adequate. Each case must depend upon its own facts. *Conkling v. DeLany* 4
6. The district courts of this state have ample power to administer, in proper cases, the remedy which a writ of prohibition affords. *State ex rel. Line v. Kuhlman* 674
7. Prohibition is a preventive remedy rather than a corrective one. *State ex rel. Line v. Kuhlman* 674
8. Prohibition is derived from the common law and is essentially and wholly a proceeding at law. Courts of equity do not issue writs of prohibition. *State ex rel. Line v. Kuhlman* 674
9. Prohibition is the proper remedy where an inferior tribunal assumes to exercise judicial power not granted by law, or is attempting to make an unauthorized application of judicial force. *State ex rel. Line v. Kuhlman* 674
10. Essential requisites justifying the issuance of a writ of prohibition stated. *State ex rel. Line v. Kuhlman* 674
11. In the absence of a statute, a writ of prohibition ordinarily issues to restrain judicial or quasi-judicial functions or acts only, and not to prevent acts of a legislative, ministerial, administrative, political, governmental, or executive character. *State ex rel. Line v. Kuhlman* 674

Public Service Commissions.
1. An order of the railway commission granting a rehearing after the case has been decided on the merits is a final order subject to review by the Supreme Court. *Chicago & N. W. Ry. Co. v. Save the Trains Assn.* 61
2. Where an application is made by a railroad company

to discontinue an existing service operated at a loss, the primary question to be determined is the public covenience and necessity therefor. *Chicago & N. W. Ry. Co. v. Save the Trains Assn.* 61

3. On appeal to the Supreme Court from an order of the railway commission, while acting within its jurisdiction, the question for determination is whether or not the order is arbitrary and unreasonable. *Chicago & N. W. Ry. Co. v. Save the Trains Assn.* 61

4. Property may be as effectively taken without due process of law by long-continued and unreasonable delay in putting an end to railway commission orders on the application of an injured party, which have become confiscatory, as by an express affirmance of them. *Chicago & N. W. Ry. Co. v. Save the Trains Assn.* 61

5. Where it appears that there is no public necessity present for the operation of passenger trains daily in each direction between two points within the state, and that such trains can be operated only at great loss to the railroad company, an order of the railway commission requiring their operation is arbitrary and unreasonable, and amounts to a confiscation of the railroad company's property without compensation. *Chicago & N. W. Ry. Co. v. Save the Trains Assn.* 61

6. The prime object and real purpose of railway commission control is to secure adequate sustained service for the public at minimum cost and to protect and conserve investments already made for that purpose. Primary consideration will be given to the public rather than to individuals. *Omaha Transit Co. v. Briggs* 703

7. To transport passengers within a city, a common carrier must have both a franchise from the city and a certificate of public convenience and necessity from the railway commission. *Omaha Transit Co. v. Briggs* 703

8. The authority of a city to control the use of its streets is not limited by the power granted to the railway commission to issue certificates of public convenience and necessity. *Omaha Transit Co. v. Briggs* 703

9. Where transit company held both a franchise and certificate of public convenience and necessity, while bus company held only a certificate of public convenience and necessity, right of transit company

to operate in city was superior. *Omaha Transit Co. v. Briggs* 703

10. Municipal boundaries play a part in determining who should be permitted or required to perform common carrier services within the municipality. *Omaha Transit Co. v. Briggs* 703

Public Utilities.

1. The right of regulation of rates by a second class city is a part of a franchise for the sale of gas. *Kansas-Nebraska Natural Gas Co v. City of St. Edward* 15
2. The power of regulation of rates of a public utility rests in the Legislature until such time as it is delegated to a proper body. *Kansas-Nebraska Natural Gas Co. v. City of St. Edward* 15
3. The fact that the delegation of the power to another body occurs after the granting of the franchise is not material. *Kansas-Nebraska Natural Gas Co. v. City of St. Edward* 15

Quieting Title.

A decree quieting title to real estate, encumbered by a lien, may be obtained on a proper ground, such as the bar of the statute of limitations, without alleging or proving payment of the lien. *Hein v. W. T. Rawleigh Co.* 176

Railroads.

Where an application is made by a railroad company to discontinue an existing service operated at a loss, the primary question to be determined is the public convenience and necessity therefor. *Chicago & N. W. Ry. Co. v. Save the Trains Assn.* 61

Rape.

1. Rule as to degree of force required to sustain a conviction of rape stated. *Ysac v. State* 24
2. Rule as to degree of resistance required of prosecutrix in rape case stated. *Ysac v. State* 24
3. In a prosecution for rape it must be shown by competent evidence beyond a reasonable doubt not only that defendant committed the act charged but that he did so under such circumstances that every element of the alleged offense existed. *Ysac v. State* 24
4. Whether or not prosecutrix resisted advances of defendant to the extent of her ability is a question

of fact. Where her testimony, if believed, would indicate that she had so resisted, a verdict based on such testimony will not be set aside. *Ysac v. State* 24

Reformation of Instruments.

It is unnecessary to secure a formal reformation of a written instrument where it differs from the true agreement of the parties in order to enforce it or have the advantage of it as a defense. *Plummer v. Fie* 367

Schools and School Districts.

1. School districts of the classes involved in this action as such were not real parties in interest in proceedings to organize and create a new high school district. *Perkins County High School Dist. v. McQuiston* 330
2. An established high school district is a proper party to maintain an action to enjoin proceedings to remove an area from such established district on the ground that the legislative act providing for the removal is unconstitutional. *Perkins County High School Dist. v. McQuiston* 330
3. Due process of law was met where notice of action taken was given, opportunity to object afforded, and opportunity for judicial review by proceeding in error provided. *Perkins County High School Dist. v. McQuiston* 330
4. Where legal voters of the school districts concerned in two counties severally signed and filed proper petitions requesting a change of boundaries thereof, the superintendents acting jointly have jurisdiction and the mandatory duty to order and make the change requested by the petitions. *Halstead v. Rozmiarek* 652
5. It is a part of the public policy of the state to encourage the reorganization, consolidation, or elimination of inefficient and uneconomical school districts. *Halstead v. Rozmiarek* 652
6. A school district is a subdivision of the state created as a convenient agency for exercising the authority entrusted to it by the state, and the duration of the powers given it and the territory over which it may be exercised depend wholly upon the discretion of the state. *Halstead v. Rozmiarek* 652
7. A county high school district is not a "district affected" by a change in school district boundaries

of a high school district to include an elementary school district, notwithstanding the elementary school district was within and a part of the territorial area of the county high school district. *Halstead v. Rozmiarek* 652

8. A school district has no territorial integrity. It is always subject to the reserve power of the state exercised through administrative officer or officers to change the territory according to the current educational needs and good educational principles. *Halstead v. Rozmiarek* 652

9. A cause of action does not accrue to a school district, as a corporate entity, against a county superintendent for the manner in which he changes the boundaries of a school district. *Halstead* v. *Rozmiarek* 652

10. An owner of taxable property within the territorial limits of a school district, but who is not a legal voter therein, does not have a sufficient interest in the matter of the consolidation of that school district with an adjoining one to authorize him to contest the annexation proceedings. *Halstead v. Rozmiarek* 652

Searches and Seizures.

A violation of the constitutional guarantee concerning search and seizure does not render evidence acquired thereby inadmissible on the trial of a criminal case against the person from or concerning whom the evidence was procured. *Haswell v. State* 169

Specific Performance.

1. Specific performance of an oral contract to transfer specific property in consideration of personal care of the owner during the remainder of his life may be decreed by a court of equity when the existence and performance of the contract is established by clear, convincing, and satisfactory evidence. *Vermaas v. Fagan* 465

2. The things done which are claimed to constitute performance must be such as are referable solely to the oral agreement sought to be enforced, and not from some other relation. *Vermaas v. Fagan* 465

3. Nothing will be considered as performance which does not put the party asserting it in a situation amounting to a fraud upon him unless the oral agreement is fully performed. Equity interferes in

such cases only to prevent fraud or unconscionable advantage. *Vermaas v. Fagan* 465

Statutes.

1. If a statute is unambiguous courts will not by interpretation or construction usurp the function of the lawmaking body and give it a meaning not intended or expressed by the Legislature. *Fugate v. Ronin* 70
2. A statute is not available for construction as a matter of course. If it is unambiguous there is no room for construction and courts may not search for its meaning beyond the statute itself. *Fugate v. Ronin* 70
3. It is clearly the duty of the Supreme Court to give a statute an interpretation which meets constitutional requirements if it can be reasonably done. *Fugate v. Ronin* 70
4. The constitutionality of a statute will not be determined unless necessary to a proper disposition of the pending case. *Fugate v. Ronin* 70
5. All statutes relating to the same subject should be construed and considered together for the purpose of giving effect to the legislative intention. *State ex rel. Menard v. Nichols* 144
6. All statutes in pari materia must be considered together and construed as if they were one law, and, if possible, effect given to each provision. *State ex rel. Menard v. Nichols* 144
7. Where an attempt is made to incorporate parts of a former law into one that is being presently enacted, the language used should be such as to indicate with a reasonable degree of certainty what was in the legislative mind. *Toronto Pipe Line Co. v. Camerland Pipelines Co., Inc.* 201
8. A careful and intelligent reading of two acts should be sufficient to indicate to the reader what parts of the old law were applicable to and were incorporated in the new. *Toronto Pipe Line Co. v. Camerland Pipelines Co., Inc.* 201
9. When interpreting a statute, the Supreme Court will consider the object intended to be accomplished by it and will give it a meaning which will attain its purpose rather than one which will defeat it. *Halstead v. Rozmiarek* 652
10. The Legislature by re-enacting a statute adopts the construction which had been previously given it by

the Supreme Court. *Halstead v. Rozmiarek* 652
11. It is the duty of the court, so far as practicable, to give effect to the language of a statute and to reconcile the different provisions of it so they are consistent, harmonious, and sensible. *Van Patten v. City of Omaha* 741

Street Railroads.
The words "street railroad" as used in the Constitution apply to all means of mass transportation of passengers for hire in a municipality without regard to the motive power employed. *Omaha Transit Co. v. Briggs* 703

Taxation.
1. 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. *Omaha Paxton Hotel Co. v. Board of Equalization* 231
2. Where the evidence shows that an assessment by a county assessor was arbitrarily made, the assessment cannot be sustained. In such a situation the valuation becomes one of fact to be determined from the evidence, unaided by presumption. *Omaha Paxton Hotel Co. v. Board of Equalization* 231
3. An appeal to the district court from action of the county board of equalization is heard as in equity, and upon appeal therefrom to the Supreme Court it is tried de novo. *Newman v. County of Dawson* 666
Matzke v. Board of Equalization 875
4. Under tax statute, the elements required to be considered in fixing the assessed value of tangible property are the earning capacity of the property, its relative location, its desirability and functional use, its reproduction cost less depreciation, and its value in comparison with other properties of known or recognized value. *Newman v. County of Dawson* 666
5. The burden of proof is upon a taxpayer to establish his contention that the value of his property has been arbitrarily or unlawfully fixed by the county board of equalization in an amount greater than its actual value, or that its value has not been fairly and proportionately equalized with all other property. *Newman v. County of Dawson* 666
6. Where the evidence shows that the assessed value of tangible property has been determined by a

formula in substantial compliance with the tax statute, which has been uniformly and impartially applied, such assessed value will not ordinarily be disturbed on appeal on evidence indicating a mere difference of opinion as to such valuation. *Newman v. County of Dawson* 666

7. Rule stated as to essentials necessary to secure a reduction in assessed value of tangible property. *Newman v. County of Dawson* 666

8. Legislative power delegated to a city to construct local improvements and to levy special assessments is to be strictly construed. Doubt as to the extent of the power is to be construed against the city. *Danielson v. City of Bellevue* 809

9. The publications and notices required by statute are mandatory and jurisdictional steps without which an ordinance never becomes effective. *Danielson v. City of Bellevue* 809

10. By statute a city of the first class is required to declare by ordinance the kind of improvement which it proposes to make and to give notice thereof by publication of the ordinance. *Danielson v. City of Bellevue* 809

11. An ordinance purporting to create a local public improvement district which fails to declare the kind of improvement proposed in the ordinance is invalid. *Danielson v. City of Bellevue* 809

12. To secure a reduction in the assessed valuation of tangible property it must be demonstrated by evidence that the assessment is grossly excessive, or that its value has not been fairly and proportionately equalized, and is the result of arbitrary or unlawful action. *Matzke v. Board of Equalization* 875

13. Where the evidence shows that the actual value of tangible property for assessment purposes was arbitrarily determined, without explanation or justification of the formula used, the actual value thus fixed is not supported by competent evidence. *Matzke v. Board of Equalization* 875

Trial.

1. While declarations made in opening statements of attorneys and preserved in a bill of exceptions may not be used as evidence in determining issues in a case, it is proper to refer to them for the purpose of ascertaining the theory on which the case was presented. *Twenty Club v. State* 37

2. The inclusion in an otherwise proper instruction defining reasonable doubt that it does not mean the possibility that the accused may be innocent does not make the instruction prejudicially erroneous. *Haswell v. State* 169
3. It is a proper charge to the jury in a criminal case that the burden of proof never shifts, but, as to all defenses which the evidence tends to establish, the burden is on the State throughout the trial to prove the defendant guilty beyond a reasonable doubt. *Haswell v. State* 169
4. Proof by a preponderance of the evidence is all that is required in any civil action; but when a litigant seeks to overcome by parol evidence the presumption arising from the express terms of a conveyance and from the relations of the parties concerned therein, the quality of the evidence must be clear, satisfactory, and convincing. *Hein v. W. T. Rawleigh Co.* 176
5. Where the undisputed evidence entitles the plaintiff to a judgment for a definite sum, it is the duty of the court to instruct the jury as to such facts and, in effect, to direct the jury to return a minimum verdict for such amount. *Heckman v. Walker* 216
6. In the absence of evidence to support the essentials of proof of a cause of action pleaded, an alternative motion for directed verdict or for dismissal of the action should be sustained. *Wischmann v. Raikes* 251
7. Procedure on motion for judgment notwithstanding the verdict outlined. *Wischmann v. Raikes* 251
8. Instructions must be considered and construed together. If they are not sufficiently specific in some respects, it is the duty of counsel to offer requests for instructions that will supply the omission. Unless this is done, the judgment will not ordinarily be reversed for such defects. *Tate v. Borgman* 299
9. A supplemental instruction is sufficient if it contains a correct statement when considered in connection with the main charge. *Tate v. Borgman* 299
10. A trial court should eliminate immaterial and superfluous matters and submit to a jury by instructions only matters properly to be considered by it in arriving at its verdict in the cause. *Cappel v. Riener* 375
Bezdek v. Patrick 754
11. It is the duty of a trial court to submit to a jury a specification of negligence if it is properly

pleaded in the cause and there is evidence tending to establish the truth of it. *Cappel v. Riener* 375

12. If there is any evidence which will sustain a finding for the litigant having the burden of proof in a cause, the trial court may not disregard it and decide the case as a matter of law. *Pankonin v. Borowski* 382
Wlaschin v. Affleck 403

13. The charge of the trial court to a jury should omit any issue made by the pleadings which is not supported by evidence and any law not applicable to the cause. *Pankonin v. Borowski* 382

14. A directed verdict or its equivalent is proper only where there is no controverted issue of fact essential to a determination of the litigation. *Allied Building Credits, Inc. v. Damicus* 390

15. Where different minds may reasonably draw different conclusions from the evidence as to whether or not the evidence establishes a cause of action or a defense, the issues must be submitted to a jury for determination. *Allied Building Credits, Inc. v. Damicus* 390

16. A proper motion for directed verdict is a necessary condition precedent to a motion for judgment notwithstanding the verdict. *Allied Building Credits, Inc. v. Damicus* 390

17. The trial court cannot properly, either on its own motion or on motion for judgment notwithstanding the verdict, set aside a verdict and enter judgment notwithstanding the verdict, where no preliminary motion for directed verdict has been made. *Allied Building Credits, Inc. v. Damicus* 390

18. To afford a basis for a valid motion for judgment notwithstanding the verdict, a motion for directed verdict must contain a statement of the specific grounds why a verdict should be directed. *Allied Building Credits, Inc. v. Damicus* 390

19. It is the duty of the trial court to instruct the jury upon all material issues raised by the pleadings and supported by competent evidence. Ordinarily it is error to submit issues which are outside the scope of the pleadings. *Mapledge Corp v. Coker* 420

20. Where good health at the date of issuance is a condition precedent to the assumption of liability by the insurer, the plaintiff has the burden of proving that the insured was in good health on

the date of issuance of the policy. *Gallentine v. World Ins. Co.* 429

21. The insurer may produce evidence to rebut the evidence introduced by the plaintiff to the effect that the insured was in good health at the date of the issuance of the policy, but the burden of proof does not shift to the defendant to disprove the same as an affirmative defense. *Gallentine v. World Ins. Co.* 429

22. Where the evidence introduced by the insurer is wholly insufficient to rebut the evidence of the plaintiff that the plaintiff was in good health at the date of the issuance of the policy, it is not error for the trial court to direct a verdict in favor of the plaintiff. *Gallentine v. World Ins. Co.* 429

23. Where a policy of accident and health insurance provides that it shall not take effect if the insured be not in good health but the premiums shall be returned, the insurer, to defend under this provision, must allege and prove a return or a tender of the premiums. *Gallentine v. World Ins. Co.* 429

24. It is the spirit and policy of the law to give every party an opportunity to prosecute or defend his case in court. Courts will not ordinarily deny such right except for the fault or gross laches of such party or his authorized attorney. *Willie v. Willie* 449

25. 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. *Mimick v. Beatrice Foods Co.* 470

26. The burden of proving a cause of action is not sustained by evidence from which negligence can only be surmised or conjectured. *Mimick v. Beatrice Foods Co.* 470

27. 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. *Starkweather v. State* 477

28. It is not error to refuse instructions requested by defendant where the court on its own motion has given the substance of such requests. The trial court is not required to instruct in the exact language of a requested instruction. If the point is

covered by an instruction couched in proper terms, it meets all the requirements of the law. *Starkweather v. State* 477
29. Ordinarily, error cannot be predicated on an instruction given at the request of the complaining party. *Starkweather v. State* 477
30. 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 inattention. *Wemmer v. Young* 495
31. In a jury case where different minds may draw different conclusions or inferences from the adduced evidence, or if there is a conflict in the evidence, the matter at issue must be submitted to the jury. *Norman v. Sprague* 528
32. In the absence of a request therefor, the trial court is not required to give a cautionary instruction relative to the weighing of circumstantial evidence. *Norman v. Sprague* 528
33. The meaning of an instruction, not the phraseology, is the important consideration. A claim of prejudice will not be sustained when the meaning of an instruction is reasonably clear. *Norman v. Sprague* 528
34. When different instructions are given on the same subject, they should be considered together. If they fairly submit the case, the judgment will not be reversed for indefiniteness or ambiguity in one of the instructions. *Norman v. Sprague* 528
35. The true meaning of an instruction will be determined not from a sentence or clause alone but by a consideration of all that is said on the subject. *Norman v. Sprague* 528
36. If instructions are not sufficiently specific in some respects, it is the duty of counsel to offer requests for instructions that will supply the omission. Unless that is done, the judgment will not ordinarily be reversed for such defects. *Norman v. Sprague* 528
37. It is the duty of a trial court to instruct the jury on each issue presented by the pleadings which is supported by evidence. *Phillips v. State* 541
38. The prerequisites of granting a summary judgment are that the movant demonstrate that there is no genuine issue of fact in the case and that he is entitled to judgment as a matter of law. *Johns v. Carr* 545
Clearwater Elevator Co. v. Hales 584
39. An issue of gross negligence is for the jury if the

evidence relating thereto is conflicting and reasonable minds might arrive at different conclusions. *Olson v. Shellington* 564

40. When the evidence is resolved most favorably to the existence of gross negligence and thus the facts are determined, the inquiry of whether they support a finding of gross negligence is one of law. *Olson v. Shellington* 564

41. In an action under motor vehicle guest statute, a guest must prove by the greater weight of the evidence the gross negligence of the host and that it was the proximate cause of the accident and injury. *Olson v. Shellington* 564

42. In considering a motion for summary judgment the court should view the evidence in the light most favorable to the party against whom it is directed. *Clearwater Elevator Co. v. Hales* 584

43. The court examines the evidence on motion for summary judgment, not to decide any issue of fact presented, but to discover if any real issue of fact exists. If there is a genuine issue of fact to be determined, a summary judgment may not be properly entered. *Clearwater Elevator Co. v. Hales* 584

44. Where the undisputed evidence shows that a collision between two motor vehicles was due solely to the negligence of the defendant, it is the duty of the trial court to direct a verdict against him on the issue of liability. *Mabe v. Gross* 593

45. In criminal cases, it is not the province of the court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Those matters are for the jury. *Pulliam v. State* 614

46. A verdict should not be directed, or a cause of action dismissed, or a judgment entered notwithstanding the verdict, unless the court can definitely determine that the evidence of defendant's negligence, when taken as a whole, fails to reach such degree of negligence that is considered gross. *O'Neill v. Henke* 631

47. Where the evidence of negligence falls within the area where reasonable minds can differ as to whether or not it establishes gross negligence then the determination of that question is for the jury and, absent prejudicial error otherwise, the verdict of the jury must prevail. *O'Neill v. Henke* 631

48. In a negligence action, the burden is on the plain-

tiff to show that there was a negligent act or omission, and that it was the proximate cause of the plaintiff's injury. *Weston v. Gold & Co.* 692

49. In a jury case, the court has a preliminary question to decide as to whether there is any evidence upon which a jury can properly proceed to find a verdict for the party upon whom the burden of proof is imposed. *Weston v. Gold & Co.* 692

50. In testing the sufficiency of evidence to support a verdict it must be considered in the light most favorable to the successful party. Every controverted fact must be resolved in his favor and he should have the benefit of every inference that can reasonably be deduced therefrom. *Weston v. Gold & Co.* 692

51. If a motion for directed verdict made at the close of the evidence should have been sustained for want of evidence to support a verdict in favor of the party against whom made, it is the duty of the court on motion for judgment notwithstanding the verdict timely made to sustain such motion. *Weston v. Gold & Co.* 692

52. The jury should be fully and precisely instructed as to the relative and reciprocal rights and duties of the operators of the motor vehicles in entering and using an intersection of a favored and a nonfavored street. *Bezdek v. Patrick* 754

53. Where there is no basis in the evidence for a finding of contributory negligence, it is error to instruct on the subject and thereby to submit to the jury an issue which is outside the evidence. *Klein v. Wilson* 779

54. Where different minds may reasonably draw different conclusions or inferences from the adduced evidence, or if there is a conflict therein, 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. *Klein v. Wilson* 779

55. It is the province of the jury to harmonize the testimony and in case of conflict to decide as to the weight to be given the testimony of the various witnesses. *Klein v. Wilson* 779

56. Triers of fact have the right to test the credibility of witnesses and to weigh their undisputed parol testimony against the facts and circumstances in evidence from which a conclusion may properly be

drawn that the witness was mistaken. *Klein v. Wilson* 779

57. Where the submission of the issue of contributory negligence and a comparison thereof with negligence of the opposing party is proper, the determination of the amount of damages is for the jury. *Klein v. Wilson* 779

58. To constitute a defense, an act of God must be the sole proximate cause of damages without concurrent negligent participation of defendant, and in order for defendant to recover a verdict, he has the burden of proving such an alleged defense by a preponderance of the evidence. *Cover v. Platte Valley Public Power & Irr. Dist.* 788

59. The trial court should direct and the Supreme Court should set aside a verdict if the evidence is undisputed or if the evidence, though conflicting, is so conclusive that it is insufficient to justify a verdict or sustain a judgment. *Cover v. Platte Valley Public Power & Irr. Dist.* 788

60. On an appeal from an order directing a verdict and dismissing an action, the party against whom the verdict was directed 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. *Christ v. Nelson* 799

61. 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. *Christ v. Nelson* 799

62. In an action where the evidence produced by the plaintiff is not sufficient to support a verdict in his favor, it is the duty of the trial court to direct a verdict for the defendant. *Christ v. Nelson* 799

63. 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 determine it and decide the case as a matter of law. *Crunk v. Glover* 816

64. A motion for summary judgment is not a substitute for a demurrer, a motion to dismiss, or for judgment on the pleadings. It is a new procedure which may be used in certain cases where other procedural steps are not effective. *Workman v. Workman* 857

65. The movant, in order to obtain a summary judgment, must show that there is no genuine issue of fact and that he is entitled to a judgment as a matter of law. *Workman v. Workman* 857

Trover and Conversion.

1. A conversion is any unauthorized act which deprives the owner of his property permanently or for an indefinite period of time. *Mapledge Corp. v. Coker* 420
2. In an action for conversion of property the motive which prompted the defendant to dispose of, or appropriate to his own use, the property of the plaintiff is an immaterial issue. *Mapledge Corp. v. Coker* 420
3. In an action for conversion the measure of damage is the value of the property at the time and place of conversion with interest from the date of the conversion. *Mapledge Corp. v. Coker* 420

Trusts.

1. A resulting trust does not arise in favor of a person furnishing the consideration for the purchase of property taken in the name of another where the parties are sufficiently close so as to give rise to the presumption that a gift was intended. *Olsen v. Best* 198
2. Ordinarily a trust will not be impressed where the transaction is as consistent with another relationship as with that of a trust. *Olsen v. Best* 198
3. To establish a resulting trust, the evidence must be clear, satisfactory, and convincing that a gift or advancement was not intended. *Olsen v. Best* 198

Usury.

The defense of usury is personal to the borrower and his sureties and privies. One who takes title to mortgaged property may not, in the absence of fraud, assert usury as a defense to the mortgage which the usurious note was given to secure. *Gilcrist v. Wright* 767

Vendor and Purchaser.

1. A good faith purchaser of real estate is one who buys it for a valuable consideration without notice of suspicious circumstances which would put

a prudent person on inquiry. *Hein v. W. T. Rawleigh Co.* 176

2. Respective rights of vendor and vendee stated where vendor fails and refuses to carry out oral contract of sale of real estate. *Wlaschin v. Affleck* 403

3. The right of vendee to recover for improvements is based on the ground that the vendor, through whose fault the contract failed, ought not to obtain the enhanced value given to his property by the money, work, labor, and material of the vendee without making compensation therefor. *Wlaschin v. Affleck* 403

4. After the vendor has failed or refused to perform oral contract for sale of real estate, tender of further performance by the vendee is unnecessary. *Wlaschin v. Affleck* 403

Venue.

1. Unless a change of venue from the court of the county where the offense was committed is had in the manner provided by law, the accused cannot be tried lawfully in any other county of the state. *State v. Furstenau* 439

2. An accused cannot waive the venue provided by law, nor select the court where he is to be tried. *State v. Furstenau* 439

Waters.

1. Title by prescription may be acquired to an island in a stream, which otherwise would belong to a riparian owner. Accretions to an island so held and occupied for more than the statutory period belong to the owner of the island, and not to the riparian owner to whom the island or a part of it would otherwise belong. *Burket v. Krimlofski* 45

2. The rights of riparian owners upon the Missouri River to land formed by accretion are the same as if the river were not navigable. *Burket v. Krimlofski* 45

3. Land uncovered by a gradual subsidence of water is not an accretion, but a reliction. The same law applies to both these forms of addition to real estate which are held to be the property of the abutting landowner. *Burket v. Krimlofski* 45

4. Accretion is the process of gradual and imperceptible addition of solid material, called alluvion, extending the shore line out by deposits made by

contiguous water. Reliction is the gradual withdrawal of the water from the land by the lowering of its surface level from any cause. *Burket v. Krimlofski* 45

5. Where by the process of accretion and reliction, the water of a river gradually recedes, changing the channel of the stream and leaving the land dry that was theretofore covered by water, such land belongs to the riparian owner. *Burket v. Krimlofski* 45

6. The fact that accretion is due, in whole or in part, to obstructions placed in the river by third parties does not prevent the riparian owner from acquiring title thereto. *Burket v. Krimlofski* 45

7. Where accretion commences with the shore of an island and afterward extends to the mainland, or any distance short thereof, all the accretion belongs to the owner of the island; but, where accretions to the island and to the mainland eventually meet, the owner of each owns the accretions to the line of contact. *Burket v. Krimlofski* 45

8. Land, to be riparian, must have the stream flowing over it or along its border. *Burket v. Krimlofski* 45

9. By statute, no specific requirement is made as to the form of notice to be given the electors with reference to an election to be held to approve or disapprove a contract to be entered into between an irrigation district and the United States of America for the sale of the irrigation facilities of such a district. *Frenchman Valley Irr. Dist. v. Smith* 78

10. By statute, the board of directors of any irrigation district may commence a special proceeding in the district court by which the proceedings leading up to or including the making of any such contract, and the validity of the terms thereof, or the taking of any particular steps or action, may be judicially examined, approved, and confirmed. *Frenchman Valley Irr. Dist. v. Smith* 78

11. By federal statute, the Secretary of the Interior is granted authority to enter into contracts with existing irrigation districts, subject to confirmation of the contract by a decree of a court of competent jurisdiction. *Frenchman Valley Irr. Dist. v. Smith* 78

12. By statute, the board of directors of an irrigation district may enter into a contract with the United States of America for the construction, operation, and maintenance of the necessary works for the

delivery and distribution of water therefrom under the provisions of the federal Reclamation Act. *Frenchman Valley Irr. Dist. v. Smith* 78

13. By statute, the board of directors of any irrigation district organized under the laws of this state may enter into contracts for a supply of water for the irrigation of lands within such irrigation district with the United States of America. *Frenchman Valley Irr. Dist. v. Smith* 78

14. Right of United States under federal Reclamation Act to furnish water to prior appropriator of normal flow of stream and conditions attached thereto stated. *Frenchman Valley Irr. Dist. v. Smith* 78

15. The contract for supply of water must be construed with reference to the federal and state statutes, which are as much a part thereof as though incorporated into the body of it. *Frenchman Valley Irr. Dist. v. Smith* 78

16. The duty of water is such a quantity of water necessary, when economically conducted and applied to the land without unnecessary loss, as will result in the successful growing of crops. *Frenchman Valley Irr. Dist. v. Smith* 78

17. By statute, the United States and every person intending to appropriate any of the public waters of the state shall, before commencing the construction, enlargement, or extension of any works for such purpose, or taking any water from any constructed works, make application to the Department of Roads and Irrigation for a permit to make such appropriation. *Frenchman Valley Irr. Dist. v. Smith* 78

18. By federal statute, the Secretary of the Interior is authorized and directed to locate and construct irrigation works for the appropriation, development, and storage of flood and unused waters for irrigation. The federal government, under the laws of this state, has a right to appropriate flood and unused waters in connection with any irrigation project constructed by the United States. *Frenchman Valley Irr. Dist. v. Smith* 78

19. By statute, the United States of America is authorized, in conformity to the laws of this state, to appropriate, develop, and store any unappropriated flood or unused waters, in connection with any project constructed by the United States. *Frenchman Valley Irr. Dist. v. Smith* 78

20. By federal statute, the United States is authorized

to enter into contracts in a form to be approved by the Secretary of the Interior with an irrigation district organized under state law for the construction or rehabilitation of irrigation works, and providing for payment of the costs thereof by the district during the time they are in control of the United States in not more than 40 years. *Frenchman Valley Irr. Dist. v. Smith* 78

21. Contracts between United States and irrigation districts under Reclamation Act are required to contain provisions limiting the use of water to 160 irrigible acres of land by any landowner. *Frenchman Valley Irr. Dist. v. Smith* 78

22. Congress has the undoubted power to restrict the right to the use of water furnished from government projects to 160 acres standing in the name of any one landowner. Having the power to dispose of the right to the use of water, Congress is in a position to fix the terms and conditions of the use. *Frenchman Valley Irr. Dist. v. Smith* 78

23. Surface water is that which is diffused over the surface of the ground, derived from falling rains or melting snows, and continues to be such until it reaches some well-defined channel in which it is accustomed to and does flow with other waters. *Walla v. Oak Creek Township* 225

24. The upper owner of land has the right, without interference, to have the flow of surface water follow along a well-defined watercourse from his land. *Walla v. Oak Creek Township* 225

25. Where surface water resulting from rain and snow flows in a well-defined course, its flow cannot be arrested or interfered with by a landowner to the injury of neighboring proprietors. *Walla v. Oak Creek Township* 225

26. It is the duty of those who build structures across natural drainways to provide for the natural passage through such obstructions of all waters which may be reasonably anticipated to drain there. *Walla v. Oak Creek Township* 225

27. Where water flows in a well-defined course and seeks its discharge in a neighboring stream, its flow cannot be arrested or interfered with by a landowner to the injury of the neighboring proprietors. What a private proprietor may not do neither can the public authorities, except in the exercise of the

right of eminent domain. *Walla v. Oak Creek Township* 225

28. If by gradual erosion a river becomes the boundary of land, the owner thereof is a riparian owner and is entitled to any accretion thereto. *Wemmer v. Young* 495

29. If the water of a stream gradually recedes, changes the channel of the stream, and leaves the land dry that was previously submerged by water, the land is the property of the riparian owner. *Wemmer v. Young* 495

30. The erosion of a river which cuts across riparian land and into the land of an adjoining owner destroys the title of him whose land was originally riparian. He may not reassert his title if the river reverses its movement and new land is formed within what were his original boundaries. *Wemmer v. Young* 495

31. Accretion must be expressly excluded from a conveyance to avoid a transfer of it. *Wemmer v. Young* 495

Wills.

1. A proceeding for the probate of a will of a deceased person is in rem. A person affected thereby may appeal from a final order of the county court to the district court without regard to whether or not he appeared and contested the probate of the will in the county court. One so appealing is necessarily limited on the appeal to the issues presented to the county court. *Gleason v. Poore* 312

2. The district court has no power to hear the contest of a will except on an appeal of such proceedings from the county court. The county court has original exclusive jurisdiction of the probate of wills and the contest thereof in the first instance. *Gleason v. Poore* 312

Witnesses.

1. Where persons are shown to be familiar with the particular land in question, they may be permitted as witnesses in condemnation proceedings to testify as to the value of the tract immediately before and immediately after the appropriation. *Twenty Club v. State* 37

2. An appraiser in condemnation proceedings may testify as any other witness when the proper foundation is laid, but in no event should evidence of the

award of the appraisers be admitted as evidence to go to the jury. *Twenty Club v. State* 37

3. A person having a direct legal interest in the result of a civil action, when the adverse party is the representative of a deceased person, is not competent to testify to any transaction or conversation had between the deceased person and the witness, in the absence of waiver. *Olsen v. Best* 198

4. Triers of fact have the right to test the credibility of witnesses and to weigh their undisputed parol testimony against the facts and circumstances in evidence from which a conclusion may properly be drawn that the witness was mistaken. *Klein v. Wilson* 779

5. 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 assumptions upon which it is based are shown to be true. *Cover v. Platte Valley Public Power & Irr. Dist.* 788

Workmen's Compensation.

1. 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. *Wynia v. Hoesing* 136

2. A compensable injury within the provisions of the Workmen's Compensation Act is one caused by an accident arising out of and in the course of the employment. *Wynia v. Hoesing* 136

3. Whether an accident arises out of and in the course of the employment must be determined by the facts of each case. There is no fixed formula by which the question may be resolved. *Wynia v. Hoesing* 136

4. The rule of liberal construction of the Workmen's Compensation Act is related to determination of the scope of the act and does not apply to evidence produced to establish a claim for compensation. *Wynia v. Hoesing* 136

5. An award under the Workmen's Compensation Act may not be based on possibilities, probabilities, or conjectural evidence. *Wynia v. Hoesing* 136

6. Statute authorizing an increase or decrease in compensation periodically after six months has application only to increase or decrease that has

occurred since award was rendered. *Pavel v. Hughes Brothers, Inc.* 727

7. Upon an application to modify an award under the workmen's compensation law, the burden of proof rests upon the petitioner to establish by a preponderance of the evidence that the disability has increased, decreased, or terminated as alleged. *Pavel v. Hughes Brothers, Inc.* 727

8. A workman who is unable to perform or to obtain any substantial amount of labor, solely because of the accident and resulting injury, either in his particular line of work or in any other for which he is fitted, is totally disabled within the meaning of the workmen's compensation law. *Pavel v. Hughes Brothers, Inc.* 727

9. Total and partial disability is defined in terms of employability and earning capacity rather than in terms of loss of bodily function. *Pavel v. Hughes Brothers, Inc.* 727

10. Provisions of workmen's compensation law making the employer liable for reasonable medical and hospital services includes the cost of travel incident to and reasonably necessary for obtaining such services. *Pavel v. Hughes Brothers, Inc.* 727

11. 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. *Pavel v. Hughes Brothers, Inc.* 727

12. An attorney's fee may be allowed in the compensation court when the employer refuses to pay compensation or neglects so to do for thirty days after the injury. *Pavel v. Hughes Brothers, Inc.* 727

13. A petition to modify an award cannot be used for the purpose of correcting judicial error, if any, in the original proceeding. *Pavel v. Hughes Brothers, Inc.* 727