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ELDON A. PETERSON, APPELLEE, V. JOE VAK, APPELLANT.
100 N. W. 2d 44

Filed December 18, 1959. No. 34648.

1. **Quieting Title.** A lessee of real estate may by virtue of section 25-21,112, R. R. S. 1943, maintain an action to quiet title to his leasehold.
2. **Landlord and Tenant.** A tenant is entitled to the exclusive possession and use of the demised premises in the absence of reservations and restrictions in his lease and he may even maintain trespass against his landlord.
3. **Trespass: Injunction.** If the nature of a threatened trespass on real estate is such that it will, if accomplished, prevent a substantial enjoyment of property or the possession thereof the remedy of injunction is appropriate to forestall the wrongful act.
4. **Appeal and Error.** When this court determines the law of the case on appeal, the trial court is bound thereby and its judgment in accordance therewith will not ordinarily be disturbed on a subsequent appeal.
5. **Appeal and Error: New Trial.** Generally, however, if other and different issues of fact and of law relating thereto have been properly adduced and presented in a new trial, the law of the case is not controlling thereof in a subsequent trial.

APPEAL from the district court for Perkins County: JOHN H. KUNS, JUDGE. *Affirmed.*

Halligan & Mullikin, for appellant.

John E. Dougherty and *George B. Hastings*, for appellee.

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

CHAPPELL, J.

This case is here on appeal a second time. Our original opinion, filed May 20, 1955, which reversed the judgment of the trial court sustaining defendant's motion to dismiss made at conclusion of plaintiff's evidence, is reported as Peterson v. Vak, 160 Neb. 450, 70 N. W. 2d 436, 51 A. L. R. 2d 1221. Thereafter, on rehearing, we simply changed our method of reversal to one "for further proceedings according to law," as

reported in 160 Neb. 708, 71 N. W. 2d 186, 51 A. L. R. 2d 1221.

The action was a suit in equity brought by plaintiff, Eldon A. Peterson, against defendants, Joe Vak and James Vak. However, the only party defendant who claimed any right, interest, occupancy, or possession of the land involved is Joe Vak, and he will generally be called defendant. Plaintiff's petition, filed July 8, 1952, sought by appropriate allegations and evidence in support thereof to quiet title to plaintiff's leasehold interest and possession of a described 160 acres of farm land in Perkins County. Such leasehold interest and possession were allegedly acquired by virtue of a written lease dated September 1, 1951, for a period of 3 years and effective beginning March 1, 1952, which lease was duly executed by plaintiff and the owner and delivered to plaintiff. Plaintiff also sought to enjoin defendant from reentering the premises for the purpose of removing 100 acres of wheat planted by defendant on the land September 25 and 26, 1951, which was prior to the expiration of his year-to-year lease of the land from March 1, 1951, to March 1, 1952, but after timely written notice of termination of defendant's lease as of March 1, 1952, had been duly served upon him by the sheriff on August 29, 1951, as directed by the owner. Such notice also informed defendant that the owner claimed the right to enter upon the land during the fall of 1951 to plant it to wheat, and also, as disclosed by the record, he was timely warned personally before said planting by defendant, and after service of the notice terminating his lease that such planting by defendant would be done by him at his peril.

Defendant's amended answer and cross-petition, filed prior to new trial, denied that plaintiff had ever been in possession of the 100 acres which defendant had planted to wheat; and alleged in substance that in the spring of 1951 there were 100 acres subject to summer fallowing and defendant then had an oral agreement

for a lease with the owner's duly authorized agent whereby defendant had the right to summer fallow such land and plant wheat thereon in the fall of 1951 to be harvested by defendant in 1952. Defendant admitted that he timely received the notice from the owner to vacate the property and that his lease was terminated as of March 1, 1952, but alleged that after service of such notice, plaintiff attempted to negotiate with defendant for a right to enter the land and plant the wheat and pay defendant for his fallowing work; that defendant made an offer for such payment but plaintiff did not accept it, and defendant planted the wheat; that plaintiff had no right, title, or interest in the wheat or the property on which it was grown; and that if plaintiff had a lease from the owner, he was charged with knowledge of defendant's claim or demand, and was estopped to deny defendant's right to possession of the land and ownership of the wheat. Defendant prayed for dismissal of plaintiff's petition and quieting of title in the 100 acres of wheat. In that connection, the allegations of defendant's amended answer and cross-petition did not fundamentally change the issues as theretofore pleaded in his amended answer, except to change his prayer thereof from one for dismissal and equitable relief to one for dismissal and quieting of title in defendant to the 100 acres of wheat.

Plaintiff's reply to defendant's first amended answer denied generally; admitted that defendant was a tenant under an oral lease up to March 1, 1952, and that defendant was duly served with written notice to vacate the land and terminate defendant's tenancy; and alleged that defendant's oral lease expired by its terms on March 1, 1952, and that any alleged oral lease to defendant was for a longer period than 1 year, and void as in violation of the statute of frauds. In that connection, the case was tried as though plaintiff's reply were to defendant's second amended answer, and there is no contention otherwise. Plaintiff's answer to de-

fendant's cross-petition denied generally and renewed the prayer of plaintiff's petition.

On retrial, plaintiff offered all of the evidence adduced by him in the first trial as his case-in-chief, and same was received by stipulation. Defendant then adduced his evidence and rested; whereupon plaintiff adduced evidence in rebuttal, and at conclusion of all the evidence the trial court rendered judgment. It found generally in favor of plaintiff and against defendant; that defendant had no lease after March 1, 1952, either by extension, which, if proved, would have been void under the statute of frauds, or by estoppel; that defendant yielded possession under his previous lease; that plaintiff took possession under a valid lease from the owner and was in possession at the commencement of the action; that defendant had no interest in crops growing on the land at the time of surrender of his possession; and that plaintiff was entitled to a permanent injunction as prayed. It found and adjudged that the injunction theretofore issued should be made permanent; perpetually enjoined defendant, his agents, and servants from asserting or claiming any right, title, interest, or estate in and to the premises or any part thereof; and ordered that plaintiff should recover costs.

Defendant's motion for new trial was overruled and he appealed, assigning in substance that the findings and judgment were not sustained by sufficient evidence and were contrary to law. We do not sustain defendant's assignment. In that connection, defendant's brief argued among other things that the trial court erred in the exclusion of certain evidence offered by defendant, but neither his motion for new trial nor his brief assigned any such errors contained in a motion for new trial. It is elementary that defendant's contention will not be given further consideration. In such respect, we point out that authorities relied upon by defendant are entirely distinguishable and not controlling.

Our original opinion correctly summarized the rele-

vant and material evidence adduced by plaintiff, and we will not restate it at length here. Such opinion, after citing applicable and controlling authorities, held that: "A lessee of real estate may by virtue of section 25-21,112, R. R. S. 1943, maintain an action to quiet title to his leasehold.

"A tenant is entitled to the exclusive possession and use of the demised premises in the absence of reservations and restrictions in his lease and he may even maintain trespass against his landlord.

"If the nature of a threatened trespass on real estate is such that it will, if accomplished, prevent a substantial enjoyment of property or the possession thereof the remedy of injunction is appropriate to forestall the wrongful act."

In that connection also, our opinion, after citing and discussing Vance v. Henderson, 141 Neb. 766, 4 N. W. 2d 833, quoted therefrom as follows. " 'In the absence of reservations or restrictions, a tenant is entitled to the exclusive possession and use of the demised premises and may even maintain trespass against his landlord. There is nothing in this record to create a bar to the defendant planting wheat on the premises if he saw fit to do so. If, as plaintiff contends, the defendant's lease expired on March 1, 1942, and he had not used or otherwise disposed of the wheat, he ran the risk of losing his labor and seed.' " If the words "March 1, 1952," were substituted for "March 1, 1942," that statement, as hereinafter observed, would be one applicable and controlling here, unless avoided by some other issues of fact and of law relating thereto properly adduced and presented by defendant.

Our opinion also, after citing and discussing Fenster v. Isley, 143 Neb. 888, 11 N. W. 2d 822, a comparable case, quoted therefrom as follows: " 'Appellee had a written lease from the owner from March 1, 1942, to March 1, 1943. More than six months prior to March 1, 1942, * * * the appellant, who was a tenant from year

to year, was notified that his tenancy would be terminated on March 1, 1942. Pursuant thereto he relinquished his possession of the lands prior to March 1, 1942, and the appellee went into possession. * * * Therefore, after March 1, 1942, the appellant had no further right to the possession of the premises by reason of his tenancy from year to year and appellee was in possession under his lease and entitled to enjoin any trespass thereon during the terms thereof * * *.'" If the words "March 1, 1952, to March 1, 1955," were substituted for "March 1, 1942, to March 1, 1943," that statement and opinion would be applicable and controlling here, unless avoided by some other issues of fact and of law relating thereto properly adduced and presented by defendant. We conclude that they were not so avoided.

This appeal will be heard de novo here, as reaffirmed in Town of Everett v. Teigeler, 162 Neb. 769, 77 N. W. 2d 467. We also bear in mind the rule that: "When this court determines the law of the case on appeal, the trial court is bound thereby and its judgment in accordance therewith will not ordinarily be disturbed on a subsequent appeal." Snyder v. Lincoln, 156 Neb. 190, 55 N. W. 2d 614. Generally, however, if other and different issues of fact and of law relating thereto have been properly adduced and presented in a new trial, the law of the case is not controlling thereof on a subsequent appeal.

Defendant argued that testimony given by plaintiff and his father was entirely discredited because they testified falsely when they testified that they told defendant that plaintiff had a written lease for the land on September 1, 1951. We do not agree. We conclude that whether plaintiff's written lease was delivered to him on or before September 1, 1951, or in fact was not actually delivered until later, as argued by defendant, was not a material fact and has no significance here. Plaintiff's written lease was on its face dated and signed

September 1, 1951, after defendant's lease from March 1, 1951, to March 1, 1952, had been lawfully terminated as of March 1, 1952, by notice served on defendant August 29, 1951, and on that day or shortly thereafter, defendant actually knew that plaintiff had a lease commencing March 1, 1952. Until this litigation began defendant never told plaintiff or anyone else that he had any lease agreement for 1952. He simply claimed at all times, after receiving a notice of termination, that because he had summer fallowed the 100 acres, he was going to keep that land, plant wheat thereon in 1951, and harvest it in 1952. Before defendant planted the wheat, plaintiff offered to pay him a reasonable amount for his fallowing labor if plaintiff could go upon the land and plant the wheat, but defendant demanded $1,800 cash within 10 days for such work or he would plant the wheat and harvest the crop, but that plaintiff could have the rest of the 160 acres of land. However, plaintiff was unwilling to pay defendant that much, and negotiations failed. Whereupon defendant planted the wheat September 25 or 26, 1951, and thereafter yielded possession of the land to plaintiff on March 1, 1952. After that time plaintiff was at all times in possession, working the remaining land, giving the wheat land such care as it needed, and this action was brought July 8, 1952, to prevent defendant from reentering the land and harvesting the wheat on the 100 acres, as he threatened to do. Before defendant planted the wheat, George B. Hastings, plaintiff's own witness, testified that he warned defendant: "* * * you put that wheat in that ground at your peril * * * you have had notice that your lease is terminated * * * your lease is up."

Finally, as said in our original opinion with regard to plaintiff's alleged conversation with defendant about plaintiff's lease: "There was no relationship between appellant (plaintiff) and appellee (defendant). The former was under no legal duty to inform the latter of anything. Appellee had an absolute right to till, plant

wheat, and use the land until March 1, 1952, but he was charged with knowledge that his status in reference to it would on that date completely and finally terminate and any crop planted that did not mature or was not disposed of by him before that date would be his loss." As heretofore observed, authorities cited, discussed, and quoted from in our original opinion support such conclusion and defendant has cited none in point holding otherwise. We conclude that plaintiff was not estopped to deny that defendant had any right to possession or to reenter and harvest the wheat in 1952 as argued by defendant.

Be that as it may, defendant now attempts in the new trial to avoid the consequences of such conclusion by arguing that George B. Hastings, a lawyer at Grant, Nebraska, was at all times the general agent of the owner, Mrs. Esther K. Parr, for the purpose of managing and leasing the land involved, and that the last of March 1951, defendant had an oral agreement with said agent for a lease of the 100 acres which gave defendant the right to summer fallow the land, plant the wheat thereon in the fall of 1951, and reenter to harvest the crop in 1952. We do not sustain that contention.

With relation to such claimed oral agreement, defendant testified in substance that the last of March 1951 he went to see Mr. Hastings at his office with reference to summer fallowing the 100 acres. The defendant allegedly told Mr. Hastings that he had just signed that quarter section in the farm program for next year at the AA office, whereupon Mr. Hastings said: " 'It's okay'. * * * 'You are all right,' I bring those papers and they will put my John Doe on it. * * * Well, I visited about a half-hour * * * And then I was stepping out of his office and Mr. Hastings brought a little note about as big as that (indicating) and he said, 'About this time of year I write those people how the land is being farmed and what crop there will be harvested through the summer.' So he asked how much crop we harvest

during the summer. I said 40 acres. And he said, 'What else'? And I said 100 acres of stubble which I summer-fallow and then harvest next year again. And then I was stepping out and he said—Mr. Hastings said, 'Go ahead, Joe, farm the land as you always did, and raise another good crop'—that's all he said."

Defendant also testified that after that he did some work on it; that he started fallowing the 100 acres about April 1951, and completed it with difficulty in August 1951 when he planted three or four rounds of wheat solely for the purpose of testing germination qualities of his seed; and that on September 25 and 26, 1951, he planted the wheat which was admittedly after he had received notice terminating his lease as of March 1, 1952, and after he knew that plaintiff had a written lease of the land from the owner commencing March 1, 1952, and after defendant had been warned not to plant the wheat both by his own witness and as appears in the notice of termination served upon defendant. The above is in substance all of the evidence upon which defendant relies to establish his claimed oral agreement for a lease of the land in 1952.

With relation to defendant's contention that Mr. Hastings was the authorized general agent of the owner to manage and lease the land, defendant called Mr. Hastings as his own witness. As such, Mr. Hastings testified positively that he never made any arrangements with defendant for the summer fallowing; that defendant never consulted with him and he never consulted with defendant about how defendant operated or farmed the land; that he had no recollection of ever consulting with defendant about how or when defendant did farm and operate the land; and that all he ever did or was authorized to do, except upon special instructions and directions of the owner, was to collect her share of the rental money and remit it to her, less his commission for doing so. Mr. Hastings generally acted as the owner's attorney when she needed one, and he advised her as such

when requested by her to do so. He did not assume to have nor did he have any authority to change the tenancy of the land. The change of tenancy here involved was made by the owner entirely on her own motion and her own volition. She directed Mr. Hastings to serve the notice of termination upon defendant, which he did, and she directed him to prepare the written lease between her and plaintiff from March 1, 1952, to March 1, 1953, and forward it to her. The written lease itself, which was so prepared and forwarded to the owner by Mr. Hastings, as he was directed to do, shows on its face not only that plaintiff and Mrs. Parr signed it, but also that the lease as originally prepared and forwarded to the owner had been changed by her on her own motion as requested by plaintiff in that she struck out "1953" as date of expiration of plaintiff's lease and substituted "1955" followed by her initials "E. P." in her own handwriting, thereby making plaintiff's lease a 3-year lease from March 1, 1952, to March 1, 1955.

In that connection, also, the record discloses that in response to one letter from defendant, the owner, Mrs. Parr, who lived in Syracuse, New York, sent defendant a typewritten letter signed by her and dated January 25, 1953, wherein she said: "I have received your letter and was interested to read of your business and friendly relations with my father over a period of thirty years. I'm sorry I have never been able to visit Perkins County and see our land and because of this have left all business connected with the farm in the hands of Mr. Hastings in whom I have the same confidence my father had." A note at the bottom of such letter, written in the owner's own handwriting, said: "In reply to your second letter which has just arrived, Mr. Hastings had my authority for completing the lease with Peterson."

From the foregoing evidence adduced by defendant, we conclude that Mr. Hastings acted as Mrs. Parr's attorney with relation to her business connected with the farm when she requested him to do so; that he was her

limited agent for the collection of rentals from the land remittance thereof to her, but that he was not her general agent for the purpose of managing and leasing the land or changing the tenancy thereof; and that with regard thereto he had no authority except and unless so instructed and directed by the owner.

If we assume for purposes of argument only that Mr. Hastings had authority to manage and lease the land, it would not change the result, because there is not sufficient evidence to support any conclusion that defendant ever had any oral agreement with Mr. Hastings for a lease of the land with a right to fallow the land, plant wheat thereon in 1951, and reenter to harvest the same when matured in 1952. Defendant's lease was lawfully terminated as of March 1, 1952, and defendant never had possession or a right to possession of the land thereafter. Such conclusion disposes of any necessity to discuss or decide any question relating to the statute of frauds. It is elementary that the mere fact that the trial court may have given a wrong reason for its judgment is immaterial if the judgment arrived at a correct conclusion in any event.

It is argued that under the circumstances, and in the light of past practice with regard to summer fallowing and fall wheat harvesting, it would be wholly inequitable to deprive defendant of the fruits of his labor. However, the record discloses without dispute that plaintiff and his father attempted to negotiate with defendant for the purchase of possession of the 100 acres before defendant planted the wheat, by paying him a reasonable sum for his fallowing labor so that plaintiff could plant the wheat and harvest it in 1952. Such negotiations took place on or after September 1, 1951, but before defendant had planted the wheat, so that defendant would be paid for his labor and plaintiff could plant the wheat. However, the negotiations failed because plaintiff did not pay defendant $1,800 within 10 days, and defendant said he was: "* * * 'keeping the land * * *

Keep off; I am keeping it, * * * there is no price, I am keeping the land. * * * I summer-tilled it and I am keeping the land.'" We find no evidence which upon any theory could sustain defendant's argument.

We conclude that the judgment of the trial court should be and hereby is affirmed. All costs are taxed to defendant.

AFFIRMED.

EDNA HARMAN, ADMINISTRATRIX OF THE ESTATE OF WAYNE HARMAN, DECEASED, APPELLEE, V. EDWARD SWANSON, APPELLANT, IMPLEADED WITH PAUL CHRISTENSEN ET AL., APPELLEES.
100 N. W. 2d 33

Filed December 18, 1959. No. 34651.

1. **Judgments: New Trial.** A trial court has inherent power, during the term at which a judgment was entered, to correct errors and mistakes, even to the extent of granting a new trial, whether or not a motion for a new trial has been filed.
2. ———: ———. The inherent power of a trial court to grant a new trial is limited to those situations where prejudicial error appears in the record and such power expires with the term of court at which the judgment was rendered.
3. ———: ———. After the adjournment of the term at which a judgment was rendered the trial court has authority to grant a new trial for any of the grounds stated in section 25-2001, R. R. S. 1943, one of which is on a motion for a new trial filed within the time and in the manner provided by section 25-1143, R. R. S. 1943.
4. **New Trial.** A motion for a new trial to be within the purview of section 25-1142, R. R. S. 1943, must be, in the alternative or otherwise, for a complete new trial. It must give the trial court, in terms, the opportunity to grant a complete new trial.
5. **Damages: New Trial.** A motion for an additur to the verdict or, in the alternative, for a new trial on one cause of action limited to the question of damages, is not a motion for a new trial within the meaning of section 25-1142, R. R. S. 1943, and does not authorize the trial court to grant a new trial at a subsequent term of court.

6. ———: ———. Such a motion, fairly construed, means that if the trial court concluded that a complete new trial was required, no action by the trial court was desired.
7. **New Trial.** A trial court has no authority after the term at which the judgment was entered to make any order not requested in a motion for a new trial which was timely filed.

APPEAL from the district court for Saline County: STANLEY BARTOS, JUDGE. *Reversed and remanded.*

Wallace W. Angle and *Joseph Ach,* for appellant.

Nelson, Harding & Acklie and *Chambers, Holland, Dudgeon & Hastings,* for appellees.

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

CARTER, J.

This is an action to recover damages for the wrongful death of Wayne Harman, deceased. Plaintiff as the administratrix of the estate of Wayne Harman, deceased, recovered a judgment for $1,925 on the first cause of action for damages resulting to Edna Harman, widow of the deceased, and for $910 on the second cause of action for funeral, hospital, and medical expenses. The trial court granted a new trial and the defendant Swanson has appealed.

It is the contention of the defendant Swanson that the trial court erred in granting a new trial. The record discloses that after the return of the jury's verdict the defendants, nor any of them, filed a motion for a new trial. The plaintiff filed a motion in which she moved the court, notwithstanding the verdict, to grant an additur to the verdict as to the first cause of action in the amount of $13,075, and to enter judgment thereon in the amount of $15,000, or, in the alternative, to grant a new trial on the first cause of action, limiting such new trial to a determination of damages to the plaintiff because of the inadequacy of that portion of the verdict. The trial court denied the motion for the additur to

the verdict and denied also the motion for a new trial of the first cause of action limited to the question of damages. The trial court then granted a new trial of the whole case. The defendant Swanson appealed from the order of the trial court granting a new trial and asserts that the trial court was without authority to grant a new trial at a subsequent term of court. The plaintiff cross-appealed, contending that the trial court erred in overruling her motion for an additur to the verdict and in denying a new trial on the first cause of action limited to the question of damages.

The verdict was returned on October 1, 1958, and plaintiff's motion for an additur and for a limited new trial of the first cause of action was filed on October 11, 1958. The term of court at which the case was tried adjourned sine die on March 9, 1959. The order granting a new trial was rendered on April 2, 1959, and journalized on April 14, 1959. It is clear therefore that the order granting a new trial was entered in a term of court subsequent to that in which the case was tried and the motion filed.

The purpose of a motion for a new trial is to afford the trial court an opportunity to correct errors that have occurred in the conduct of the trial. The trial court has inherent power over its judgments to correct errors and mistakes therein even to the extent of granting a new trial where such is necessary, whether or not a new trial is requested or a motion for a new trial is filed. Such inherent power to grant a new trial is limited to those situations where prejudicial error appears in the record. Its inherent power to act, however, expires with the term of court at which the judgment was rendered. Olson v. Shellington, 162 Neb. 325, 75 N. W. 2d 709. It is clear that the trial court was without authority to grant a new trial by virtue of its inherent power since the term of court had expired at which the judgment was entered.

The trial court does have authority to grant a new

trial at a subsequent term for the reasons stated in section 25-2001, R. R. S. 1943, one of which reasons is: "by granting a new trial of the cause within the time and in the manner prescribed in sections 25-1143 and 25-1145." In Elvidge v. Brant, 131 Neb. 1, 267 N. W. 169, we said: "While the motion was filed during the same term at which confirmation was had, nothing had been done to secure action upon it and several terms of court have succeeded. The matter must come within some of the provisions of section 20-2001, Comp. St. 1929 (now § 25-2001, R. R. S. 1943), to authorize the vacation of the order at a subsequent term. This comes within none of those provisions. 'After the final adjournment of the term of court at which a judgment has been rendered, the court has no authority or power to vacate the judgment except for the reasons stated and within the time limited in chapter 20, art. 20, Comp. St. 1929 (now chapter 25, art. 20, R. R. S. 1943).'" See, also, Lyman v. Dunn, 125 Neb. 770, 252 N. W. 197; Meade Plumbing, Heating & Lighting Co. v. Irwin, 77 Neb. 385, 109 N. W. 391. The question then is whether or not the motion filed by plaintiff was a motion for a new trial within the meaning of section 25-1142, R. R. S. 1943. If it was, the trial court had the authority at a subsequent term to grant a new trial for prejudicial error appearing in the record; if it was not, the trial court had no such authority.

In Cerny v. Paxton & Gallagher Co., 83 Neb. 88, 119 N. W. 14, we said: "We think we may say it is the universal practice for a trial court, upon granting a new trial under said section, to examine all the issues of the case, and that such a practice as setting aside a verdict as to some part of the issues of fact, and submitting such part to another jury, is altogether unknown. When a case brought to this court is sought to be reversed for any of the errors which are specified in section 314 of the code (now § 25-1142, R. R. S. 1943) as ground for a new trial, the making of a motion in the district court

for such new trial in the time and manner required by the statute is an essential prerequisite to the right of the party appealing to have such error considered in this court. * * * until the nature of the trial by jury is modified, and the character of their verdict is essentially altered, we doubt the beneficent effect of any attempt of the courts to by construction change the law so as to split the verdict of the jury into component parts, and try the several issues by different juries. We therefore must adhere to the rule that, where a general verdict is set aside for errors occurring at the trial, no part of such verdict can be left to stand, but a new trial must be awarded upon all the issues of fact."

A motion for a new trial to be within the purview of section 25-1142, R. R. S. 1943, must be, in the alternative or otherwise, for a complete new trial. A motion for a partial new trial is insufficient to authorize the trial court to grant such a new trial after the term at which the judgment was entered. The court is not authorized to grant a new trial after term-time in the absence of a motion for a complete new trial, as required by section 25-1142, R. R. S. 1943, unless other grounds for a new trial are set forth as authorized by section 25-2001, R. R. S. 1943.

As early as Real v. Hollister, 20 Neb. 112, 29 N. W. 189, this court held that a motion for a new trial must be made in the terms substantially in which it may be allowed, within rules of law, or it will be denied.

The reason for the rule is well stated in Simmons v. Fish, 210 Mass. 563, 97 N. E. 102, Ann. Cas. 1912D 588, as follows: "The motion of the plaintiff was that the 'verdict as to damages be set aside and a new trial ordered on the question of damages only.' * * * It is to be noted that this is not the common form of motion. By the unusual form of his motion the plaintiff sought not a setting aside of the verdict but simply one aspect of it. Indeed, it is not a motion for a new trial at all, but only that one feature of the verdict be disregarded

and that a new jury pass upon that feature. This is not correct practice. The only motion known to the law in this connection is one for setting aside the verdict and ordering a new trial. If granted, the entire verdict is set aside. A verdict as the foundation of a judgment in law is an elemental entity, and cannot be 'divided by a judge.' * * * But the plaintiff by the form of his motion apparently undertook to give to the court no opportunity to set aside the verdict as a whole, * * *."

In Nathan v. Charlotte St. Ry. Co., 118 N. C. 1066, 24 S. E. 511, the court said: "When, therefore, the defendant's counsel restricted their request to a single issue, they appealed to the discretion of the court to open the verdict only in part. Fairly interpreted, the motion meant that if the judge concluded that the ends of justice would be best subserved by granting a new trial upon all of the issues, they did not wish him to interpose. * * * In this view of the matter, his ruling must be treated as a refusal to disturb the verdict at all, unless left at liberty to set aside the whole of it. While the trial judge may work out, of his own accord, or even on suggestion of one of the parties, the same result, the appellate Court will never recognize the right of a party to demand, without regard to the views of the court, that such findings of the jury as are favorable to him shall remain undisturbed, while only another, or others, which are prejudicial to him, shall be reviewed on appeal from the refusal of a motion for a new trial. The motion of counsel must be for a new trial, and while he may suggest or ask that it be partial, he cannot demand it as a right, and by his motion attempt to restrict the action of the court to one or more issues, without forfeiting his right to have the refusal of the motion reviewed." See, also, Burnett v. Roanoke Mills Co., 152 N. C. 35, 67 S. E. 30; Murray v. Krenz, 94 Conn. 503, 109 A. 859. In the last case cited the court said: "The only motion for a new trial known to our practice is the motion for a trial de novo."

In Manning v. City of Orleans, 42 Neb. 712, 60 N. W. 953, a motion was made solely for the purpose of increasing the jury's verdict, which the trial court granted. This court held that the trial court erred in so doing and in disposing of the case said: "The city did not by motion for a new trial attack the verdict. It remains, therefore, unmodified and unassailed, and judgment should be entered in conformity thereto."

We conclude that a motion for a partial retrial is insufficient on which to base an appeal under section 25-1142, R. R. S. 1943. A proper motion for a new trial, sufficient to support an appeal after the term at which the judgment was entered, must demand, in the alternative or otherwise, a complete new trial. A motion which does not afford the trial court an opportunity, in terms, to grant a complete new trial, is not a motion for a new trial within the purview of the statute. We are required to say, therefore, that plaintiff failed to file a motion for a new trial following the verdict of the jury and that the trial court was without authority to grant a new trial after term-time. Since a proper motion for a new trial was not filed, the verdict and judgment remain unmodified and unassailed. The order of the trial court granting a new trial is reversed with directions to the trial court to reinstate the verdict and to enter judgment in conformity therewith.

REVERSED AND REMANDED.

JAMES D. THOMAS, APPELLEE, V. JOHN A. FLYNN, APPELLANT, IMPLEADED WITH RALPH K. COTTON ET AL., APPELLEES.

100 N. W. 2d 37

Filed December 18, 1959. No. 34662.

1. **Adverse Possession.** The title to land becomes complete in the adverse occupant when he and his grantors have maintained an actual, continued, notorious, and adverse possession thereof, claiming title to the same against all persons, for 10 years.

2. ———. If the adverse possession of the occupant is a continuation of the possession of a prior adverse possessor claiming title, and such occupant claims title from such prior possessor, then the possession of the occupant may be tacked to that of such prior possessor.

3. **Taxation.** The words in actual possession or occupancy, as contained in section 77-1832, R. R. S. 1943, mean such occupancy or possession by a person as would put an ordinarily prudent man on notice of that fact by observation of the premises involved.

APPEAL from the district court for Douglas County: PATRICK W. LYNCH, JUDGE. *Affirmed.*

Ross & O'Connor, for appellant.

Martin A. Cannon, for appellee Thomas.

John C. Burke, for appellees Cotton et al.

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

WENKE, J.

On July 17, 1958, James D. Thomas brought this action in the district court for Douglas County against John A. Flynn, Ralph K. Cotton, Samuel Howell, Treasurer of Douglas County, and Douglas County. The purpose of the action is to have declared null and void a certain "Treasurer's Tax Deed" from the county treasurer of Douglas County to defendant Ralph K. Cotton, insofar as such deed seeks to convey to Cotton Lot K, Kincade Survey, a subdivision of Section 14, Township 15 North, Range 13 East of the 6th P.M., in Douglas County, Nebraska, as surveyed, platted, and recorded, to which tract we shall hereinafter refer as Lot K; to authorize plaintiff to redeem Lot K from the tax sale thereof; and for an order finding plaintiff to be the sole owner of Lot K. The basis on which this relief is asked is that the tax deed to Cotton is void as to Lot K because the notice required by section 77-1831, R. R. S. 1943, which section 77-1832, R. R. S. 1943, requires

"shall be made on every person in actual possession or occupancy of the land" for which a tax deed is intended to be asked, was never served upon the plaintiff or his predecessors in title who, it is claimed, were at all times in actual possession and occupancy of Lot K as the owners by reason of adverse possession.

Answer was filed by the defendant John A. Flynn wherein he claims he is the owner of Lot K, title thereto having been quieted in him on April 13, 1954, by decree rendered by the district court for Douglas County, Nebraska, of which, he alleges, plaintiff and his predecessors in interest had knowledge for over 2 years prior to the institution of this suit. Plaintiff replied to this contention, alleging that neither he nor his predecessors in title were ever made parties to that action nor was any service of summons ever had upon him or any of them, although they were in actual possession and occupancy of Lot K at all times pertinent to defendant Flynn's action to quiet title.

The trial court found generally for the plaintiff and rendered a decree accordingly, holding the treasurer's tax deed as to Lot K to be null and void; that plaintiff's rights to Lot K were not affected by defendant Flynn's action to quiet title; that there was due defendant John A. Flynn the sum of $251.39 for taxes he had paid, upon payment of which Lot K should stand redeemed from tax sale; that the sum of $326.76, deposited by the plaintiff with the clerk of the court for the purpose of being used to redeem Lot K from the tax sale, could be used to pay the amount found due to Flynn; and that plaintiff is the sole owner of Lot K. Defendant Flynn filed a motion for new trial and this appeal was taken by him from the overruling thereof.

Primarily there are two questions raised by this appeal. First, did Ralph K. Cotton sufficiently comply with the statutory requirements in obtaining his treasurer's tax deed to Lot K so as to divest the Thomases of their rights to redeem from the tax sale thereof as

section 77-1824, R. R. S. 1943, provides they may; and secondly, did appellant, in his action to quiet title, obtain jurisdiction of the Thomases so as to divest them of whatever rights or interests they then had in and to Lot K?

The burden of proof was on appellee. This is particularly true in view of the provisions of section 77-1842, R. R. S. 1943. This being an action in equity, it is the duty of this court to try the issues de novo and reach an independent conclusion as to the merits thereof without reference to the findings of the district court. § 25-1925, R. R. S. 1943. However, as stated in Jack v. Teegarden, 151 Neb. 309, 37 N. W. 2d 387: "'* * * in a case wherein the trial court has made a personal examination of the physical facts (which the trial court did here), and where, in the same case, the oral evidence in respect of material issues is so conflicting that it cannot be reconciled, this court will consider the fact that such examination was made and that such court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite.'"

The foregoing has particular application to the testimoney of Stella Thomas as to the condition of the property after the flood in April of 1952 and what was thereafter done thereto and thereon by the Thomases to put everyone on notice that the property was actually occupied by someone claiming rights therein and that of Robert E. O'Connor, attorney at law for Ralph K. Cotton, as to what he saw and found out when he examined the property shortly before making an affidavit in Cotton's behalf upon the basis of which notice, as provided for by section 77-1834, R. R. S. 1943, was published in The Daily Record of Omaha.

Ben Thomas and Stella Thomas, being then husband and wife, moved onto Lot K about September 1, 1926. At that time their family consisted of a daughter, Stella Opal, about 4 years of age, and a son, appellee James

D. Thomas, about 1 year old. There was a two-room dwelling on the property.

When they first moved onto these premises the Thomases did so under an oral agreement of purchase with a party who claimed to be the owner thereof. Shortly thereafter the Thomases came to the conclusion that the seller was a phony and actually had no interest in Lot K. Thereafter they made no further payments under the oral agreement but continued to occupy the premises as their home. They built substantial additions to the house, adding a bedroom, a kitchen, and a porch thereto. They also raised the house, dug a basement thereunder, and put it on a permanent concrete and stone foundation. The record shows they improved the house until it was a very good home considering the area in which it was located, being along the Missouri River and east of the dike along the west side thereof; that is, it was in the flood basin of the Missouri River. They built and maintained fences along both the north and south sides of Lot K. The Thomases continued to live on this property and make it their home until forced to vacate it by a flood in April of 1952.

"The title to land becomes complete in the adverse occupant when he and his grantors have maintained an actual, continued, notorious, and adverse possession thereof, claiming title to the same against all persons, for ten years." Walker v. Bell, 154 Neb. 221, 47 N. W. 2d 504.

We think the record established that by adverse possession the Thomases became the owners of Lot K sometime in 1937 and continued to be such although the flood forced them from the premises in April of 1952. Ben Thomas died intestate on March 15, 1958. The Thomas family has always consisted of the father, mother, and two children hereinbefore referred to. After the father died the mother and daughter, on July 15, 1958, quitclaimed to the son, appellee herein, what-

ever interest they had in and to Lot K. In this situation the following principle applies to appellee: "If the adverse possession of the occupant is a continuation of the possession of a prior adverse possessor claiming title, and such occupant claims title from such prior possessor, then the possession of the occupant may be tacked to that of such prior possessor." Walker v. Bell, *supra.*

In 1946 Lot K was, for the first time, listed and assessed for the purpose of taxation. It was assessed in the name of John Doe, there being no owner thereof listed in the records of Douglas County at that time. Taxes were levied thereon for that and all subsequent years. The taxes assessed and levied on Lot K for the years 1946 and 1947 became delinquent and were thereafter, on July 20, 1949, sold to the County of Douglas and subsequently, on September 16, 1952, the "Certificate of Tax Sale" issued to the county was assigned by the county treasurer of Douglas County to Ralph K. Cotton, he having paid the amount of taxes, with interest owing thereon, as shown on the face of the certificate. See § 77-1809, R. R. S. 1943.

The flood of April 1952, which forced the Thomases to vacate their home, came up so quickly that they had to vacate by boat and could only take with them dishes, bedding, and personal apparel. They were forced to leave all their furniture in the house. The water came up so high that only the roof of the house remained out of the floodwaters. The floodwaters tore the two outer doors from the house and carried away some of the furniture. It saturated the walls with muddy water and left mud all over the floor of the house and in the basement. After the flood the Thomases intended to return to the home to live but found, because of the condition in which the flood had left the house and due to the poor health of Mr. Thomas, it was not possible for them to do so. It appears that Mr. Thomas

was at that time having some kind of trouble with his lungs from which condition he ultimately died.

After the flood had receded the American National Red Cross, in May 1952, employed a Mr. Beaver at a cost of $100 to remove the mud from the Thomas house; wash down the walls, ceiling, and woodwork; clean the windows; and scrub the floors. This he did. Although this had been done the Thomases felt it was not desirable to move back because of dampness in the house and the odor from the conditions left by the flood. They did, however, put the two outside doors back on their hinges and then locked them with padlocks, their furniture being in the house. When they left their home, due to the flood, the Thomases rented a two-room apartment at 2022 Webster where they continued to live for some years when they moved to 2114 Cuming. However, they frequently returned to their old home to try to clean it up, there being rubbish, which the flood had left, all over the place. They also took back some of their dishes that they didn't need in the apartment they had rented. They also put a sign on the door showing their name, address, and telephone number. The evidence shows it was always their intention to return to their home when the condition of the property had been restored to normal and the father's health would permit. This, of course, never happened because his health was never restored prior to his death.

The title to Lot K never appeared of record in the name of the Thomases in the register of deeds office of Douglas County. Section 77-1832, R. R. S. 1943, provides, insofar as here material, as follows: "Service of the notice provided by section 77-1831 shall be made on every person in actual possession or occupancy of the land, * * * if, upon diligent inquiry, he can be found in the county." Failure to serve such notice makes such deed void. Thomsen v. Dickey, 42 Neb. 314, 60 N. W. 558.

We said in Parsons v. Prudential Real Estate Co., 86 Neb. 271, 125 N. W. 521, 44 L. R. A. N. S. 666, that: "The terms 'occupant' or 'actual occupant' are not always susceptible of precise definition. Their meaning may vary according to the context. The idea which the lawmakers intended to convey must be gathered from a consideration of the purpose of the constitutional provisions, and of the statutes in which the terms are used, as well as from the ordinary definitions given by lexicographers. Ordinarily the occupant or actual occupant of land is one in the actual possession of the premises. 'Occupant' is defined in the Century dictionary as: 'One who occupies; an inhabitant; especially, one in actual possession, as a tenant, who has actual possession, in distinction from the landlord, who has legal or constructive possession.' The Standard definition is: 'One who occupies; especially, a tenant in possession of property, as distinguished from the actual owner.' Quoting from Cutting v. Patterson, 82 Minn. 375, ' "Actual occupancy" is defined as an open, visible occupancy, as distinguished from the constructive possession which follows the legal title. "Actual possession" has practically the same meaning. It means possession in fact, effected by actual entry upon the premises and actual occupancy. * * * Black, Law Dict. 29, 30. The same definitions are found in 2 Bouvier, Law Dict. 254, 349.' "

In Kuska v. Kubat, 147 Neb. 139, 22 N. W. 2d 484, in construing Parsons v. Prudential Real Estate Co., *supra*, we said: "In construing the Constitution and applicable statute, it was held that 'occupants' and 'actual possession or occupancy' were synonymous and meant actual, open, visible possession or occupancy in fact, exactly that and nothing less, as distinguished from constructive possession. It was also held that the actual possession or occupancy must be by one claiming an interest in the property either in privity with or adversely to the owner as distinguished from a mere trespasser." See, also, Durfee v. Keiffer, 168 Neb. 272, 95 N. W.

2d 618; Quist v. Duda, 159 Neb. 393, 67 N. W. 2d 481.

Actual occupancy or possession is always involved in any claim to land by adverse possession. As stated in Purdum v. Sherman, 163 Neb. 889, 81 N. W. 2d 331: "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." As stated in Worm v. Crowell, 165 Neb. 713, 87 N. W. 2d 384: "The possession is sufficient if the land is used continuously for the purpose to which it may be in its nature adapted. See, James v. McNair, *supra;* Walker v. Bell, 154 Neb. 221, 47 N. W. 2d 504. As stated in Walker v. Bell, *supra:* '* * * Ordinarily the law does not undertake to specify the particular acts of occupation by which alone title by adverse possession may be acquired since the existence and establishment of the continuity must necessarily depend greatly on the circumstances of each case, and the use to which the property is adapted, the actual manner of its use, the circumstances of the occupant, and to some extent his intention must be considered. * * *.'" And, as stated in James v. McNair, 164 Neb. 1, 81 N. W. 2d 813: "The law does not require that possession shall be evidenced by a complete enclosure, nor by persons remaining continuously upon the land and constantly from day to day performing acts of ownership thereon. It is sufficient if the land is used continuously for the purposes to which it may be in its nature adapted." See, also, Ferber v. McQuillen, 99 Neb. 280, 156 N. W. 506; Lantry v. Parker, 37 Neb. 353, 55 N. W. 962.

We think "in actual possession or occupancy," as contained in section 77-1832, R. R. S. 1943, means such occupancy or possession by a person as would put an ordinarily prudent man on notice of that fact by observation of the premises involved. Here the record establishes that someone was actually occupying or in possession of Lot K at the time application for the

tax deed was made and any reasonable investigation and inquiry would have disclosed that it was the Thomases who were occupying and in possession thereof. No notice of the fact that Cotton was going to apply for a tax deed to Lot K, under and pursuant to the certificate of tax sale he held thereon, was ever served upon the Thomases, or either of them. In view of that fact the tax deed obtained by Cotton to Lot K was null and void and consequently the Thomases, or their successors in title, have a right to redeem from such tax sale and from all subsequent taxes assessed and levied on Lot K and paid by the holder thereof.

It is true that service by publication was had on certain named parties, not including the Thomases, pursuant to affidavit of Robert E. O'Connor filed in behalf of Robert K. Cotton. Robert E. O'Connor testified as to what he did as a basis for making the affidavit. However, neither the affidavit nor notice contained the name of Ben or Stella Thomas. In the absence thereof it was without force and effect as to the Thomases, and their successors in title, as to their rights in and to Lot K because, as we have already said, the Thomases were in actual occupancy and possession of said lot within the meaning of section 77-1832, R. R. S. 1943, and, consequently, notice was required to be served upon them in order to divest them of their right to redeem.

On April 14, 1953, an action was instituted in the district court for Douglas County by Ralph K. Cotton for the purpose of quieting title in him to Lot K and other properties located in Kincade Survey and covered by his treasurer's tax deed. Appellant was substituted as plaintiff therein because Cotton had, by special warranty deed, conveyed these premises to him. A decree was rendered therein in favor of appellant on April 13, 1954, quieting title in him to Lot K along with many other lots in Kincade Survey. The Thomases were never made parties defendant in this action, although their occupancy and possession of Lot K, as here-

inbefore described, continued at all times during the pendency of this action, up to and including the date when the decree was rendered. However, "all persons having or claiming any right, title or interest to all of Lots * * * K, * * * of Kincade's survey * * * real names unknown" were made parties thereto and served by publication pursuant to affidavit of appellant's counsel and an order of the court.

In this regard appellant states in his brief as follows: "By the provisions of Section 25-321, R. R. S. 1943, the proof of service of publication, in accord with Sections 25-517 and 25-518, R. R. S. 1943, is conclusive against all persons except those in actual possession of the property and whose ownership of, interest in, right or title to, or lien upon such property, does not appear of record."

In this respect, insofar as here material, section 25-321, R. R. S. 1943, provides: "Judgments and decrees against persons so designated and made defendants and served by publication as herein provided shall be conclusive as against all persons who are not in actual possession of such property, and whose ownership of, interest in, rights or title to, or lien upon such property does not appear of record in or by their respective names in the county wherein such property is situated." We interpreted this section in Durfee v. Keiffer, *supra,* as follows: "It will be noted that section 25-321, R. R. S. 1943, in summary requires an allegation in the petition or other pleading that there are persons who claim to have some interest in the property; that it does not appear of record; that diligent investigation and inquiry have been made; and that the person in whose behalf the investigation has been made does not know the names, whereabouts, or residence of such persons. Section 25-518, R. R. S. 1943, requires an affidavit supporting the allegation. Section 25-517, R. R. S. 1943, requires a court order for service by publication after the court is satisfied that sufficient investigation has been made. It is obvious that such a procedure was intended to

establish a 'conclusive' record in accord with the facts shown and established to the satisfaction of the court, as against all persons except those 'in actual possession' (section 25-321, R. R. S. 1943), whose interest in the property does not appear of record." See, also, Jurgensen v. Ainscow, 155 Neb. 701, 53 N. W. 2d 196; § 25-21,113, R. R. S. 1943.

In view of the facts hereinbefore set forth we do not think the appellee and his predecessors were precluded from their right to redeem from the tax sale by the decree rendered in the action to quiet title because they were never made parties thereto, they being in actual possession thereof under claim of ownership which did not appear of record in their respective names in Douglas County.

Appellant further contends that: "Proceedings to vacate or modify a Judgment or Order, for the causes mentioned in Section 25-2001, Subdivision (4), must be commenced within two years after the Judgment was rendered or Order made, or where fraud is alleged, within two years from the discovery of the fraud." In this respect, section 25-2001, R. R. S. 1943, provides: "A district court shall have power to vacate or modify its own judgments or orders after the term at which such judgments or orders were made * * * (4) for fraud practiced by the successful party in obtaining the judgment or order; * * *." Section 25-2008, R. R. S. 1943, provides, insofar as here material, that: "Proceedings to vacate or modify a judgment or order, for the causes mentioned in section 25-2001, subdivisions (4), * * * must be commenced within two years after the judgment was rendered or order made, * * *."

Appellee became aware of the fact that appellant had brought an action to quiet title against Lot K more than 2 years before bringing this action and, at the time he became aware thereof, advised his father of that fact. But this cause is not based on fraud but upon

lack of jurisdiction and these statutes and the cases cited by appellant are not in point.

We have come to the conclusion that the trial court was correct in rendering the judgment that it did and therefore affirm its action in doing so.

AFFIRMED.

PAUL KLEINKNECHT, APPELLANT, V. CHRIS A. MCNULTY ET AL., APPELLEES.
100 N. W. 2d 77

Filed December 18, 1959. No. 34678.

1. **Pleading.** The refusal to permit an amendment which is proposed at an opportune time, and which should be made in the furtherance of justice, is an abuse of discretion on the part of the trial court.
2. ———. The law of amendments should be liberally construed in order to prevent a failure of justice. Changes in judicial procedure have not altered the rule, nor indicated any reason for discontinuing its judicial application.
3. **Joint Adventures.** To constitute joint adventure, there must be an agreement to enter into an undertaking in the objects of which the parties have a community of interest and common purpose in performance, and each of the parties must have equal voice in the manner of its performance and control over the agencies used therein, though one party may entrust performance to another.
4. **Automobiles: Joint Adventures.** In order to constitute occupants of an automobile joint adventurers, there must be not only joint interest in the objects and purposes of the enterprise, but also an equal right, express or implied, to direct and control the conduct of each other in the operation of the automobile.
5. **Judgments.** A summary judgment is authorized only when the moving party is entitled to a judgment as a matter of law. If there is a genuine issue of fact to be determined, a summary judgment may not be properly entered.

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

Maupin, Dent, Kay & Satterfield, Thomas O. David, and *James J. Duggan,* for appellant.

Luebs, Elson & Tracy, for appellees.

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

SIMMONS, C. J.

This is an action for damages for personal injuries arising as a result of a collision between two motor vehicles. There were originally three defendants, namely, Osborn, McNulty, and Weber. Plaintiff was riding in a motor vehicle owned and driven by Osborn. Defendant Weber was the owner of the other motor vehicle which was being driven by defendant McNulty.

The collision occurred on October 10, 1956. Plaintiff filed his petition on August 29, 1957. On September 24, 1957, McNulty and Weber appeared specially challenging the court's jurisdiction over their persons.

On February 17, 1958, Osborn demurred to plaintiff's petition. The demurrer was sustained on April 14, 1958. On April 22, 1958, plaintiff filed an amended paragraph to paragraph 6 of his petition. Osborn again demurred. On September 5, 1958, the demurrer was sustained and the petition dismissed as to Osborn. The cause then proceeded against McNulty and Weber. Their special appearance was overruled. They followed with a motion for security for costs and a motion to make more definite and certain. On February 7, 1959, the deposition of plaintiff was taken by the defendants. On February 7, 1959, they filed an answer admitting the allegations of paragraph 6 of the amended petition and denied generally. They then alleged affirmative acts of negligence on the part of Osborn and alleged that Osborn and plaintiff were engaged in a joint enterprise.

On February 16, 1959, plaintiff in open court asked leave to strike his paragraph 6 as amended. Defendants objected. The court denied the motion.

On March 24, 1959, defendants filed a motion for summary judgment.

On April 6, 1959, plaintiff, with permission of the

court, filed an application for leave to strike paragraph 6 and his amended paragraph 6 from the petition. Evidence was taken. The court then took up and sustained defendants' motion for a summary judgment and dismissed the cause with prejudice.

Plaintiff appeals. We reverse the judgment of the trial court and remand the cause for further proceedings.

Plaintiff in his petition which he verified alleged: "That the defendant, Roy Osborn was negligent in not having his car under proper control so that he could stop within the range of his vision; that he was driving at an excessive rate of speed under the circumstances and conditions existing upon said highway at said point, in that the dust raised by the first truck that he met so obscured his vision that he was unable to stop said automobile when the second truck appeared in front of him; that said Roy Osborn did not keep a proper lookout for cars approaching on said highway; that said Ray (sic) Osborn did not turn his car to the right in time to avoid a collision with the truck owned by Harold Weber and driven by Chris A. McNally (sic)."

The amendment, drawn by plaintiff's attorney, and not verified by or exhibited to plaintiff before filing, alleged: "That the defendant, Roy Osborn, was guilty of gross negligence, in that he drove said car at a high and excessive rate of speed through the dust raised by the first truck that he met; that said cloud of dust obscured his vision of the road to the south of him in such manner that he was unable to see the road or any part thereof, or any vehicles approaching thereon, south of said first truck; that he grossly and negligently failed to reduce the speed of his car under the conditions and circumstances above existing; that he was travelling at such an excessive rate of speed that when the second truck appeared in front of him in said cloud of dust, that he was unable to stop the car so driven by him; that he struck said truck by reason of the fact of his excessive speed and his failure to turn his car to the right in time

to avoid said collision with the truck so owned by Harold Weber and driven by Chris A. McNulty; that said defendant, Roy Osborn, was familiar with the condition of said road and that there was considerable travel upon said road and that driving into said dust of said first truck, without reducing his rate of speed, was gross negligence."

On the hearing on the application for leave to strike the paragraph, plaintiff's attorney testified that he had conferred with his client once about the facts which was before preparing the petition; that he thought he had ascertained the facts to be that at the time the collision occurred the Osborn car was moving at 40 or 50 miles per hour; that he found out differently when plaintiff's deposition was taken and when plaintiff testified that the Osborn car was virtually stopped when the collision occurred; and that he prepared the amendment pleading gross negligence, as he thought, but relying on his original understanding of the facts of a speed of 40 to 50 miles per hour at the time of impact. The credibility of the attorney is not challenged.

On this feature of the issues here the plaintiff in his deposition testified that there were two trucks approaching the Osborn vehicle; that when about one-half mile from the first one the Osborn car had a speed of 40 miles per hour; that the approaching trucks were raising dust clouds; that Osborn slowed down to about 15 miles per hour when he met the first truck; that this was necessary because of the dust which at times obscured vision down the road; that before they had passed the first truck plaintiff saw another truck following and said, "stop"; and that the Osborn vehicle had stopped before the collision.

The motion for summary judgment was based on the contention that the pleadings and the deposition showed that Osborn was guilty of contributory negligence more than slight as a matter of law; that Osborn's negligence was imputable to the plaintiff; that plaintiff was guilty

of contributory negligence; and that there is in the case no genuine issue of any material fact.

Defendants, to sustain the trial court, argue first for the rule that a party may at all times invoke the language of his opponent's pleadings, on which a case is being tried, and in doing so he is neither required nor allowed to offer such a pleading in evidence in the ordinary manner. We have reexamined and followed this rule in Kirchner v. Gast, *ante* p. 404, 100 N. W. 2d 65. There is no need to amplify the statements in that opinion.

Concededly section 25-849, R. R. S. 1943, applies to amendment of a petition without leave before answer is filed. That is not the situation here.

Section 25-852, R. R. S. 1943, applicable here, provides in part: "The court may, either before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process or proceeding, by adding or striking out the name of any party or by correcting a mistake in the name of the party, or a mistake in any other respect, or by inserting other allegations material to the case, or, when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved."

Defendants here invoke the rule relied on in Robinson Outdoor Advertising Co. v. Wendelin Baking Co., 145 Neb. 112, 15 N. W. 2d 388, that an amendment to a pleading may be made, which does not change the issues nor affect the quantum of proof as to a material fact, at any stage of the proceeding.

The rule is a permissive one. It defines one circumstance under which an amendment may be made at any stage of the proceedings. It does not hold that amendments, after answer is filed, may be made only if they do not change the issues nor affect the quantum of proof as to a material fact.

In the Robinson case the proposed amendment to the

answer was offered while evidence was being received and for the purpose of conforming the answer to the proof.

In Miller Rubber Products Co. v. Anderson, 123 Neb. 247, 242 N. W. 449, the amendment was proposed after nearly all the evidence had been adduced. In Folken v. Union P. R. R. Co., 122 Neb. 193, 239 N. W. 831, the amendment was proposed at the conclusion of plaintiff's testimony on rebuttal. In Bliss v. Beck, 80 Neb. 290, 114 N. W. 162, the amendment was proposed after both parties had rested. In Cate & Foristall v. Hutchinson, 58 Neb. 232, 78 N. W. 500, the amendment was proposed after the plaintiff had submitted the evidence-in-chief. In Deck v. Smith, 12 Neb. 389, 11 N. W. 852 (erroneously cited in Miller Rubber Products Co. v. Anderson, *supra*, as 12 Neb. 205), on appeal from a justice of the peace, an amendment was allowed in the district court increasing the alleged value of property taken in replevin. We affirmed the allowance of the amendment holding it to be the duty of the court "to do as complete justice between the parties as possible." The above is a brief summary of all the cases relied on in the Robinson case. In every instance we affirmed the allowance of the amendment.

We cited the Robinson case in Gergen v. Western Union Life Ins. Co., 149 Neb. 203, 30 N. W. 2d 558, where plaintiff filed an amended petition after answer day and without notice to the defendant. We affirmed. The Robinson case was again cited in Schwank v. County of Platte, 152 Neb. 273, 40 N. W. 2d 863. There the trial court permitted an amendment to the petition to make it conform to the proof after almost all of plaintiff's evidence had been received.

In Gable v. Pathfinder Irr. Dist., 159 Neb. 778, 68 N. W. 2d 500, plaintiff at the close of his case-in-chief was allowed to amend the prayer of his petition by increasing the ad damnum to conform to the proof. We affirmed, following the Robinson case.

In Kroeger v. Safranek, 161 Neb. 182, 72 N. W. 2d 831, the court in submitting the cause to the jury without request of the plaintiff increased the amount the plaintiff sought to recover in her petition and changed facts alleged as a basis therefor. We held that "in the absence" of a request therefor the court should not have made the material change in the amount sought to be recovered.

It becomes quite apparent that the rule of the Robinson case does not apply and has not been applied to fact and pleading situations such as we have here.

It is patent also that the rule of the Robinson case is not an all-inclusive construction of the application of section 25-852, R. R. S. 1943, heretofore quoted.

The statute provides that the court "may * * * in furtherance of justice * * *." That is the lodestar to guide it.

Using the disjunctive "or" the statute provides for: (1) The adding or striking out of the name of a party; (2) correcting a mistake in the name of a party; (3) correcting a "mistake in any other respect"; (4) inserting other allegations material to the case; and (5) when the amendment does not change substantially the claim or defense by conforming the pleading to the facts proved.

It is quite apparent that the Robinson case falls within the grouping covered by the last power authorized by the statute.

In the early case of Berrer v. Moorhead, 22 Neb. 687, 36 N. W. 118, we held: "The law of amendments should be liberally construed in order to prevent a failure of justice." We quoted this language in Louis Hoffman Co. v. Western Smelting & Refining Co., 150 Neb. 524, 34 N. W. 2d 889, and added: "The progressive evolution of procedure in our courts has not changed that rule, but has demonstrated the necessity of its continuing judicial application." We there quoted from other cases supporting the same rule. In the Hoffman

case defendant had filed a general denial. After the case was set for trial, but before trial, defendant asked leave to file an amended answer, denying generally, making certain admissions, and pleading a counterclaim. The trial court denied leave to amend. We reversed and remanded holding that the trial court abused its discretion in refusing to permit defendant to file its amended answer and counterclaim.

In Dixon v. Coffey, 161 Neb. 487, 73 N. W. 2d 660, at a pretrial hearing the court ruled that certain property damages alleged were not recoverable under the allegations of the petition. The plaintiff asked leave to amend to show the full amount of the damage. The trial court denied the leave to amend. The trial court submitted the issue of damages for personal injuries to the jury but not the issue of damages to the car. The jury's verdict was for the plaintiff. Plaintiff filed a motion for a new trial claiming an abuse of discretion in refusing to permit the amendment. The plaintiff was granted a new trial. We affirmed following the Hoffman case.

In Zancanella v. Omaha & C. B. St. Ry. Co., 96 Neb. 596, 148 N. W. 158, citing this statute, we held: "* * * the rule is that amendment should be allowed when it is 'in furtherance of justice' to do so."

This holding has been repeatedly cited favorably down to and including Dixon v. Coffey, *supra.*

In Deck v. Smith, *supra,* we held that this statute confers upon the court an almost unlimited power of amendment in furtherance of justice. We quoted this language with approval in Bliss v. Beck, *supra.*

In Westrope v. Anderson, 98 Neb. 57, 151 N. W. 955, we held: "The rule of the statute in regard to amendment of pleadings is very liberal, * * *."

We need not cite more from our decisions construing the statute. The trial court here was called upon to exercise its power to permit an amendment of plaintiff's petition in the furtherance of justice.

For the purposes of this matter the court had before it the uncontradicted testimony of plaintiff's then counsel that certain allegations of fact in the original and amended paragraph 6 were placed there by him as a result of a misunderstanding on his (counsel's) part of what the facts were as claimed by the plaintiff. The court also had before it the uncontradicted sworn testimony of the plaintiff setting out wherein the facts as alleged in the original and amended paragraph 6 were not true.

The court by denying leave to strike the original and amended paragraph 6 in effect held that the plaintiff had to go to trial with the allegations, here involved, as constituting a judicial admission and irrefutable.

There is no claim here that plaintiff or his counsel are moved by other than a good-faith desire to have the pleadings reflect plaintiff's fact contentions. It has been held: " 'But the refusal to permit an amendment which is proposed at an opportune time and should be made in furtherance of justice is an abuse of discretion on the part of the trial court.' " State ex rel. Gold Creek Mining Co. v. District Court, 99 Mont. 33, 43 P. 2d 249.

We agree. The trial court abused its discretion in denying plaintiff leave to strike the original and amended paragraph 6 from his petition. This necessitates a reversal of the judgment and a remand of the cause.

It is patent that the trial court held that the allegations of plaintiff's petition of negligence of Osborn, being irrefutable, admit Osborn's contributory negligence more than slight as a matter of law; that the court then found plaintiff and Osborn were engaged in a common venture or enterprise; and that because of it Osborn's negligence was imputed to the plaintiff.

The existence of a common enterprise is a material fact in this line of reasoning.

The applicable rules are: 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. A summary judgment is authorized only when the moving party is entitled to a judgment as a matter of law. If there is a genuine issue of fact to be determined, a summary judgment may not be properly entered. The court examines the evidence on motion for summary judgment, not to decide any issue of fact presented, but to discover if any real issue of fact exists. The burden is upon the party moving for summary judgment to show that no issue of fact exists, and unless he can conclusively do so the motion must be overruled. Dennis v. Berens, 156 Neb. 41, 54 N. W. 2d 259.

The only evidence before the court on this matter is found in the deposition of the plaintiff. The plaintiff and Osborn are farmers and near neighbors. The plaintiff bought some hay in a field. He mowed and raked it. Plaintiff paid for the baling. Plaintiff then sold half the hay to Osborn. A trucker was engaged to haul the hay. On the day of the accident one load remained to be hauled. It was to be delivered to plaintiff. The trucker notified Osborn that he would have to have some help in loading the hay, as his employee for that purpose was not available. Osborn notified plaintiff. Plaintiff went to Osborn's farm and from there started for the hay field in Osborn's car, because on occasions before they had traveled in plaintiff's car. They were on their way to the hay field when the accident here involved occurred.

In Soulek v. City of Omaha, 140 Neb. 151, 299 N. W. 368, we stated a number of rules regarding joint adventure. We need not restate those here. Specifically we held there that: "To constitute joint adventure, there must be an agreement to enter into an undertaking in the objects of which the parties have a community of interest and common purpose in performance, and each of the parties *must* have equal voice

in the manner of its performance and *control over the agencies used* therein, though one party may entrust performance to another." (Emphasis supplied.)

In the case of Judge v. Wallen, 98 Neb. 154, 152 N. W. 318, L. R. A. 1915E 436, an automobile injury case, we held that negligence could be imputed if the passenger possessed "joint control over the automobile." We have repeatedly followed that decision. It was cited along with intervening cases in Hansen v. Lawrence, 149 Neb. 26, 30 N. W. 2d 63, where we held that the evidence did not show "the requirement that the plaintiff had any control whatever over the car."

Authoritative texts state the following rules: "The test of a joint enterprise between the driver of an automobile and another occupant is whether they were jointly operating and controlling the movements of the vehicle. * * * In other words, the passenger, as well as the driver, must be entitled to a voice in the control and direction of the vehicle." 5 Am. Jur., Automobiles, § 501, p. 786. (Citing a Nebraska case.)

Generally speaking, the negligence of the driver of an automobile can be imputed to a passenger only when the passenger has authority to direct the driver or has charge of the car, or when the driver is under the control or authority of the occupant. The test is whether the passenger had a right to control or to share in the control of the operation of the vehicle. * * * In order to constitute a joint enterprise for the purposes of this rule it is generally held that there must be a common purpose and a community of interest in the object of the enterprise and an equal right in the driver and the occupant to direct and control the conduct of each other with respect thereto." 5A Am. Jur., Automobiles and Highway Traffic, §§ 814, 826, pp. 759, 765. (Citing Nebraska cases.)

"In order to constitute occupants of a conveyance joint adventurers, there must be not only joint interest in the objects and purposes of the enterprise, but also

an equal right, express or implied, to direct and control the conduct of each other in the operation of the conveyance." 65 C. J. S., Negligence, § 168, p. 814. (Citing Nebraska cases.)

Restatement, Torts, § 491, p. 1275, states: "When the journey on which the plaintiff and driver of the vehicle are participating is itself a part of a business enterprise in which the parties are mutually interested, the two are engaged in a joint enterprise. * * * It is, however, not enough that the journey is preparatory to the conduct of a business in which the two are mutually interested. Thus, if the owner of the vehicle and another are jointly interested in a business transaction to be carried on at a particular point, the fact that the owner of the vehicle gives the other transportation to that point does not of itself make the journey thereto a joint enterprise." It gives the following illustrations: "1. A and B are partners in a business carried on in the City of X. They live in adjacent houses in a suburb of X. The partners drive to town one day in A's car, another day in B's car. In neither case is the drive to their office in X a joint enterprise of A and B.

"2. A, as attorney for B, is engaged in the trial of a case in the town of X. C is retained by B to assist A. Both A and C live in the same village which is at some distance from the town of X. On the day of the trial A offers to drive C to X. While on the way to X, A drives the car carelessly and a collision ensues in which C is injured. A's negligent driving does not bar C from recovering against the driver of the negligently driven vehicle with which A's car collides."

Consistent with the above authorities, as we read this evidence, there was before the trial court no evidence that would sustain a finding that plaintiff and Osborn were engaged in a common enterprise, so as to impute Osborn's alleged negligence to the plaintiff. The

trial court erred in holding that there was presented no genuine issue of any material fact.

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

REVERSED AND REMANDED.

GLENN O. JOURDON, APPELLANT, V. THE COMMONWEALTH COMPANY, A CORPORATION, APPELLEE.

100 N. W. 2d 84

Filed December 24, 1959. No. 34626.

1. **Actions: Equity.** If a litigant brings an equitable action, even now, when the same court administers both systems of law and equity, the litigant must maintain his equitable action upon equitable grounds, or fail, even though he may prove a good cause of action at law on the trial.
2. **Equity.** If an adequate remedy exists at law, a litigant may not obtain relief in equity. The burden is on the party seeking relief to establish he has no adequate remedy at law before he can succeed in a court of equity.
3. ———. If no ground for equitable relief is alleged or if no equitable relief is granted, a court of equity will generally decline jurisdiction to enter a money judgment on a legal cause of action.
4. **Actions: Equity.** If a cause of action for equitable relief and a cause of action at law are joined and equitable relief is not granted, the court is without authority to determine the issue of personal liability and render a judgment on the cause of action at law.
5. ———: ———. In such a situation the cause of action at law must be determined as any other law action and should be retained by the court for that purpose.
6. **Abatement and Revival: Judgments.** The pendency of a former suit by the same parties may be shown in abatement when a judgment in such suit would be a bar to a judgment in the second action. That one is an equitable action and the other a suit at law is immaterial if both suits are based upon substantially the same facts.

APPEAL from the district court for Lancaster County:

JOHN L. POLK, JUDGE. *Affirmed in part, and in part reversed and remanded with directions.*

Ewald D. Warnsholz, for appellant.

Ginsburg, Rosenberg & Ginsburg and *Norman M. Krivosha,* for appellee.

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

BOSLAUGH, J.

Appellee was at all times important to this litigation a corporation authorized by license issued to it by the State of Nebraska to engage in transactions by virtue of and subject to the conditions and limitations of the Industrial Loan and Investment Company Act. §§ 8-401 to 8-433, R. R. S. 1943. Appellee permitted appellant to become obligated to appellee on seven promissory notes, payable to its order, and executed and delivered to it by appellant, as follows:

1. A note dated April 8, 1954, for the sum of $1,444, payable in 2 monthly installments the last of which was due June 8, 1954. The amount of this note was wholly paid by August 7, 1954, and the note was canceled by appellee and surrendered to appellant August 18, 1954.

2. A note dated April 17, 1954, for the sum of $1,601, payable in 2 monthly installments the last of which was due June 17, 1954. The amount of this note was satisfied in part by a credit thereon of the amount of two notes given appellee by appellant each dated August 3, 1954, hereafter described, one in the sum of $700 and the other in the sum of $575. The amount of the note of April 17, 1954, was wholly paid by August 7, 1954, and the note was canceled by appellee and returned to appellant.

3. A note dated June 24, 1954, for the sum of $1,330, payable in 2 monthly installments the last of which was due August 24, 1954. The amount of this note was

satisfied in part by a credit thereon for the sum of $1,107 of a note given appellee by appellant dated November 15, 1954, hereafter described, in the sum of $1,755.66. The amount of the note of June 24, 1954, was wholly paid by November 15, 1954, and the note was by appellee canceled and returned to appellant.

4. A note dated August 3, 1954, for the sum of $700, payable in 12 monthly installments the last of which was due August 3, 1955. The amount of this note was paid by July 26, 1955, and the note was by appellee canceled and returned to appellant.

5. A note dated August 3, 1954, for the sum of $575, payable in 2 monthly installments the last of which was due October 3, 1954. The amount of this note was satisfied in part by a credit thereon in the sum of $575 of a note given appellee by appellant dated November 15, 1954, hereafter described, in the sum of $1,755.66. The note of August 3, 1954, for $575 was by November 15, 1954, paid and it was by appellee canceled and returned to appellant.

6. A note dated November 15, 1954, for the sum of $1,755.66, payable in 12 monthly installments the amount of which note was satisfied in part by a credit thereon of the sum of $915.88 of a note given appellee by appellant dated August 2, 1955, hereafter described, in the sum of $958.23. The note of November 15, 1954, for the sum of $1,755.66 was paid by August 2, 1955, and it was canceled and returned to appellant.

7. A note dated August 2, 1955, for the sum of $958.23, payable in 18 monthly installments the last of which was due February 2, 1957. The only part of this note which has been paid was $20.39 paid in cash by appellant October 12, 1955.

Each of the notes contained the following: "Agreed rate of charges on unpaid principal balance until maturity as follows: 100% of the following rates, 3% per month on that part of the unpaid principal balance not in excess of $50.00; 1½% per month on any part of the

principal balance exceeding $50.00 but not exceeding $550.00; ¾ of 1% per month on that part of the principal balance exceeding $550.00; charges to be computed on the basis of number of days actually elapsed, a month being any period of 30 consecutive days and the daily rate 1/30 of the monthly rate. * * * This note is made pursuant to the provisions of article 4 of chapter 8 of the Revised Statutes of Nebraska, 1943, as amended, and is to be construed strictly in accordance with the terms and provisions thereof, and subject thereto."

The first cause of action of the second amended petition of appellant concerns only six notes, 1 to 6, described above. It alleged substantially the matters recited above and appellant also therein pleaded the following: The interest designated on the face of each of the said notes given by appellant to appellee and all interest charges paid by appellant on each of the notes were in excess of the maximum rates prescribed by section 8-418, R. R. S. 1943. Appellee induced and permitted appellant to enter into the six separate loan contracts (described herein as promissory notes) and two or more of them were wholly or partially in effect from April 8, 1954, to August 2, 1955, for the purpose of permitting appellee to obtain and receive higher rates of interest than were provided in section 8-418, R. R. S. 1943, and in direct violation of the provisions of section 8-419, R. R. S. 1943. The six promissory notes and the payments made thereon were void and uncollectible but appellant paid the notes in full and they were canceled by appellee on or about the date when final payment was made as recited above. The promissory note dated November 15, 1954, in the principal sum of $1,755.66 made by appellant to appellee was void and uncollectible because it included charges accrued more than 60 days previously in connection with the note dated June 24, 1954, in the principal amount of $1,330 made by appellant to appellee. The six loan contracts were void and appellee had no right to collect and re-

ceive any principal, interest, or charges thereon or on any of them. Appellant paid to appellee on note No. 1, $1,486.19; on note No. 2, $1,661.78; on note No. 3, $1,401.10; on note No. 4, $783.42; on note No. 5, $602.67; and on note No. 6, $1,928.91. Appellee holds in trust for and is indebted to appellant for all sums of money actually paid by him to appellee and received and accepted by it, with legal interest thereon.

The relief asked on the basis of the first cause of action was an adjudication that the notes were void and for a judgment in favor of appellant against appellee for all payments made thereon with legal interest.

The answer of appellee to the first cause of action of appellant to the extent necessary to be repeated here was in substance the following: An admission of the corporate status of appellee; that it was licensed as an industrial loan and investment company on August 12, 1941, by the state; and that the promissory notes described in the first cause of action were canceled by appellee. A denial of the other allegations of the first cause of action. A plea that all of said promissory notes were prior to and at the time of the commencement of the action in the possession of appellant, marked canceled by appellee, and delivered by it to appellant. This was done long before any claim of appellant, as alleged in this litigation, was made by him against appellee. The canceled notes were accepted by appellant, were fully extinguished, and were in the absolute control and possession of him before and at the time of the commencement of this case. Appellee did not induce or permit appellant to become liable on more than one contract of loan at the same time for the purpose of obtaining a higher rate of interest than would have been permitted if the obligations of appellant had been consolidated into one obligation but the loans were made and the notes executed at the express request, direction, and solicitation of appellant for his sole benefit, accommodation, and convenience in con-

ducting his several businesses and activities. A defense that the purported cause of action of appellant accrued more than 2 years before the institution of this action by him, is for the recovery of a forfeiture and a penalty, is required to be brought within 1 year from the date of the accrual of the cause of action, and the alleged cause of action is barred by the statute of limitations of this state. The answer also interposed the assertion that the district court as a court of equity had no jurisdiction to entertain the action because appellant had an adequate remedy at law and he had not pleaded grounds for equitable relief. The prayer was for dismissal of the first cause of action.

The trial court found for appellee and rendered a judgment of dismissal of the first cause of action of appellant. His motion for new trial was denied and he has prosecuted this appeal.

Section 8-418, R. R. S. 1943, is as follows: "Any industrial loan and investment company may contract and receive on any loan, charges including interest at graduated rates not exceeding thirty-six per cent per annum on that part of the unpaid principal balance on any loan not in excess of fifty dollars; not exceeding eighteen per cent per annum on that part of the unpaid principal balance on any loan in excess of fifty dollars and not in excess of five hundred and fifty dollars; not exceeding nine per cent per annum on that part of the unpaid principal balance on any loan in excess of five hundred and fifty dollars and not in excess of five thousand dollars; Provided, that such graduated rates shall be computed strictly as simple interest on the unpaid principal balance for the time actually outstanding."

Section 8-419, R. R. S. 1943, states: "No industrial loan and investment company shall induce or permit any person, nor any husband and wife, jointly or severally, to become obligated, directly or contingently or both, under more than one contract of loan at the same time for the purpose of obtaining a higher rate of charge

than would be permitted if all of the obligations of such person to such company were consolidated into one obligation."

The pertinent part of section 8-432, R. R. S. 1943, is as follows: "If the industrial loan and investment company shall fail to comply with any of the provisions of sections 8-418 to 8-433, in the making or collection of any loan which is subject to said sections, the loan shall be void and the lender shall have no right to collect and receive any principal, interest or charges."

Appellee asserted in its answer to the first cause of action that the district court as a court of equity had no authority to hear or determine that cause of action, that there were no grounds pleaded for equitable relief, and that appellant had no right of action in equity. The substance of this was presented to the court by motion of appellee at the close of the case-in-chief of appellant but the trial court reserved ruling thereon.

The six notes of appellant representing loans made to him by appellee described in the first cause of action were paid to, canceled, and surrendered by it to appellant before the commencement of this action. The chattel mortgages incident to and security for the payment of the notes were likewise canceled and surrendered by appellee to appellant at the time when the notes were. These have since been in his unconditional possession and control. There were no notes as described in the first cause of action when this litigation had its inception. They had been extinguished. They then had no value or effect and were capable of no hazard or loss to appellant or of any benefit to anyone.

The situation considered in Mercantile Bank v. Pettigrew, 74 N. C. 326, was that the maker of a promissory note had paid it but the note was not surrendered to her and she secured no receipt or other written acquittance. The maker sought an adjudication that the note be surrendered to her for cancellation. Judgment of nonsuit was rendered in the case. The court concluded:

"The fact that no precedent can be found for such an action, is strongly against it * * *. A note, which has been paid off, is of no value. * * * It is simply a worthless piece of paper, which was evidence of a promise which has been performed. It could be worth nothing to B (the maker), if he were to recover it. It is worth nothing to A (the holder) who keeps it, for if he attempt to recover upon it of B, B can defeat the recovery by the very evidence upon which he would rely in his action to have it delivered up and cancelled, that is, by proof of payment."

The first cause of action asserted only these circumstances: Appellant gave six promissory notes to appellee on account of loans made by it to appellant. The loans were made under and subject to the industrial and investment statute of the state. The interest charges exacted by the terms of each of the notes were in excess of those permitted by the statute, hence the notes were void, and appellee was not entitled to collect or receive any of the principal, interest, or charges evidenced by the notes. Appellant paid the notes in the exact amounts stated in his pleading and he pleads he is entitled to recover judgment against appellee for the sum of the total amount paid by him, together with the legal interest. Appellant prayed judgment against appellee for the amount it received from appellant in payment of the notes and he prayed judgment that the notes were void.

Appellant did not even assert in his pleading for a judgment for money only by a court exercising equitable powers that he did not have an adequate remedy at law for the recovery of the money he claims. He did not plead a cause of action in equity or any cause of action except one for the recovery of money only. An action at law was adequate to accomplish that result, and the absence of an adjudication in equity that the notes violated the statute and were void could in no manner or degree prejudice the adequacy of the remedy

at law for the recovery of the money from appellee. If the facts alleged in the first cause of action were supported in a court of law, it would be imperative that the court accord appellant the benefit of the illegality of the notes and all consequences legally flowing therefrom. See Powell v. Edwards, 162 Neb. 11, 75 N. W. 2d 122. The first cause of action exhibited no fact which required or permitted the court to exercise equitable jurisdiction or to administer any equitable relief. Appellant has not by his pleading or evidence claimed that there was the slightest obstacle to his pursuing an action at law and having therein a full and unimpeded adjudication of the rights he asserts. There is no claim in this cause that the evidence of the facts available in a court exercising equitable powers and administering equitable relief was not equally as available in a court of law or that the latter could not or would not have granted to appellant all the relief the evidence would have sustained. The trial court did not and could not legally award appellant any equitable relief in this case.

The conclusion of this court in Massman Construction Co. v. Nebraska Workmen's Compensation Court, 141 Neb. 270, 3 N. W. 2d 639, is appropriate in the situation of this case: "The plaintiff having instituted and prosecuted this case in the district court as an equitable action, and, after a complete hearing as such was had thereon, now seeks strictly a common-law relief therein, which a court of equity in the exercise of its equitable powers may not grant, and which, if originally presented as a case for original relief, such court, as a court of equity, would have no jurisdiction to entertain. It would seem within the reasons of the rule announced by the supreme appellate court of New York, as follows: ' "The opinion of this court, in Mann v. Fairchild (2 Keyes, 106, 111 et seq.), is that, 'if a party brings an equitable action, even now, when the same court administers both systems of law and equity, the party must maintain his equitable action upon equitable grounds, or

fail, even though he may prove a good cause of action at law on the trial.' * * *"' " See, also, Gillespie v. Hynes, 168 Neb. 49, 95 N. W. 2d 457.

This court has frequently and consistently maintained that if an adequate remedy exists at law, the litigant may not obtain relief in equity. The burden is on the party seeking relief to establish he has no remedy at law before he can succeed in a court of equity. Brown v. Reed, 72 Neb. 167, 100 N. W. 143, states: "Where an adequate remedy exists at law equity will not assume jurisdiction." The opinion says on this subject: "We are unable to see any grounds for the interposition of a court of equity in behalf of the plaintiff in this case. He has utterly failed to show that he is without an adequate remedy at law." See, also, Western Union Telegraph Co. v. Douglas County, 76 Neb. 666, 107 N. W. 985; Burkhardt v. Cihlar, 149 Neb. 712, 32 N. W. 2d 197; School Dist. No. 49 v. School Dist. No. 65-R, 159 Neb. 262, 66 N. W. 2d 561.

The granting of equitable relief in a cause is a prerequisite to the authority or jurisdiction of the court to determine an issue of personal liability and to render a judgment in a cause of action at law.

Reynolds v. Warner, 128 Neb. 304, 258 N. W. 462, 97 A. L. R. 1128, contains this: "When the trial court determined that the interveners were not entitled to equitable relief, the court was without power to determine the legal action without the intervention of a jury. * * * where there is no equitable relief granted, a court of equity will generally decline jurisdiction to enter a money judgment on a legal cause of action."

Gillespie v. Hynes, *supra,* approved the language last quoted and said: "Where no equitable relief is granted in a suit to foreclose a mechanic's lien, a court of equity is without authority to enter a personal judgment in favor of the mechanic's lien claimant."

Buck v. Village of Davenport, 168 Neb. 250, 95 N. W. 2d 488, declares: "If a cause of action for equitable re-

lief and a legal cause of action at law are joined in a cause and equitable relief is entirely denied, the court is without authority to determine the issue of personal liability and render a judgment on the cause of action at law."

A court exercising equity powers often declares an instrument void and cancels it. This is the administration of protective or preventive jurisdiction because the instrument may be vexatiously or injuriously used against the party seeking relief when conditions have changed to his disadvantage or injury.

In 9 Am. Jur., Cancellation of Instruments, § 4, p. 352, it is said: "This power of equity is, however, very exceptional in its character. The purpose of its exercise is * * * only to supplement the powers of courts of law where there is exceptional equity of a settled and recognized kind."

It is stated in 12 C. J. S., Cancellation of Instruments, § 31, p. 990, as follows: "Where, however, the defense to the enforcement of the instrument at law is not difficult or uncertain, and there exist no circumstances calling for equitable relief other than the invalidity of the instrument and the wrong that would result from its enforcement, courts of equity uniformly refuse to interfere, but remit complainant to his defense at law * * *."

Erickson v. First Nat. Bank of Oakland, 44 Neb. 622, 62 N. W. 1078, 48 Am. S. R. 753, 28 L. R. A. 577, was an action to restrain the defendants from the negotiation of a promissory note executed by plaintiff and for cancellation of the note. The note was invalid because of a material alteration of it without the consent of the maker. The court said: "A court of equity has no jurisdiction to enjoin the transfer or collection of such a note, since the maker has an adequate remedy at law."

Town of Venice v. Woodruff, 62 N. Y. 462, 20 Am. R. 495, was an action to enjoin holders of municipal bonds claimed to have been issued without assent of

the required percent of the taxpayers from transferring the bonds and to cancel them because they were alleged to be void. Relief was denied. The court said: "There must exist some circumstance establishing the necessity of a resort to equity, to prevent an injury which might be irreparable, and which equity alone is competent to avert. If the mere fact that a defence (defense) exists to a written instrument were sufficient to authorize an application to a court of equity to decree its surrender and cancellation, it is obvious that every controversy in which the claim of either party was evidenced by a writing could be drawn to the equity side of the court, and tried in the mode provided for the trial of equitable actions, instead of being disposed of in the ordinary manner by a jury."

In Allerton v. Belden, 49 N. Y. 373, it is said in the statement of the case that the: "Complaint prays that said promissory note be declared void." In the opinion the court said: "The mere fact that a party has made an agreement or given a security which is void for usury, is not, and never was, sufficient to entitle him to apply to a court of equity to have the contract annulled. The right to this relief exists only where from the form of the security the defence (defense) cannot be made available at law, or where the instrument sought to be avoided is a cloud upon the title to land, or some other necessity for the interposition of a court of equity is shown. The most usual ground for going into equity in such cases formerly was the necessity for a discovery, to prove the usury."

It is stated in 4 Pomeroy's Equity Jurisprudence (5th Ed.), § 1377, p. 1001, as follows: "The jurisdiction of equity to grant the remedy of cancellation exists and will always be exercised when it is necessary to protect or maintain equitable primary estates, interests, or rights; where, however, the estate, interest, or right is legal * * * its exercise depends upon the adequacy of the legal remedies,—a party being left to his affirmative

or defensive remedy at law, where full and complete justice can thereby be done."

The district court should not have dismissed the first cause of action but under the circumstances of this case it should have retained the cause of action of appellant for the recovery of money only for trial and determination as any other law action. Buck v. Village of Davenport, *supra;* Gillespie v. Hynes, *supra.*

The second cause of action of the second amended petition alleged in substance the following: The corporate status of appellee and that it was licensed by the state August 12, 1941, to conduct transactions as provided by and subject to the industrial loan and investment laws of the State of Nebraska. Appellant on August 2, 1955, executed and delivered to appellee a promissory note in the principal sum of $958.23 payable to its order in 18 monthly installments the last of which was due February 2, 1957. The interest charge on the loan represented by the note was in excess of the maximum prescribed by section 8-418, R. R. S. 1943. Demand was made on appellant, in a judicial proceeding later described, for interest in excess of the rates allowed by law. The payment of the note was secured by a chattel mortgage executed and delivered to appellee on the date of the note in which there was described the following property: One 1949 Ford Custom Tudor, serial #98BA 324 551, certificate of title #2-342176; one Yellow jacket 14 ft. Runabout Capri motor boat; one Evenrude boat motor #25012-41970; and one Mercury boat motor #532616 Q Model KG 7. The note was void because it was made in payment of a prior note which was also void and uncollectible, the new note included charges on the prior note accruing more than 60 days previously, and the principal amount of the note was more than the amount credited to appellant which was the sum of $915.88. Appellee made demand on appellant on or about November 1, 1955, for the payment of the note in the sum of $1,079.61. Appellee was indebt-

ed to appellant on account of illegal collections of money alleged in the first cause of action in the second amended petition in an amount greater than the amount of the loan which is the subject matter of the second cause of action. The note of August 2, 1955, is void and appellee is by law prohibited from collecting any principal, interest, or other charges thereon. Appellee has instituted a proceeding in replevin in the district court for Lancaster County, Nebraska, against appellant, docketed as 195-189, for the purpose of securing possession of the personal property described in the second cause of action and to enable appellee to foreclose the mortgage securing the payment of the note of August 2, 1955, and apply the proceeds of the security to the payment of the note. The writ of replevin was executed by the officer to whom it was directed. The prayer of the petition in the replevin action against appellant described above was for $1,079.61, more than the amount of the note of $958.23, and the amount demanded in the replevin petition is based on a computation of interest for the full period of the loan evidenced by the note, that is, for 18 months, in violation of law.

Appellee answered the second cause of action by an admission of its corporate status; that it was a licensee under the industrial loan and investment laws of the state; and that it had commenced a proceeding in replevin in the district court for Lancaster County, Nebraska, to secure possession of the personal property described in the chattel mortgage identified in the second cause of action of the second amended petition of appellant; a denial of all other allegations of the second cause of action; and a plea of another action pending in the district court for Lancaster County, docketed as 195-189, which was commenced by appellee against appellant long prior to the institution of the action involved in the pending appeal in this court. The replevin action involved all the issues presented in the second cause of action and they can and should be tried and

determined in the replevin case which is an adequate remedy at law.

The record shows that a replevin action was commenced in the district court for Lancaster County prior to and was pending therein at the time of the institution of the present case in which the pending appeal arose. The replevin case was commenced November 4, 1955, the writ of replevin was executed by the sheriff, and the property was taken and delivered to appellee that day. The case in which the pending appeal arose was instituted December 10, 1955. The parties to the two cases are identical. The validity of the note of August 2, 1955, was put in issue by the second cause of action and is the issue in the replevin case. A single transaction between the parties is the basis of the replevin case and of the second cause of action. The replevin case was an adequate remedy for trial and determination of the issues and a final adjudication therein would be a bar to the prosecution of the second cause of action and any judgment thereon. See American Loan Plan v. Frazell, 135 Neb. 718, 283 N. W. 836.

Appellee pleaded the fact of another action pending in its answer to the second cause of action in the present case. It reiterated the objection in a motion when the appellant completed his case-in-chief. The trial court found that the replevin action was pending when the second action was commenced, that the former involved the same subject matter as the second cause of action in the second case, and that the second cause of action should be abated and dismissed. A judgment of dismissal thereof was rendered.

In State ex rel. Chicago, B. & Q. R. R. Co. v. North Lincoln St. Ry. Co., 34 Neb. 634, 52 N. W. 369, it is said: "The pendency of a former suit between the same parties may be shown in abatement when a judgment in such suit would be a bar to a judgment in the second action." The opinion states: "It may be safely stated that, as a general rule, the pendency of a former action between

the same parties may be shown in abatement, where a judgment in such suit would be a bar to a judgment in the second suit brought in another court of concurrent jurisdiction. That one is an equitable action and the other a suit at law is immaterial, so long as both suits are based upon substantially the same facts." See, also, Spencer v. Johnston, 58 Neb. 44, 78 N. W. 482; Cahoon v. First Nat. Bank, 112 Neb. 462, 199 N. W. 830; Ashton v. Blue River Power Co., 117 Neb. 661, 222 N. W. 42.

The judgment abating the second cause of action herein should be and it is affirmed.

The judgment rendered on the first cause of action herein should be and it is reversed and the cause is remanded with directions to the district court for Lancaster County to try and determine it as an action at law.

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

FRANKLIN ARTHUR WRIGHT, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.
100 N. W. 2d 51

Filed December 24, 1959. No. 34636.

1. **Homicide.** A purpose to kill and malice are essential elements of murder in the second degree and in a prosecution therefor each must be established beyond a reasonable doubt.
2. ———. If the circumstances attending the homicide are in evidence by a witness or witnesses thereto, there is no presumption of malice from the fact of the homicide.
3. **Criminal Law: Trial.** This court may not in a case of the character of the present one resolve conflicts in or weigh the evidence or pass upon the credibility of witnesses.
4. ———: ———. It is implicit in a verdict of guilty in such a case that the jury decided all controverted questions of fact unfavorably to the accused and this court will not disturb the verdict if based on evidence unless as a matter of law it is insufficient to support a finding of guilty beyond a reasonable doubt.
5. **Homicide.** Language alone, though excessively abusive and in-

decent, is no justification for the doing of violence to the person of another.

6. **Witnesses.** The credibility of witnesses and the weight of the evidence are for the jury to determine in a criminal case and the verdict of the jury may not be disturbed by this court unless it is clearly wrong.
7. **Trial.** Instructions should be considered together in order that they may be properly understood; and if the entire charge properly submits the issues to the jury, the verdict will not be set aside.

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

John N. Baldwin and *Thomas P. Lott*, for plaintiff in error.

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

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

BOSLAUGH, J.

The plaintiff in error, referred to herein as the accused, was charged with and convicted of the crime of murder in the second degree. He was adjudged to be confined in the Nebraska State Penitentiary for a definite term. He prosecutes error to review the record of his conviction.

The record establishes that the accused in his place of business, the Pastime Cafe at 604 North Sixteenth Street in the city of Omaha, Douglas County, Nebraska, at about 11 o'clock on the evening of January 20, 1958, stabbed Robert Lattery, hereafter described as Lattery, in the abdomen with a knife from which injury he died a few hours thereafter. An eyewitness to the affair testified that the accused, holding a knife in front of him, approached Lattery and struck him in the stomach with the knife. A second eyewitness said on the trial that he saw the accused with a knife in his hand come to the center of the building where Lattery was, they

met, there was a considerable noise, and Lattery walked towards the outside of the place of business in a bent-over position. The accused was interrogated by a city detective about 30 minutes after the assault on Lattery and the accused then admitted he had stabbed Lattery. The detective testified that the accused told him that he picked up a knife from a vegetable table or salad board, met Lattery halfway, and when he reached out and put a hand on the shoulder of accused he stabbed Lattery in the stomach. The accused in a statement made by him and taken by a court reporter about 2 hours after the tragedy said he had a small paring knife used in his business in his hand when he went to meet Lattery in the place of business of the accused that night. Lattery was coming toward the accused and as they converged upon one another the accused struck Lattery in the stomach with the knife. In the cross-examination of the accused at the trial he fixed the time when he told Lattery to leave the Pastime Cafe as before the time the accused stabbed Lattery with a knife.

A policeman of the city saw Lattery about 11:15 p. m. that night as he came stumbling outward through the door of the Pastime Bar which was adjacent to but separate from the Pastime Cafe. He told the policeman that he had been stabbed and then fell unconscious on the cement. He was taken by ambulance to the County Hospital. He died there at 2:35 a. m., January 21, 1958. The undisputed evidence is that the cause of his death was hemorrhagic shock produced by acute loss of blood resulting from the penetrating wound of the abdomen inflicted upon him.

It is definite that the accused purposely assaulted and wounded Lattery at the time and place above stated and that the injury inflicted on him was the cause of his death. However, the accused argues that malice was an essential element of the crime charged; that the burden was on the State to prove its existence beyond a reasonable doubt; that the evidence was not sufficient to

sustain a finding of malice; and that it was reversible error for the trial court to submit to the jury the charge of second-degree murder.

The prosecution was based upon section 28-402, R. R. S. 1943, which in part declares: "Whoever shall purposely and maliciously, but without deliberation and premeditation, kill another, every such person shall be deemed guilty of murder in the second degree * * *." Malice is thereby made an essential element of the crime charged. Vanderheiden v. State, 156 Neb. 735, 57 N. W. 2d 761. If the circumstances attending the homicide are in evidence by a witness or witnesses thereto, there is no presumption of malice from the fact of the killing. Tvrz v. State, 154 Neb. 641, 48 N. W. 2d 761; Woodard v. State, 159 Neb. 603, 68 N. W. 2d 166. The facts of the tragedy in this instance were explored and presented by examination at the trial of persons who were present and witnessed it. Therefore it must be shown by evidence beyond a reasonable doubt that the wrongful act attributed to the accused was maliciously done. Childs v. State, 120 Neb. 310, 232 N. W. 575.

This court may not in a case of this character decide conflicts in or weigh the evidence or pass on the credibility of witnesses. Hertz v. State, 160 Neb. 640, 71 N. W. 2d 113. It is implicit in a verdict of guilty in such a case that the jury resolved all controverted questions of fact unfavorably to the accused and this court will not disturb such a verdict, based on evidence, unless as a matter of law it is insufficient to support a finding of guilty beyond a reasonable doubt. Hertz v. State, *supra*. In a case of the character of the present one the unlawful killing is the principal fact but the condition of the mind or the attendant circumstances determine the class of the crime as second-degree murder or manslaughter. If the evidence in reference thereto is such that various inferences may properly be deduced therefrom as to the degree of the crime, the trial court must submit the different degrees to the jury to determine

which inference shall prevail. Vanderheiden v. State, *supra*. The trial court in this case by instructions, the correctness of which has not been contested, submitted both second-degree murder and manslaughter to the jury and it determined that the crime committed by the accused was murder in the second degree. The problem because of the challenge tendered by the accused is whether the wrongful act which caused the death of Lattery was maliciously done or, stated differently, was the accused actuated by a desire and purpose to kill the deceased unlawfully. Lucas v. State, 78 Neb. 454; 111 N. W. 145.

The record contains evidence of this character: A customer sitting at the counter near the front of the cafe the evening of the occurrence, the subject of this controversy, stated there were two ladies waiting near the cash register obviously to pay their bills for service they had in the cafe. A man, later identified as Lattery, was sitting on a stool next to the witness. Lattery addressed the persons operating the cafe in substance that they should take care of and wait on their trade. Accused approached Lattery from back of the counter and said that they would take care of that as rapidly as they could and that he was not needed to run the business. Lattery stood up and said to the accused: " 'You are going to give me a bad time,' " and he started towards accused who backed away towards the back part of the room. It was said by another witness who, as a customer, was near the back part of the cafe and had given his order that evening, that he thought he heard in the front of the cafe scuffling, profanity, and argument as though there was going to be a fight. The persons involved were the accused and Lattery. The former was behind the counter and the latter was in front of it. There was much loud talking and profanity and it seemed that each of the two men had threatened the life of the other. They both got in front of the counter. Lattery was the larger man and he grabbed the ac-

cused by the collar. Accused left and went to the back part of the building. It looked like he was being run out of his own place of business. Lattery was near the center of the room mumbling to himself and he said: " 'Why don't you call the Law?' " The witness saw accused go towards the front of the cafe with a knife in his hand. He met Lattery near the center of the building and Lattery walked away from the accused limping or bent over. He was later assisted from the building. It was said by a witness who was also a customer in the cafe at about 11 p. m. that night that he heard loud talking up front. He saw Lattery and accused across the counter from each other. He heard Lattery ask the accused: " 'Why don't you do something about it?' " The accused said: " 'Well, I think I will.' " Accused left and went to the rear of the building, got a knife, and started toward Lattery who then said: " 'You don't need to call the Police. * * * I will get out.' " The accused with the knife in front of him went to Lattery and struck him in the stomach with the knife. He folded forward, put his hands in front of him, and said: " 'You didn't need to do that.' " The accused walked toward, to, and struck Lattery. He was doing nothing but just standing near the center of the room. An employee of the cafe and the accused turned Lattery around, opened the front door, and pushed him outside. They closed the door and the accused said: " 'Well, I guess I fixed him.' " The witness said he did not see Lattery at any time make any threatening motions or moves toward the accused. The accused told a police officer that he did not think his personal safety was in jeopardy at the time the accused stabbed Lattery but the accused said the reason he did was because he was angry at the foul language applied to him. The accused told the police officer that Lattery did not at any time strike or attempt to strike the accused. In the statement taken by the court reporter soon after the tragedy occurred the accused said that when Lattery

started out (meaning out of the cafe when accused went for the knife), that was when accused made his mistake: "I should have just kept going on the other way."

The accused gave Lattery no aid after he was fatally injured. Accused returned from ejecting his victim into the street in the night in his seriously disabled condition with the words of triumph: " 'Well, I guess I fixed him,' " and he immediately went to his bed for a night of rest. That is where the police found him.

The presence of Lattery in the cafe was not as a customer. He sought no service there. His purpose apparently was that of a disturber and a tormentor. There is some proof that he was brazenly insulting and was a foul defamer by the employment of profane and indecent language accompanied by threats of violence. However, language alone, though extremely abusive or indecent, is no justification for doing violence to the person of another. Braunie v. State, 105 Neb. 355, 180 N. W. 567, 12 A. L. R. 658; 26 Am. Jur., Homicide, § 29, p. 175. Lattery had no weapon or object that could have done anyone harm. He attempted no actual violence. There was not the slightest basis for a claim of self-defense by accused as a justification for his having mortally wounded Lattery. It is true that the evidence is somewhat conflicting but the credibility of the witnesses and the weight of the evidence were for the jury to determine and this court may not intervene to disturb the conclusion of the jury unless it is clearly wrong. Griffith v. State, 157 Neb. 448, 59 N. W. 2d 701. It may not be said that the verdict of the jury was clearly wrong in this case. The court was correct in submitting to the jury the issue of whether or not the accused was guilty of second-degree murder and the evidence sustains the verdict.

The accused asserts that the trial court prejudiced the jury against him by an instruction which was to the effect that there had been evidence that Lattery used vile and foul language directed toward the ac-

cused immediately before the stabbing; and that even though the jury should find that such language was used and that it angered and provoked the accused, the use of the language would not justify accused in committing an unlawful act toward Lattery. The instruction also said: "If you find that said language provoked or angered Defendant to the extent that Defendant committed an unlawful act directed towards ROBERT LATTERY * * * and that same resulted in the death of ROBERT LATTERY, * * * then you should find the Defendant guilty provided the State has proven said facts by evidence beyond a reasonable doubt." The specific objection of accused to the instruction is that thereby the trial court told the jury that even though the stabbing occurred in a sudden quarrel provoked by vile and foul language of Lattery, it should find the accused guilty of second-degree murder. Such is not a correct interpretation of the instruction. The words "second-degree murder" are not contained in the instruction. The instruction did not say the jury could convict accused because of the bad language of Lattery but that it could do so notwithstanding it if the essential facts delineated were proved by evidence beyond a reasonable doubt. The trial court by appropriate instruction assigned to the jury the duty of deciding whether accused was guilty of second-degree murder or manslaughter or neither. The instruction complained of is understandable when it is considered with the other parts of the charge to the jury. It advised the jury that the use of vile and foul language by Lattery in reference to the accused did not justify him in committing an unlawful act toward Lattery; and that if such language caused the accused to commit an unlawful act toward Lattery which resulted in his death, then the jury should find the accused guilty (of either second-degree murder or manslaughter), providing the State had proven said facts by evidence beyond a reasonable doubt. Instructions should be considered together in

order that they may be properly understood; and when as an entire charge they properly submit the issues to the jury, the verdict will not be set aside. Bezdek v. Patrick, 164 Neb. 398, 82 N. W. 2d 583. The complaint of accused in this respect is not well taken.

The judgment and sentence should be and they are affirmed.

AFFIRMED.

ROGER L. ROBB ET AL., APPELLEES, V. CENTRAL CREDIT CORPORATION, A CORPORATION, ET AL., APPELLANTS.
100 N. W. 2d 57

Filed December 24, 1959. No. 34653.

1. **Usury.** An automobile dealer may in good faith sell a car on time for a price in excess of the cash price without tainting the transaction with usury, though the difference in prices may exceed lawful interest for a loan.
2. ———. However, in order to have the foregoing principle apply it must appear that the buyer actually was informed of and had the opportunity to choose between a time sale price and a cash sale price.
3. ———. A loan coming within the provisions of the Installment Loan Act, when section 45-138, R. S. Supp., 1955, was in effect, which was not secured by a bona fide duly recorded mortgage on real estate owned by the borrower and by the terms of which the payment of principal was extended beyond a period of 21 months from the making thereof was in violation of said section and therefore void.
4. ———. The effect of such violation is to make such contract void and uncollectible and a lender should have nothing in such a situation, and the lender, or those to whom any payments have been made thereunder, must return the payments received.
5. **Trial: Appeal and Error.** It is error to refuse a request for a jury trial in an action at law, but where the one making the request has no substantial cause of action or defense, and the judgment of the trial court is the only one which could have been rendered in the case, such refusal is error without prejudice, for which the judgment will not be reversed.
6. **Money Lenders: Usury.** The design of the Installment Loan Act is to license and control the business of making installment

loans and to restrict the enforcement or collection of illegal loans once they have been made.

APPEAL from the district court for Lancaster County: PAUL W. WHITE, JUDGE. *Affirmed.*

Marti, O'Gara, Dalton & Sheldon, Bernard L. Packett, and *Robert P. Miller,* for appellants.

Ewald D. Warnsholz, for appellees.

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

WENKE, J.

This is an appeal from the district court for Lancaster County. It involves an action brought by Roger L. Robb and Ardys L. Robb against Central Credit Corporation, A. C. Nelsen Company of Lincoln, A. C. Nelsen Auto Sales, Inc., and First National Bank of Omaha. The purpose of the action is to have declared null and void a certain note dated February 8, 1956, given by the plaintiffs to defendant A. C. Nelsen Company of Lincoln in the sum of $1,656.29 in connection with the purchase of an automobile because, it is claimed, it represents a loan and its terms violate certain provisions of the Nebraska Installment Loan Act. Plaintiffs also seek to recover from the defendants all of the money they paid to them under and pursuant to the provisions thereof.

The trial court found generally for the plaintiffs and granted them the relief they had prayed for, holding the note to be void and uncollectible and rendering a judgment against the defendants, or some of them, for all the money plaintiffs had paid to them under and pursuant to the note held void. Defendants filed a motion for new trial, which was overruled, and they have perfected this appeal therefrom.

Appellees are husband and wife, having been married on September 10, 1955. At all times herein material

appellee Roger L. Robb was a student in the University of Nebraska from which he was graduated on August 2, 1957. They lived in Lincoln until shortly after his graduation when they moved to Mountain View, California, where they apparently now reside.

Appellant Central Credit Corporation is a Nebraska corporation with its place of business located at 2112 Harney Street in Omaha, Nebraska. At all times herein material it was licensed by the State of Nebraska to engage in the installment loan business. We shall herein refer to it as Central Credit. Appellant A. C. Nelsen Auto Sales, Inc., is a Nebraska corporation engaged in the business of selling automobiles with its place of business located at 2112 Harney Street in Omaha, Nebraska. We shall herein refer to it as Nelsens of Omaha. Appellant A. C. Nelsen Company of Lincoln is a Nebraska corporation engaged in the business of selling automobiles with its place of business located at 245 O Street in Lincoln, Nebraska. We shall herein refer to it as Nelsens of Lincoln. Appellant First National Bank of Omaha is a bank existing under the laws of the United States and is engaged in general banking with its place of business located at Sixteenth and Farnam Streets in the City of Omaha. We shall herein refer to it as the bank.

Nelsens of Lincoln, Nelsens of Omaha, and Central Credit are corporations which, for all practical purposes, have the same officers and stockholders and are managed by these officers. A. C. Nelsen was, at all times herein material, the president of all three and the principal stockholder therein. Joseph J. Sharp, to whom we shall refer as Sharp, was, during that time, vice president of all three and although employed by Nelsen of Omaha in its Omaha office as credit manager he had authority to bind not only Nelsens of Omaha but Nelsens of Lincoln and Central Credit in the sale and financing of such sales.

The burden of proof to show the nature of the trans-

action out of which the note in suit had its origin was on the appellees, since they claim the note given by them on February 8, 1956, to Nelsens of Lincoln was a loan and not a time sale. See, State ex rel. Beck v. Associates Discount Corp., 168 Neb. 298, 96 N. W. 2d 55; McNish v. General Credit Corp., 164 Neb. 526, 83 N. W. 2d 1; Kucaba v. Kucaba, 146 Neb. 116, 18 N. W. 2d 645.

There is really no dispute as to just how the transaction herein involved was handled. On September 11, 1955, appellees had purchased from Nelsens of Lincoln a 1950 Safeway housetrailer and, at that time, executed to it a note in the sum of $1,186.20 in payment thereof and a chattel mortgage on the trailer as security therefor. This note was payable in 30 installments of $39.54 each, the first being due on October 11, 1955. Before February 8, 1956, four installments had been paid on this note, leaving a balance owing thereon on that date of $1,028.04.

On February 8, 1956, Mel A. Bullock, a salesman employed by Nelsens of Omaha but working for Nelsens of Lincoln, contacted the appellees and took them to Omaha. There appellees purchased a 1949 Mercury from the display floor of Nelsens of Omaha for a consideration of $525, trading in a 1940 Buick on the deal. They were allowed a tradein value of $75 for the Buick, thus leaving a balance of $450 owing on the purchase price of the Mercury. Appellees had previously advised Bullock they would have to finance any balance owing if they purchased a car as they could not pay cash but would need time in which to pay for it. And, in this respect, they had also advised him they would like to combine such loan, if possible, with the balance owing on the indebtedness they had on the trailer. Bullock assured them that could be done.

After the deal had been made Bullock introduced the appellees to Sharp and advised Sharp of the arrangements. Sharp then took appellees into his office and

arranged a loan to cover both obligations, being familiar with the obligation owing on the housetrailer. Sharp advised appellees there would be an insurance premium of $62 and a finance charge of $116.25 in connection with the loan and that the loan would be payable in installments, the first being in the sum of $39.54 and the balance would be payable in 25 installments of $64.67 each, or a total of $1,656.29 to cover the following items: Balance owing on purchase of 1949 Mercury, $450; balance owing on indebtedness to Nelsens of Lincoln on the housetrailer, $1,028.04; insurance premium, $62; and finance charges, $116.25. These are all shown on the purchase agreement prepared by Sharp, executed by appellees at that time, and witnessed by Bullock and pursuant to which the note herein involved was prepared by Sharp and executed by appellees along with a chattel mortgage on both the car and housetrailer. The chattel mortgage was given as security for the note.

"An automobile dealer may in good faith sell a car on time for a price in excess of the cash price without tainting the transaction with usury, though the difference in prices may exceed lawful interest for a loan." State ex rel. Beck v. Associates Discount Corp., 168 Neb. 298, 96 N. W. 2d 55. See, also, Curtis v. Securities Acceptance Corp., 166 Neb. 815, 91 N. W. 2d 19; Nelson v. General Credit Corp., 166 Neb. 770, 90 N. W. 2d 799; McNish v. General Credit Corp., *supra;* State ex rel. Beck v. Associates Discount Corp., 162 Neb. 683, 77 N. W. 2d 215.

However, "In order to have the foregoing principle apply it must appear that the buyer actually was informed of and had the opportunity to choose between a time sale price and a cash sale price." State ex rel. Beck v. Associates Discount Corp., 168 Neb. 298, 96 N. W. 2d 55. See, also, Curtis v. Securities Acceptance Corp., *supra;* Nelson v. General Credit Corp., *supra;* McNish v. General Credit Corp., *supra.*

It is not a time sale if a car dealer, in selling a car, actually agrees with the buyer that he will finance the balance of the cash purchase price agreed upon, and does so, even though at the time he informs the buyer of the amount he will be required to pay and the terms thereof. Such a transaction would be a loan to finance the balance of the cash purchase price and, if payable in installments, must meet the requirements of the statutes relating thereto. And the fact that the buyer knew the terms and provisions of such loan at the time it was made and voluntarily entered into it would not have the effect of waiving the illegality of any provision thereof, if such provision was actually in violation of any of the inhibitory provisions of the installment loan statute. See State ex rel. Beck v. Associates Discount Corp., 168 Neb. 298, 96 N. W. 2d 55.

"The installment loan statutes include all persons or parties violating any of the inhibitory provisions thereof whether they be licensees or nonlicensees." State ex rel. Beck v. Associates Discount Corp., 168 Neb. 298, 96 N. W. 2d 55. See, also, Curtis v. Securities Acceptance Corp., *supra;* Nelson v. General Credit Corp., *supra;* McNish v. General Credit Corp., *supra;* State ex rel. Beck v. Associates Discount Corp., 162 Neb. 683, 77 N. W. 2d 215.

There is no question of fact as to the note herein involved being an installment loan to finance the balance owing on the purchase price of the car purchased by appellees on February 8, 1956, and to cover the balance owing on appellees' loan to Nelsens of Lincoln, which had been assigned by it to Nelsens of Omaha. This fact is corroborated by a letter from Nelsens of Omaha to appellee Roger L. Robb, dated December 27, 1956, advising it had sold appellees' contract to the bank but advising him: *"We will continue to finance and make loans,* and will look forward to selling you another car, truck, or housetrailer, *and financing it for you."* (Emphasis ours.) This letter was signed by A. C. Nelsen

whose relationship to Central Credit, Nelsens of Omaha, and Nelsens of Lincoln has been hereinbefore set forth.

Section 45-138, R. S. Supp., 1955, here applicable, provides, insofar as here material, that: "No licensee shall enter into any contract of loan under sections 45-114 to 45-155, under which the borrower agrees to make any payment of principal more than twenty-one calendar months from the date of making such contract, if such contract is not secured by a bona fide duly recorded mortgage on real estate owned by the borrower, * * *."

It is self-evident that the installment loan herein involved provides for installment payments beyond 21 months from the making thereof. In A-1 Finance Co., Inc. v. Nelson, 165 Neb. 296, 85 N. W. 2d 687, we said: "A loan made by a licensee under the installment loan law which is not secured by a real estate mortgage and is not due or payable within the period of 21 months as provided for in section 45-138, R. R. S. 1943, is violative of said section and void." See, also, State ex rel. Beck v. Associates Discount Corp., 168 Neb. 298, 96 N. W. 2d 55; State ex rel. Beck v. Associates Discount Corp., 162 Neb. 683, 77 N. W. 2d 215.

But appellants contend that appellees failed to prove that the indebtedness was not secured by a bona fide duly recorded mortgage on real estate owned by them. It is true the appellees were never asked directly if such was the situation. However, the evidence does establish that Sharp drew up all the papers executed in connection with the sale and loan, which appear to be the purchase agreement, note, and chattel mortgage given to secure the note. We think the purchase agreement fully reflects the arrangements made by the parties. It provides, in addition to the 1949 Mercury, that the only "Additional Security" will be a "1950 Safeway Housetrailer." No mention is therein made of any real estate being given as additional security. The agreement goes on to recite: "The above order consti-

tutes the entire terms and agreement between us in reference to the above vehicle." The chattel mortgage given responds to the items of the purchase agreement. We find the record fully establishes the obligation here in question was not secured by a bona fide duly recorded mortgage on real estate owned by the appellees.

The effect of such violation is to make such contract void and uncollectible and a lender should have nothing in such a situation, State ex rel. Beck v. Associates Discount Corp., 168 Neb. 298, 96 N. W. 2d 55; A-1 Finance Co., Inc. v. Nelson, *supra;* Nelson v. General Credit Corp., *supra;* and the lender, or those to whom any payments have been made thereunder, must return the payments received. State ex rel. Beck v. Associates Discount Corp., 168 Neb. 298, 96 N. W. 2d 55; McNish v. General Credit Corp., *supra.*

Appellees paid to Nelsens of Lincoln the first 11 installments due under the terms of the note, being $39.54 for February 1956, and $64.67 for each of the months of March through December of 1956, or a total of $686.24. It is for this amount, plus interest, that the trial court, on January 13, 1959, rendered a judgment against Central Credit, Nelsens of Omaha, and Nelsens of Lincoln. Judgment was for $788.31.

On December 24, 1956, Nelsens of Omaha, the note having been assigned to them by Nelsens of Lincoln, sold and assigned to the bank the balance of the note for the sum of $920.88, there being at that time a total of 15 future installments unpaid having a face value of $970.05. Appellees paid each of the installments of $64.67 due in January, February, and March of 1957, to the bank and then, after this suit had been started on April 13, 1957, paid the bank the sum of $783.92, being the balance due on the note as computed by the bank. It was for these payments to the bank, and interest thereon at 6%, that the trial court, on January 13, 1959, rendered its judgment against Central Credit, Nelsens of Omaha, Nelsens of Lincoln, and the Bank.

The amount of the judgment rendered was for $1,068.34.

It appears from the record that shortly before appellee Robert L. Robb was graduated, which was on August 2, 1957, that he sold the housetrailer and in order to give a clear title thereto he paid off the bank, whereupon Nelsens of Lincoln gave him title to both the car and housetrailer.

Looking through form to substance, as we should do in cases of this character (see State ex rel. Beck v. Associates Discount Corp., 168 Neb. 298, 96 N. W. 2d 55; Curtis v. Securities Acceptance Corp., *supra;* Nelson v. General Credit Corp., *supra;* State ex rel. Beck v. Associates Discount Corp., 162 Neb. 683, 77 N. W. 2d 215), we find Nelsens of Lincoln, Nelsens of Omaha, and Central Credit to be three corporations owned by the same persons, having the same principal offices, and managed by officers having authority to deal for all of them for the one common purpose of selling and financing the sale of cars, trucks, and trailers. As, for example, when the housetrailer was sold by Nelsens of Lincoln the paper was assigned to Nelsens of Omaha and the collection thereof supervised and handled through Central Credit although the installment payments were made to Nelsens of Lincoln. Then, when the 1949 Mercury was sold, although the title thereto was in Nelsens of Omaha, the paper therefor was taken in the name of Nelsens of Lincoln and the title thereto transferred by Nelsens of Omaha to Nelsens of Lincoln. Apparently the note was immediately transferred to Nelsens of Omaha and payments, although made to Nelsens of Lincoln, were immediately transferred to Nelsens of Omaha to be credited to appellees' account on the books of Nelsen of Omaha under the supervision of Central Credit. In view of the foregoing, we think the trial court was correct in holding all three of these appellants liable for all payments made by appellees as they were all directly interested in the subject matter thereof.

Appellants contend the trial court erred when it refused to grant their motion for a jury trial, stating: "It was our contention at the time the motion was made, as it is now, that plaintiffs' amended petition did not set forth facts upon which the court could exercise its equitable powers; and therefore plaintiffs' only cause of action was for the recovery of money." They go on to state that: "After plaintiffs made the July 30 payment it was no longer necessary or possible for the trial court to exercise its equitable powers because upon receiving the payment from the plaintiffs the bank cancelled the note and chattel mortgage, released the liens on the certificates of title to the automobile and trailer house, and returned these instruments to the plaintiffs * * *. The allegations of plaintiffs' amended petition alone clearly show that there was no equitable relief to be granted. In fact, the only equitable relief which plaintiffs prayed for was an order declaring the promissory note to be void and uncollectible and at the same time the allegations of their petition clearly showed that the note had been paid in full and failed to show that any demand was being made thereon which required or justified equitable relief." However, we need not answer the question raised. Here the facts are not in dispute and the effect thereof is a matter of law. In view of that fact, the following principle is applicable and controlling: "It is error to refuse a request for a jury trial in an action at law, but where the one making the request has no substantial cause of action or defense, and the judgment of the trial court is the only one which could have been rendered in the case, such refusal is error without prejudice, for which the judgment will not be reversed." Worrall Grain Co. v. Johnson, 83 Neb. 349, 119 N. W. 668.

This action, to have the entire obligation declared void and uncollectible, was commenced by appellees on April 13, 1957. As to the payment made by appellees to the bank subsequent thereto on July 30, 1957, in the

sum of $783.92 the appellants say that: "A payment of money, on claim of right thereto by the person to whom made, and with knowledge of all the facts, constitutes in law a voluntary payment and is not subject to recovery." Appellees contend the payment was not voluntarily made because, at the time it was made, appellee Robert L. Robb was about to be graduated and, having accepted employment in Mountain View, California, it was necessary for him to dispose of his house-trailer; that he could not sell it subject to the lien; and that, in order to give the purchaser a clear title, he had no other alternative than to pay the bank the balance owing so the lien would be released and he could get a good title thereto.

The principle on which appellants rely is stated in Meyer v. Rosenblatt & Son, 119 Neb. 471, 229 N. W. 771, as follows: "Where one has voluntarily, with full knowledge of the facts, paid a disputed demand, which he claimed he did not owe, he cannot ordinarily recover it back on the ground of its invalidity." See, also, Malec v. ASCAP, 146 Neb. 358, 19 N. W. 2d 540; Weber v. Kirkendall, 39 Neb. 193, 57 N. W. 1026, on rehearing, 44 Neb. 766, 63 N. W. 35; Baldwin v. Foss, 71 Iowa 389, 32 N. W. 389; American Surety Co. v. Steen, 86 Okl. 252, 208 P. 212.

In Powell v. Edwards, 162 Neb. 11, 75 N. W. 2d 122, we said: "The design of this law is to license and control the business of making installment loans and to restrict the enforcement of collection of illegal loans once they have been made." It not only provides that a loan made in violation thereof shall be void and uncollectible, but further provides that the lender is not entitled to receive any principal, interest, or charges on such loan. See State ex rel. Beck v. Associates Discount Corp., 168 Neb. 298, 96 N. W. 2d 55. In view thereof the lender must return all payments which he has received on such void loan. See McNish v. General Credit Corp., *supra*. Such legislation is within the pub-

lic policy making power of the state. See, State ex rel. Beck v. Associates Discount Corp., 168 Neb. 298, 96 N. W. 2d 55; McNish v. General Credit Corp., *supra;* Althaus v. State, 99 Neb. 465, 156 N. W. 1038. All such borrowers are regarded not as in pari delicto but as in vinculus to the lenders to whom they owe no duty in equity. See, State ex rel. Beck v. Associates Discount Corp., 168 Neb. 298, 96 N. W. 2d 55; Curtis v. Securities Acceptance Corp., *supra;* McNish v. General Credit Corp., *supra;* State ex rel. Beck v. Associates Discount Corp., 162 Neb. 683, 77 N. W. 2d 215. As stated in Seebold v. Eustermann, 216 Minn. 566, 13 N. W. 2d 739, 152 A. L. R. 585, by quoting from Lukens v. Hazlett, 37 Minn. 441, 35 N. W. 265: "The borrower is not particeps criminis with the lender, whatever his knowledge or intention may be. The lender alone is the violator of the law, and against him alone are its penalties enacted."

As stated in Chakford v. Sturm (Fla.), 65 So. 2d 864: "Under a statute providing that usurious interest shall be forfeited, a mortgagor 'does not waive his right to recover usurious payments by paying the mortgage debt, including usury, without protest.' "

We think here the principle contended for by appellants has no application because the legislative declaration of public policy applicable to installment loans, as determined by this court, provides, in case of any violation of the inhibitory provisions of the Installment Loan Act, that such loan shall be void, uncollectible, and the borrower is entitled to a refund of all money paid thereunder. To hold otherwise would be to defeat that purpose.

We think, as stated in Cuneo v. Bornstein, 269 Mass. 232, 168 N. E. 810, that: "The statute was passed as a protection to the borrower; it was intended to make the statute effective and to prevent its evasion by indorsing notes given for such loans to third parties. It would afford little protection to a borrower if the notes given contrary to the statute would be valid in the hands

of a holder in due course. In our opinion the word 'void' was used in its technical sense; the notes were void at their inception and of no validity in the hands of Glickman."

We have often said the violation of such inhibitory provisions in connection with any indebtedness, however acquired, renders such indebtedness void and uncollectible. See, Curtis v. Securities Acceptance Corp., *supra;* State ex rel. Beck v. Associates Discount Corp., 162 Neb. 683, 77 N. W. 2d 215; Powell v. Edwards, *supra.* We think this would be applicable to the bank or anyone who acquired the ownership of such indebtedness.

It is further contended by appellees that other requirements of the Installment Loan Act were not complied with by certain of the appellants in the handling of the loan herein involved. In view of our holding, as hereinbefore set forth, it is not necessary to discuss them. We have come to the conclusion that the lower court was correct and therefore affirm its judgment.

AFFIRMED.

WILLIAM HERSH, APPELLANT, V. MILDRED K. MILLER, APPELLEE.
99 N. W. 2d 878

Filed December 24, 1959. No. 34716.

1. **Pleading.** A general demurrer admits all allegations of fact in the pleading to which it is addressed which are issuable, relevant, material, and well pleaded; but does not admit the pleader's conclusions of law or fact.
2. **Negligence.** The violation of any statutory or valid municipal regulation, established for the purpose of protecting persons or property from injury, is sufficient to prove such a breach of duty as will sustain a private action for negligence, if the other elements of actionable negligence occur.
3. ———. Such a violation is evidence of negligence which the jury is entitled to consider upon the question whether actionable negligence exists.
4. ———. Negligence consisting in whole or in part of the viola-

tion of statutes or ordinances, like other negligence, is without legal consequence unless it is a contributing cause of the injury for which recovery is sought.

5. ———. Proximate cause, as used in the law of negligence, is that cause which in a natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the accident could not have happened.

6. ———. A party is only answerable for the natural, probable, reasonable, and proximate consequences of his acts; and where some new efficient cause intervenes, not set in motion by him, and not connected with but independent of his acts and not flowing therefrom, and not reasonable in the nature of things to be contemplated or foreseen by him, and produces the injury, it is the dominant cause.

7. ———. An efficient, intervening cause is a new and independent force which breaks the causal connection between the original wrong and the injury.

8. ———. The causal connection is broken if between the defendant's negligent act and the plaintiff's injury there has intervened the negligence of a third person who had full control of the situation and whose negligence was such as the defendant was not bound to anticipate and could not be said to have contemplated, which later negligence resulted directly in the injury to the plaintiff.

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

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

Gross, Welch, Vinardi & Kauffman, for appellee.

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

WENKE, J.

This action was commenced in the district court for Douglas County by William M. Hersh against Mildred K. Miller. Defendant's demurrer to plaintiff's second amended petition was sustained by the trial court. Plaintiff elected to stand on his second amended petition, whereupon the case was dismissed. Plaintiff then

filed a motion for new trial and has taken this appeal from the overruling thereof.

The question presented by this appeal is, does appellant's second amended petition state a cause of action against the appellee? Insofar as here material, the appellant in his second amended petition, alleges:

"That plaintiff is and was on April 25, 1958 the owner of a 1953 Utility Semi-Trailer and a 1953 Diamond T. Tractor, which on April 25, 1958 was being driven east on U. S. Highway #6, also called the West Dodge Road, in Douglas County, Nebraska. * * * That on said date at about 1:00 P.M. defendant was in charge of a certain 1957 Chevrolet automobile, and left said automobile unlocked and unguarded in a public place in the City of Omaha near 5718 Military Avenue. One Donald Pecoraro, a minor then 12 years of age, got into said automobile, started it and drove it away, and shortly thereafter drove it south on 156th Street, into the intersection of 156th & Dodge Road and drove it into and against the side of plaintiff's truck in the intersection of 156th and West Dodge Road. As a result plaintiff's trailer was severely damaged and was disabled for the period of time necessary for repairs. * * * That on said date there was in force an Ordinance of the City of Omaha, entitled 'Traffic Code', Chapter 55 of the Omaha Municipal Code, which includes Article 7, 'Operation of Vehicles', and in said article 7 contains Section 30 which reads as follows: 55-7.30, UNLOCKED, UNATTENDED MOTOR VEHICLE. It shall be unlawful for any person to leave any motor vehicle standing on the streets or thoroughfares or other public places in the City of Omaha, without first having securely locked said vehicle, or without leaving some person in charge thereof: Provided, however, this Section shall not apply to delivery trucks or trucks of any other character whatsoever. * * * That said damage was directly and proximately caused by the negligence of the defendant in leaving the said automobile

standing in a public place in the City of Omaha without first having securely locked it, and without leaving some person in charge thereof, contrary to the ordinances of said City, and when she knew or should have known that to do so would endanger persons in the class to which plaintiff belonged and the property of such persons."

"A general demurrer admits all allegations of fact in the pleading to which it is addressed, which are issuable, relevant, material, and well pleaded; but does not admit the pleader's conclusions of law or fact." Babin v. County of Madison, 161 Neb. 536, 73 N. W. 2d 807.

It will be observed that appellant contends the appellee's violation of the ordinance was negligence and the proximate cause of the accident and damages flowing therefrom.

While the purpose of the ordinance is primarily for the protection of car owners themselves and as an aid in proper law enforcement against theft and pilferage, however, to a limited extent, it is also a safety measure intended to protect the users of the public streets and highways at large, of whom appellant was one. See, Hanley v. Fireproof Building Co., 107 Neb. 544, 186 N. W. 534, 24 A. L. R. 382; Fimple v. Archer Ballroom Co., 150 Neb. 681, 35 N. W. 2d 680. As stated in Frontier Steam Laundry Co. v. Connolly, 72 Neb. 767, 101 N. W. 995, 68 L. R. A. 425: "* * * in some cases their purpose is both for the welfare of the public at large and also for the protection of the personal and property rights of individuals. In such case the individual may adduce the failure to perform the duty enjoined as evidence of negligence."

"The violation of any statutory or valid municipal regulation, established for the purpose of protecting persons or property from injury, is sufficient to prove such a breach of duty as will sustain a private action for negligence, if the other elements of actionable negligence concur. * * * Such a violation is evidence of negli-

gence, which the jury is entitled to consider upon the question whether actionable negligence existed." Stark v. Turner, 154 Neb. 268, 47 N. W. 2d 569. In 51 A. L. R. 2d at page 636, under the annotation "Liability for damage or injury by stranger starting motor vehicle left parked on street," it is stated: "There is abundant authority to indicate that if a motor vehicle has been parked in a public street and left unlocked with the keys in the ignition switch, this is sufficient to support a finding of negligence on the part of the person who parked the car."

Negligence consisting in whole or in part of the violation of statutes or ordinances, like other negligence, is without legal consequence unless it is a contributing cause of the injury for which recovery is sought. See, Permenter v. Milner Chevrolet Co., 229 Miss. 385, 91 So. 2d 243; Sullivan v. Griffin, 318 Mass. 359, 61 N. E. 2d 330. As stated in Kiste v. Red Cab, Inc., 122 Ind. App. 587, 106 N. E. 2d 395, by quoting from Northern Ind. Transit, Inc. v. Burk, 228 Ind. 162, 89 N. E. 2d 905, 17 A. L. R. 2d 572: "A violation of the statutory duty must be also a proximate cause of the injury to constitute actionable negligence."

"Proximate cause, as used in the law of negligence, is that cause which in a natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the accident could not have happened." Kroeger v. Safranek, 161 Neb. 182, 72 N. W. 2d 831.

"A party is only answerable for the natural, probable, reasonable, and proximate consequences of his acts; and where some new efficient cause intervenes, not set in motion by him, and not connected with but independent of his acts and not flowing therefrom, and not reasonable in the nature of things to be contemplated or foreseen by him, and produced the injury, it is the dominant cause." Kroeger v. Safranek, *supra*.

"An efficient, intervening cause is a new and inde-

pendent force which breaks the causal connection between the original wrong and the injury." Coyle v. Stopak, 165 Neb. 594, 86 N. W. 2d 758.

"The causal connection is broken if between the defendant's negligent act and the plaintiff's injury there has intervened the negligence of a third person who had full control of the situation and whose negligence was such as the defendant was not bound to anticipate and could not be said to have contemplated, which later negligence resulted directly in the injury to the plaintiff." Coyle v. Stopak, *supra.*

We have never dealt squarely with a case, such as here, where a thief, or any other unauthorized person, takes a car parked in violation of an ordinance such as here presented. However, many courts have as is evidenced by the annotation contained in 51 A. L. R. 2d at page 633, under the subject "Liability for damage or injury by stranger starting motor vehicle left parked on street." The great majority thereof have come to the conclusion that no liability attaches. As stated in Galbraith v. Levin, 323 Mass. 255, 81 N. E. 2d 560: "* * * the conduct of the thief was an intervening cause which the defendants were not bound to anticipate and guard against." See, also, Corinti v. Wittkopp, 355 Mich. 170, 93 N. W. 2d 906; Kiste v. Red Cab, Inc., *supra;* Anderson v. Theisen, 231 Minn. 369, 43 N. W. 2d 272; Permenter v. Milner Chevrolet Co., *supra.* As stated in Permenter v. Milner Chevrolet Co., *supra,* by quoting from Midkiff v. Watkins (La. App.), 52 So. 2d 573: "Under the facts as related in this case, we are convinced that there was an intervening cause which broke the sequence of the defendant's alleged negligence, if any. To hold the defendants liable in this case would go far towards making them insurers as to the consequences of every accident in which their car might become involved while operated by thieves or their successors in possession." As stated in Corinti v. Wittkopp, *supra:* "Even where there was a statute or ordi-

nance prohibiting leaving the key in the ignition, most State courts have held that theft of an automobile left with key in ignition by the driver severed, as a matter of law, any possible causal relation between the violation of the ordinance or statute and the ultimate damage occasioned by the thief."

We think the reasons stated by the majority of the courts that have passed thereon that no liability attaches to the owner of a car parked in violation of such ordinance when taken by a thief, or other unauthorized person, who, while driving the same, has an accident therewith resulting in injury and damage to third persons, such as the appellant, are sound and should be followed. The same would be true in the absence of such an ordinance. See Kiste v. Red Cab, Inc., *supra*.

In view of the foregoing we find the action taken by the trial court to be correct and affirm its judgment of dismissal.

AFFIRMED.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1960

STATE OF NEBRASKA EX REL. HARRY SCHAUB, APPELLANT, V. CITY OF SCOTTSBLUFF, A MUNICIPAL CORPORATION, APPELLEE.

100 N. W. 2d 202

Filed January 8, 1960. No. 34619.

1. **Municipal Corporations.** A position is held upon the implied condition that the employee will diligently and faithfully perform the duties assigned to him, and where it appears that the employee refuses or neglects to perform the duties of his position for so long a period of time and under such circumstances as to reasonably warrant the presumption that he does not desire or intend to perform the duties of his position he will be held to have abandoned it.
2. ———. Such rule obtains, not only where his refusal to perform was willful, but also where, though not intending to vacate the position, he in good faith but mistakenly supposed he had no right to perform such duties.
3. ———. While abandonment of a position by an employee must be total and under such circumstances as to clearly indicate its absolute relinquishment, whether or not a position has been abandoned is dependent on his acts and conduct rather than his declared intention.
4. ———. The law will infer an abandonment where the acts and conduct of the employee indicate that he has completely relinquished the duties of his position.
5. **Election of Remedies.** One who has voluntarily chosen and carried into effect an appropriate legal remedy, with knowledge of the facts and of his rights, will not generally be permitted to afterwards resort to an inconsistent remedy, involving a con-

tradiction of the grounds upon which he previously proceeded.

6. ———. The rule under the doctrine of the election of remedies that one may pursue a second remedy after seeking a first remedy unsuccessfully applies only when both remedies are sought on a consistent state of facts.

APPEAL from the district court for Scotts Bluff County: RICHARD VAN STEENBERG, JUDGE. *Affirmed.*

Wright, Simmons & Harris, for appellant.

Loren G. Olsson, for appellee.

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

CARTER, J.

This is an action for a writ of mandamus to compel the city of Scottsbluff to restore Harry Schaub to his employment as a member of the fire department as of July 1, 1955, and to pay his salary as such from said date. The trial court denied the writ and relator appeals.

It is not disputed that the city at all times herein mentioned was a city of the first class with a population of less than 40,000, which had not adopted a home rule charter, and that it maintained a fire department with paid members. Schaub became a member of the fire department on June 20, 1949, and thereupon became entitled to the rights of a fireman under the Civil Service Act for firemen.

On September 11, 1953, Schaub was injured in the course of his employment with the city. He continued on duty until April 4, 1954, and was thereafter off duty until August 19, 1954, due to a surgical operation. From August 19, 1954, to November 15, 1954, he worked as a fireman. After November 15, 1954, Schaub did not again actually work as a fireman. On June 13, 1955, Schaub made application to the city for a pension under section 35-203, R. R. S. 1943, contending that he was totally and permanently disabled as a fireman. The

city denied the application for a pension. Schaub was granted the relief he sought by the district court for Scotts Bluff County. On appeal to this court the judgment of the district court was reversed, the effect of the reversal being that Schaub was found not to be totally and permanently disabled and, consequently, not entitled to a fireman's pension. Schaub v. City of Scottsbluff, 164 Neb. 805, 83 N. W. 2d 775.

On November 5, 1957, a date subsequent to the final judgment of this court in Schaub v. City of Scottsbluff, *supra*, Schaub applied in writing to the city for reinstatement as an active fireman. The application was denied on November 14, 1957, on the ground that Schaub had abandoned his employment as a fireman and was precluded from claiming any rights under the Civil Service Act. On January 10, 1958, this action was commenced to compel the city to reinstate Schaub as a fireman as of July 1, 1955, and to pay him his salary since that date. As heretofore stated, the trial court denied the writ, and this appeal followed.

It is stipulated by the parties that the city at no time filed charges against Schaub, or in any manner purported to discharge him from his employment. It is stipulated also that the city continues to withhold 3 percent of Schaub's pay, as permitted by section 35-212, R. R. S. 1943, and that Schaub has not demanded its return to him in accordance with said section of the statute. It is further stipulated that Schaub was paid his full salary for 12 months while disabled, as required by section 35-203, R. R. S. 1943. It is likewise stipulated that the city has retained the sums of $548 and $418.95 paid to Schaub by the city's compensation insurance carrier, pursuant to section 35-213, R. R. S. 1943, and that Schaub has made no demand for the return of the same. At no time subsequent to November 15, 1954, did Schaub report for duty as a fireman, nor did he obtain or seek to obtain a leave of absence from his employment, until on or after June 25, 1957. It is

stipulated that Schaub made no request to return to duty as a fireman from June 12, 1955, to about June 25, 1957.

The evidence shows that during this period Schaub registered as an applicant for employment with the Nebraska State Employment Service in Scottsbluff and made subsequent inquiries at that office concerning employment opportunities for himself. In April 1956, he made application to the city for a position as a parking meter patrolman in the police department, which application was denied. From October 9, 1956, to December 15, 1956, he was employed by the Great Western Sugar Company as an oiler. In March 1957, he was employed by the Scottsbluff School District for a period of 10 days. The evidence shows that he drove his automobile continuously from July 1955 to June 1957, including a trip to and from Cheyenne, Wyoming. The evidence clearly shows that Schaub was not totally disabled from performing the duties of a fireman during this period and that he considered himself as not in the employ of the city.

It is the contention of Schaub that he was at all times a fireman up to and including June 25, 1957, the date he first requested permission to return to duty under the provisions of the Civil Service Act, section 19-1808, R. R. S. 1943, thereof. The foregoing section of the statute states in part: "No person in the classified civil service, who shall have been permanently appointed or inducted into civil service under the provisions of this act, shall be removed, suspended, demoted or discharged except for cause and then only upon the written accusation of the appointing power or any citizen or taxpayer." We point out at this time that the city consistently contended that Schaub was not permanently and totally disabled and at no time terminated or purported to terminate the employment of Schaub as a fireman. It is the contention of the city that Schaub voluntarily abandoned his employment as a

fireman and, consequently, section 19-1808, R. R. S. 1943, has no application. We concur with this view. One under the Civil Service Act may resign his position or abandon it and thereby lose all benefits provided by the act. The Civil Service Act was enacted for the purpose of creating and protecting the rights of employees, and affords no benefits to employees who resign or abandon the employment. Abandonment of the duties of a position is generally regarded as a form of resignation, having all the consequences of a voluntary resignation. The rule is: A position is held upon the implied condition that the employee will diligently and faithfully perform the duties assigned to him. Where it appears that the employee refuses or neglects to perform the duties of his position for so long a period of time and under such circumstances as to reasonably warrant the presumption that he does not desire or intend to perform the duties of his position he will be held to have abandoned it, not only where his refusal to perform was willful but also where, though not intending to vacate the position, he in good faith but mistakenly supposed he had no right to it. While an abandonment of a position by an employee must be total and under such circumstances as to clearly indicate its absolute relinquishment, whether or not a position has been abandoned is dependent on his acts and conduct rather than his declared intention. The law will infer an abandonment where the acts and conduct of the employee indicate that he has completely relinquished the duties of his position. See Mechem on Public Officers, § 435, p. 278.

We think the evidence in this case shows an abandonment by Schaub of his position as a fireman for the city under the foregoing rule. Schaub contends, however, that he was enforcing a claimed legal right to a pension because of permanent total disability during the period of his absence, and that his attempted assertion of that right in the court under the Firemen's

Pension Act (section 35-203, R. R. S. 1943) does not impair or defeat his rights under the Civil Service Act. In this respect we point out that the Civil Service Act is for the protection and benefit of employees of the city who come within its terms while the Firemen's Pension Act is for the benefit of former employees of the fire department who have been separated from their employment for any of the reasons set forth in the act. In other words, the Civil Service Act contemplates the existence of the employer-employee relationship while the Firemen's Pension Act contemplates the severance of that relationship. It is clear, therefore, that one entitled to a pension has no rights remaining under the Civil Service Act, and one having rights under the Civil Service Act has no right to a pension.

The record here shows that Schaub applied for a pension, which the city refused to grant. Schaub was then faced with the alternative of accepting the judgment of the city and continuing the performance of his duties as a fireman, or of continuing the litigation to obtain a pension, the latter course implying a severance of his employment as a fireman. He elected to assert in the courts his claimed right to a pension, a claim which was finally determined against him by the final judgment of this court in October 1957. He now contends, after failing to perform the duties of a fireman for a period of 2 years and without requesting or obtaining a leave of absence from such employment, that he may properly assert rights under the Civil Service Act which include restoration to service and back pay from July 1955. We point out that the election of Schaub to pursue his claimed right to a pension in the courts was based on his status as a former employee who had become permanently and totally disabled in the course of his employment. For 2 years he conducted himself as one who had severed his employment. He failed to perform the duties of his position, he neither requested nor obtained a leave of absence,

and he sought and obtained employment elsewhere. He elected to abandon his position and the rights incidental to that position contained in the Civil Service Act and to insist upon his right to a pension under the Firemen's Pension Act. By the present action he alleges a completely new factual situation wholly contrary to his position in the previous litigation.

We think the case is controlled by our decision in Turner v. Grimes, 75 Neb. 412, 106 N. W. 465, wherein we said: "To sustain the present action requires a negation of the facts set forth in the petition in the first action, and, having assumed a certain position in this litigation, and having vexed the defendant with a lawsuit based thereupon, he cannot now be permitted to change his position and harass the defendant with another action based upon another and totally different theory. State v. Board of County Commissioners, 60 Neb. 570; 7 Ency. Pl. & Pr. 370; Moss v. Marks, 70 Neb. 701; Thompson v. Howard, 31 Mich. 309; Fowler v. Bowery Savings Bank, 113 N. Y. 450, 10 Am. St. Rep. 479, and note, p. 491. * * * The cases cited by plaintiff lay down the principle that, where the plaintiff was mistaken and undertook to avail himself of a remedy that he was not entitled to, he may afterwards avail himself of the proper remedy. The plaintiff in this case had the right to elect as to whether he would treat the title to the property as having passed, and sue in assumpsit upon the express promise, or he had the right, upon the theory that the title never passed, to sue for the wrong. He did not have the right to do both." Paraphrasing the holding of that opinion, Schaub had the right to continue to perform his duties as a fireman and obtain the benefits provided by the Civil Service Act, or he could abandon his employment as a fireman and obtain any benefits provided by the Firemen's Pension Act. He did not have the right to do both.

The rule under the doctrine of the election of remedies, that one may pursue a second remedy after seek-

ing a first remedy unsuccessfully, applies only when both remedies are sought on a consistent state of facts. The rule has no application where the second remedy is based on a state of facts wholly inconsistent with the factual situation in the previous litigation. Pekin Plow Co. v. Wilson, 66 Neb. 115, 92 N. W. 176; State v. Bank of Commerce, 61 Neb. 22, 84 N. W. 406.

There is a distinction in the law between a mistake of remedies and an election of remedies. A plaintiff is not precluded from resorting to a remedy because he has attempted to avail himself of another to which he was not entitled, even if he has prosecuted such suit to judgment. The doctrine of election of remedies is not a bar to a subsequent action that can be sustained on proof of facts consistent with the proof in the prior action. A litigant may not, however, assert the existence of one state of facts in one action and, being unsuccessful in such action, assert a different state of facts wholly inconsistent with those asserted in the first action. Once a plaintiff has taken a positive position with regard to the subject matter he will not be permitted thereafter to change his position and harass the defendant with another action based on wholly inconsistent facts for a wholly inconsistent remedy.

Schaub relies to some extent on Simpson v. City of Grand Island, 166 Neb. 393, 89 N. W. 2d 117. The case is clearly distinguishable. We held in that case that the city properly abolished the position occupied by Simpson but that it wrongfully discharged him and wrongfully deprived him of the benefits provided by the Civil Service Act. Upon discharge, Simpson properly raised the issue before the city council of the city and prosecuted error proceedings from its adverse decision. The issues thus presented bear no similarity to those presently before us.

We conclude that Schaub abandoned his position as a fireman and elected to pursue the remedy provided by the Firemen's Pension Act. He is precluded under

the doctrine of election of remedies from prosecuting a second action based upon a state of facts completely inconsistent with those asserted in the first suit. The trial court having arrived at the same conclusion, the judgment of the district court is affirmed.

AFFIRMED.

EMIL J. PALLAS, APPELLEE, V. LILLIAN M. DAILEY ET AL., APPELLEES, IMPLEADED WITH CLARENCE R. MURPHY ET AL., APPELLANTS.
100 N. W. 2d 197

Filed January 8, 1960. No. 34647.

1. **Boundaries: Trial.** The burden of proof upon an issue as to a boundary is upon the party having the affirmative of that issue. This burden must be established by a preponderance of the evidence.
2. **Boundaries.** A resurvey not shown to have been based upon the original survey is inconclusive in determining boundaries, and will ordinarily yield to a resurvey based upon known monuments and boundaries of the original survey.
3. **Adverse Possession.** Where there is no evidence that a claimant and his predecessors in title have been in open, notorious, hostile, and uninterrupted possession of land for 10 years or more, his claim to title by adverse possession necessarily fails.

APPEAL from the district court for Douglas County: PATRICK W. LYNCH, JUDGE. On motion for rehearing. See *ante* p. 277, 99 N. W. 2d 6, for original opinion. *Motion for rehearing overruled. Judgment affirmed.*

Tesar & Tesar, for appellants.

James R. McGreevy, for appellee Pallas.

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

WENKE, J.

We originally dismissed this appeal because of lack of jurisdiction. See Pallas v. Dailey, *ante* p. 277, 99 N.

W. 2d 6. Since that time, for good cause shown, we permitted a supplemental transcript to be filed. See Rule 4 c, Revised Rules of the Supreme Court, 1959. An order nunc pro tunc, entered by the trial court on November 19, 1959, and contained in the supplemental transcript, shows the original decree of the trial court was actually rendered on January 29, 1959, rather than on November 14, 1958, as disclosed by the original transcript filed herein on May 2, 1959. In view of that fact the motion for new trial of defendants Clarence R. and Abbie Ruth Murphy and Carl Johannes and Johanna Hoff, filed on February 2, 1959, was filed within time and this court acquired jurisdiction of the cause when this appeal was properly taken by these defendants from the overruling thereof. Consequently we vacate our order of dismissal and consider the appeal on its merits.

Appellee Emil J. Pallas brought this action to have determined the correct location of a disputed boundary line between real estate owned by him and that owned by appellants Clarence R. Murphy and Abbie Ruth Murphy, to whom we shall hereinafter refer as the Murphys.

At all times herein mentioned appellee was admittedly the owner of the east 30 feet of Lot 7 and the west 60 feet of Lot 8 in Block 77, in Benson, now incorporated within and a part of the city of Omaha, as surveyed, platted, and recorded in Douglas County, Nebraska, having acquired the same from Lillian M. Dailey by warranty deed dated January 25, 1955. The Murphys were, at all times herein material, the owners of the west 90 feet of Lot 7 in said Block 77, having acquired the same from Edwin C. and Harriet E. Quist by deed dated July 26, 1957. The Quists had acquired this property from Lillian M. Dailey by deed dated May 22, 1955.

Appellants Carl Johannes Hoff and Johanna Hoff were apparently made defendants herein because they were, at the time this action was commenced, the owners of the south half of Lot 6 of said Block 77. It should be

mentioned that Lillian M. Dailey was originally made a party defendant. However, the cause was dismissed as to her in the court below and no appeal was taken therefrom.

The trial court rendered a decree in favor of the appellee, quieting his title in and to the east 30 feet of Lot 7 in said Block 77 and ordering the Murphys to remove therefrom their fence presently situated on and overlapping the above property within 60 days. This order is based on a finding by the lower court: "That a fence owned and erected by the defendants, Clarence R. Murphy and Abbie Murphy, and extending from Maple Street to the north for a distance of 300 feet is situated on a portion of the East 30 feet of Lot 7, Block 77, in Benson, owned by the plaintiff, Emil J. Pallas. That at the front of Lot 7, Block 77, in Benson (that is, Maple Street), the said fence of the defendants' overlaps the portion of the said Lot 7, Block 77, in Benson owned by the plaintiff, Emil J. Pallas, by 3.3 feet, and that the overlapping tapers off as the fence extends 300 feet north until at the rear of said Lot 7, Block 77, in Benson, the fence of the defendants, Clarence R. Murphy and Abbie Ruth Murphy, does not overlap the property of the plaintiff, Emil J. Pallas."

The issue raised by the pleadings is the proper location of the common boundary line between the properties of appellee and that of the Murphys. The question raised in regard thereto is the sufficiency of the evidence adduced by appellee to support his claim.

"* * * in an action of this character, appellant (here appellee) must recover upon the strength of his own title, * * *." Elsasser v. Szymanski, 163 Neb. 65, 77 N. W. 2d 815.

"It is a settled rule in this state that only a preponderance of evidence is required to establish an issue in civil actions, and cases of this kind (boundary disputes) are no exception to the rule." Bock v. Porterfield, 80 Neb. 523, 114 N. W. 597. And, as stated in

8 Am. Jur., Boundaries, § 90, p. 810: "The burden of proof upon an issue as to a boundary is upon the party having the affirmative of that issue. This burden, generally, must be established by a preponderance of the evidence."

"Suits in equity, on appeal to this court, are triable de novo, subject to the rule that when evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying and accepted one version of the facts rather than another." Wilkie v. Banse, 166 Neb. 138, 88 N. W. 2d 181. See, also, Sofio v. Glissmann, 156 Neb. 610, 57 N. W. 2d 176.

The latter has particular application in this case as it relates to the evidence of surveyors William S. Cook and William J. Provoznik insofar as it is in conflict with that of surveyor Vern L. Hill.

Block 77, as originally surveyed, platted, and recorded, fronts on Maple Street to the south and on Seventy-eighth Street to the west. It consists of 10 lots, Lots 6, 7, 8, 9, and 10 constituting the south half thereof. The lots in the south half are numbered from west to east, that is, Lot 6 is to the west. These 5 lots all front on Maple Street, are 300 feet in depth and 120 feet in width except Lot 6, which was platted 117 feet in width as it fronts on Maple Street.

Surveyor Cook made his original resurvey in June 1955, surveying east from the section line located at the center of the intersection of Seventy-eighth and Maple Streets. Later, in the fall of 1957, Cook made a joint resurvey with surveyor Provoznik. This resurvey was from a point to the east. Surveyor Provoznik made the joint resurvey with surveyor Cook in October 1957, doing so from a point located at the northeast corner of Seventy-sixth Street.

Surveyor Hill made a resurvey in May 1953, and again in December 1956. He made this resurvey from a

marker that he thought was located at the southwest corner of Lot 7 or the southeast corner of Lot 6, that being a corner common to both lots. He measured 90 feet east from there to ascertain where the southeast corner of the Murphys' land should be. Hill disregarded original survey points.

We think the following principle is applicable to the above situation: "A resurvey not shown to have been based upon the original survey is inconclusive in determining boundaries, and will ordinarily yield to a resurvey based upon known monuments and boundaries of the original survey. So a resurvey which locates lines in accordance with a recorded plat will prevail over a resurvey not in accordance with such plat." 11 C. J. S., Boundaries, § 61, p. 634.

As stated in Perry v. Wright, 216 Miss. 652, 63 So. 2d 40: "He was warranted in finding, as he apparently did, that the survey of Polk, who testified for the defendant, correctly located the property line, and in not accepting the survey of Eustis, who testified for appellant. The Eustis survey was based upon a starting point of a certain iron pin which Eustis found south of the curb on Arthur Street, which he thought was the northeast corner of the Perry lot. From that pin he went south 63.2 feet and then measured the line dividing the parties' lands by turning at right angles. He did not verify the correctness of the location of the iron pin as being the true northeast corner of the Perry property. It was not checked against other established points in the Vicksburg survey. The trial court under such circumstances was justified in concluding that the starting point of the Eustis survey was not adequately established as correct." See, also, Jackson v. Snyder, 202 Iowa 262, 208 N. W. 321.

We think the resurvey of Cook and Provoznik, which placed the Murphys' fence as overlapping and on the appellee's lot, to be correct.

The error in Hill's resurvey is apparent from the

record. As originally surveyed and platted Lot 6 had a frontage on Maple Street of 117 feet. As of now it has a frontage thereon of 120 feet, thus extending it east some 3 feet onto Lot 7. Hill, by taking a marker located at this point and measuring 90 feet east therefrom, naturally overlapped the east 30 feet of Lot 7 by approximately that amount at the south end. We find the fence built by Murphys, although starting from a correct common point at the north end of the boundary line between appellee and themselves gradually encroached on appellee's property as the fence extended south until, at the south end thereof, it had encroached on the east 30 feet of Lot 7 for a distance of 3.3 feet. The appellee is entitled to have the fence constructed by Murphys on this 300-foot long, wedge-shaped piece of land removed and his title to the east 30 feet of Lot 7 quieted in him.

Murphys also pleaded adverse possession. It will be noted both appellee's and Murphys' properties were owned by Lillian M. Dailey as late as January 25, 1955. Under this situation we thing the following applies: "Where there is no evidence that a claimant and his predecessors in title have been in open, notorious, hostile, and uninterrupted possession of land for 10 years or more, his claim to title by adverse possession necessarily fails." Hakanson v. Manders, 158 Neb. 392, 63 N. W. 2d 436.

We have come to the conclusion that the judgment of the trial court is correct and should be affirmed. It is so ordered and, in view thereof, appellants' motion for rehearing is overruled.

AFFIRMED.

BOSLAUGH, J., participating on briefs.

BETTY L. MALCOM, APPELLANT, V. DONALD P. DOX ET AL., APPELLEES.

100 N. W. 2d 538

Filed January 8, 1960. No. 34657.

1. **Automobiles.** When two vehicles approach or enter an intersection at approximately the same time, the driver of the vehicle on the left must yield the right-of-way to the vehicle on the right if it is traveling at a lawful rate of speed.
2. ———. The drivers of vehicles approach an intersection at approximately the same time whenever the two vehicles are in such relative position that, upon appraisal of all the factors, it would 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.
3. ———. One having the right-of-way may not on that account proceed in disregard of the surrounding circumstances and potential dangers. One having a right-of-way is not thereby relieved from the duty of exercising ordinary care to avoid accidents.
4. **Automobiles: Negligence.** Where a motorist approaches an intersection from the left, looks to his right and observes the imminence of danger of a collision, then swerves to the left and accelerates the speed of his vehicle to avoid a collision, he is guilty of contributory negligence which is more than slight as a matter of law.
5. **Automobiles: Evidence.** Where it appears that a witness had no opportunity to formulate a basis for an opinion as to the speed of a motor vehicle, it is error to permit him to estimate such speed.
6. **Negligence.** The doctrine of the last clear chance applies in those cases where there is negligence of the defendant subsequent to the negligence of the plaintiff, and the defendant's negligence is the proximate cause of the injury.

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

Miles N. Lee and *Tedd C. Huston*, for appellant.

Haney & Walsh and *Maupin, Dent, Kay & Satterfield*, for appellees.

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

CARTER, J.

This is an action for damages for personal injuries and property damage sustained in an automobile accident. The trial court directed a verdict for the defendants at the close of plaintiff's evidence. The plaintiff has appealed.

The evidence shows that plaintiff was driving south on a county road in a pickup truck. The defendant Dox was driving a loaded gravel truck in an easterly direction on an intersecting road. At the intersection of the two roads near Cozad, Nebraska, a collision occurred. The collision happened on October 5, 1957, at about 1:45 p.m. The traveled portions of the roads were graveled. It was a bright, sunny day and the roads were dry. The graveled portions of the roads were each 18 feet wide. The collision occurred in the southeast quadrant of the graveled portion of the intersection. The driver of the gravel truck had the directional right-of-way over the driver of the pickup truck. Neither of the two roads was protected by stop signs. The plaintiff was seriously injured. The Missouri Valley Construction Company was alleged to be the employer of the defendant Dox at the time of the accident.

The evidence shows that plaintiff was driving at a speed of 40 to 45 miles an hour as she approached the intersection. At a point about 200 feet north of the intersection she looked to her right and saw nothing approaching the intersection from the west. She slowed down to 20 or 25 miles an hour. As she approached closer to the intersection she looked to her left and saw nothing approaching from the east. She again looked to the right and saw no traffic approaching from that direction. As she reached a point where the cab of her pickup truck was even with the fence line of the east-west road, and the front of her pickup truck was 24 to 29 feet north of the center of the intersection, she looked to her right again and saw the gravel truck approaching at a distance of 65 or 70 feet west of the intersection. Plaintiff testi-

fied that she immediately swerved her pickup truck to the left and increased her speed by stepping on the accelerator. She made no attempt to stop. She was hit by the defendants' truck at the southeast corner of the graveled portion of the intersection. Plaintiff's evidence is that her pickup truck had cleared the intersection except for the rear 2 or 3 feet. The evidence shows that the right front of defendants' truck hit the right rear of plaintiff's vehicle, causing it to skid for a distance of 56 feet before rolling over 4 times and coming to rest about 118 feet south of the point of impact.

The evidence shows that plaintiff was driving 20 or 25 miles an hour when she saw the defendants' truck approaching from her right. She said she looked back to watch the road ahead of her and did not look again to her right. She immediately swerved to her left and speeded up to avoid a danger that must have appeared imminent. It is apparent that plaintiff attempted to win the race across the intersection by speeding up and swerving to her left immediately after first seeing the gravel truck 65 or 70 feet away. The speed to which plaintiff accelerated her vehicle is not shown by the record other than that her pickup truck skidded more than 50 feet, rolled over 4 times, and came to rest 118 feet south of the place where the collision occurred.

The defendant approaching from the right had the directional right-of-way. Plaintiff asserted that she entered the intersection first and therefore had a superior right to that of the defendant to the use of the intersection. We are impressed with the fact that the two vehicles must have approached the intersection at approximately the same time, since a collision actually occurred without a showing of excessive speed on the part of either. This conclusion is further supported by the fact that plaintiff speeded up and swerved left immediately after seeing defendants' truck approaching from her right. She at no time attempted to stop, but elected to beat the gravel truck across the intersection.

It is the law of the road in this state that where two vehicles approach or enter an intersection at approximately the same time, the driver of the vehicle on the left must yield the right-of-way to the vehicle on the right if it is traveling at a lawful rate of speed. The drivers of vehicles approach an intersection at approximately the same time whenever the two vehicles are in such position that, upon appraisal of all the factors, it would 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. One having the right-of-way, however, may not on that account proceed with disregard of surrounding circumstances and potential dangers. One having a right-of-way is not thereby relieved from the duty of exercising ordinary care to avoid accidents. Long v. Whalen, 160 Neb. 813, 71 N. W. 2d 496; Wieck v. Blessin, 165 Neb. 282, 85 N. W. 2d 628; Evans v. Messick, 158 Neb. 485, 63 N. W. 2d 491.

Assuming for the purpose of this case that the driver of the gravel truck was negligent, the plaintiff, by swerving her pickup truck to the left and accelerating its speed when she first saw defendants' truck, thereby indicating her knowledge of the imminence of danger, was guilty of negligence more than slight as a matter of law. Miller v. Aitken, 160 Neb. 97, 69 N. W. 2d 290; Whitaker v. Keogh, 144 Neb. 790, 14 N. W. 2d 596. Contributory negligence by a plaintiff which is more than slight has been repeatedly held by this court to defeat a right of recovery regardless of negligence on the part of a defendant. Where the negligence of the plaintiff is shown to be more than slight as a matter of law by the evidence adduced by the plaintiff, it is the duty of the trial court to direct a verdict for the defendant.

The plaintiff contends that the trial court erred in not permitting her to testify to the speed of the approaching gravel truck. In this respect plaintiff testified that she glanced to the right and saw the gravel truck for the first time when it was 65 or 70 feet distant, and then

gave attention to her own driving and did not look again. She later stated she could not say how far the gravel truck traveled during the time she saw it. Upon being pressed as to the time she watched the truck and the distance she saw it moving she stated she had a good look at it and "As I observed the truck, I would say he traveled probably about 10 or 15 feet, approximately. I wouldn't say for sure, I couldn't say for sure." We do not think the trial court erred in holding the foundation for plaintiff's opinion as to the speed of the gravel truck to be insufficient. The rule is: Where it appears that a witness had no opportunity to formulate a basis for an opinion as to the speed of a motor vehicle, it is error to permit him to estimate such speed. Kristufek v. Rapp, 154 Neb. 343, 47 N. W. 2d 923; Bergendahl v. Rabeler, 133 Neb. 699, 276 N. W. 673.

The plaintiff complains of the failure of the trial court to instruct the jury under the last clear chance doctrine. The doctrine has no application to such a situation as we have here. The negligence of the plaintiff in the instant case was active and continuous as a contributing factor up to the time of the collision. The doctrine of the last clear chance applies in those cases where there is negligence of the defendant subsequent to the negligence of the plaintiff and the defendant's negligence is the proximate cause of the injury. The rule, and its nonapplicability here, is made clear in Whitehouse v. Thompson, 150 Neb. 370, 34 N. W. 2d 385.

The conclusion we have reached makes it unnecessary for us to consider other assignments of error contained in plaintiff's brief. The trial court concluded from the evidence adduced by the plaintiff that the contributory negligence of the plaintiff barred a recovery of damages by her against the defendants. We concur with the trial court's conclusion. The judgment of the district court is affirmed.

AFFIRMED.

ARNOLD BUSHON, ADMINISTRATOR OF THE ESTATE OF JAMES L. WILKINSON, DECEASED, APPELLANT, V. LAVERN FALLON ET AL., APPELLEES.

100 N. W. 2d 200

Filed January 8, 1960. No. 34660.

Trial: Appeal and Error. A judgment of the trial court in sustaining a directed verdict should be affirmed when the plaintiff fails to prove a material allegation of his petition essential to the proof of his case.

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

Theodore L. Richling and *Lawrence R. Brodkey,* for appellant.

Gross, Welch, Vinardi & Kauffman, for appellees.

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

MESSMORE, J.

This is an action at law for damages brought in the district court for Douglas County under the wrongful death act, sections 30-809 and 30-810, R. R. S. 1943, by Olaf D. Kruse, special administrator of the estate of James L. Wilkinson, deceased, with Arnold Bushon substituted therefor, against Lavern Fallon, Virgil Gotsch, Patrick Gotsch, Virgil Gotsch and Patrick Gotsch doing business as Gotsch Brothers, and Virgil Gotsch and Patrick Gotsch, a partnership doing business under the firm and style name of Gotsch Brothers, defendants.

An International truck owned by the defendants Gotsch Brothers collided with a Ford coach driven by Nancy Wilkinson, wife of James L. Wilkinson, deceased, at the intersection of Seventy-second and Pacific Streets in Douglas County. As a result of the collision, James L. Wilkinson, who was a passenger in the Ford automobile, was killed. A jury was impaneled and the case proceeded to trial. At the close of plaintiff's evidence

the defendants moved for a directed verdict which the trial court sustained and dismissed the plaintiff's case. The plaintiff filed a motion for new trial which was overruled. The plaintiff appealed.

The plaintiff alleged in his petition that on November 19, 1952, the defendant Lavern Fallon was driving a 1952 International truck which was owned and operated by Gotsch Brothers; that Gotsch Brothers was either a firm and style name for Virgil Gotsch or Patrick Gotsch or for Virgil Gotsch and Patrick Gotsch, and the exact method of operation of Gotsch Brothers was unknown to the plaintiff; that when the term Gotsch Brothers was used it referred to both Virgil Gotsch and Patrick Gotsch and to whatever legal entity was operating under and by virtue of the name of Gotsch Brothers; and that at all times mentioned the defendant Lavern Fallon was the employee and agent of Gotsch Brothers. The petition then went on to recite facts relating to the collision, and alleged certain acts of negligence on the part of Lavern Fallon in driving the defendants' truck which constituted the proximate cause of the accident and death of James L. Wilkinson.

The defendants' answer to the plaintiff's petition admitted that at about the time and place complained of, defendants' vehicle was in a collision with a Ford automobile in which plaintiff's decedent was a passenger, but denied all allegations of the plaintiff's petition not admitted.

It is true that statements, admissions, and allegations in pleadings upon which the case is tried are always in evidence for all purposes of the trial; they are before the court, and may be used for any legitimate purpose. Krueger v. Krueger, *ante* p. 82, 98 N. W. 2d 360, and cases cited therein.

An analysis of the defendants' answer discloses that the defendants admitted owning a vehicle which was in a collision with a Ford automobile in which the decedent was a passenger. No place in the answer is

there an admission on the defendants' part that Lavern Fallon was an employee or agent of the defendants or that he was driving the truck which collided with the Ford automobile.

The only evidence touching on this phase of the case was given by the witness Eugene Lemmer, as follows: "Q. Now, did you find out who was the driver of the truck involved in the accident? A. No, sir. Q. Did you see him afterwards? A. Yes. Q. Is he present in the courtroom? A. I couldn't say, I don't know. I can't remember what he looked like. Q. Did you have any conversation with him afterwards? A. Not particularly."

The record is void as to any evidence that Lavern Fallon was the driver of the truck involved in the accident or was an employee or agent of the defendants Gotsch Brothers. The plaintiff was obligated to prove this material allegation of his petition which was essential to proving his case. This he failed to do. Consequently, there is no other alternative than to affirm the judgment of the trial court.

In the light of what has been heretofore said, assignments of error set forth by the plaintiff need not be determined.

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

AFFIRMED.

FREDRICK P. WEGNER ET AL., APPELLANTS, V. LOYD WEST, APPELLEE.
100 N. W. 2d 542

Filed January 8, 1960. No. 34661.

1. **Appeal and Error.** In an action in equity it is the duty of this court to try it de novo on the record and to reach thereon an independent conclusion.

2. **Contracts: Rescission.** A rescission is not effective unless the parties to the contract are placed in status quo so far as the circumstances will permit.
3. ———: ———. Ordinarily in rescission a formal tender of property is not required if it appears that it would have been futile, however, a tender may not be regarded as valid, even if it appears that at the time it was made it would have been futile, if there was not a present ability to make the tender good.
4. ———: ———. A party to a contract may not rescind on account of fraud or misrepresentation, or on account of breach by the other party, if for an unreasonable time after knowledge of the facts giving rise to the right he fails to declare a rescission and to disclaim the benefits of the contract.
5. ———: ———. The question of whether or not there has been unreasonable delay is one which resides in the sound discretion of the court in the light of the particular facts and circumstances disclosed.
6. ———: ———. Rescission by its nature implies the extinction of the contract which leaves the parties without a right of recovery on the contract itself.
7. ———: ———. The rescission of a contract must be in toto and the parties must be placed in status quo as far as the circumstances will permit.
8. **Contracts.** Where a party to a contract, with full knowledge of the facts and with knowledge of a breach by the other party, receives money in the performance of the contract the breach will be deemed to have been waived.
9. **Contracts: Rescission.** The assertion of the rescission of a contract is nullified by the subsequent acceptance of benefits growing out of the contract.
10. **Contracts.** The acceptance of benefits of a contract after breach whether before or after action is commenced waives the forfeiture.
11. **Fraud: Sales.** False representations, in order to found an action in the nature of deceit, must not consist merely of promises to be performed in the future, and generally not merely of expressions of opinion by a vendor as to the quality of goods, but they must be representations of known existing facts.
12. **Fraud.** Fraud must relate to present or preexisting facts, and cannot ordinarily be predicated on representations or statements which involve mere matters of futurity or things to be done or performed in the future.

APPEAL from the district court for Knox County: FAY H. POLLOCK, JUDGE. *Affirmed.*

George F. Johnson, Mark J. Ryan, and *Arthur L. Burbridge,* for appellants.

Roscoe L. Rice, Frederick M. Deutsch, and *William I. Hagen,* for appellee.

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

YEAGER, J.

This is an action in equity by Fredrick P. Wegner and Ferol H. Wegner, plaintiffs and appellants, against Loyd West, defendant and appellee, for the rescission of contracts, or in the alternative for damages, which contracts it is alleged were entered into as the result of fraudulent inducements and representations of the defendant. The case was tried to the court at the conclusion of which a decree was rendered denying any relief to the plaintiffs. Motion for new trial was duly filed and overruled. From the decree and the order overruling the motion for new trial the plaintiffs have appealed.

In order that there may be an understanding of what is presented by this appeal it has become necessary by analysis rather than by summary to seek to define the issues. The condition of the pleadings and proceedings makes this necessary.

On or about April 16, 1954, the plaintiffs and the defendant entered into a written contract whereby the plaintiffs agreed to sell to the defendant their home in Creighton, Knox County, Nebraska, for $15,000, payable $2,000 on the delivery of the agreement, $5,000 on May 1, 1954, and $8,000 on August 1, 1954, with possession to be given on August 1, 1954.

On or about April 12, 1954, the defendant entered into a contract with the plaintiffs for the sale to them of certain real estate and personal property in the city of Bonesteel, South Dakota, for $9,980, payable $500 on the execution of the contract and the balance in monthly payments of $120 each. Interest was chargeable at 8

percent on delinquent payments. Some of the personal property consisted of structures on leased real estate. All of the property described in the contract was used and occupied by the defendant in what has been described as his lumber business in Bonesteel, South Dakota. It did not include, in fact it specifically excluded, the stock and materials used in the lumber business.

On or about July 25, 1954, an agreement supplemental to this one was entered into. The only matter of importance in this is that possession of the personal property was to be given August 15, 1954. The other obligations of the agreement were to remain the same.

It appears that transfers were consummated pursuant to the contracts. However the amount of cash or credit passing to the plaintiffs was reduced by liens upon which they were obligated.

These formal contractual transactions were related to an oral arrangement whereby the plaintiffs were to enter upon, take over, and operate the lumber business which was being operated by the defendant. This further arrangement involved taking over by plaintiffs of certain equipment not classed as merchantable articles and the stock of merchandise on hand for the purpose of sale. It appears that this equipment was of the value of about $1,000. It does not appear to be an item of dispute.

An inventory was taken of the merchandise in July of 1954 and the inventory value at that time was $29,020.01. On the basis of this inventory and the written agreements the plaintiffs took over the properties and the business on July 26, 1954, and thereafter operated it as their own.

The plaintiffs in their pleadings, on the trial of the case in the district court, and on the presentation to this court on appeal have treated all of these transactions as parts and incidents of a single contractual arrangement which in toto they have sought by declaration in the petition to rescind.

On or about February 19, 1958, the plaintiff Fredrick P. Wegner notified the defendant of his intention to rescind "the agreement to purchase the plant and the inventory." This was renewed on or about March 3, 1958. On or about July 1, 1958, the plaintiffs closed down the business at Bonesteel, South Dakota.

On July 17, 1958, the plaintiffs filed their petition in this action in which they prayed for "a rescission of the entire agreement of the parties covering the plant, inventory, and Wegner home." They prayed further that "in the event a rescission be not granted, the court retain jurisdiction of the matter and award the plaintiffs damages for fraud." The propriety of this alternative application for relief is not brought into question.

The pleaded basis for rescission as well as for damages was false and fraudulent representations made by the defendant to the plaintiffs on which they relied to their detriment and damage.

By answer the defendant denied generally all of the allegations of the petition. He pleaded further that the plaintiffs were guilty of laches and were on that account in no position to place the defendant in status quo. The general denial of course puts in issue the question of whether or not the acts of plaintiffs were sufficient to accomplish rescission, or to entitle them to damages.

The district court by its decree did not pass directly upon the question of sufficiency of acts to accomplish rescission, but simply found there was no fraud and dismissed the action.

The case, as pointed out, is an action in equity. It therefore becomes the duty of this court to try it de novo on the record and to reach an independent conclusion. See, Mullikin v. Pedersen, 161 Neb. 22, 71 N. W. 2d 485; Wilkie v. Banse, 166 Neb. 138, 88 N. W. 2d 181.

Basic in the determination of the case are the questions of whether or not there was within the true meaning of the term what amounted to a rescission, and

whether or not on the facts there was a right of rescission. Following are some pertinent definitive legal principles.

A rescission is not effective unless the parties to the contract are placed in status quo so far as the circumstances permit. See, Bennett v. Emerald Service, Inc., 157 Neb. 176, 59 N. W. 2d 171; Caruso v. Moy, 164 Neb. 68, 81 N. W. 2d 826.

Ordinarily in rescission a formal tender of property is not required if it appears that it would have been futile, however, a tender may not be regarded as valid, even if it appears that at the time it was made it would have been futile, if there was not a present ability to make the tender good. See Bennett v. Emerald Service, Inc., *supra*.

Numerous important principles relating to the right of rescission are considered in the opinion in Russo v. Williams, 160 Neb. 564, 71 N. W. 2d 131, with authoritative citations. One of these is that a party to a contract may not rescind a contract on account of fraud or misrepresentation, or on account of breach by the other party, if for an unreasonable time after knowledge of the facts giving rise to the right he fails to declare a rescission and to disclaim the benefits of the contract.

It is there further pointed out that the question of whether or not there has been unreasonable delay depends upon the particular circumstances disclosed. This question is one which is addressed to the sound discretion of the court.

It is also pointed out therein that rescission by its nature implies the extinction of the contract which leaves the parties without a recovery upon it.

The following rule is stated in Caruso v. Moy, *supra*: "The rescission of a contract must be in toto and the parties must be placed in status quo as far as the circumstances will permit."

In Einot, Inc. v. Einot Sales Co., Inc., 154 Neb. 760, 49 N. W. 2d 625, the following principles are set forth:

"Where a party to a contract, with full knowledge of the facts and with knowledge of a breach by the other party, receives money in the performance of the contract the breach will be deemed to have been waived.

"The assertion of the rescission of a contract is nullified by the subsequent acceptance of benefits growing out of the contract claimed to have been rescinded.

"The acceptance of the benefits of a contract after breach whether before or after action is commenced to enforce a forfeiture waives the forfeiture."

An examination of the record in the light of the cited principles points first to the question of whether or not there was ever a recognizable rescission of the agreement and transactions which plaintiffs make the basis of the action. If there was a rescission it must flow, first, from the following which is a part of a letter from the plaintiff Fredrick P. Wegner to the defendant dated February 19, 1958, and designated as exhibit No. 8: "* * * you are hereby notified that it is my intention to rescind the whole deal and by that I mean the agreement to purchase the plant and the inventory, and I hereby tender back to you immediately everything which I received from you as a result of our deal. That which I can not return, I will pay you the value of. If you are willing to agree to a rescission, I am willing to attempt to work it out with you, otherwise it will have to be settled in court"; second, the acts and conduct of the plaintiffs after February 19, 1958, including the incidents occurring at the trial; and third, the contents of the petition with reference to the pleaded acts of rescission.

The quoted portion of exhibit No. 8 contains the only specific declaration of purpose or overt act in furtherance of that purpose until the petition in this case was filed. It is true that in later exhibits rescission is mentioned but in these attention was merely called to the contents of exhibit No. 8 and the defendant was informed that if a settlement was not made plaintiffs would proceed pursuant to the declaration contained

in exhibit No. 8.

By the petition which was filed herein the plaintiffs renewed the purported rescission by exhibit No. 8; offered in terms to put the defendant in status quo so far as possible; offered to pay for the portion of the inventory which had been disposed of; tendered a return of what they had received less what had been disposed of; and declared that they were ready, willing, and able to pay sufficiently to put the defendant in status quo.

By the following from the prayer of the petition it is made clear, as has been indicated earlier herein, the attempted rescission was of all of the transactions which have been described: "Wherefore, the plaintiffs pray for a rescission of the entire agreement of the parties covering the plant, inventory, and Wegner home; * * *." Coupled with this was no overt act in furtherance of rescission.

The question of whether or not the plaintiffs rescinded depends upon whether or not the plaintiffs were in a legal position to rescind and whether or not what was done amounted to rescission. In a consideration of this question it should be pointed out that under the evidence whether or not there was an overt tender requires no discussion. It is clear that an overt tender would have been refused. Under such circumstances, as pointed out, overt tender is not necessary. This however does not dispose of the question of the sufficiency of evidence to disclose whether or not a valid tender was offered, or whether or not a validly recognizable tender could be made.

As pointed out present ability to make a tender good is an essential of validity of the tender. In this instance present ability to make good would have required the plaintiffs, among other things, to be able to reimburse the defendant for the home for which the defendant paid $15,000; to return the merchandise which had been received of the inventory value of $29,020.01, or at least to account for that which remained and for

the proceeds of that which had been disposed of; and to return the buildings, the real estate, and the operating equipment used in the business.

The preponderance of the evidence discloses that the plaintiffs never even up to the time of trial had a present ability to effectually do anything more than to return the buildings, the real estate, and the operating equipment. It is true that the plaintiff Fredrick P. Wegner said he could have obtained sufficient money to accomplish a rescission but there is nothing else to indicate that he could have or that he took timely steps. The weight of his own evidence is to the contrary. There was therefore never a present ability to make good the pretended tender made first in February 1958. This failure of present ability to make the tender good rendered the purported tender invalid.

From the evidence no conclusion may reasonably be reached other than that there was no possibility of placing the parties in any position even approaching the status quo. The plaintiffs received a going business with an inventory of the value of $29,020.01 which was perhaps the most important factor involved. At the time of attempted rescission, as distinguished from proposals coupled with offers to negotiate, which was the date of the filing of the petition herein, a reasonable inference obtains that the inventoried merchandise had been sold in the ordinary course of business, and replaced several times, with the exception of a quantity of the agreed inventory price and value of $5,843.63 which the plaintiffs contended was obsolete and which was disposed of by plaintiffs to the defendant at that price during the trial of this case, and a quantity of cement of uncertain original inventory value.

A condition of rescission, as has been pointed out, is that rescission may not be effective unless the parties may be placed in status quo so far as the circumstances permit. It may not well be said that under the evidence here that the plaintiffs did or could put them-

selves or the defendant in a position wherein rescission could be recognized.

The evidence discloses that the paramount complaint of the plaintiffs was that in the inventory was included obsolete merchandise, a fact known to the defendant but not disclosed to the plaintiffs. If this is true it became known to the plaintiffs as early as October 1954. Complaint was made of this to the defendant at that time and on occasions thereafter, and the evidence discloses that in each such instance adjustment was made with an agreement for credit therefor on final payment to defendant by the plaintiffs. This character of adjustment was followed down to and including the time of trial except as to the incident related to cement on hand at the time of the trial. In this there does not appear to be any fraud or deception, but even if this appeared it would have to be said that the plaintiffs waited an unreasonable time after receiving knowledge of the facts to claim a right of rescission.

That the plaintiffs accepted benefits arising out of these contracts after purported rescission there can be no doubt. From February 1958 to some time in July 1958 the plaintiffs continued to operate the business as their own. At some time about July 1, 1958, the business was closed as a going business. After that the plaintiffs sold from the then inventory merchandise of the value of about $12,000. This was not accounted for to the defendant although in the case of a valid tender of rescission it would have belonged to the business which business they seek to have this court say belonged to the defendant. On the trial, as has been indicated, the plaintiffs conveyed to the defendant merchandise from the inventory for a consideration of $5,843.63. This acceptance of benefits under the rules cited is another reason why the plaintiffs may not be allowed to say that there was a valid rescission of the contractual arrangements which they have described.

For the reasons stated it must be said that the dis-

trict court did not err in its effectual holding that there was no rescission.

In this action as an alternative to their claim of rescission they seek a recovery in damages for fraud and misrepresentation, that is, if it be found that they have not rescinded but have proved damages that they be allowed to recover damages.

The petition of the plaintiffs relating to fraud and misrepresentation contains numerous specifications some of which could in nowise be or become actionable, so therefore all of them will not be set out herein. Only those which within legal rules could be the basis for action and which have been dealt with from an evidentiary standpoint will be mentioned herein. This will exclude the home sold to the defendant by plaintiffs. The home was sold on a separate written contract and no representation with regard to it is involved.

The specifications which may be the basis of action for damages are stated as follows in Cook Livestock Co., Inc. v. Reisig, 161 Neb. 640, 74 N. W. 2d 370:

"False representations, in order to found an action in the nature of deceit, must not consist merely of promises to be performed in the future, and generally not merely of expressions of opinion by a vendor as to the quality of his goods. They must be representations of known existing facts.

"Fraud must relate to a present or preexisting fact, and cannot ordinarily be predicated on representations or statements which involve mere matters of futurity or things to be done or performed in the future."

Within the meaning of these rules the pleaded specifications of fraud and misrepresentation are, that the sale of the plant was being made to the plaintiffs for what it cost, which cost was $12,500, whereas the cost was only $4,000, and that the yard did a business of at least $60,000 a year, which was also untrue.

The evidence to support the first of these two specifications is insufficient to sustain the contention of the

plaintiffs, even if the representation was made, which the defendant denies. The evidence discloses that long after the sale was made Fredrick P. Wegner found some records from which he concluded that the cost to the defendant was about $4,000. However, defendant adduced evidence to the effect that the cost was at least $8,836.58. Furthermore, it is clear that the purchase was not made on a basis of a valuation of $12,500, but for a price of $9,980.

The charge that the defendant falsely represented that the yard did a business of at least $60,000 a year is not sustained by the evidence. The fact is that the yard did an average business of slightly more than $60,000 for the 4 full years previous to the sale to the plaintiffs with a high of $64,362.16 and a low of $56,822.48, and for the year in which the sale was made, a part of which time it was operated by the defendant and a part by the plaintiffs, it did a business of $62,284.24.

The evidence fails to disclose preponderantly that the defendant was guilty of any fraud or misrepresentation which provides a basis for recovery of damages by the plaintiffs.

The finding of the district court that the defendant practiced no fraud upon the plaintiffs is correct and the judgment of dismissal of the action is affirmed.

AFFIRMED.

SIMMONS, C. J., not participating.

IN RE ESTATE OF LUCY V. BARRETT, DECEASED. FRANK R. STUCKEY ET AL., APPELLANTS, V. HYMEN ROSENBERG, EXECUTOR OF THE ESTATE OF LUCY V. BARRETT, DECEASED, ET AL., APPELLEES.
100 N. W. 2d 526

Filed January 8, 1960. No. 34663.

1. **Wills: Taxation.** A testator may shift the burden of taxes from the person or fund which is ordinarily liable under the law to some other person or fund.

2. ———: ———. No special formula of words is necessary to free a legacy or devise from the tax if the intention to do so is shown. A few simple words may suffice to indicate the intention of the testator and to effectuate his purpose.
3. ———: ———. It is permissible for a testator to make a gift which is not subject to diminution by reason of a death tax payment. The controlling consideration here, as elsewhere, is the expressed intention of the testator.
4. **Wills.** In searching for the intention of the testator the court must examine the entire will, consider each of its provisions, give words their generally accepted literal and grammatical meaning, and indulge the presumption that the testator understood the meaning of the words used.
5. **Wills: Taxation.** A gift made by a will of an amount to be paid each month during the life of the beneficiary beginning with the date of the death of the testator manifests an intention that the gift or a part of it should be paid before taxes are or can be estimated or ascertained and indicates an intention that the gift is exonerated from diminution under a tax apportionment act.

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

Mason, Knudsen, Dickeson & Berkheimer, for appellants.

Field & Ricketts and *Ginsburg, Rosenberg & Ginsburg,* for appellees.

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

BOSLAUGH, J.

The issue on this appeal is whether or not the will of Lucy V. Barrett, deceased, directs that the gifts therein made to Ella Saul and Lebbie Blocker were bestowed on them without deduction of state inheritance and federal estate taxes.

Lucy Virginia Barrett, also named in the record as Lucy V. Barrett, herein referred to as testatrix, died testate, a resident of Lancaster County on December 30, 1956, and her will and the codicil thereto were each admitted to probate by decree of the county court of

that county February 27, 1957. Proceedings for the administration of the estate of the testatrix were had in the county court of Lancaster County; that court determined the inheritance taxes due; and Hymen Rosenberg, the executor of the will and estate of the testatrix, paid a substantial federal estate tax. Frank R. Stuckey and Charles S. Stuckey, appellants and the residuary legatees and devisees under the will of the testatrix, by proper application made in that court asked that each beneficiary of a gift by the terms of the will or codicil be required to pay his inheritance tax and a share of the federal estate taxes for the gift. The executor asked instructions of the court in reference thereto. An answer and objections were filed by Ella Saul and Lebbie Blocker, also named in the record as Lebbie Blocher, to the application of appellants for apportionment of state inheritance and federal estate taxes. The issues tried and determined in the county court in this respect were: What if any inheritance taxes were required to be paid by Ella Saul and Lebbie Blocker; what if any of the federal estate tax should be borne by either of them; and how the amount of the inheritance and estate taxes should be collected and from whom. The county court sustained the objections of Ella Saul and Lebbie Blocker, collectively designated hereafter as appellees, to the application of appellants for apportionment; denied the application of appellants; and ordered the executor to make distribution of the estate in accordance with the final decree of distribution entered in the administration proceeding without apportionment of state inheritance or federal estate taxes to the gifts or shares of appellees.

An appeal was prosecuted to the district court for Lancaster County by appellants and identical issues were raised as had been before the county court concerning the taxes, the apportionment thereof, and the payment of them. The adjudication by the district court was in substance the same as that of the county

court. A motion for a new trial was denied and this appeal is from the action of the district court.

The assignments by appellants are in substance: That the district court erred by failing to require that the determined inheritance and apportionable estate taxes on the life estate devised to Ella Saul and on the remainder devised to appellants be charged against and satisfied out of a half-section of land specifically subject to that disposition by the will of the testatrix; and by failing to require that the determined inheritance and apportionable estate taxes on annuities of $100 per month each to appellees be paid by them in full immediately or collected in effect by an actuarially computed credit serving to reduce the monthly payments.

The will of the testatrix gave to Ella Saul, characterized as "my friend and faithful companion," the household furniture in the house on the premises now occupied by Ella Saul "without any restrictions whatsoever." The will devised to Ella Saul a life estate in the premises above referred to with full right to use the premises and every part thereof during her natural life and during that time all income of every nature whatsoever from the land. Appellants, nephews of the deceased and the residuary beneficiaries under the will, or the survivor of them, were required to pay the taxes on the land during the life of Ella Saul "to the end that said property herein described and in which I have given said Ella Saul a lifetime estate shall be fully protected during the time that the said Ella Saul is entitled to the use of the premises * * * which is for her natural life." Appellants were required to "make all needed repairs to the improvements on said premises, including well repairs." The will also provides: "Beginning with the date of my death, I direct my executor to pay to the said Ella Saul, the sum of One Hundred ($100.00) Dollars per month during the time that said estate is being administered, payable monthly and direct that said sum be made a charge against my estate." From the

time the estate was closed and the executor discharged the appellants or the survivor of them were required to continue to pay to Ella Saul the sum of $100 each month during her lifetime and this obligation was made a perpetual lien on the real estate devised by the will to appellants. The payments to Ella Saul were to cease at her death and the lien on the real estate was to be discharged at that time if during her life appellants fully complied with the requirements of the will so far as she was concerned. The land in which Ella Saul was devised a life estate was encumbered by a mortgage of about $10,000. The executor was directed to pay the indebtedness secured by the mortgage as soon as possible after the death of the testatrix from her personal property; and if it was not sufficient, the executor was directed and empowered to sell real estate and liquidate the mortgage. The testatrix recited in her will that she was indebted to Ella Saul, her faithful friend and companion, because of a written contract of July 13, 1934, in the amount of about $1,000 with interest from October 24, 1932, and the testatrix directed her executor to pay the amount thereof to Ella Saul as soon as possible after the death of testatrix from the personal property; and if it was not adequate to do so, then the executor should sell real estate and from the proceeds thereof pay the indebtedness to Ella Saul. The testatrix said in her will that this indebtedness might be barred by the statute of limitations but she gave positive instructions to pay the indebtedness to Ella Saul "regardless of whether said indebtedness may or may not be a legal obligation binding upon my said estate." A provision of the will made the payment of all taxes on the land in which Ella Saul was devised a life estate, the monthly payments to Ella Saul during her lifetime, the payment of the mortgage referred to above, and the repairs to the well and improvements on the land "a positive lien on any and all land of which I die seized * * *."

The will of the testatrix was made November 27, 1943, and a codicil thereto was made April 22, 1954. It gave to "my faithful friends and companions, Ella Saul and Lebbie Blocker" all the livestock owned by the testatrix at the time of her death, and expressed confidence of the maker that "my good friends" will make "an amicable division of the cattle of which I may die seized." The codicil directed appellants or the survivor of them to provide for the care of Ella Saul if she should become ill or be placed in a nursing home. The purpose of this requirement was to provide for Ella Saul if she should become so ill she could not care for herself or in the event that it was necessary or to her best interest that she be placed in a nursing home. The codicil made provision for the payment "beginning with the date of my death * * * to my faithful friend and the caretaker of some of my real estate holdings, Lebbie Blocker," of $100 per month, payable monthly, during his lifetime in the identical language as the gift of a like amount to Ella Saul during her lifetime as above recited. Likewise there was a provision in the codicil for the care of Lebbie Blocker if he became ill, afflicted, or disabled in the identical language as the provision for the care of Ella Saul as stated above. The codicil states if Ella Saul or Lebbie Blocker or either of them were placed in a nursing home and were there provided with care and sustenance, that they or the one of them confined shall not receive the payment of $100 per month during their or his or her illness or disability.

Ella Saul was the preferred and, disregarding the residuary clause, she was the major beneficiary of the will. The chief concern and anxiety of the testatrix was obviously the welfare of Ella Saul and Lebbie Blocker after the death of the testatrix. The will consists of 18 numbered paragraphs. The first nine of these concern incidental and quite minor matters. There are seven paragraphs which concern and are for the benefit of Ella Saul after the death of testatrix. The last

paragraph relates to the appointment and powers of the executor. The codicil to the will of testatrix is composed of eight numbered paragraphs, five of which concern and are for the benefit of Ella Saul or Lebbie Blocker or both. The remaining paragraphs relate to the revocation of a paragraph of the will, a confirmation of the will as modified by the codicil, and the disposition of items of furniture and relics on display in the Joslyn Memorial Building in Omaha. Lebbie Blocker was the preferred and principal beneficiary of the codicil. Ella Saul was nearly 66 years of age and Lebbie Blocker was slightly less than 66 years of age when the testatrix died. The record is silent as to any property or estate owned by either of them except the benefits given them by the will and codicil of the testatrix and the indebtedness of testatrix to Ella Saul mentioned above.

Appellants argue that Ella Saul and Lebbie Blocker should be required to pay the inheritance taxes on the gifts they receive from the testatrix and that they should be compelled to pay the share of federal estate taxes attributable to the gifts they receive from the testatrix in the amounts used by the county court in computing and assessing the inheritance taxes on their gifts. Contrary thereto, appellees assert that the will and codicil contain language definitely evidencing the intention of the testatrix that the temporary estates given and devised to Ella Saul and Lebbie Blocker should not be diminished by the imposition of any death taxes. The issue is thus joined. If it is determined that Ella Saul or Lebbie Blocker is not liable for any death taxes, that will be dispositive of this appeal.

The estate tax apportionment statute, section 77-2108, R. R. S. 1943, provides in part as follows: "Whenever it appears upon any accounting, or in any appropriate action or proceeding, that an executor, administrator, trustee, or other person acting in a fiduciary capacity, has paid * * * any estate tax levied or assessed under

Chapter 77, article 21, or under the provisions of any estate tax law of the United States * * * upon or with respect to any property required to be included in the gross estate of a decedent under the provisions of any such law, the amount of the tax so paid or payable, except as otherwise directed in the decedent's will, * * * shall be equitably apportioned and prorated among the persons interested in the estate. Such apportionment and proration shall be made in the proportion as near as may be that the value of the property, interest, or benefit of each such person bears to the total value of the property, interests, or benefits received by all such persons interested in the estate * * *. In cases where a trust is created or other provision made whereby any person is given an interest in income or an estate for years, or for life, or other temporary interest in any property or fund, the tax on both such temporary interest and on the remainder thereafter shall be charged against and be paid out of the corpus of such property or fund without apportionment between remainders and temporary estates."

The statute directing nonapportionment of inheritance tax, section 77-2008.02, R. R. S. 1943, is in this language: "In cases where a trust is created or other provisions made whereby any person is given an interest in income or an estate for years, or for life, or other temporary or contingent interest in any property or fund, the tax on both such temporary or contingent interest and on the remainder thereafter shall be charged against and be paid out of the corpus of such property or fund without apportionment between remainders and temporary or contingent estates, and any refund of taxes paid out of corpus shall again become a part of the corpus of such property or fund."

The will of the testatrix contains no express direction with respect to the payment of inheritance or federal estate taxes. This omission is not surprising since the will was made about 6 years before the adop-

tion of a tax apportionment statute by this state and more than 8 years prior to the effective date of the Nebraska inheritance tax apportionment statute. When the will was made, in the absence of a direction in the will, the law required all estate taxes to be paid by the residuary estate. Annotation, 37 L. R. A. 2d 109. The estate tax apportionment statute requires the estate tax to be equitably apportioned and prorated among the persons interested in the estate "except as otherwise directed in the decedent's will." § 77-2108, R. R. S. 1943.

In 28 Am. Jur., Inheritance, Estate, and Gift Taxes, § 486, p. 351, it is said: "It is competent for a testator to specify what property or class of property shall assume the burden of the tax on the transfer or the right of succession of his estate, as, for example, to provide that inheritance and estate taxes shall be paid out of the general or residuary estate, or out of any portion of his estate he may designate. The right by will to impose or relieve the burden of estate or inheritance taxes is universally recognized or assumed to exist, and statutes relating to the burden of the estate tax invariably exclude situations in which the testator directs otherwise in his will."

The author of Annotation, 37 A. L. R. 2d 13, says: "A testator who desires to shift the burden of taxation from the person or fund which is liable under the law to some other person or fund is free to employ any words or combination of words that he desires. A few simple words may suffice to indicate his intent and effectuate his purpose."

Sherman v. Moore, 89 Conn. 190, 93 A. 241, declares: "It is, however, competent for a testator to make a gift which shall not be subject to diminution by reason of a succession tax payment. The controlling consideration here, as everywhere, in the construction of wills, is the expressed intent of the testator." See, also. In re Estate of Duryea, 277 N. Y. 310, 14 N. E. 2d 369,

124 A. L. R 647; United States v. Goodson, 253 F. 2d 900; Brock v. House (Ky.), 318 S. W. 2d 409; Cuppett v. Neilly (W. Va.), 105 S. E. 2d 548; Estate of Nesbitt, 158 Cal. App. 2d 630, 323 P. 2d 474.

It is certain that in each instance the intention of the testator as expressed in the will, considered as a whole, is controlling in determining if there shall be apportionment of taxes.

Weller v. Noffsinger, 57 Neb. 455, 77 N. W. 1075, states: "No rule of law is better settled, or more in accord with good sense, than that which requires the intention of the testator to be ascertained from a liberal interpretation and comprehensive view of all the provisions of the will. * * * The court, without much regard to canons of construction, will place itself in the position of the testator, ascertain his will, and, if lawful, enforce it."

It is stated in Hiles v. Benton, 111 Neb. 557, 196 N. W. 903: "Such may have been the implication of Loosing v. Loosing, 85 Neb. 66, but in Kluge v. Kluge, 103 Neb. 534, and Grant v. Hover, 103 Neb. 730, and other comparatively late cases, this court has plainly said, following the Nebraska statute, that it is the intention of the testator which will govern, and not the mere letter of his language."

The recent decision in Abbott v. Continental Nat. Bank, *ante* p. 147, 98 N. W. 2d 804, reiterates this doctrine: "In searching for the intention of the testator the court must examine the entire will, consider each of its provisions, give words their generally accepted literal and grammatical meaning, and indulge the presumption that the testator understood the meaning of the words used."

The testatrix said the devise of the life estate in a half-section of Lincoln County land to Ella Saul was "with full right to use said premises and every part thereof during her natural life and during said life, she shall be entitled to all of the income of every nature

whatsoever, from said land in this paragraph described." The testatrix directed appellants, her nephews and residuary beneficiaries, to "pay the taxes" on the land during the life of Ella Saul "to the end that said property herein described and in which I have given the said Ella Saul a lifetime estate shall be fully protected, during the time that the said Ella Saul is entitled to use the premises * * * which is for her natural life." The testatrix required appellants to "make all needed repairs to the improvements on said premises, including well repairs" and she made "these provisions a lien" on all the extensive real estate which she devised to appellants. Ella Saul thereby got substantially more than the usual life estate in which the life tenant would be liable for taxes and to make repairs and improvements. The intention of the testatrix was made undoubted when she gave Ella Saul not only the full use during her life of the land and the improvements thereon, including the house where Ella Saul was living, but also of all the household furniture in the house "without any restrictions whatsoever" and the common silverware then used by Ella Saul, and required the mortgage indebtedness on the land to be promptly paid after the death of the testatrix. Obviously the testatrix intended to provide, and she thought she had provided, a comfortable home for Ella Saul, her "faithful friend and companion," for the remainder of her life, with the right to all income and profits from the farm on which the home was located; all this with a guarantee of freedom from a single expenditure for rent, taxes, upkeep, repairs, or replacements. It would seem to be self-evident the testatrix intended that there should be no diminution of the gift she made to her faithful friend and companion on any account.

Appellants assert that Ella Saul must be required to bear the burden of the inheritance tax on the gift of a life estate which she received from the testatrix; that the statute says that a life estate is subject to in-

heritance tax at its appraised fair market value on the date of the death of the decedent; and that the portion of the value allocable to the temporary interest, that is the life estate, must be determined actuarially based upon the table provided by the state Tax Commissioner. § 77-2008, R. R. S. 1943. Appellants further say that the method of collecting the tax is that "the tax on both such temporary or contingent interest and on the remainder thereafter shall be charged against and be paid out of the corpus of such property or fund without apportionment between remainders and temporary or contingent estates * * *." § 77-2008.02, R. R. S. 1943. Appellants continue their argument by saying that the first sentence of section 77-2108, R. R. S. 1943, creates rights and obligations of parties with reference to the burden of estate taxes, is substantive, uses the word "shall," and is thereby a legislative mandate. They conclude that the taxes on the life estate instead of being paid out of the half-section of Lincoln County land have been satisfied out of the property in the residue of the estate contrary to section 77-2008.02, R. R. S. 1943, and the last sentence of section 77-2108, R. R. S. 1943, which require that where there is a life estate in property, the tax thereon shall be "paid out of the corpus of such property." These do not say out of the residue of the estate or out of the corpus of the residue but they speak of "such property" in direct reference to the property in which the temporary interest is held. Appellants assert further that the statutory sentence and its purposes are clearly applicable and must be given effect in this case; that the statute specifically gives power to the executor to sell the property in which Ella Saul was given a life estate in order to collect and pay the tax; and that it is doubtless true that a sale of the land must necessarily follow unless the parties can work out a more satisfactory solution. This contention of appellants includes an insistence that the half-section of Lincoln County land must be sold unless Ella Saul

makes some other arrangement satisfactory to appellants and that the inheritance tax on the life estate of Ella Saul and also the inheritance tax on the remainder subject to the life estate properly chargeable to appellants must be paid from the proceeds of the sale, the net proceeds must be invested, and the income therefrom only paid to Ella Saul during her lifetime.

The arguments of appellants or the end result thereof cannot be reconciled with the expressed intention of the testatrix that the property in which she gave Ella Saul a life estate "shall be fully protected, during the time that the said Ella Saul is entitled to use the premises * * * which is for her natural life." The argument of appellants in this regard is the very antithesis of the expressed intention of the testatrix. Appellants would not fully protect but would substantially destroy the usefulness and purpose of the gift made to Ella Saul. It would violate and wholly destroy the obvious purpose and intention of the testatrix that Ella Saul should not in any manner or for any purpose be disturbed in or deprived of the use and income of the land as her home during her lifetime. The contention of appellants in this regard cannot be sustained.

The will involved in Wright Estate, 391 Pa. 405, 138 A. 2d 102, empowered the executors " 'to borrow money to pay any debts or pay any taxes if (the executors) decide the time is not right for the selling of (testator's) securities in paying (his) bequests and debts.' " The residuary estate was by the will given and devised in equal shares to two named charities. The opinion contains this language: "The question, then, is, what did the testator intend, as disclosed by his will, the intent being permissively ascertainable from implication no less than from express direction. * * * A study of Mr. Wright's will reveals a donative scheme which is utterly inconsistent with the idea that the gifts to the preresiduary legatees and devisee were to be subject to deduction for any death taxes in connection with the

decedent's estate. * * * We think the decedent's will clearly evidences an intention that the pre-residuary legatees and the devisee were to receive their testamentary gifts without diminution for any of the death duties incident either to the transmission of the decedent's property at his death or to the beneficiaries' receipt of it."

In re Bruckheimer's Estate, 193 Misc. 414, 38 N. Y. S. 2d 146, considered a provision of a will which provided in part: "'I direct further that my home in Scarsdale, Westchester County, be preserved for the use of my wife and such others as she may designate, as long as she lives or as long as she and my other executors and trustees deem it advisable.'" The court said: "The petitioner seeks a determination particularizing the expenditures required to be made in preserving the home for the widow, and also a finding as to whether the principal account or the income account shall be charged with such expenditures. The preservation of the home requires defrayment of mortgage interest, taxes, repairs, insurance and other fixed charges. The payment of such charges insures both the continuance of ownership of the property and the maintenance of the existing physical condition thereof. * * * The expenses necessarily incurred in preserving the home must be charged against principal. In the absence of a provision for the payment thereof out of income, it is entirely consistent with the testamentary plan to so hold. In view of the imperious direction to the executors and trustees concerning the preservation of the home, it is clear that such charges were intended to be paid whether there should be sufficient income or not. If the charges were to be paid out of income, then the benefits contemplated under the earlier provisions in the will, directing payment of income to the widow, would be materially lessened. Inasmuch as the widow was the primary object of the testator's bounty, it is natural to assume that he wishes the home to be pre-

served for her in any event, for so long as she desired."

In re James' Estate, 180 Misc. 441, 40 N. Y. S. 2d 4, concerned a will which made various specific legacies to relatives and pecuniary bequests to a sister and a niece with directions as to each of the last two legacies that it be " 'paid to her as soon as may be after my death.' " The decision of the court contains this language: "Even more significant are two gifts in two separate trusts of $500,000 each for the benefit for life of her sisters, Mary P. Davidson and Maude P. Larson, respectively, with remainders to certain designated persons. In these gifts contained in paragraphs eighth and ninth of the will the language used is illuminative of a purpose to create these benefits in the full amount of the fund and undiminished by the apportionment and charge of any estate taxes. In each case the gift of the trust fund was to her executors in 'the sum of Five Hundred Thousand Dollars ($500,000.), *or property which they may value at that amount,* such valuation, when made by a majority of my executors to be conclusive for all purposes, * * *.' * * * The direction to set aside securities in the fixed amount precludes an inference that taxes were to be deducted."

In In re Thomson's Will, 43 N. Y. S. 2d 392, a will was involved which directed that $20,000 be invested in Liberty Bonds. The testatrix created a life estate and a remainder in this fund and she directed that in case of any shrinkage of the principal, an equal amount was to be deducted from all gifts made by the terms of the will with the exception of the $20,000 which she required to be " 'kept intact.' " In the opinion of the court it is said: "There remains to be considered the question as to whether the following article of the will indicates an intent that said legacy of $20,000 was to be preferred, and as to whether such language imports an intent that the estate taxes thereon should or should not be prorated among the recipients thereof: 'In case of any shrinkage of the Principle, an equal amount to

be deducted from every ones share with the exception of the amount of $20000, which is to be kept intact & the same to be invested as heretofore stated.' * * * It appears that as of the death of the decedent * * * her assets had dwindled to * * * an amount less than the sum total of all general legacies, and that consequently in all probability there must be an abatement. The direction that said amount 'be kept intact' clearly demonstrates an intent that said legacy was to be preferred over other legacies. * * * As to the second question with respect to the apportionment of estate taxes, it is well established that in the absence of a contrary testamentary intent, all legatees must bear their proportionate share of such taxes. * * * The established policy of this state, that estate taxes shall be prorated, is capable of testamentary reversal where the testator 'otherwise directs in his will'. Matter of Duryea's Estate, 277 N. Y. 310, 14 N. E. 2d 369, 124 A. L. R. 647. I am satisfied that the language of the will demonstrates a desire of the testatrix not only that the legacy in favor of her brother be preferred over other legacies, as hereinabove determined, but that also she intended that such legacy remain 'intact', unimpaired by any deductions whatsoever. The phrase 'which is to be kept intact,' interpreted in the light of the circumstance that the will is holographic, is a clear declaration that the said legatee is exempt from contribution to the payment of the estate taxes."

Estate of Pearson, 90 Cal. App. 2d 436, 203 P. 2d 52, involved the interpretation of a will. The court said: "Appellant contends that the language appearing in the will that 'said real property and premises herewith devised shall be free and clear of all liens of any kind and character and description' evidences an intent of testator that she should receive all of the property devised to her without deduction of the state inheritance tax or its prorata share of the federal estate tax. In answer thereto respondent in effect argues that at most

the provision in question could only be applicable to liens against the real property in existence at the time of the testator's death, such as mortgage liens or other evidence of indebtedness but not the liens, if any, attaching by virtue of federal estate or state inheritance taxes. * * * Turning to the said provision of the will it seems clear that the testator's intent was that appellant should receive the real property free and clear of all liens, since the provision by its terms is applicable only to the devise of the real property and by its context is not applicable to the bequests of personal property. To this extent we agree with respondent's contention but we cannot agree with his further argument that the liens created by the applicable taxing statutes are not such liens as were contemplated by the testator. * * * Neither the phrase 'at the time of my death' as stated in the will, nor 'at the date of death' as provided in the federal and state taxing statutes, appear to be wholly irreconcilable to one another. Possibly the phrase as used in the will is neither as clear nor as precise as it could be. However, that should not be allowed to defeat what appears to this court to have been the clear intent of the testator—that the petitioner herein should receive his home free and clear of all liens at the time of his death which, in accordance with such interpretation, would include the liens of both federal estate and state inheritance taxes as well as other evidences of incumbrance. * * * From our interpretation of the will as stated above it necessarily follows that in determining the amount of state inheritance and federal estate taxes which the executor was authorized to deduct from the share of the estate distributed to appellant, the value of the real property so devised cannot be considered."

In In re Furry's Will, 196 Misc. 763, 92 N. Y. S. 2d 349, the will considered by the court created a trust for the benefit of the wife of the testator and gave her the right to occupy a house. The trustee was directed to

pay " 'all charges accruing on said property while she so occupies same' " and the trustee was authorized to invade the corpus in the event of an accident, catastrophe, emergency, or prolonged illness of the wife. The court said: "The immediate beneficiary of the entire net estate of the testator is his widow, Ethel R. Furry. * * * The only additional material provisions of the will are that the trust created primarily for the widow's benefit is subject to invasion of corpus in the event of 'an accident, catastrophe, emergency or other prolonged illness' and that a power of sale of real estate is accorded subject, however, to the right of the widow to continue to live at testator's last residence * * * as long as she may choose to do so, the said trustee to *'pay all charges accruing on said property while she so occupies same'*. * * * In the present case, the testator's failure to prescribe the source of the payment of the charges in question either from one or the other of the two possible alternatives makes it presently necessary that his most probable intent be gathered as indicated by the composite consideration of all the various criteria determinative thereof. * * * One of the primary rules of construction is that any question of intent must be resolved from a consideration of the will as a whole, gathered from its 'four corners'. In this connection, there are certain applicable observations. The testator first gave all of the net income from his entire estate to his wife. He next gave her the use of his residence to the full extent of her life if she shall choose to have it so. (If she might ever choose otherwise, the residence property must be sold and its proceeds incorporated in the trust for her benefit.) He also incorporated an invasion clause in relation to the trust to take care of his widow in the event of unforeseeable emergencies which he apparently contemplated might be beyond her financial ability to cope with. * * * These provisions of the will indicate beyond any serious question that the primary intent of the testator was to provide for his

widow in preference to any other beneficiary, none of whom were of any blood relationship to himself. He was a prominent industrialist who must, rationally, be assumed to have had in mind that the residence property would be unproductive of income as long as occupied by his widow, and that, if it might be necessary to use a great part of the income from the trust to pay carrying charges on the residence, it would endanger her security, only to result in some aggrandizement of gifts to other and secondary objects of his bounty. The invasion clause by itself indicates he thought he was providing for all contingencies including improbable emergencies. * * * I conclude that the testator's intent in respect to the direction to the trustee to 'pay the same' (charges accruing) was that he meant that such charges be paid from corpus."

In re Meynen's Estate, 173 Misc. 19, 18 N. Y. S. 2d 62, interpreted a will which contained a provision that the testator directed: " 'that out of my total estate available for distribution, shall be paid in full the legacy given to Katherine N. Ackert in paragraph Second of this my Will, and said legacy shall not abate unless said total estate is insufficient for this purpose, in which case it shall be used exclusively for its payment so far as possible.' " In the opinion the court said: "It is out of the balance remaining testator has directed that the legacy in question shall be paid. His intention to charge the available balance with the prior payment of the legacy is emphatically expressed. He desired that she should receive the full sum of $65,000, undiminished by any tax or other charge. Her legacy was not to abate unless his estate was insufficient to make payment in full, and in such contingency it was to be used exclusively for its payment so far as possible. I think the testator has clearly expressed an intention to relieve this legacy from sharing any burden of the taxes." See, also, Annotation, 37 A. L. R. 2d 132.

The monthly payments of $100 to Ella Saul and Lebbie

Blocker, respectively, were directed by the testatrix to be effective "beginning with the date of my death." The executor was directed to pay these amounts monthly from the estate of the testatrix to each of the named beneficiaries during the administration of the estate, and thereafter during the life of each of the beneficiaries the amounts were required to be paid by appellants or the survivor of them. In the event of the illness or disability of the beneficiaries or either of them appellants were required to care for them or the one requiring special care but during such period of illness or disability the monthly payments for the benefit of appellees were to cease. The monthly payments and the obligations for special care of the beneficiaries were made a perpetual lien on the real estate devised by testatrix to appellants. The intention of the testatrix in this regard is reasonably certain. She obviously provided a minimum support for her faithful friends and loyal companions for the life of each by monthly equal payments to them respectively and in the event of illness or disability the gift of each was the amount required to provide them suitable care. During any period of illness or disability the fixed monthly payments were discontinued. The gifts to each of the beneficiaries were assured by a lien on the real estate of the testatrix devised to appellants.

Appellants assert that the executor should be instructed to collect from Lebbie Blocker on account of death taxes $2,382.21 or that this amount be amortized over his life as a net deduction from the monthly sum of $100 of $21.25 so that he would receive only $78.75 monthly instead of $100 monthly; and that the executor should be instructed to collect from Ella Saul $2,650.37 on account of death taxes or that this amount be amortized over her life as a net deduction from the monthly sum of $100 of $22.77 so that she would receive $77.23 monthly instead of $100 monthly.

A provision of a will to pay legacies or bequests com-

mencing immediately or soon after the death of the testator has been determined as manifesting an intention of the testator that such a gift should be paid before estate taxes are or can be estimated and as indicating an intention that such a gift is exonerated from diminution by death taxes under the apportionment acts.

In re Reben's Will, 115 N. Y. S. 2d 228, contains the following: "Direction in fourth article of will that legacies referred to therein be paid within six months of date of testator's death, and direction in seventh article of will that residuary legacies were not to be paid until all legacies contained in fourth article had been paid in full, showed a clear intent on part of testator to exonerate legacies under fourth article of will from any estate tax burden."

In re James' Estate, *supra,* contains this language: "Each of the legacies in separate paragraphs for the benefit of her three secretaries and her housekeeper contains the significant direction that payment should be made to these legatees 'as soon as may be after my death.' Certainly there is no indication of purpose that payment should be deferred until the taxes were finally assessed after a period of two or three years or, more important, that these legacies should be burdened with any share of such taxes."

Annotation, 37 A. L. R. 2d 147, discusses this subject as follows: "There is ordinarily a delay of more than one year before the debts and charges against the estate can be determined so that the estate taxes can be calculated. Therefore a direction to pay certain legacies as soon as possible or within six months after the testator's death manifests an intention that such gifts should be paid before the estate taxes are determined and tends to indicate an intention that they be exonerated from the burden imposed under the apportionment statute."

In 28 Am. Jur., Inheritance, Estate, and Gift Taxes, § 529, p. 374, the author states: "On the other hand,

in particular circumstances the following provisions have been held to shift the burden of death taxes: a direction for equality among children, a provision for payment of a 'net' amount, provision for a legacy payable out of 'my total estate available for distribution,' and a direction to pay legacies as soon as possible or within 6 months after the testator's death—this being a time shorter than that normally required to determine the debts and charges against the estate."

The terms of the will of the testatrix evidence her intention that the gifts therein made to Ella Saul and Lebbie Blocker should not be diminished to any extent by the payment of any part of the inheritance or federal estate taxes.

The judgment should be and it is hereby affirmed.

AFFIRMED.

E. R. SPRINGER ET AL., APPELLANTS, V. JOHN J. HENTHORN, APPELLEE.

100 N. W. 2d 521

Filed January 8, 1960. No. 34708.

1. **Trial.** Under section 25-1315.02, R. R. S. 1943, a motion for directed verdict is an absolute prerequisite to a motion for judgment notwithstanding the verdict, and the trial court cannot, either upon its own motion or upon motion for judgment notwithstanding the verdict, set aside a verdict and enter a judgment notwithstanding the verdict, where no preliminary motion for a directed verdict has been made.
2. **Appeal and Error.** On appeal, our authority is no greater than that of the trial court.
3. ———. 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.
4. **Sales.** Where a seller seeks to rectify a defective condition because of a warranty made at the time of the sale thereof ordinarily the seller is liable for costs of such repairs. And, by doing so, any time limitation on the warranty is thereby waived.

5. **Sales: Damages.** Ordinarily, the measure of damages for breach of warranty of quality or condition is the difference between the value of the property at time of sale and the value it would have had if as warranted.
6. ———: ———. However, all damages in contemplation of the parties to the contract, or which naturally may result from a breach of a warranty, accrue in favor of the party injured by such breach. What are sometimes denominated consequential damages may be recoverable in an action for a breach of warranty, if they are certain and determinate in nature or amount, or can be rendered so by evidence, and are also directly attributable to the breach of the contract as their cause.
7. **Damages: Evidence.** The amount of damages awarded by a jury must be sustained by ascertained and established facts, or it will be set aside.
8. **Damages: Trial.** A jury should be fully and fairly informed as to the various items of damages which it should take into consideration in arriving at its verdict. In this respect it is the duty of the trial court to instruct as to the proper basis upon which damages are to be assessed for each such item.
9. **Trial.** The charge of the trial court to the jury should be confined to the issues presented by the pleadings and supported by the evidence.
10. ———. It is error for the trial court to submit to the jury an issue pleaded by the defendant which, under the evidence adduced in the case, affords no basis for recovery.
11. ———. A verdict cannot be based on mere speculation or conjecture.

APPEAL from the district court for Hamilton County: JOHN D. ZEILINGER, JUDGE. *Reversed and remanded.*

Edgerton & Powell, for appellants.

Charles L. Whitney, for appellee.

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

WENKE, J.

This is an appeal from the district court for Hamilton County. The action was originally brought on January 21, 1958, in the county court of Hamilton County by E. R. Springer and Ralph Olson, doing business as Springer-Olson Company, a partnership, against John J. Hen-

thorn. The purpose of the action is to recover from defendant the sum of $112.55, with interest thereon at 7 percent from September 13, 1954, being the balance allegedly owing on an open running account of defendant with plaintiffs for goods, merchandise, and labor sold and furnished to defendant, which goods, merchandise, and labor, plaintiffs allege, were furnished to defendant at his request and for which he promised and agreed to pay, but has failed to do so. Defendant filed an answer wherein he denied being indebted to the plaintiffs as claimed by them, although in his testimony he admits owing $69 thereof. Defendant also filed a counterclaim wherein he alleged plaintiffs are indebted to him in the sum of $175 for loss he suffered because of a breach by plaintiffs of a warranty given by them on a Ford tractor which he had purchased from plaintiffs on April 16, 1953. From the judgment rendered by the county court the plaintiffs appealed to the district court. In the district court the cause was tried on the same issues as in the county court. A jury brought in a verdict against the plaintiffs and for the defendant, fixing defendant's damages at $175. Judgment was entered on the verdict. Plaintiffs filed two motions, one for judgment notwithstanding the verdict and the other for new trial. Both were overruled and the plaintiffs have perfected this appeal therefrom. It should be mentioned that the trial court, as a condition for overruling these motions, required defendant to file a remittitur for $66.24. This the defendant did, thus reducing his judgment by that amount.

Appellants contend the trial court erred in overruling their motion for judgment notwithstanding the verdict. Appellants did not make a motion for a directed verdict either at the close of appellee's evidence or at the close of all the evidence. We have often said that: "Under section 25-1315.02, R. R. S. 1943, a motion for directed verdict is an absolute prerequisite to a motion for judgment notwithstanding the verdict, and the trial

court cannot, either upon its own motion or upon motion for judgment notwithstanding the verdict, set aside a verdict and enter a judgment notwithstanding the verdict, where no preliminary motion for a directed verdict has been made." Kohl v. Unkel, 163 Neb. 257, 79 N. W. 2d 405. See, also, Allied Building Credits, Inc. v. Damicus, 167 Neb. 390, 93 N. W. 2d 210; Pahl v. Sprague, 152 Neb. 681, 42 N. W. 2d 367; In re Estate of Kinsey, 152 Neb. 95, 40 N. W. 2d 526. And, on appeal, our authority is no greater than that of the trial court. This contention is not well taken.

Appellants also contend that the trial court erred in admitting hearsay evidence when proper objection was made by them thereto. In Wieck v. Blessin, 165 Neb. 282, 85 N. W. 2d 628, where this subject is fully discussed, we held: "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." See, also, Sanne v. Sanne, 167 Neb. 683, 94 N. W. 2d 367; Davis v. Dennert, 162 Neb. 65, 75 N. W. 2d 112; Flaherty v. Carskadon, 155 Neb. 853, 53 N. W. 2d 756; Colbert v. Miller, 149 Neb. 749, 32 N. W. 2d 500; Joiner v. Pound, 149 Neb. 321, 31 N. W. 2d 100. Appellants' assignments of error as to the admission of the evidence complained of do not meet this requirement.

Appellants, as a partnership, operated a business in Aurora, Nebraska. On April 16, 1953, this partnership, through appellant Olson, sold appellee a new Ford tractor, which appellee contends appellants expressly warranted against any defects which would make it unfit to perform normal farm tasks. Appellee, who had been a farmer for many years, was then living in the trade territory of Aurora. He had, prior to April 16, 1953, purchased Ford tractors from Olson on two occasions, one in 1947 and the other in 1949. Thus it becomes apparent that appellant Olson knew the pur-

pose for which appellee was purchasing the tractor.

The burden of proof on the counterclaim was on appellee. Mueller v. Keeley, 165 Neb. 243, 85 N. W. 2d 309. From the evidence adduced a jury could find there was an express warranty on the tractor against any defects; that the tractor was defective in many respects, such as the brakes, gears, transmission, clutch, power lift, and overdrive; that these defective conditions affected the tractor's operation and, on many occasions, prevented appellee from using it to perform the normal farm tasks for which it had been purchased; that appellants, on numerous occasions and as late as September 1955, endeavored to correct these defective conditions but were not completely successful in doing so; that such repairs were usually performed without expense to appellee; and that the Tractor and Implement Division of Ford Motor Company, as late as March 5, 1957, advised their Lincoln distributor of appellee's problem and requested it to make a further investigation.

Appellants contend the trial court erred in its instructions to the jury by referring to a warranty "to perform normal farm tasks," which appellee had pleaded, as reference thereto appears in instructions Nos. 2, 6, 9, 10, and 14. It should be remembered that the counterclaim is based on a breach of warranty and not on fraud because of misrepresentation.

As we have already stated, a jury could properly find, from the evidence adduced, that there was an express warranty against any defects in the operation of the tractor. This is particularly true in view of the conduct of appellants in their endeavor to repair the tractor, free of charge, and to put it in operating condition together with the activities of the Tractor and Implement Division of Ford Motor Company to the same end.

Section 69-415, R. R. S. 1943, insofar as here material, provides: "Subject to the provisions of this act and of any statute in that behalf, there is no implied war-

ranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract to sell or a sale, except as follows: (1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose. * * * (6) An express warranty or condition does not negative a warranty or condition implied under this act unless inconsistent therewith."

Under these provisions of this statute the law implied a warranty that the tractor purchased by appellee was reasonably fit, suited, and adapted to the general purposes for which it was made and sold which, in this case, was the performance of normal farming tasks; that is, there was an implied warranty that the tractor would not be unfit, because of defective materials used or workmanship performed by the manufacturer, to perform the ordinary tasks of the kind of work for which it was purchased. See, Mueller v. Keeley, *supra;* Refrigeration Discount Corp. v. Richards, 135 Neb. 856, 284 N. W. 343; 77 C. J. S., Sales, § 330, p. 1192.

Appellants also contend that appellee's claim for warranty credit on the account is for items furnished long after the warranty had expired. There is no direct evidence as to the length of time the warranty was to cover. The record does show that the last item on the account in September 1955, related to repairs made by appellants in an endeavor to put the tractor in good operating condition because of the warranty given thereon at the time of sale.

Where a seller seeks to rectify a defective condition because of a warranty made at the time of the sale thereof ordinarily the seller is liable for the costs of such repairs. 77 C. J. S., Sales, § 330, p. 1192. And, by doing so, any time limitation on the warranty is there-

by waived. Advance Thresher Co. v. Vinckel, 84 Neb. 429, 121 N. W. 431; Ditto v. International Harvester Co., 105 Neb. 544, 181 N. W. 544.

Appellants further contend there was no evidence adduced upon which a jury could properly base its verdict of damages in the sum of $175.

In Long v. Carpenter, 154 Neb. 862, 50 N. W. 2d 67, we said: "Ordinarily, the measure of damages for breach of warranty of quality or condition is the difference between the value of the property at time of sale and the value it would have had if as warranted. Cox v. Greenlease-Lied Motors, 134 Neb. 1, 277 N. W. 819.

"However, as held in Burr v. Redhead, Norton, Lathrop Co., 52 Neb. 617, 72 N. W. 1058: 'All damages in contemplation of the parties to the contract, or which naturally may result from a breach of a warranty, accrue in favor of the party injured by such breach.

" 'What are sometimes denominated "consequential damages" may be recoverable in an action for a breach of warranty, if they are certain and determinate in nature or amount, or can be rendered so by evidence, and are also directly attributable to the breach of the contract as their cause.' See, also, Punteney-Mitchell Mfg. Co. v. Northwall Co., 66 Neb. 5, 91 N. W. 863.

"As stated in 88 A. L. R. 1440, quoting from 24 R. C. L. 76: ' "The right to recover special damages is subject to two conditions or limitations: (1) That the damages must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract, that is, must be such as might naturally be expected to follow its violation; and (2) they must be certain, both in their nature and in respect to the cause from which they proceed." ' " See, also, Benson v. Walker, 157 Neb. 436, 59 N. W. 2d 739; Sherrill v. Coad, 92 Neb. 406, 138 N. W. 567.

There was evidence adduced to the effect that appellee was, under the foregoing principles, damaged be-

cause of the tractor's failure to operate properly but no evidence was adduced as to the value thereof.

"The amount of damages awarded by a jury must be sustained by ascertained and established facts, or it will be set aside." Poels v. Brown, 78 Neb. 783, 111 N. W. 798.

"A jury should be fully and fairly informed as to the various items of damages which it should take into consideration in arriving at its verdict. In this respect it is the duty of the trial court to instruct as to the proper basis upon which damages are to be assessed for each such item." Baty v. Wolff, 162 Neb. 1, 74 N. W. 2d 913. See, also, Kroeger v. Safranek, 161 Neb. 182, 72 N. W. 2d 831.

"The charge of the trial court to the jury should be confined to the issues presented by the pleadings and supported by the evidence." Kroeger v. Safranek, *supra.*

"It is error for the trial court to submit to the jury an issue pleaded by the plaintiff which under the evidence adduced in the case affords no basis for recovery." Van Wye v. Wagner, 163 Neb. 205, 79 N. W. 2d 281.

A verdict cannot be based on mere speculation or conjecture. Van Wye v. Wagner, *supra;* Wessel v. City of Lincoln, 145 Neb. 357, 16 N. W. 2d 476; Securities Investment Corp. v. Krejci, 132 Neb. 146, 271 N. W. 287; Peabody v. Continental Life Ins. Co., 128 Neb. 23, 257 N. W. 482.

We think this contention of appellants has merit and, because thereof, the judgment should be reversed and the cause remanded to the district court for a new trial. It is so ordered.

REVERSED AND REMANDED.

IN RE APPLICATION OF EDWARD D. KENNEDY FOR A WRIT OF HABEAS CORPUS.

EDWARD D. KENNEDY, APPELLANT, V. PATRICK CORRIGAN, SHERIFF OF DOUGLAS COUNTY, NEBRASKA, APPELLEE.

100 N. W. 2d 550

Filed January 8, 1960. No. 34744.

1. **Habeas Corpus: Bail.** In a case where bail in a criminal prosecution has been fixed and request has been made to the district court for reduction and fixation, which request has been refused, resort to habeas corpus to review the discretion of the district court is available.
2. ———: ———. In a habeas corpus action the fixation of the amount of bail is a matter residing in the sound discretion of the court.
3. **Bail.** Where bail has been fixed the presumption that it is reasonable and not excessive prevails until the contrary is made to appear.
4. **Habeas Corpus: Bail.** The petitioner in an action in habeas corpus, and also the respondent, may adduce evidence bearing on the question of whether or not the bail fixed is reasonable and not excessive.
5. **Bail.** Matters proper to be considered in determining whether or not a sound discretion has been exercised in fixing bail are atrocity of the offense, the penalty authorized, the probability of the accused appearing to answer the charge if released on bail, his pecuniary condition, and the circumstances surrounding the case.

APPEAL from the district court for Douglas County: PATRICK W. LYNCH, JUDGE. *Affirmed.*

Jack L. Spence and *Thomas P. Lott*, for appellant.

Clarence S. Beck, Attorney General, and *Bernard L. Packett*, for appellee.

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

YEAGER, J.

This is an appeal in an action wherein Edward D. Kennedy, as petitioner by his attorney, filed a petition for writ of habeas corpus the declared purpose of which

was to have the district court for Douglas County reduce bail in the amount of $25,000 which had been fixed on a finding by the municipal court of the city of Omaha, Douglas County, Nebraska, of probable cause to believe that the petitioner was guilty of the crime of "possession of burglar tools," and to fix bail in an amount in conformity with the petitioner's constitutional rights. Patrick Corrigan, sheriff of Douglas County, Nebraska, was named as respondent. The petitioner was at the time in the custody of the sheriff. By the petition it was alleged that the bond of $25,000 was fixed in the municipal court on September 16, 1959, and that a motion was filed in the district court for a reduction of the amount on September 17, 1959, which was overruled on September 18, 1959.

A writ requiring the production of the petitioner was duly issued, and according to the terms of an order in the transcript the respondent made a return and produced the petitioner in court. The transcript contains no pleading which denies the allegations of fact contained in the petition. A hearing was had on September 29, 1959, and the petition was denied. From this order the petitioner has appealed. He will hereinafter be referred to as appellant and the respondent will be referred to as appellee.

It is proper to state here that in this case on the record there is, properly speaking, no factual dispute. There is a bill of exceptions but it contains little bearing on the questions here for consideration. The only basic facts in the case are that the appellant stood charged with the offense of "possession of burglar tools"; that bail was fixed at $25,000; that he applied to the district court for a reduction thereof; and that a judge of the district court denied his application. These allegations of fact are not denied. It is further pointed out that no question has been raised of whether or not the offense with which the appellant is charged is bailable. The parties have proceeded on the assumption that it is a bailable offense.

The first question presented for consideration is that of whether or not the issue of the excessiveness of bail under the conditions described in the petition may be raised and adjudicated in a habeas corpus proceeding in the district court, and in case of an adverse ruling in that court whether or not a review may be had on the merits in this court.

The appellee contends substantially that when there has been a request to the district court for reduction and fixation of bail and a ruling had thereon denying the request the only remedy is that of appeal from that ruling to this court.

This contention of the appellee cannot be sustained. This court, in the case of In re Scott, 38 Neb. 502, 56 N. W. 1009, a case similar in the particulars to this one, made this clear. That was an action in habeas corpus in which one in custody on a criminal charge was seeking a reduction of the amount fixed for bail.

In arriving at its conclusion as to whether or not habeas corpus was available the court referred first to section 346 of the then criminal code. This section designates those who may fix and take bail in bailable offenses. The substance of this section appears in section 29-901, R. R. S. 1943. There is more to the new section than this but this portion is in nowise negatived.

The opinion then refers to section 358 of Chapter 34 of the then criminal code. This section, with reference to habeas corpus as applied to a person in custody charged with an offense, contains the following: "And in case the person or persons applying for such writ shall be confined or detained in a legal manner, on a charge of having committed any crime or offense, the said judge shall, at his discretion, commit, discharge, or let to bail such person or persons, * * *." The substance of this section is contained in section 29-2806, R. R. S. 1943.

In application of the provision to the situation the court said: "Suppose in violation of the constitutional provisions excessive bail be demanded and the pris-

oner required to give a recognizance in a sum greatly in excess of that which the nature of the offense and the circumstances of the case demand. Would it for a moment be contended that the prisoner is without a remedy? Certainly not. He may in such a case in a proceeding by habeas corpus have the amount of bail reduced or fixed anew under the section last above quoted."

This case has never been reversed and nothing has been presented which is deemed sufficient to justify a departure from the conclusion arrived at in the opinion or criticism of the reasoning on which it is predicated.

It then becomes necessary to review and pass upon the question of whether or not the district court erred in refusing to reduce the bail of appellant below $25,000, and if it did so err to fix the proper amount. In a determination of this question a rule for guidance is that without evidence the person charged with the criminal offense is for the purpose of bail presumed to be guilty. See In re Scott, *supra*.

This presumption however may be overcome by proof, and the court may take evidence relating to the truthfulness of the charge for the purpose of arriving at a conclusion as to the amount of bail to be exacted. See In re Scott, *supra*.

Incidents to be taken into consideration in fixing bail as pointed out are numerous. In the case of In re Scott, *supra*, it was said: "Many things should be taken into consideration in fixing the amount of bail, such as the atrocity of the offense; the penalty which the law authorizes to be inflicted in case of a conviction; the probability of the accused appearing to answer the charge against him, if released on bail; his pecuniary condition and the nature of the circumstances surrounding the case."

The adduced evidence as to these elements shows only and generally that the appellant had on other occasions been released on bail and that he responded

as required without difficulty. The only other pertinent information is that which may be gleaned from the statutes and that is that the penalty for the offense charged is imprisonment in the penitentiary for not less than 1 nor more than 5 years. Neither party on the hearing in the district court chose to submit other or further evidence bearing on the proper elements of inquiry.

The question therefore was, on the record, that of whether or not the bail of $25,000 demanded was unreasonable and disproportionate, under the limited disclosure, to the crime charged. There is no fixed pattern in this jurisdiction whereby this question may be resolved. This court has said that it is a question of discretion and that the discretion of the court fixing the amount of bail, in the absence of abuse, will be accepted. See In re Scott, *supra*.

Many cases from different jurisdictions are referred to in an annotation, 72 A. L. R. 801, wherein the various phases of this subject and the propriety of the amount of bail under different circumstances and as to different charges of crime are considered. The citations will not be set out herein. No pattern or guide as to reasonableness of bail flows from these cases. In some the court in fixing the amount of bail which was under examination had before it extraneous facts bearing on the question and in others this does not appear to have been true.

It appears therefore that since, as already pointed out, the fixing of bail is a matter of discretion which discretion will be upheld unless it has been abused, this case must turn upon the question of whether or not the district court abused its discretion in refusing to reduce the bail below $25,000.

The appellant has failed to present this court with a record containing evidence of the surrounding facts and circumstances relating to the matter of sufficiency of bail and the question of the discretion of the court

in fixing it, as it has been made clear he had the right to do. There is the same lack of showing on the part of the appellee. The burden of showing here that the bail was excessive, however, was upon the appellant.

In the absence of a showing such as indicated it may not well be said that in this instance the action of the district court in refusing to reduce bail amounted to an abuse of discretion, especially in view of the penalty provided by law for the criminal offense with which appellant is charged.

In the light of this the judgment of the district court is affirmed.

AFFIRMED.

DONALD J. PALTANI, APPELLEE, V. JOSEPHINE CREEL, APPELLANT.
100 N. W. 2d 736

Filed January 15, 1960. No. 34595.

1. **Children Born Out of Wedlock: Actions.** In this state, a common-law jurisdiction, an action for the purpose of legitimating or determining the paternity of a child born out of wedlock and obtaining support and maintenance for such child depends upon statutory authority for its maintenance.
2. ———: ———. In an action the sole purpose of which is to have determined the paternity of a child born out of wedlock, the proceeding must be in accordance with the provisions of section 13-106, R. R. S. 1943, or section 13-113, R. S. Supp., 1957.
3. ———: ———. In this case a valid cause of action within the meaning of section 13-106, R. R. S. 1943, or section 13-113, R. S. Supp., 1957, has not been pleaded or proved.
4. **Marriage.** In a case wherein there is an issue as to the nullity of a marriage and a decree of nullity has been rendered, the court may decree what it shall deem proper concerning the care, custody, and maintenance of minor children of the parties.

APPEAL from the district court for Douglas County: HERBERT RHOADES, JUDGE. *Reversed and remanded.*

Schrempp & Lathrop, Henry C. Rosenthal, Jr., and *Simon J. Albracht,* for appellant.

Clayton H. Shrout and *James H. Moylan,* for appellee.

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

YEAGER, J.

This is an action in equity by Donald J. Paltani, plaintiff and appellee, against Josephine Creel, defendant and appellant, which was tried in the district court for Douglas County, Nebraska, the purpose of which was to have himself declared the father of two children born out of wedlock to the defendant; to be declared entitled to all rights attendant "upon being the father of said children"; and for such other and further relief as equity may require.

To the petition on which the action is based the defendant filed a demurrer on the ground that the court was without jurisdiction and on the further ground that the petition did not state a cause of action. The demurrer was overruled after which an answer was filed. The demurrer was preserved in the answer.

The action came on for trial and at its conclusion the court decreed that the plaintiff was the father of the two children; that he pay $10 a week for each child for support and maintenance until the further order of the court; and that he was entitled to "the right of reasonable visitation" of the children until the further order of the court. From this judgment the defendant has appealed.

The brief of appellant contains five assignments of error but in the light of the view taken the substance of only one requires consideration in this opinion. That one presents the question of whether or not the petition states a cause of action.

This is a direct action, as has already become apparent, by an alleged father of two children born out of

wedlock the primary purpose of which is to have himself declared the father. This purpose is not in anywise incidental to other relief which is proper for consideration in an action cognizable in equity.

Every question which is presented by the assignment of error which has been urged by the appellant and responded to by the appellee has been fully answered, adversely to the appellee, by the opinion in Timmerman v. Timmerman, 163 Neb. 704, 81 N. W. 2d 135. In that case it was said: "In this state, a common-law jurisdiction, an action for the purpose of legitimating or determining the paternity of a child born out of wedlock and obtaining support and maintenance for such child depends upon statutory authority for its maintenance."

With reference to the method to be employed in the determination of paternity it is said in the same case: "In an action the sole purpose of which is to have determined the paternity of a child born out of wedlock, the proceeding must be in accordance with the provisions of section 13-106 or 13-113, R. R. S. 1943." Section 13-113, R. R. S. 1943, was amended by action of the 1955 Legislature but not in any sense pertinent here.

The appellee contends however that by authority of this same case his action in equity for the purposes declared in the petition is proper. He relies upon the fact that in that case which was an action triable in equity a decree declaring paternity of a child born out of wedlock was rendered.

It is true that in that case the right of the court to adjudicate paternity of a child born out of wedlock was upheld. The right to maintain an action in equity for that sole purpose however was not declared or upheld. Such a right, as pointed out, was expressly denied.

That action as instituted was for divorce. After the action was instituted the validity of the marriage was appropriately brought into question and it was by the decree of the court nullified. The court then decreed paternity and fixed the custody of a child born of the

parties, and made provision for his maintenance. It was this action that was approved by this court.

The action was not approved, however, on the ground that it was in the exercise of the general equity power of the court. It was, as is pointed out in the opinion, pursuant to power granted and declared in situations such as the one presented under the facts of that case, namely, the power of the court in an instance where there was an adjudication of nullity of a marriage. The provision is section 42-311, R. R. S. 1943, and the part which is of significance here is the following: "Upon pronouncing a sentence or decree of nullity of a marriage * * * the court may make such further decree as it shall deem just and proper concerning the care, custody, and maintenance of the minor children of the parties, * * *." It is not pleaded or otherwise contended that in the present action the question of the validity of a marriage is involved.

In the light of this, unless this court is to depart from what was said in Timmerman v. Timmerman, *supra*, it must be said that no valid cause of action was pleaded and the demurrer should have been sustained and the action dismissed. There is no disposition to so depart.

The judgment of the district court is accordingly reversed and the cause remanded.

REVERSED AND REMANDED.

SIMMONS, C. J., not participating.

BERT ARMBRUSTER ET AL., APPELLANTS AND CROSS-APPELLEES, V. STANTON-PILGER DRAINAGE DISTRICT, APPELLEE AND CROSS-APPELLANT.
100 N. W. 2d 781

Filed January 15, 1960. No. 34614.

1. **Appeal and Error.** When this court determines the law of the case on appeal, the trial court is bound thereby and its judgment

in accordance therewith will not ordinarily be disturbed on a subsequent appeal.

2. ———. Generally, however, if other and different issues of fact and of law relating thereto have been properly adduced and presented in a new trial, the law of the case is not controlling thereof in a subsequent appeal.

3. **Drains.** The method of financing improvements and repairs of a drainage system and the plans for accomplishing the result are ordinarily within the discretion of the board of supervisors of the district, but it must act, and its acts must be commensurate with its legal duty.

4. **Constitutional Law: Eminent Domain.** When land is taken outside the boundaries of the right-of-way condemned, it constitutes a second taking of private property for a public use and liability attaches therefor under Article I, section 21, of the Constitution.

5. **Injunction.** A party seeking an injunction must establish by competent evidence every controverted fact necessary to entitle it to relief and an injunction will not lie unless the right is clear, the damage is irreparable, and a remedy at law is inadequate to prevent a failure of justice.

6. ———. Acts which destroy or result in a serious change of property either physically or in the character in which it has been held or enjoyed have been held to do an irreparable injury.

7. ———. Ordinarily where an injury wrongfully committed by one against another is continuous or is being constantly repeated so that complainant's remedy at law requires the bringing of successive actions, that remedy is inadequate and the injury will be prevented by injunction.

8. ———. In such cases, equity looks to the nature of the injury inflicted, together with the fact of its constant repetition or continuation, rather than to the magnitude of the damages inflicted, as the ground of affording relief.

9. **Eminent Domain.** The measure of damages for land taken for public use is the fair and reasonable market value of the land actually appropriated and the difference in the fair and reasonable market value of the remainder of the land before and after the taking.

10. ———. Everything which affects the market value is to be taken into consideration. The burden of additional fencing, and like matters, are to be included, not by being added together item by item, but to the extent that, taken as a whole, they detract from the market value of the property.

11. **Constitutional Law: Eminent Domain.** In a suit to recover damages under the constitutional provision for damages to property for public use, it is immaterial whether the petition states a cause of action ex delicto or ex contractu. If the fact is

established that property has been damaged for public use, the owner is entitled to compensation.

12. **Eminent Domain.** In fixing the damages sustained by a landowner in consequence of the appropriation, or injury, of his property for a public use, every nonspeculative element of annoyance and disadvantage resulting from the improvement which would influence an intending purchaser's estimate of the market value of such property may be taken into account.
13. **Estoppel.** A party may not properly base a claim of estoppel in his favor on his own wrongful act or dereliction of duty, or on acts or omissions induced by his own conduct, concealment, or representations.
14. ———. There can be no waiver or estoppel unless the person against whom it is claimed had full knowledge of his rights and of facts which will enable him to take effectual action for their enforcement. No one can acquiesce in a wrong while ignorant that it has been committed, and that the effect of his action will be to confirm it.
15. **Release.** General words in a release are ordinarily sufficient to bar a claim which had accrued at the date of the execution of the release, or a claim known to exist by the party signing it.
16. ———. However, when the amount received in settlement is grossly inadequate to compensate for the injuries sustained, that fact may be considered, with other evidence, as tending to show unfair practice, that the party has been overreached, and that the minds of the parties never met in consummation of a valid contract.
17. ———. Also, even where parties fairly and honestly intend to settle their controversy for known injuries received, but there are injuries wholly unknown to the parties, of a serious character, which are not taken into consideration, a release given in settlement of the injuries, although purporting to be a release of all damages that may thereafter accrue, will be set aside on the ground of mutual mistake, as inequitable, unjust, and not complying with the intention of the parties.

APPEAL from the district court for Stanton County: LYLE E. JACKSON, JUDGE. *Reversed and remanded with directions.*

R. M. Mueting and *R. J. Shurtleff*, for appellants.

Thomas L. Grady, for appellee.

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

CHAPPELL, J.

This case is here on appeal a second time. Our former opinion is reported as Armbruster v. Stanton-Pilger Drainage Dist., 165 Neb. 459, 86 N. W. 2d 56. Therein plaintiffs, Bert Armbruster and Irene Armbruster, his wife, appealed, and we reversed the judgment of the trial court which had dismissed plaintiffs' amended and supplemental petition on motion of defendant, Stanton-Pilger Drainage District, at conclusion of plaintiff's case. We then remanded the cause for new trial. Plaintiffs' action sought a mandatory injunction and damages against defendant. Hereinafter, when referring to Bert Armbruster alone he will be called plaintiff, and when referring to both plaintiffs, they will be so designated.

Except on the issues of plaintiffs' alleged release of their claim for damages and their alleged estoppel to claim the same, this appeal will be considered in the light of the applicable and controlling rules appearing in Snyder v. Lincoln, 156 Neb. 190, 55 N. W. 2d 614, which held that: "When this court determines the law of the case on appeal, the trial court is bound thereby and its judgment in accordance therewith will not ordinarily be disturbed on a subsequent appeal." Generally, however, if other and different issues of fact and of law relating thereto have been properly adduced and presented in a new trial, the law of the case is not controlling thereof in a subsequent appeal. It would serve no useful purpose here to restate the determined rules of law which appear in our first opinion as syllabus points 2 to 8 inclusive. The entire record, including all evidence adduced by plaintiffs at the first trial together with all evidence adduced by the parties at the new trial, is now before this court for consideration.

To clarify the situation, we point out that this case involved the alleged interference with and diversion by defendant of waters flowing in a small natural stream known as Cedar Creek, hereinafter called the creek,

which caused damages to plaintiffs' land by erosion of said creek. In that connection, it is undisputed that prior, during, and subsequent to 1950, plaintiffs were joint owners of the north half of a described section of land in Stanton County. Prior to 1950, the creek entered plaintiffs' land from the south at a point near the southeast corner, then flowed 3,960 feet north and northwest, then left plaintiffs' land at their north line under a county bridge which spanned the creek on an east and west county road, thence flowed on north over land of another and emptied into the Elkhorn River, which flowed generally from east to west in a meandering course about 2,200 feet north of plaintiffs' north line.

It was stipulated as follows: That a petition to form defendant district under the provisions of sections 31-401 to 31-450, R. R. S. 1943, inclusive, was filed August 19, 1949. It was signed by 12 named persons other than plaintiffs. The same day a statutory bond was filed which was signed by all such named persons except one. On October 11, 1949, five named directors other than plaintiffs were elected, who all continued to serve defendant as such for more than 5 years thereafter. On October 24, 1949, such directors instructed defendant's engineer, theretofore employed by them, to prepare detailed plans, specifications, and cost estimates for the construction of a pilot channel, hereafter called ditch, with which to straighten the channel of the Elkhorn River. On February 9, 1950, such plans, specifications, and cost estimates were presented to defendant's directors, who approved and adopted a proposed plan which provided for the construction of a ditch 34 feet wide at the top, 24 feet wide at the bottom, and 10 feet deep, with a right-of-way 100 feet wide on each side, and such plans were left at all times thereafter in the custody of defendant's lawyer. In that connection, it is undisputed that no part of plaintiffs' land was within the boundaries of the district except plaintiffs' described northwest 40 acres, and plaintiffs' land, through which

the creek flowed and on which damages directly occurred by erosion, was entirely outside the boundaries of the district.

The record discloses that in 1950 defendant constructed the ditch over right-of-way acquired by it for the purpose of straightening the Elkhorn River channel and to provide for the passage of waters which would otherwise have flowed through the old Elkhorn River channel. The ditch was constructed from west to east and then from east to west until it intersected or cut across the channel of the creek on land of another about 990 feet north of plaintiffs' north line. The ditch, which was completed by defendant in November or December 1950, was cut about 6 feet below the base or bed of Cedar Creek and the Elkhorn River, which created a waterfall 6 feet high where defendant's ditch intersected the creek, and the water therefrom emptied into the ditch. The evidence is conclusive that thus such waterfall created by defendant naturally and directly caused the channel of the creek to substantially erode upstream in the creek, thus deepening and widening the creek and continuing to do so until it reached and entered plaintiffs' land, and, as hereinafter observed, caused and continued to cause substantial and irreparable damage to plaintiffs' land and the use thereof, and to plaintiffs' improvements and structures on their land.

Before such erosion caused by the waterfall had reached plaintiffs' land, and before any material damage had been caused on their land, plaintiffs notified defendant of the apparent progressive damage which had already manifested itself on the land of another north of plaintiffs. However, although there were and are standard, practical, feasible, and effective structures, means, and methods by which defendant could have built and thereby arrested and prevented the damage to plaintiffs which naturally ensued, occurred, has continued, and will continue to occur through all 3,960 feet of plaintiffs' land unless prevented, defendant has

failed and refused to employ any such means or methods. On June 27, 1952, before damages had occurred on plaintiffs' land, they filed an original petition against defendant, praying for a mandatory injunction and requiring defendant to build some such structure in the bed and channel of the creek to prevent further erosion to and upon plaintiffs' land. While such action was pending, the waterfall had eroded into plaintiffs' land for some distance, deepening, widening, and eroding the bed and banks of the creek and causing substantial and irreparable damage to plaintiffs' land and the use thereof, and to some improvements and structures on plaintiffs' land.

In the meantime, about August 25, 1952, plaintiffs consulted with and employed an engineer, and, as advised by him, plaintiffs expended some $7,267.74 in the respective construction of three separate piling structures in the creek on plaintiffs' land, thereby attempting to prevent further erosion and damages, but each of such structures eventually washed out during heavy rains and failed to stop the continued erosion. Plaintiffs had also expended substantial sums to protect, remove, or repair the property and improvements on their land which had been damaged or were threatened by the erosion. There is some evidence by plaintiffs' engineer that the piling structures built by plaintiffs' contractor, who was admittedly competent, failed to function as they should and would have done, because plaintiffs did not follow the engineer's instructions and have enough concrete placed in the bed of the creek below the piling. However, such evidence was a mere conclusion, of doubtful credibility as we view it, because in making an inspection he made no attempt to determine, and admittedly never knew, how much concrete plaintiffs did have placed below the structure. In any event, the structures washed out substantially around the ends of the piling and not below the piling. In such respect, plaintiff testified positively that he fol-

lowed his engineer's instructions and expended such sums in good faith, which is the important factor to be considered here because, as hereinafter observed, plaintiffs could not recover such sums as such in any event.

Be that as it may, on July 2, 1953, plaintiffs filed an amended and supplemental petition, hereinafter called petition, repeating and elaborating upon the allegations of their original petition and seeking both a mandatory injunction and damages. Thereafter, on January 28, 1954, defendant filed an answer denying generally and alleging as a defense that plaintiffs never filed with the secretary of defendant's board of directors any notice of their claimed damages within 30 days after they occurred, as provided by section 31-451, R. R. S. 1943. Defendant then prayed for dismissal of plaintiffs' petition. However, thereafter, on November 16, 1955, defendant filed an amended answer renewing its previous allegations and also alleging as a defense that on July 13, 1950 (which, it will be noted, was before the ditch had been constructed or any damage to plaintiffs was threatened or had occurred), plaintiffs allegedly satisfied and released defendant from all damages, present and future, sustained by them, arising or growing out of construction of the ditch, whether plaintiffs' damages were caused by negligence of defendant or otherwise. A copy of said release, admittedly signed by plaintiffs on July 13, 1950, was attached to and made a part of defendant's amended answer. Defendant then renewed its prayer for dismissal.

It is well here to say that such release provided in substance that for a consideration of $9.20 plaintiffs granted defendant the authority to construct and perpetually maintain such ditches or drains as necessary or expedient for the purpose of straightening or altering the then course of the Elkhorn River or providing a system of drainage within said district for surface or running water over and upon a part of plaintiffs' particu-

larly-described northwest 40 acres heretofore mentioned, which was within the district but through which the creek never flowed. The release then went on to grant defendant perpetual authority "upon the above described premises" to cut, remove, or destroy all trees or bushes growing or being within a distance of 100 feet of the center line of any ditch constructed or excavated by defendant or of the center line of the Elkhorn River "where the course of such river remains unchanged" (and it did remain unchanged) which, as hereinafter observed, ran through an unused ninety-two hundredths of an acre, entirely located in said 40 acres between the county road and plaintiffs' extreme northwest corner of said 40 acres. The release also gave defendant perpetual authority within the area where the trees or brush might be destroyed, to construct and maintain such dikes, levees, or dams as might be deemed necessary by defendant. The release then agreed that the $9.20 consideration was received by plaintiffs in full settlement and satisfaction for all damages, present and future, "to the above described premises or to any other premises owned by either of us within the boundaries of said Drainage District, or damage otherwise sustained by either of us, arising or growing out of the construction, excavation, or maintenance of ditches, drains, dikes, levees, or dams upon the above described premises *or upon other lands in said Drainage District,*" whether such damage arose because of the negligence of defendant in the construction and maintenance of such works of improvement or otherwise. (Italics supplied.) In that connection, defendant relies solely upon the above-quoted obscure italicized language. It will be noted that the release refers repeatedly to "upon the above described premises" which was a part of plaintiffs' described 40 acres, the only portion of plaintiffs' land "within the boundaries of said Drainage District." It is apparent to us that unless plaintiffs, as reasonably intelligent persons, were

particularly informed and warned or knew that the language "or upon other lands in said Drainage District," meant that they thereby also released all damages, present and future, to their land, it would not and could not be so reasonably understood.

On December 12, 1955, plaintiffs filed a reply traversing defendant's allegations that plaintiffs had failed to comply with section 31-451, R. R. S. 1943. In such respect, plaintiffs alleged that they had complied therewith at their earliest known opportunity and that same was not required in any event to recover under the provisions of Article I, section 21, Constitution of Nebraska. With regard to plaintiffs' alleged satisfaction and release of damages, plaintiffs denied generally and alleged in substance that they did not know or realize and had never been informed by defendant, as it had the duty to do, that the proposed ditch would cut below the bed of the creek and thereby create a waterfall which would cause the creek to erode upstream and damage plaintiffs' land outside the district in any respect; that the threatened damage to plaintiffs' land was not apparent or known to them for a considerable time after the ditch had been constructed; that at the time plaintiffs signed said release, they did not know or intend, and were not informed that for a nominal and greatly inadequate consideration of $9.20, they were releasing any damages they might sustain by diversion of the creek from its bed or channel and such was not within the contemplation of either plaintiffs or defendant; that there was either a mutual mistake, or defendant overreached plaintiffs and took or seeks to take an unfair and unjust advantage of plaintiffs' ignorance of facts then existing; and that equity should not relieve defendant from its unlawful acts and negligence by enforcing said release. Plaintiffs also alleged that at and prior to the signing of said release, the Elkhorn River ran through about an acre located in the extreme northwest corner of plaintiffs' 40 acres heretofore mentioned

and described in the release, and plaintiffs were informed by defendant that the purpose of the release was to secure an easement for right-of-way over ninety-two hundredths of an acre located in said corner, for which plaintiffs were offered and paid $9.20 on the basis of $10 an acre, the amount per acre which defendant paid to others granting such an easement. Plaintiffs then renewed the prayer of their petition.

In that connection, it was stipulated that on August 26, 1950, which it will be noted was before construction of the ditch and before plaintiffs were damaged or threatened with any damage, the directors allowed some bills and ordered warrants for their payment, among which was one to plaintiffs "Bert Armbruster and Irene Armbruster, easement for right-of-way $9.20." In that connection, we point out here that defendant's own engineer, in testifying at the second trial about the claimed erosion and damages to plaintiffs, testified that they didn't anticipate it doing what it had done; never dreamed of it; and never expected it to do that. Also, one of defendant's directors testified that he never knew how deep the bed of the creek was to be cut. Another testified that he never was warned that there might be erosion and trouble in the creek if the cutoff was made through there. Another testified that they did not know and could not foresee what would happen, and that he was never warned that such a situation would be created in the creek. At this point, it is well to say that plaintiffs' evidence established the relevant and material allegations of their reply by a great preponderance of the evidence.

The first trial began on December 12, 1955, and proceeded at designated intervals until September 12, 1956, when plaintiffs rested and defendant moved for dismissal, and on November 28, 1956, the trial court rendered a judgment sustaining defendant's motion and dismissing plaintiffs' petition. Thereafter, on April 6, 1957, plain-

tiffs' motion for new trial was overruled, and they appealed.

Our opinion, Armbruster v. Stanton-Pilger Drainage Dist., *supra,* filed November 15, 1957, summarized the factual situation adduced by plaintiffs as declared in their petition. Our opinion concluded that plaintiffs' cause of action was sustained by plaintiffs' evidence, that is, that plaintiffs had proved the acts charged against defendant and plaintiffs were thereby damaged. Citing authorities, we concluded that plaintiffs had stated a cause of action, which, if sustained by evidence, would entitle them to a mandatory injunction, and that the evidence adduced was prima facie sufficient to prove their right to such relief. Citing other authorities, we also concluded that plaintiffs' right of action, based on Article I, section 21, Constitution of Nebraska, was not barred by failure to give the notice provided by section 31-451, R. R. S. 1943; that plaintiffs' cause of action for damages could be and was properly joined with one for equitable relief; and that plaintiffs' evidence was prima facie sufficient to sustain a recovery of damages. In the light thereof, we reversed the judgment and remanded the cause for new trial.

On June 30, 1958, judgment on the mandate was rendered by the trial court, which granted a new trial; retained the cause on the trial docket in order to proceed in conformity with the judgment and mandate of this court; and ordered plaintiffs to recover from defendant the costs of appeal. Thereafter, on December 22, 1958, with leave of court, defendant filed an amendment to its amended answer alleging that plaintiff, having actively participated in the location and construction of defendant's ditch, and plaintiffs having executed the release aforesaid, they were estopped to assert any claim for damages against defendant.

On December 22, 1958, the new trial was resumed as if plaintiffs' reply were a reply to defendant's answer as amended. Thereat, plaintiffs were permitted to with-

draw their previous rest. Whereupon all evidence adduced by them at the first trial was offered and received; they adduced additional evidence with regard to the condition of their land and additional damages sustained by them since the first trial; defendant adduced evidence in support of its amended answer; and plaintiffs offered evidence in rebuttal. Thereafter, on January 7, 1959, rests of the parties were withdrawn by agreement to stipulate some matters with reference to organization of defendant district; its election of directors; their instructions to defendant's engineer to prepare detailed plans, specifications, and cost estimates for construction of the ditch; their approval and adoption thereof; and the allowance of $9.20 to plaintiffs for a right-of-way easement, all of which has been heretofore mentioned.

On January 27, 1959, after the trial court had viewed the premises, a judgment was rendered, which found and adjudged the issues of release and estoppel in favor of plaintiffs and against defendant. It also found: (1) That plaintiffs should not be granted either preventive or mandatory relief because plaintiffs had already sustained all of the damages they will sustain, and injunctive relief would not benefit them, but would be an unnecessary burden upon defendant; (2) that the difference in value between plaintiffs' land immediately before construction of defendant's ditch and the date of the judgment, January 27, 1959, was $3,200; (3) that plaintiffs had expended $2,939 in constructing the first dam under advice of their engineer, and they were entitled to recover that sum, but should recover nothing expended for their second and third dams constructed under advice of their engineer because plaintiffs and their engineer should have known that any further attempts to prevent erosion in the creek by similar structures would be unavailing with money uselessly expended, and defendant could not be charged therewith; (4) that it was difficult to determine the amount of

plaintiffs' land washed away by erosion of the creek, but the court estimated such loss to be "one acre or slightly more," for which plaintiffs should be allowed "$275"; and (5) that the total of such items was $6,414. The judgment then denied plaintiffs any injunction, either preventive or mandatory, against defendant, and ordered that plaintiffs recover from defendant $6,414 and costs.

Therefrom plaintiffs appealed, assigning: (1) That the finding and judgment of the trial court denying plaintiffs a mandatory injunction was contrary to the evidence and law; and (2) that the finding and judgment for plaintiffs in the sum of $6,414 was contrary to the evidence and law and wholly inadequate to compensate plaintiffs under the Constitution. We sustain plaintiffs' assignments.

On the other hand, defendant cross-appealed, assigning that the trial court erred: (1) In not holding that plaintiffs were estopped to assert their cause of action against defendant; and (2) in not holding that the release executed by plaintiffs on July 13, 1950, absolved defendant from all liability for damages alleged in plaintiffs' petition. We do not sustain defendant's assignments.

In addition to the holdings in Armbruster v. Stanton-Pilger Drainage Dist., *supra,* there are other applicable and controlling authorities which should be pointed out. We reaffirmed in Town of Everett v. Teigeler, 162 Neb. 769, 77 N. W. 2d 467, that: "Actions in equity, on appeal to this court, are triable de novo, subject, however, to the rule that when credible evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite.

"The trial court is required to consider any competent and relevant facts revealed by a view of the premises

as evidence in the case, and a duty is imposed on this court on review of findings made by the trial court to give consideration to the fact that the trial court did view the premises; provided, that the record contains competent evidence to support the findings.

"It is the duty of those who build structures across natural drainways to provide for the natural passage through such obstruction of all waters which may be reasonably anticipated to drain there. This is a continuing duty."

In that connection, there is no credible evidence on material questions of fact which is in irreconcilable conflict except on the question of the extent of plaintiffs' damages and the dollar amount thereof, and the issues of release and estoppel, which, as we view it, eventually became simply questions of law. Also, as hereinafter observed, the record contains no competent evidence to support some of the findings of the trial court, who viewed the premises.

Section 31-437, R. R. S. 1943, provides in part: "None of the provisions of sections 31-401 to 31-450 shall be construed as repealing or in anywise modifying the provisions of any other act relating to the subject of drainage. Nothing therein contained shall be deemed to authorize any drainage district to divert the waters of any river, creek, stream, canal or ditch from its channel to the detriment of any person or persons having any interest in such river, creek, stream, canal or ditch or the waters therein, unless proper compensation be ascertained and paid therefor under the laws of this state relating to the taking of private property for public use."

As recently as McGree v. Stanton-Pilger Drainage Dist., 164 Neb. 552, 82 N. W. 2d 798, this court held: "When land is taken outside the boundaries of the right-of-way condemned, it constitutes a second taking of private property for a public use and liability attaches therefor under Article I, section 21, of the Constitution."

In Lackaff v. Bogue, 158 Neb. 174, 62 N. W. 2d 889,

we held that: "A party seeking an injunction must establish by competent evidence every controverted fact necessary to entitle it to relief and an injunction will not lie unless the right is clear, the damage is irreparable, and a remedy at law is inadequate to prevent a failure of justice.

"Acts which destroy or result in a serious change of property either physically or in the character in which it has been held or enjoyed have been held to do an irreparable injury.

"Ordinarily where an injury wrongfully committed by one against another is continuous or is being constantly repeated so that complainant's remedy at law requires the bringing of successive actions, that remedy is inadequate and the injury will be prevented by injunction.

"In such cases, equity looks to the nature of the injury inflicted, together with the fact of its constant repetition or continuation, rather than to the magnitude of the damages inflicted, as the ground of affording relief." See, also, Armbruster v. Stanton-Pilger Drainage Dist., *supra*.

In Crawford v. Central Nebraska Public Power & Irr. Dist., 154 Neb. 832, 49 N. W. 2d 682, referring to damages, this court held: "The measure of damages for land taken for public use is the fair and reasonable market value of the land actually appropriated and the difference in the fair and reasonable market value of the remainder of the land before and after the taking.

"Everything which affects the market value is to be taken into consideration. The burden of additional fencing, and like matters, are to be included, not by being added together item by item, but to the extent that, taken as a whole, they detract from the market value of the property."

Also, as held in Quest v. East Omaha Drainage Dist., 155 Neb. 538, 52 N. W. 2d 417: "The words, 'or damaged,' in Article I, section 21, of the Constitution of Ne-

braska, include all actual damages resulting from the exercise of the right of eminent domain which diminish the market value of private property.

"In a suit to recover damages under the constitutional provision for damage to property for public use, it is immaterial whether the petition states a cause of action ex delicto or ex contractu. If the fact is established that property has been damaged for public use, the owner is entitled to compensation.

"Whatever reduces the market value of real estate by the injuring of it for public use may be considered in determining the just compensation to which the property owner is entitled.

"The jury in fixing the damages sustained by a landowner in consequence of the appropriation, or injury, of his property for a public use may take into account every (nonspeculative) element of annoyance and disadvantage resulting from the improvement which would influence an intending purchaser's estimate of the market value of such property." See, also, Rath v. Sanitary District No. One, 156 Neb. 444, 56 N. W. 2d 741. Of course, such rules also apply when the court fixes the damages in cases such as that at bar.

In other words, in determining the amount of plaintiffs' damages, their expenses for additional fencing, repairs, removal, and rebuilding thereof; the expenses of removal and repair of plaintiffs' private roads and bridge, together with inconvenience and disadvantage caused thereby; the expenses of repair and the threatened peril and damages to one of plaintiffs' two valuable irrigation wells, irrigation and sewer systems, and to their buildings; and the expenses incurred attempting, in good faith, to stop the erosion and damages when defendant refused to do so, and like matters, are elements to be considered, not by adding them together item by item and allowing them, or by allowing such item or items as such, but, together with the amount of plaintiffs' land taken by erosion, such elements should be

considered in determining the extent that, taken as a whole, defendant damaged plaintiffs' land by detracting from and reducing the market value thereof. In other words, the allowance of $2,939 as such to plaintiffs for money expended in building their first preventive structure in the creek was entirely erroneous and contrary to law. In such respect, Nine Mile Irr. Dist. v. State, 118 Neb. 522, 225 N. W. 679, and Peck v. Chicago Rys. Co., 270 Ill. 34, 110 N. E. 414, relied upon by plaintiffs, are entirely distinguishable from the case at bar, and not controlling herein.

Defendant, in its cross-appeal, relied upon Idlewild Farm Co. v. Elkhorn River Drainage Dist., 114 Neb. 134, 206 N. W. 741, 116 Neb. 300, 216 N. W. 817, and upon Halligan v. Elander, 147 Neb. 709, 25 N. W. 2d 13, to support its claim of estoppel. However, an examination of those opinions discloses that they are entirely distinguishable from the case at bar upon both the facts and the law.

In Kime v. Cass County, on rehearing, 71 Neb. 680, 101 N. W. 2, this court said: "We are of opinion that the spirit, if not the letter, of the constitution requires that the public seeking to appropriate private property to its use should, unless damages have been waived by some affirmative and unequivocal act, take steps of its own motion to ascertain their amount and secure their payment, and that mere passive acquiescence by an individual in the appropriation of property, unaccompanied by any conduct indicative of affirmative assent thereto, should not, unless continued for the statutory period of limitations, be regarded as a waiver of his rights."

In Sedlak v. Duda, 144 Neb. 567, 13 N. W. 2d 892, 154 A. L. R. 490, we held: "A party may not properly base a claim of estoppel in his favor on his own wrongful act or dereliction of duty, or fraud committed or participated in by him, or on acts or omissions induced by his own conduct, concealment, or representations."

Also, in George v. Guarantee Mutual Life Co., 144 Neb. 285, 13 N. W. 2d 176, dealing with estoppel, we held: "There can be no waiver, unless the person against whom it is claimed had full knowledge of his rights and of facts which will enable him to take effectual action for their enforcement. No one can acquiesce in a wrong while ignorant that it has been committed, and that the effect of his action will be to confirm it." Such authorities are controlling here on the issue of estoppel.

In that connection, during the spring and summer of 1949 there were conversations in the neighborhood by landowners, including plaintiff, with reference to the advisability of forming a drainage district to straighten the old Elkhorn River channel. A letter, dated June 20, 1949, came to plaintiffs before any legal steps were taken to form the district. It was entitled: "RE: Engineering Services in Connection with the Proposed Drainage District in the Vicinity of Stanton, Nebraska." Therein, an engineering firm offered its services in connection with preparation of preliminary plans, reports, and estimates of costs for the straightening of the Elkhorn River between Stanton and Pilger, for a distance of 5 or 6 miles if a district were formed. Therein it was proposed that the engineering fee for such preliminary services would be $500 if such services were completed within the next 60 days, but said sum was to be refunded if the drainage district were created and said engineers were subsequently employed by the directors as consulting and construction engineers. Plaintiff was one of 14 persons who signed and accepted that preliminary offer. Thereafter, on September 9, 1949, such preliminary report, addressed to "Stanton-Pilger Drainage District, Stanton, Nebraska," was furnished by the aforesaid engineers "In accordance with your instructions." Among other proposals, it recommended adoption by the district of "Pilot Channel No. 1" with a "34-foot top, 24-foot bottom, 10 feet deep."

It recited that: "A preliminary field survey has been made for the purpose of determining, 1. Approximate location of pilot channel. 2. Approximate length of pilot channel. 3. Approximate cost of pilot channel"; it then said: "A temporary committee of interested parties met in Stanton, Nebraska. The members of this temporary committee are as follows: Bert Armbruster" and seven other named persons who "have assisted us not only in selecting the temporary location of the pilot channel, but also in determining the boundaries of the district. The location of the pilot channel, as shown in the accompanying plan, is approximate only, and is subject to changes when the final survey is made * * *." Among other things, it also said: "This is a worthwhile project and we recommend its construction. If you decide to organize a drainage district, we hope that we may have the pleasure of carrying the engineering work to completion, and we will be pleased to cooperate with your attorney in furnishing the necessary enginering data required in connection with the legal procedure for forming a drainage district. * * * In the event that the election for the creating of a Drainage District carries, we would be pleased to assist your temporary committee and attorney in determining the units of benefit."

As heretofore pointed out, defendant district was thereafter legally formed by persons other than plaintiff, and such engineers were thereafter employed by the board of directors elected October 11, 1949, who thereafter approved and adopted "Pilot Channel No. 1" as presented and recommended by such engineers. Plaintiff never served as a director of the district or in any official capacity after its formation. As held in Ritter v. Drainage Dist. No. 1, 148 Neb. 873, 29 N. W. 2d 782: "The method of financing improvements and repairs of a drainage system and the plans for accomplishing the result, are ordinarily within the discretion of the board of supervisors of the district, but it must

act, and its acts must be commensurate with its legal duty."

In other words, plaintiffs took no part whatever in construction of the ditch, and they never knew that the waterfall created thereby would erode upstream and cause plaintiffs any damage until long after construction of the pilot channel. Defendant's own engineers and its board of directors did not even know that or anticipate it, as they should have done. With regard to the temporary committee aforesaid, plaintiff testified positively that he never even knew that he was on such committee until he saw the preliminary report dated September 9, 1949, and that he never met with any such committee which allegedly assisted in "selecting the temporary location of the pilot channel." In such respect, defendant's evidence conflicting therewith is equivocal, uncertain, and of doubtful credibility. We conclude that the trial court properly found in favor of plaintiffs and against defendant on the issue of estoppel. No other conclusion could be reached upon any theory.

Turning to the question of plaintiffs' alleged release of their claim for damages, defendant relies upon general rules stated in 45 Am. Jur., Release, § 14, p. 681, and § 18, p. 683, but they are not controlling here. Rather, note the exceptions appearing in such sections, and the statements appearing in § 20, p. 685, and § 22, p. 687. Defendant also relies upon Shanle v. Busch, 134 Neb. 903, 280 N. W. 174, wherein we held that: "When a party of mature age, able to read and write, being somewhat experienced in business transactions, has an opportunity to read a release, and executes the same, she is bound thereby, her defense being that she does not remember the transaction at all." However, such case is distinguishable from the case at bar.

In Cover v. Platte Valley Public Power & Irr. Dist., 162 Neb. 146, 75 N. W. 2d 661, we held: "After an easement to drain across the lands of another has been

legally acquired it is limited both as to extent and nature to the terms of the original grant.

"The rule is that if the grant of an easement or reservation is specific in its terms, it is decisive of the limits of the easement."

In Collins v. Hughes & Riddle, 134 Neb. 380, 278 N. W. 888, we held: " 'When the amount received in settlement is grossly inadequate to compensate for the injuries sustained, that fact may be considered, with other evidence, as tending to show unfair practice, that the party has been overreached, and that the minds of the parties never met in the consummation of a valid contract.' Perry v. Omaha Electric Light & Power Co., 99 Neb. 730, 157 N. W. 921.

"Where parties fairly and honestly intend to and do settle their controversy for known injuries received, but there are injuries wholly unknown to the parties, of a serious character, which are not taken into consideration, a release given in settlement of the injuries, although purporting to be a release of all damages that may thereafter accrue, will be set aside, on the ground of mutual mistake, as inequitable, unjust, and not complying with the intention of the parties." See, also, Bryant v. Greene, 164 Neb. 15, 81 N. W. 2d 580.

In Schmidt v. City of Lincoln, 151 Neb. 317, 37 N. W. 2d 500, we distinguished Collins v. Hughes & Riddle, *supra*, and held that: "General words in a release are sufficient to bar a claim which had accrued at the date of the execution of the release, or a claim known to exist by the party signing it."

Herein, plaintiffs' claim had not accrued at the date of signing the release, and they had no knowledge that then or in the future such a claim would exist. In fact, no material work had been done on the project and neither defendant's engineer nor defendant's officers had any such knowledge until plaintiffs' damage had actually occurred or was about to inevitably do so. Also, the release actually related only to a part of plaintiffs'

described 40 acres within the district, and the release never was intended by anyone to have any relation to plaintiffs' damages here involved, which subsequently occurred.

Finally, as stated in Hopper v. Elkhorn Valley Drainage Dist., 108 Neb. 550, 188 N. W. 239: "The record evidence seems to show beyond question that the defendant drainage company was grossly negligent and did not perform its duty; that plaintiff's welfare was entirely overlooked or disregarded; that approved engineering principles were not followed in the construction and maintenance of the ditches. It would be unreasonable to so construe the right of way deeds as to release all damages on account of the negligent and faulty construction or maintenance of the defendant's works. The drainage district was organized for the purpose of controlling the waters and improving the natural drainage of the land within such district, not to take waters from one section and make them overflow the lands lower down and thus destroy their usefulness and producing qualities. * * * Courts should not be asked to construe a right of way deed given for a nominal consideration into an instrument for the confiscation without remuneration of a large and valuable farm. Such could not have been the intention of the plaintiff or the meaning of the language used, and the defendant drainage district would have hardly dared, on the solicitation of such conveyances, to have so interpreted their meaning and purpose." Such statement has application here. We conclude that plaintiffs' release was not a waiver of their damages and did not estop their claim for damages.

As we view it, the remaining primary and fundamental issue here is whether plaintiffs were entitled to a mandatory injunction, and the extent and amount of plaintiffs' damages. In such respect, the evidence is voluminous and can only be summarized. There are five volumes of oral testimony and stipulations, and four

volumes of exhibits, consisting of letters, plans, surveys, proposals, agreements, and maps, together with many photographs which graphically support plaintiffs' contention that defendant had caused great, continued, continuing, and irreparable damage to plaintiffs' land.

Plaintiff was born on plaintiffs' land, where he had lived for more than 50 years. His father had lived upon the land and farmed it well many years before plaintiffs first became tenants, then acquired it in 1938. Prior to 1950, Cedar Creek was a small, useful, flowing stream except during some dry portions of the summer and when frozen over in winter. In 1950 and prior thereto, the average width of the creek from bank to bank was 25 to 28 feet and its average depth from top of the banks to its bed was 6 to 9 feet. Its banks were then sloping, grassed over, and stabilized by nature for many years, with no noticeable erosion of its bed or banks. One bend near plaintiffs' yards had been straightened by plaintiffs' father many years ago to make the creek more convenient and useful for agriculture and stockraising purposes. Plaintiffs' stock, of which there were many each year, could readily travel up and down the creek banks for watering and feeding purposes. A private bridge, 28 feet long and 14 feet wide, spanned the creek from west to east near plaintiffs' yards and buildings for convenient use in crossing the creek in plaintiffs' large-scale farming and stockraising on plaintiffs' land located on each side of the creek. Plaintiffs had private roads on each side of the creek which led to the west and east county road on plaintiffs' north line, where the creek was crossed by a county bridge. Plaintiffs' yards, feed lots, and other improvements are generally on the west side of the creek. Plaintiffs' land was greatly and expensively improved. Such improvements included a valuable modern home where plaintiffs lived, another less valuable modern home where plaintiffs' daughter and her husband lived, and two other partly modern homes where plaintiffs' hired men and their

families respectively lived. Each house had a well in it and there were several wells in the yards, together with a windmill and pump. There were numerous other valuable improvements, including barns; granaries; machine sheds; chicken houses; garages; animal sheds for cattle, hogs, and sheep; a large corn storage building with an elevator; two valuable irrigation wells with a steel flue crossing the creek to plaintiffs' land east thereof; and all land and yards were fenced hog tight. The buildings were painted and kept in good repair. Two hundred acres of plaintiffs' farm land were irrigated by gravity, with irrigation ditches, and the rest of their farm land was irrigated with a sprinkler system. Their land was generally level except some on the west side, which was gradually sloping but easily farmed. Their soil was Elkhorn River bottom land, known as "Waukesha Loam." It had been well fertilized each year, and had been highly productive. Plaintiffs' corn regularly produced from 70 to 100 bushels an acre. One year it produced 123 bushels an acre. Another year, plaintiffs produced 99 bushels an acre, for which plaintiff was cited for having produced the highest acreage in the state. Plaintiffs also owned 1,137 acres of pasture land used in connection with their large farming and stockraising projects. They yearly raised or fed several hundred head of cattle and hogs. At times they fed several hundred head of lambs.

Defendant's ditch was cut 6 feet below the bed of the creek at the point where it intersected the creek on land about 990 feet north of plaintiffs' north line. Prior thereto, the creek emptied into the Elkhorn River, about 2,200 feet north of plaintiffs' north line. The ditch was completed about November or December 1950. Early in 1952, after erosion had progressed toward plaintiffs' land and damage thereto appeared to be inevitable, a competent engineer for the State Soil Conservation Service attended a meeting called by defendant's board of directors and the county commissioners. Others were

present also, and such engineer was told that the purpose of the meeting was to find out if there was some solution which would arrest the erosion in the creek. They were told by such engineer, who had years of experience in like situations, that it was possible, and he was requested by defendant's directors and the county commissioners to make surveys and designs in order to affirm that statement. In April or May 1952, that was done by making a survey of elevations, distances, and taking profiles of the channel, and by taking cross-sections thereof at different places down the creek to the point where it emptied into the ditch. That engineer testified that he "was aghast at the development * * * at the severe development that had taken place, erosion of the banks and widening of the channel" of the creek; that the width of the creek from bank to bank was "approximately 100 feet at a certain location"; but there was "a great deal of irregularity to it" which continued "for some distance, approximately to the * * * county road"; and there was "quite a pronounced waterfall (straight up and down about 5 feet high) just below the bridge at that time" which naturally caused the erosion. As directed, such engineer prepared and subsequently presented a practical standard design of a structure to correct erosion in the creek, which he testified could be built at some proper point in the creek, and same would be effective to do the job, but if it was not done, the erosion would continue throughout plaintiffs' land, which would take a number of years. However, the county commissioners refused to cooperate in the sharing of expenses for the building of such a structure, and defendant refused to build it because it would cost between 12 and 14 thousand dollars to do so.

Thus, the erosion caused by defendant came on up through the county bridge, creating a great broad, deep hole on plaintiffs' land, and washing out one end of the county bridge, which required the county to build an 18 or 20 foot extension thereto. From there the ero-

sion moved back on plaintiffs' land for about 200 feet when, in July 1952, plaintiffs consulted with their engineer with regard to having something done at once to save any further damages. They then decided to attempt construction of a temporary piling structure. Such a structure was then built as advised, at a cost of $2,939, and it served effectively from August 1952 until a heavy rain in July 1953, when the water went over the piling and washed out around it, at one end. In March 1953, while that structure was still intact, plaintiffs' engineer returned to make a survey of the creek and the effect of erosion that had taken place. At that time there had been marked increase in erosion, with the waterfall still farther up stream, which caused a further steepening and widening of the banks of the creek, and which was and would continue throughout plaintiffs' land until stabilized. Plaintiffs' engineer testified it was and is practical and feasible for defendant to have built or to build a standard structure in the creek, and that such construction would stop the erosion. After the first structure washed out, and as advised by their engineers, plaintiffs repaired, increased, and widened the piling at a cost of $2,100, but it washed out again around the end after a heavy rain. Thereafter, upon advice of their engineer, plaintiffs pulled out the piling and moved the structure 500 or 600 feet up stream and replaced it above the waterfall at a cost of $1,330, but it also washed out and the piling was removed. The admitted total reasonable cost of building the three structures, including engineering services, grading, and pulling the piling, was $7,267.74. Thereafter, plaintiffs abandoned any further effort to stop the erosion, and defendant refused to make any effort to do so, although plaintiffs offered to permit that to be done on their land.

Defendant's employed engineer testified that the district plans were made with the intentional idea that the ditch would cut through the creek below its bed,

and he anticipated that there would be created about a 6-foot waterfall at point of intersection. He saw the waterfall about 10 or 12 days after the intersecting of the creek. The first time he saw the erosion on plaintiffs' land was in December 1955, at which time the waterfall was about 6 feet high. The creek was about 100 feet wide in some places, and he "didn't anticipate (erosion) doing what it had done." He "never dreamed of it" and "never expected (it) to do that." He testified that the erosion was then upstream about 800 feet from plaintiffs' north line, and the plaintiffs could anticipate that the waterfall would continue eroding throughout their land at about the same height over several years' time. About 2 acres of land had washed out in December 1955, computed on the banks of the stream about 100 feet wide for a distance of 800 feet, and if the stream averaged that much through the entire distance of nearly 4,000 feet, the number of acres eventually taken from plaintiffs' land could be readily approximated by computation. He testified that a practical and efficient standard structure could have been built 300 or 400 feet back from the point of intersection, which would have stopped the erosion, but such a structure was not talked over with the district board of directors before the creek was intersected because such erosion was never anticipated, although he knew that the extent of natural erosion of waterfalls in such cases depended upon the type of soil and other factors for which no test was made. He testified that it was not beyond the capability of engineers to build a structure in the creek which would then stop the erosion, but that it would cost 12 or 14 thousand dollars, and such structure would not be feasible because of the cost of construction. However, as we view it, that would be no excuse for defendant's failure to perform its duty and build such a structure. Defendant's engineer was called by plaintiffs out of order in the first trial, and was called by defendant as its first witness in the second trial.

At the first trial, plaintiff, his brother, and other witnesses who were familiar with plaintiffs' land and had observed the creek for many years, described in detail the erosion on plaintiffs' land from 1952 when it approached the county bridge then entered plaintiffs' land. They testified that the erosion was continuing and in their opinion would continue in the future. They described tree roots that had never been exposed before in the banks and bed of the creek; large trees falling in the creek or about to do so; and great holes washed in the bed and banks which were vertical and caving in, when before they were sloping and grassed over. They described extensive erosion to plaintiffs' private bridge; the erosion coming within a few feet of plaintiffs' irrigation well; plaintiffs' washed-out road and fences west of the creek; and plaintiffs' washed-out irrigation ditches east of the creek, all of which erosion and damages had not existed prior to 1950.

Plaintiff testified in detail about being required to repair, add to, and extend one end of his private bridge where it had washed out; that he rebuilt and regraveled his private road on the west side of the creek two or three times because it had washed out; and that he moved his fences along the creek several times where it had eroded out at various places. He described the washing and eroding of the creek into his farm land on both sides; the banks eroding closer to one of his tenant houses and hog barn and into his feed yards; the washouts imperiling his irrigation well, flume, and sewer pipes; the washing out of his irrigation ditches and crops on the east side; the continuous deepening of the creek channel and the vertical steepening and widening of its banks; the inability of his stock to reach the stream for watering purposes; and the uprooting of large trees with some of which he tried to protect his land by riprapping the creek. He testified that in some places the creek was 100 feet wide, and that the banks were vertical and as much as 20 to 31 feet from bank to bed.

In that connection, one of plaintiffs' witnesses testified that the creek "looked like a canyon." Another testified that he "saw something that he didn't ever realize could happen, that it would erode like that." In support of the foregoing evidence, plaintiffs offered in evidence numerous photographs and other exhibits which graphically described the great amount of erosion which witnesses could not adequately describe. In that connection, defendant adduced some evidence that the erosion was only natural and would have occurred in any event, and that the creek was stabilizing or was stabilized, but a great preponderance of the evidence is otherwise, and the photographs and other evidence entirely refute such evidence.

At the second trial in December 1958, plaintiff testified that since September 1956, the water had washed larger holes, going farther up into his fields, and the waterfall had eroded up the creek 587 feet farther, which would make a total of 1,387 feet of erosion, or less than half way through plaintiffs' land. In other words, the creek had then eroded 1,387 feet over a period of 6 years, and if the erosion continued at the same rate it would take about 7 more years to travel and erode the rest of the distance through plaintiffs' land. One hole washed out in the creek during last July was 170 feet 4 inches wide, 20 feet 6 inches deep, and 94 feet long, and was only 23½ feet from one of plaintiffs' sheds. There was another large hole back of that where water came down the creek 21 feet 5 inches wide, leaving the banks straight up and down with 16 feet to the bottom of the creek. The banks of the creek were continually dropping off and the stream was widening and approaching one of plaintiffs' sheds and tenant houses. Plaintiffs had moved the north fence back along the creek about a year ago because the creek had caved under the fence, and last July it washed out under the fence quite a ways, so plaintiffs were required to take up the fence and quit using that yard. A year ago last July plain-

tiffs took out their private bridge for fear of its loss, which was threatened because the creek was getting deeper and wider. The material taken from the bridge was useable, but it took 5½ days to remove the bridge at plaintiffs' expense, and with the bridge unuseable or out, plaintiffs had been and were put to the inconvenience and expense of driving 1.6 miles farther around to cross the county bridge to their land east of the creek, and come back to their yards again. In that connection, several photographs offered in evidence by plaintiffs and defendant also graphically supported the foregoing evidence.

Here it should be said that plaintiffs also showed expenses of several hundred dollars for new piling for their private bridge, its repair, extension, and abutment, and ultimate removal; moving and rebuilding fences; repairing, rebuilding, regrading, and regraveling their washed-out private road west of the creek; repairing and reconstructing their irrigation ditches washed out on the east side of the creek; and riprapping and otherwise protecting plaintiffs' sewer line, irrigation flume, and items of that nature.

Plaintiff also testified that prior to 1950, plaintiffs' land had a value of $325 an acre, but on December 22, 1958, it had a value of $170 to $175 an acre. A witness for plaintiffs, a farmer and landowner who had known plaintiffs' land all of his life and was familiar with their improvements, methods of farming, irrigation, and soil, testified that in 1950 plaintiffs' land was worth $300 an acre, but was worth $200 an acre in November 1956.

Another comparable witness for plaintiffs testified that in 1950, plaintiffs' land was worth $300 an acre, but in November 1956 it was worth $150 to $175 an acre, without taking into consideration plaintiffs' expenses in attempting to protect their land from erosion.

Another comparable witness for plaintiffs, who was licensed to sell real estate and had done soil conservation work several years, had inspected plaintiffs' land

and the creek with its erosion thereof, and had taken some pictures thereof, testified that in 1950 plaintiffs' land as irrigated was worth $300 an acre, but in November 1956 its value would be about $200 an acre, although in August 1952 it was worth about $225 to $250 an acre.

A witness for defendant, who was not an engineer but was employed by the county agricultural stabilization and conservation service committee, testified that plaintiffs' land had been substantially eroded and that by the use of a planimeter, measured on an aerial photograph taken August 1, 1957, he had computed that at that time 2.1 acres had eroded into the creek.

Another witness for defendant, who had been a member of its board of directors until April 1957, admitted that by erosion "the creek has widened, and deepened," but that the difference in the value of plaintiffs' land before and after the erosion "would be the land that went into the creek." That the creek "is stabilizing" and that "at present there is no damage to (plaintiffs') buildings, yet," but "if the creek continues in the way it is there will be."

Another witness for defendant, who was a member of its board, admitted that he knew about the erosion from the beginning and its coming up on plaintiffs' land, but the extent of plaintiffs' damages "would be the amount of land that has been taken by this erosion * * * I would say five or six acres," together with "a certain amount of inconvenience as to getting to his fields to farm them * * *."

Another witness for defendant, who was a member of defendant's board, admitted that he knew about the erosion of plaintiffs' land. When he went out there at different times, he saw plaintiffs' old bridge and "enough erosion had taken place that the piling, looked to me like, were standing on the bottom of the creek." He admitted "that the damaged claimed" in his opinion "would be the number of acres that were taken away

by erosion, plus a very small amount for inconvenience, traveling around." That he "wouldn't have any way of knowing the actual number of acres" but thought that "four to five acres * * * would be fair." His opinion was that the value of the land that went into the creek was not as "high as $300.00 an acre * * * I will put it at $250.00"; that "$250.00 * * * would be putting it high then, especially land along the creek bank"; that "$250.00 was a high figure on that land on the east side" and that "it would be still less on the west side"; and if the land taken "is five acres, two and a half acres on" each side "the damage" is land "That fell in the creek * * * $875.00."

Another witness for defendant, who was a member of defendant's board, admitted that he had been acquainted with the erosion to plaintiffs' land right along. He testified, "Well, about all the way you can fix that damage is what the erosion has taken in the land; and the creek was there originally, and figure that in. My estimate of land taken is between two and two and a half acres," and that plaintiffs' added inconvenience without the bridge would be insignificant with modern machinery and made no difference in the value of the land. He admitted that the waterfall had then eroded up to only about 100 feet north of plaintiffs' feed yard.

A Norfolk real estate broker examined plaintiffs' land a few days before the trial at the request of defendant's attorney, in order to determine plaintiffs' damages by erosion and testified for defendant with regard thereto. To a degree he examined the erosion and testified that plaintiffs' land before erosion "would have had a market value *on today's values* of $225.00 an acre * * * That is $72,000.00 total." (Italics supplied.) After the erosion occurred, his opinion was, "Well, on the basis of other farms with similar erosion and creeks going through that, my experience in seeing them, I determined that this was of not any damage or difference to the value of the farm, that the farm would admittedly

bring at this time $215.00 per acre or a difference of $10.00, a total of $3,200.00 less." He admittedly was not familiar with plaintiffs' land or the creek prior to 1950 and before the ditch was dug through said creek. Upon examination before the trial, he admitted seeing the waterfall and knew that such waterfall had a tendency to work backward and deepen the stream, and he had observed that they did so, but he had reason to believe that the fall in the creek would not do so "if ordinary precautions are taken to eliminate that, which most people would do to protect their property." He admittedly did not know that plaintiffs had spent some $7,000 trying to do so, and did not take that into consideration as an element in fixing his "values or damages in any respect." He had heard that plaintiffs had been compelled to move their fences two or three times because they had been washed out, and he did take that into consideration, but did not take into consideration that plaintiffs might have to do so in the future. He admitted there was evidence of some riprapping in the nature of trees left along the banks of the stream; that he saw some big holes as he walked along the stream; but did not take into consideration that there might be additional holes washing in the stream. He didn't know that before the erosion plaintiffs had a private bridge for convenient access from their buildings to land east of the creek, or that such bridge had washed out, so he did not take that element into consideration in fixing the value of plaintiffs' land. He would have considered such private bridge a convenience and of some value. dependent upon its condition, which should have been added to his value of $225 an acre before the erosion.

In that connection, no witnesses for defendant, except two as heretofore set forth, made any effort whatever to testify as to the money value of plaintiffs' land lost by erosion or the value of plaintiffs' other land either before or after the erosion. On the other hand, the testimony adduced by plaintiffs with regard thereto

must be considered in the light of the entire record considered de novo.

The evidence in this case is overwhelming that defendant's actions have caused plaintiffs great and irreparable damage; that the creek has not stabilized and will not be stabilized for several years; that the erosion and damages are continuing and will continue over a period of years throughout plaintiffs' land unless a preventative structure is built by defendant to prevent further erosion and damages; that such a structure is standard practice and effective to stop the erosion and damages; and that plaintiffs should be granted a mandatory injunction requiring defendant to build such a structure. There is no competent evidence whatever which could upon any theory support the trial court's conclusion that "plaintiffs have already sustained all of the damages that they will sustain because of the acts of the defendant district and such injunctive relief would not benefit them but would be an unnecessary burden upon the defendant district." Also, the allowance to plaintiffs of $2,939 as an item of expense for construction of their first piling dam to prevent further erosion was erroneous, and there was no competent evidence which could support the trial court's conclusion that plaintiffs had lost only "one acre or slightly more" of their land. In that connection, the minimum thereof admittedly was 2.1 acres as of August 1, 1957, almost 1½ years before conclusion of the trial, and at the trial four of defendant's directors respectively admitted that as of December 1958, plaintiffs had lost 5 or 6 acres, 4 or 5 acres, between 2 and 2½ acres, and 5 acres, being 2½ acres on each side of the creek. Further, the allowance of $3,200 by the trial court as the difference in the value of plaintiffs' land before and after the erosion was supported by but one witness for defendant who had never seen plaintiffs' land and fixed his 1950 values "on today's values," and who, having failed to consider several elements heretofore

pointed out, admitted that if he had, the amount of $3,200 as damages should have been more.

We conclude that the fair and reasonable market value of plaintiffs' land on and prior to 1950 was $250 an acre, and that as of December 23, 1958, the date when the new trial was concluded, plaintiffs' land had a fair and reasonable market value of $215 an acre. We conclude that plaintiffs' loss from erosion caused by defendant was at least 5 acres as of December 23, 1958, for which plaintiffs are entitled to recover $250 an acre, or a total of $1,250 therefor. We likewise conclude that as of December 23, 1958, plaintiffs are entitled to recover the difference between $250 and $215, or $35 an acre for 314 acres, or a total of $10,990 therefor. In other words, we conclude that as of December 23, 1958, plaintiffs are entitled to recover damages in the total sum of $12,240, and that they should be awarded a mandatory injunction as prayed.

Therefore, we reverse the judgment of the trial court and remand the cause with directions to render judgment in favor of plaintiffs and against defendant in strict accord with this opinion. All costs are taxed to defendant.

REVERSED AND REMANDED WITH DIRECTIONS.

SIMMONS, C. J., not participating.

EMERY V. MAZANEC ET AL., APPELLEES, V. LINCOLN BONDING AND INSURANCE COMPANY, A CORPORATION, APPELLANT.
100 N. W. 2d 881

Filed January 15, 1960. No. 34640.

1. **Fraud: Rescission.** Whether the right of one party to a contract to rescind the same arises on account of fraud inducing the contract or on account of a breach by the other party of a dependent covenant, such right is barred by failure of the one party, for an unreasonable time after knowledge of the facts giving rise to such right, to declare a rescission and disclaim

the benefits of the contract.

2. **Equity.** The question whether laches exists in a particular case depends upon its own peculiar circumstances and is addressed to the sound discretion of the court, the question of the unreasonableness of the delay depending largely upon the nature of the property in the particular case.
3. **Notice.** Where one is put upon inquiry, he is charged with notice of all of such facts as he would have learned by reasonable inquiry.
4. **Alteration of Instruments.** The filling of blanks in a written instrument is not, strictly speaking, an alteration of the instrument. Where a blank is filled in after the execution and delivery of a written instrument, it is a question of authority to do so.
5. ———. The right to fill blanks in written instruments after execution and delivery is based upon an assumption of consent, in the absence of specific instructions, and the leaving of such blanks is considered to imply authority to fill them, and creates an agency in the receiver to do so in the way contemplated by the maker.
6. ———. A material alteration, already made, may be ratified and adopted subsequently; and in such case the instrument, as altered, will be binding.
7. ———. Any act or conduct showing an intention to recognize the instrument as altered is generally sufficient to constitute a ratification of the alteration.
8. **Homesteads: Acknowledgments.** Any conveyance or encumbrance of the homestead of a married person is absolutely void and unenforceable unless voluntarily executed and acknowledged by both husband and wife as required by section 40-104, R. R. S. 1943.
9. ———: ———. Any conveyance or encumbrance of real estate, executed and delivered, is valid between the parties, though not lawfully acknowledged nor witnessed, and is sufficient to convey or encumber the land described therein, with the exception of the homestead of the grantor.

APPEAL from the district court for Sioux County: EARL L. MEYER, JUDGE. *Reversed and remanded with directions.*

Chambers, Holland, Dudgeon & Hastings, for appellant.

W. E. Mumby and *Perry, Perry & Nuernberger*, for appellees.

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

CHAPPELL, J.

On March 14, 1957, plaintiffs, Emery V. Mazanec and Ardeyne D. Mazanec, as husband and wife, brought this action against defendant, Lincoln Bonding and Insurance Company, seeking cancellation of a note and an alleged void real estate mortgage securing payment thereof, which defendant allegedly procured on March 15, 1951, by various false representations made by defendant's then president, Edward A. Dosek, upon which plaintiffs relied and were injured thereby in making the transaction. A purported copy of the note and a copy of the mortgage were attached to and by reference made a part of plaintiffs' petition.

The note, dated January 2, 1951, and payable to defendant in 10 years, was for $30,000, with interest at 2 percent payable annually, which was secured by a mortgage of even date and amount on about 2,560 acres of described land belonging to plaintiff, Emery V. Mazanec, in Sioux County, where the mortgage was recorded March 21, 1951. Such instruments were allegedly given in exchange for a $30,000 surplus note of defendant dated April 18, 1951, with interest at 6 percent payable to plaintiffs annually. A copy of such surplus note, which recited the statutory provisions authorizing its execution and conditions under which it was payable, was attached to and by reference made a part of plaintiffs' petition.

The alleged false representations upon which plaintiffs relied were in substance: That defendant was the oldest and biggest bonding company in Nebraska, and as strong as any company in the state; that its business was good and successfully expanding; that it was skillfully and successfully operated by its officers; that its operations, assets, and assured solvency were supervised and approved by the state Department of Insurance,

which made defendant maintain $2 for every $1 of surplus notes; that defendant seldom suffered any losses and was making great profits; that the purpose of seeking plaintiffs' investment was for expansion of the company and to help common people; that the transaction was simply a paper trade or exchange costing plaintiffs nothing, but giving them $1,200 a year profit from defendant's surplus note approved by the Department of Insurance, without possible loss to plaintiffs; that defendant would never foreclose plaintiffs' mortgage; and that plaintiffs would never be required to pay the $600 interest on their note and mortgage until after they received the $1,800 interest on defendant's surplus note, which defendant was in a financial position to pay.

In that connection, plaintiffs alleged that such representations continued "until on or about the first day of June, 1955, when the defendant first learned that the Director of the State Department of Insurance contended that the company was approaching insolvency, that it had been dishonestly managed, that it did not have sufficient funds to pay its expenses and losses and that said Department of Insurance refused to issue a new license to the defendant or to permit it to operate as a bonding and insurance company." Further, plaintiffs' petition alleged: "Plaintiffs never learned of any fact which would put them on inquiry as to representations on which they relied being false until on or about June 2, 1955," and that "As soon as plaintiffs learned that their note and mortgage had been obtained by such fraudulent representations as to the contents and operations of said company and learned that the company had refused to keep and perform * * * by the payment of the amount due on the said 'Surplus Note,'" that plaintiffs tendered to defendant its surplus note on March 1, 1957, together with $3,839, the amount plaintiffs had received on the surplus note over and above the amount paid on plaintiffs' note and mortgage, but defendant refused the tender which was renewed and

refused at the trial. Plaintiffs' prayer was for cancellation of the note; that the mortgage be held for naught and stricken from the records of Sioux County; that title be quieted in plaintiffs against purported lien of the mortgage; and for equitable relief.

Defendant's answer admitted that on or about January 2, 1951, plaintiffs made, executed, and delivered to defendant the note and mortgage aforesaid; and that on March 1, 1957, plaintiffs made the tender which defendant refused as alleged. Defendant then, as far as important here, denied generally and alleged in substance that on or about June 1, 1955, defendant informed plaintiffs that the Department of Insurance had examined defendant company and would not permit it to operate because of its "impaired financial structure and perilous underwriting practices" unless new officers were elected, and that such steps had been taken; and that on September 12, 1955, defendant informed plaintiffs of severe losses suffered by defendant, and that because thereof, it would be required to discontinue further operations at an early date. Defendant then alleged that after June 1, 1955, and prior to May 8, 1956, plaintiffs personally and through representatives made investigations of the operations and conditions of defendant company; that thereafter, on May 8, 1956, plaintiffs paid defendant the interest due on plaintiffs' note and mortgage; that plaintiffs, by their conduct, confirmed and ratified the transaction between the parties from June 1, 1955, until about March 1, 1957, and induced defendant and its officers to continue to furnish free rent and services without compensation to defendant, in reliance upon validity of plaintiffs' note and mortgage; that plaintiffs, after notice and knowledge concerning the affairs and condition of the company on or about June 1, 1955, retained defendant's surplus note and the income therefrom, without offering to rescind the transaction, until March 1, 1957; and that under the circumstances plaintiffs delayed their attempted re-

scission too long to entitle them to the relief sought by them. Defendant's cross-petition alleged that plaintiffs had failed, neglected, and refused to pay the interest due January 2, 1957, on the note to defendant, who prayed for an accounting of the amount due and foreclosure of plaintiffs' mortgage as provided in the acceleration clause therein.

Plaintiffs' reply to defendant's answer denied generally, then alleged in substance that the purported mortgage was never acknowledged or otherwise binding on plaintiffs, but was a nullity, and the recording thereof was a fraud upon plaintiffs; and that plaintiffs relied upon advice of defendant's officers who lulled them into a sense of security up to and including May 8, 1956, when for the first time plaintiffs learned that they were defrauded, and they realized that it was necessary for them to employ counsel and assert their rights, but defendant and its officers succeeded in concealing the extent and nature of the fraud until early in December 1956, whereupon they elected to rescind on March 1, 1957. Plaintiffs' answer to defendant's cross-petition denied generally, then renewed the allegations of their petition and reply, and renewed the prayer of their petition. Defendant's reply to that answer admitted plaintiffs' tender on March 1, 1957, and denied generally.

The cause was tried on the merits May 15 and 16, 1958, and the parties were directed to submit the matter on written briefs. Thereafter, on February 2, 1959, a judgment was rendered which found generally in favor of plaintiffs and against defendant, and decreed that plaintiffs' note and mortgage should be held for naught and stricken from the record, and that title to the land described in said mortgage should be quieted and confirmed in plaintiff, Emery V. Mazanec, against any and all claims of defendant, with costs taxed to defendant. Thereafter, on March 16, 1959, motions for new trial respectively filed by defendant on February

10, 1959, and February 25, 1959, were overruled, and defendant appealed, assigning in substance and effect that the judgment of the trial court was contrary to the evidence and law, and that the trial court erred in denying defendant's cross-petition. We sustain defendant's assignments in the manner and to the extent hereinafter set forth.

Hereinafter, Emery V. Mazanec will be called plaintiff. When referring to Ardeyne D. Mazanec, she will be called plaintiff's wife, and when speaking of both, they will be called plaintiffs. Defendant, Lincoln Bonding and Insurance Company, will be called defendant or the company, and Carroll R. Pauley will be called Pauley.

The cause will be tried de novo here in conformity with the rule reaffirmed in Town of Everett v. Teigeler, 162 Neb. 769, 77 N. W. 2d 467. However, we point out that there is little dispute with relation to the relevant and material evidence, and that in such respect plaintiffs' brief makes several statements and their pleadings make several allegations which are not supported by any competent evidence.

As summarized, the record discloses the following: On March 15, 1951, Edward A. Dosek, hereinafter called Dosek, was president of defendant company, and a majority of the board of directors were members of Dosek's family. Plaintiff, who had an eighth-grade education, was engaged in the cattle business on about 2,560 acres of described clear land owned by him near Hemingford in Sioux County. Plaintiffs' homestead, a part thereof, was alleged to be the "NE¼ of Section 26, Township 27N, Range, 53" and there is no dispute about that. Plaintiffs first met Dosek at their home the evening of March 15, 1951. One Joe Bayer, who had known plaintiff since about 1941 and had known plaintiff's wife since about 1946, went there with Dosek. Bayer, a general insurance agent, who wrote insurance as agent for defendant and other companies, had theretofore sold various kinds of insurance to plaintiffs. He was friend-

ly with plaintiffs and they had confidence in him. Plaintiff, Dosek, and Bayer were all Bohemians who could speak and understand that language, but plaintiff's wife was not Bohemian and could not speak nor understand that language. In such respect, however, and contrary to plaintiffs' contention, the conversation that evening at plaintiffs' home was in the English language except for possibly some Bohemian slang words.

Sometime before March 15, 1951, Dosek had asked Bayer if he had some friends who might be interested in making an investment in defendant company. Bayer had responded by suggesting the names of two persons, one of whom was plaintiff. Dosek then said that he was going up that way soon and would like to meet plaintiff. Before March 15, 1951, Bayer saw plaintiff and asked him whether he would care to make an investment in an insurance company, and plaintiff replied that he might. Thereafter, Dosek and Bayer left Lincoln in Dosek's car, and after stopping at other places on business, they arrived at plaintiffs' home on March 15, 1951, in the evening, where Bayer introduced Dosek to them as the man who had defendant company. There they all had supper together, visited during the evening, and Dosek made the representations heretofore summarized, upon which plaintiffs allegedly relied as they had a right to do, and were thereby injured in completing the transaction hereinafter set forth. In that connection, on the evening of March 15, 1951, plaintiffs each admittedly signed the note and mortgage heretofore described, which were blank except for such signatures. Bayer signed as a witness to the mortgage. The consideration for such transaction was to be defendant's surplus note heretofore described, which was thereafter to be and was executed and delivered to plaintiffs.

After the signatures were so attached to the note and mortgage, Dosek wanted the abstracts to plaintiffs' land in order to complete the transaction, so plaintiffs agreed

to meet Dosek and Bayer at plaintiffs' bank in Hemingford the next morning and get the abstracts for Dosek. They met there as agreed, where plaintiff went into the bank, brought the abstracts out, and handed them to Dosek who said he would mail back to plaintiffs the necessary papers to complete the transaction. Upon a previous occasion, plaintiff had experienced the giving of a note and mortgage on land to another insurance company, but such mortgage had been paid. When Dosek got plaintiffs' abstracts, plaintiff knew that defendant would keep them until plaintiffs' note and mortgage were paid. Plaintiff knew that he was giving a $30,000 note and mortgage for the defendant's surplus note for a like amount, and that the blank spaces on plaintiffs' note and mortgage would be filled in after plaintiffs signed them. In that connection, there is no specific evidence disclosing what authority Dosek was actually given with regard to filling in the blanks on the note and mortgage, but there is no competent evidence that Dosek was not authorized to date said instruments as of January 2, 1951, nor that he exceeded his authority in filling out the blanks, except it is conclusive that Dosek's purported acknowledgment by plaintiffs on the mortgage was never authorized or taken in any manner whatever as required by law. Plaintiffs always knew that they were to pay $600 interest each year on their note and mortgage, and they did so to and including 1955. They also knew that they would receive $1,800 interest each year on defendant's surplus note which would be a clear profit to them of $1,200 a year, or $100 a month. In that connection, also, plaintiffs always received the $1,800 a year from defendant about the middle of March until 1955, when its payment was a little late, so they drove to Lincoln to see about its payment. There they met Dosek, who handed plaintiffs the defendant's check for $1,800, dated March 31, 1955, and made excuses for its delay of delivery. Plaintiffs cashed that check April 2, 1955. At that time, Dosek also

handed plaintiffs a letter dated March 1, 1955, which enclosed that check, and said: "We might say, that we enjoyed a very nice year, business wise in 1954 and from indications expect to make a better record in 1955."

Thereafter, in a letter dated June 1, 1955, and admittedly received by plaintiffs on June 2, 1955, one Carroll R. Pauley, then the new president of defendant company, introduced himself as such, and as the representative of the largest investment group in defendant company and as a minority member of the then board of directors. He then informed plaintiffs that during April the Department of Insurance had made an exhaustive study of defendant's books and had advised that the department would not issue defendant a license to operate "primarily because of its impaired financial structure and perilous underwriting practices * * * that the Department could see no other way but to take the company to court and ask for a receivership and eventual termination of business." Pauley then informed plaintiffs that as a less costly alternative, his attorney (who had theretofore been a member of defendant's board and its attorney), proposed to the department that Pauley's investment group furnish whatever additional capital was needed; that the old management resign; that new directors and officers be elected, with an attempt made by them to reestablish the company; that after considerable hesitation the department consented to such alternative plan; and that on May 23, 1955, a board of directors' meeting was held, with the Director of Insurance and the attorney for the department present, whereat defendant's former officers and directors resigned and new named officers were elected. Plaintiffs were also informed that at the same meeting, the new board voted to move the company's offices from 1311 M Street where the company was paying $200 a month rent, to 945 South Twenty-seventh Street, Pauley Lumber Company offices, on a rent-free

rental basis; and that such board had also voted to accept president Pauley's offer of time and efforts in behalf of defendant company for the remainder of the year without remuneration, in order to save $500 a month theretofore paid to Dosek, the former president. We point out here also the record discloses that the new president then invested $5,700 in a surplus note of the company to give defendant necessary capital in order to operate, which then made the Pauley interests have a total of $69,700 invested in defendant company.

Such letter then pointed out that it would seem much progress had been made, but much remained to be done; sought the loyal support of everyone still connected with the company during the months of transition; and stated that with favorable loss experience and their backing, they all stood a good chance of working out without loss. Pauley also told plaintiffs that if they had any further questions, "please do not hesitate to contact me and I will answer them to the best of my ability. In the event you would rather receive more professional answers * * * the Director of Insurance * * * has advised me that he will be happy to talk with you regarding your company—its past, present and future at any time convenient with you." The letter went on to say that it was addressed to plaintiffs on the theory that they were holders of a surplus note, but the records of the company were so indefinite on that subject, as well as on many others, that Pauley was not entirely certain who the surplus note holders were, or the amounts thereof. Thus, Pauley asked plaintiffs to inform him whether or not they were note holders, and if so, to give him the dates and amounts thereof.

Plaintiff saw Bayer and discussed that letter with him shortly after plaintiffs received it. Plaintiff then said: "'It looks kind of bad.'" Bayer agreed with him. As a matter of fact, the record discloses, as shown by records from the Department of Insurance and other

evidence as well, that the company had been mismanaged and was in a questionable financial condition as far back as March 1947.

Be that as it may, on June 27, 1955, plaintiff wrote defendant and Pauley, its new president, in reply to his letter of June 1, 1955, saying: "We do hold a Surplus Note, for the amount of $30,000.00, Thirty Thousand Dollars, Dated April 18, 1951. Hope that everything will be for the better in the future for the company. It was a surprise to hear that the company was in a run down way like that." Also, sometime in June, plaintiff and Bayer had a conference with Pauley, the president, who stated that loss to investors would be about 25 percent.

In that connection, on September 12, 1955, plaintiffs admittedly received a letter from defendant, signed by Pauley as president, informing plaintiffs that the directors had determined that circumstances over which they had no control "require the discontinuance of further operations of the company at the earliest possible date." Reasons given therefor were defendant's liability upon certain bonds furnished contractors whose solvency had become impaired; that defendant's liabilities were about $45,000, with resources of only $16,000 or $17,000 to meet them; and that there were several other unreinsured bonds which were questionable and might become a cash liability at any time. Also, sometime in September 1955, Pauley told plaintiff that the loss of investors would be about 50 percent.

Plaintiff was in Lincoln at least three times during 1956 to inquire further about defendant's condition and affairs. The first time was in January 1956, when he went to the Department of Insurance and to see Pauley. A reputable lawyer employed by plaintiffs went with him. Among other things, the Director of the Department of Insurance told them that he would not let Dosek operate the company under any circumstances, as they suggested. In that connection, Pauley told them

"absolutely not." Nevertheless, plaintiff, together with his brother, who also was a surplus note holder, and plaintiffs' lawyer, went to a Chamber of Commerce luncheon with Dosek. They then went back to Dosek's office, where they talked about reviving the company and helping Dosek get control thereof in order to get the company going again.

In that connection, about April 14, 1956, plaintiffs received a copy of a typed letter from Dosek, purportedly signed by plaintiff but with Dosek's initials appended to the signature. Such letter read: "I am a substantial investor as well as a member in the Lincoln Bonding & Insurance Co. I understand that you are also an investor so invite you to a meeting to be held Thursday evening in the English room of Hotel Lincoln at 7:30 April 19, 1956." At the end of such letter, Dosek wrote in his own hand as follows: "Dear Emery: Here is a copy of letter that was sent. Lets get together earlier in the afternoon to talk matters over." With regard thereto, plaintiff testified that he did not sign the letter and did not know that it was sent out under his name, but that he did nothing about the fact that it did go out under his name because he was after "something better." He attended the meeting but did not inform anyone that he had not called it, and did not lead the discussion as Dosek wanted him to do. There were several people there, including two reputable lawyers who represented plaintiffs, and with whom plaintiffs had theretofore consulted about defendant's condition and affairs. The condition of "the company and a few things" were discussed at the meeting and Dosek made a talk about getting control of and reviving the company.

In October 1956, Dosek tried to scare plaintiff by telling him that Pauley had got his securities out of the company and left plaintiffs holding the sack with only questionable mortgages remaining in the company, whereupon plaintiff consulted with another reputable

lawyer, who as late as July 5, 1957, some 4 months after plaintiffs had attempted to rescind, wrote plaintiff that after several conferences with the insurance commissioner regarding plaintiffs' surplus note and the possibility of making collection upon it from defendant, it appeared that the company was not operating on a good basis and the commissioner had suggested that at a conference with him in September he could better determine what should be done in the matter. Here is a proper place to say that plaintiffs' argument that the lawyers employed and consulted with by plaintiffs represented Dosek without plaintiffs' knowledge is not supported by a shred of evidence in this record. Rather, the record is entirely devoid of any conclusion except that they represented only plaintiffs and that they did so in an entirely ethical manner. In that connection, there is not much that lawyers can do to help people who are determined to continue to receive something for nothing regardless of known facts and advice with regard thereto.

With reference to Dosek's information that Pauley had left plaintiffs holding the sack, the record discloses that on April 17, 1951, a mortgage executed by Pauley Lumber Company to C. R. Pauley, on January 4, 1940, and assigned to Merchants Casualty Company, now Lincoln Bonding and Insurance Company, on February 3, 1940, was duly released of record by defendant as "settled and paid." Also, on November 20, 1951, a mortgage executed on January 4, 1940, by Carroll R. Pauley and his wife to L. H. Pauley, who assigned it to the company on January 4, 1940, was duly released of record by defendant as "settled and paid." However, it is undisputed that such transactions were made without any knowledge by Pauley at the time that such mortgages were partly replaced in the Department of Insurance by plaintiffs' note and mortgage, and in any event the transactions still left the Pauley interests with an investment of $64,000 in surplus notes of defendant, and

no act of Pauley is shown to have been responsible for the company's mismanagement and its financial condition or failure. As a matter of fact, as heretofore mentioned, Pauley, as president, advanced $5,700 more money in order to permit the company to operate, and in good faith attempted to salvage the losses of investors, including plaintiffs and the Pauley interests.

In the meantime, on January 23, 1956, defendant notified plaintiff in writing that the interest of $600, due and payable January 2, 1956, on plaintiffs' note and mortgage, was unpaid; that defendant, being in a serious financial condition, with large losses, had no earnings with which to pay plaintiffs the interest on defendant's surplus note; and that it was necessary to ask plaintiffs to pay the interest on their note and mortgage without being able to send them a check for interest on defendant's surplus note. Plaintiffs were also told that although partial recovery was possible, a total recovery was improbable, and it appeared that all investors would suffer severe losses.

Plaintiffs, not having paid the interest on their note and mortgage, Pauley, as president, again wrote plaintiff May 2, 1956. Therein reference was made to conversations in Pauley's office on April 20, 1956, regarding plaintiffs' mortgage, then plaintiff's attention was called to the fact that the interest on plaintiffs' note and mortgage for 1955 was unpaid; that all other investors had suffered substantial cash losses; and that plaintiff should see the importance of forwarding to defendant the 1955 interest of $600 within the next few days to supply funds necessary for use in the "orderly dissolution proceedings of the company."

Thereafter, on May 8, 1956, plaintiff wrote to defendant, enclosing a $600 check for plaintiffs' 1955 interest on their note and mortgage. In that letter, plaintiff said that he was "sorry to be so slow," that "I just can't get this thing off my mind. I hope that things will get little better and that we could recover some of those

losses. I hope the meeting with my lawyer * * * and others did not put you out to (sic) much he wrote me a letter about being there. Most what I already new (sic) after meeting with you when I was in Lincoln."

On December 3, 1956, Pauley, as president, wrote plaintiffs that: "Another year is about to close and that means another interest payment of $600.00 will be due on your note and mortgage as of January 2, 1957. We have nothing particularly new to report but will send you a statement of our position sometime during January or February." Again on January 28, 1957, Pauley, as president, wrote plaintiff stating that: "Having just made the $600.00 payment covering the 1956 interest on" a mortgage owing defendant, "reminds me that your payment for the same period and in the same amount has not yet been received. Please advise me as to when this may be expected. You no doubt noted from the annual report, that" defendant "is still involved in paying losses, although they now appear to be on the downgrade. Surely 1957 will see the conclusion of most if not all loss payments other than those involving health and accident policies."

In that connection, we find no competent evidence in this record which would support plaintiffs' contention that defendant's officers lulled plaintiffs into a sense of security and thereby prevented them from learning all the facts until shortly before they decided to rescind on February 5, 1957, and attempted to do so by making a tender on March 1, 1957, before this action was filed March 14, 1957, which was 6 years after the original transaction and some 21 months after plaintiffs admittedly learned facts which put them upon inquiry. It is also just as obvious from this record that plaintiffs actually did discover the alleged fraud many months before they attempted to rescind in any manner. Further, after such discovery plaintiffs took steps to put Dosek back in control of the company so that the original transaction could be carried out, and recog-

nized validity of the transaction by paying interest on their note and mortgage as late as May 8, 1956, yet took no steps to rescind for almost a year thereafter.

We are convinced that plaintiffs alleged and proved by a preponderance of the evidence what material representations were made; that they were false and so known to be by the party charged with making them, or else were made by him without knowledge as a positive statement of known fact; that plaintiffs believed them to be true; that plaintiffs relied thereon as they had a right to do; and that plaintiffs were injured thereby. We discussed and passed upon such matters at length in Russo v. Williams, 160 Neb. 564, 71 N. W. 2d 131, wherein we also held: "Whether the right of one party to a contract to rescind the same arises on account of fraud inducing the contract or on account of a breach by the other party of a dependent covenant, such right is barred by failure of the one party, for an unreasonable time after knowledge of the facts giving rise to such right, to declare a rescission and disclaim the benefits of the contract.

"The question whether laches exists in a particular case depends upon its own peculiar circumstances and is addressed to the sound discretion of the court, the question of the unreasonableness of the delay depending largely upon the nature of the property in the particular case." As recently as Caruso v. Moy, 164 Neb. 68, 81 N. W. 2d 826, we reaffirmed those rules.

Also, as early as Ensign v. Citizens Interurban Ry. Co., 92 Neb. 363, 138 N. W. 718, this court said: " 'It is a principle which has been too long and too thoroughly established in our law to admit of any doubt or discussion, either as to the principle itself or the reasons upon which it is founded, that a party claiming to rescind a contract on the ground of fraud must do so promptly upon discovery of the facts, and that if he delays, or takes any further steps in the execution of the contract,

or does any act recognizing its validity, after discovery, he loses all right to this particular form of relief.'

"In the case of Grymes v. Sanders, 93 U. S. 55, it was held: 'Where a party desires to rescind, upon the ground of mistake or fraud, he must, upon discovery of the facts, at once announce his purpose, and adhere to it.' The same doctrine was announced by this court in the case of American Building & Loan Ass'n v. Rainbolt, 48 Neb. 434." See, also, the many authorities cited and discussed for this and other jurisdictions in Annotation, 72 A. L. R. pp. 726 to 797 inclusive.

Further, in Hollenbeck v. Guardian Nat. Life Ins. Co., 144 Neb. 684, 14 N. W. 2d 330, this court held: "Where one is put upon inquiry, he is charged with notice of all of such facts as he would have learned by reasonable inquiry." See, also, Durfee v. Keiffer, 168 Neb. 272, 95 N. W. 2d 618. In the light of such rules and the evidence in this record, we conclude that plaintiffs' right to rescind was barred by unreasonable delay.

However, such conclusion does not entirely dispose of the issues presented by the pleadings and evidence. Plaintiffs first argued that their note and mortgage to defendant were void because the transaction occurred on March 15, 1951, and the instruments were materially altered by filling in the blanks and dating them back to January 2, 1951, to cost plaintiffs more interest. In that connection, plaintiffs did not plead alteration as such, but their petition did allege that the instruments were void, after which defendant's answer and cross-petition denied generally and alleged ratification, after which plaintiffs' reply and answer thereto denied generally. Contrary to defendant's contention here, we conclude that alteration and ratification were issues upon which evidence appearing in this record was admissible. See, Walton Plow Co. v. Campbell, 35 Neb. 173, 52 N. W. 883, 16 L. R. A. 468.

In that connection, on page 5 of plaintiffs' petition, they plead and set forth a complete tabulation of all

interest received by plaintiffs from defendant each year on its surplus note and all interest paid by plaintiffs to defendant each year on their note and mortgage, beginning January 1, 1952, and ending January 1, 1956. The item thus listed under January 1, 1952, was admittedly interest for 1951 for which plaintiffs received only $1,265 and paid to defendant only $426, which conclusively shows an exact adjustment of interest on plaintiffs' note and mortgage and defendant's surplus note to April 18, 1951, the date of defendant's surplus note. Plaintiffs' tabulation also shows that from January 1, 1953, to and including January 1, 1955, plaintiffs received $1,800 interest each year on defendant's surplus note, and that plaintiffs paid defendant $600 interest each year from January 1, 1953, to and including January 1, 1956, on plaintiffs' note and mortgage. Thus it cannot be said that the dates on plaintiffs' note and mortgage were altered to make plaintiffs pay more interest, as argued by plaintiffs.

Plaintiffs also argued that filling in the blanks and dating their note and mortgage January 2, 1951, was a material alteration in any event. In Montgomery v. Dresher, 90 Neb. 632, 134 N. W. 251, 38 L. R. A. N. S. 423, this court held: "The filling of blanks in a written instrument is not, strictly speaking, an alteration of the instrument. Where a blank is filled in after the execution and delivery of a written instrument, it is a question of authority to do so.

"The right to fill blanks in written instruments after execution and delivery is based upon an assumption of consent, in the absence of specific instructions, and the leaving of such blanks is considered to imply authority to fill them, and creates an agency in the receiver to do so in the way contemplated by the maker." See, also, Mutual Benefit Health & Acc. Assn. v. Milder, 152 Neb. 519, 41 N. W. 2d 780; 10 C. J. S., Bills and Notes, § 136, p. 583; 3 C. J. S., Alteration of Instruments, §§ 62, 63, p. 976, § 66, p. 977; § 62-114, R. R. S. 1943.

In Bank of Cedar Bluffs v. Beck, 128 Neb. 244, 258 N. W. 528, 96 A. L. R. 1099, we held: "After a note has been signed and delivered by the maker, if the time of the maturity is altered by the holder without the consent of the maker, this constitutes a material alteration, which releases the maker."

Be that as it may, in State Bank of Edgar v. Jordan, 129 Neb. 19, 260 N. W. 687, we held that: " 'A material alteration, already made, may be ratified and adopted subsequently; and in such case the instrument, as altered, will be binding.' State v. Paxton, 65 Neb. 110.

"Where holder of note that has been materially altered without maker's consent relies on ratification of such alteration, it must be pleaded." See, also, 3 C. J. S., Alteration of Instruments, § 75, p. 981. As said in § 77, p. 983: "Any act or conduct showing an intention to recognize the instrument as altered is generally sufficient to constitute a ratification of the alteration." Also, as said in § 46, p. 961: "A change in an instrument before its complete execution will not ordinarily be considered to be an alteration, although under some circumstances the instrument may be unenforceable for lack of mutual assent."

In the light of this record and the foregoing authorities, we conclude from plaintiffs' own pleadings and the evidence heretofore set forth that plaintiffs ratified the dates of their note and mortgage and that they were not void for alteration thereof.

Plaintiffs also argued that their mortgage was void because when they signed it in blank it did not contain a description of the property to be mortgaged. No authority in point is cited from this jurisdiction, and we have found none. Other authorities relied upon by plaintiffs are distinguishable upon the facts and law of the particular jurisdiction. The description of the property to be mortgaged was left blank, but it is obvious from the evidence that plaintiffs understood and agreed that Dosek had authority to later fill in the

description as he did from the abstracts admittedly furnished Dosek by plaintiffs for that purpose in order to complete the transaction, and authorities heretofore cited adversely dispose of plaintiffs' contention.

Plaintiffs further argued that their mortgage was entirely void because it was never acknowledged as required by law. In the light of holdings in Trowbridge v. Bisson, 153 Neb. 389, 44 N. W. 2d 810, cited with approval in Marston v. Drobny, 166 Neb. 747, 90 N. W. 2d 408, and the undisputed evidence in this record, we conclude that plaintiffs' mortgage, although witnessed, was never acknowledged in any respect as required by law, and that the purported acknowledgment appearing thereon was false. However, that conclusion does not make plaintiffs' mortgage entirely void as between the parties herein. In such respect, plaintiffs' land described in the mortgage, did include the Northeast Quarter of Section 26, Township 27 North, Range 53 in Sioux County, which, without dispute, was plaintiffs' homestead, and the mortgage of such homestead was absolutely void and unenforceable. See Trowbridge v. Bisson, *supra*, which concluded that any conveyance or encumbrance of the homestead of a married person is absolutely void and unenforceable unless voluntarily executed and acknowledged by both husband and wife as required by section 40-104, R. R. S. 1943. However, in the case at bar, the mortgage did describe other lands belonging to plaintiff which were not plaintiffs' homestead, and as between the parties the mortgage was valid and enforceable as to such other lands.

In that connection, on rehearing in Wilson v. Wilson, 85 Neb. 167, 122 N. W. 856, this court, citing many authorities, held: "A deed to real estate, executed and delivered, is valid between the parties, though not lawfully acknowledged nor witnessed, and is sufficient to convey the land described therein, with the exception of the homestead of the grantor." By analogy, of course, such rule applies to a like execution and delivery of a

mortgage on real estate. Citing and quoting from Wilson v. Wilson, *supra*, this court reaffirmed such quoted holding in Blum v. Poppenhagen, 142 Neb. 5, 5 N. W. 2d 99, which involved a deed to real estate and a separate contractual reservation of an interest therein executed at the same time by the same parties for the same purpose in the same transaction. In such respect, citing authorities, we concluded that in the absence of anything to indicate a contrary intention, such instruments were in the eye of the law, one instrument, and would be read and construed together as if they were as much one in form as they are in substance.

Other questions were argued but they require no discussion. We conclude that the judgment of the trial court should be and it hereby is reversed and the cause remanded with directions to make an accounting of the amount due on plaintiffs' note and mortgage, and award defendant a judgment on its cross-petition therefor, together with a foreclosure of the mortgage as prayed, except upon plaintiffs' homestead heretofore described. All costs are taxed to defendant.

REVERSED AND REMANDED WITH DIRECTIONS.

SIMMONS, C. J., not participating.

RUTH BRACKMAN AS NEXT FRIEND OF KENTON DEAN SCHAUB, APPELLANT, V. GEORGE BRACKMAN, APPELLEE.
100 N. W. 2d 774

Filed January 22, 1960. No. 34602.

1. **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 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 of plaintiff is to be measured

is the extent thereof by comparison with the negligence of the defendant.

2. **Negligence: Trial.** The question of the existence of negligence or contributory negligence is for a jury where different minds may reasonably draw different conclusions from the evidence as to the existence of negligence or contributory negligence.
3. **Infants.** Infants, like adults, assume the ordinary risks of the service in which they engage. But an infant engaging in a hazardous employment is entitled to warning of dangers which, on account of youth and inexperience, he does not fully comprehend.
4. **Negligence.** There is a clear distinction between the defense of assumption of risk and the defense of contributory negligence in that assumption of risk rests in contract or in the principle expressed by the ancient maxim, "volenti non fit injuria," whereas contributory negligence rests in tort.
5. **Negligence: Trial.** Although the defense of assumption of risk is not incompatible with the defense of contributory negligence and both defenses may arise under the same set of facts, an instruction given by the trial court stating that both such defenses are identical is prejudicially erroneous.
6. **Negligence: Customs and Usages.** Upon the issue of negligence or contributory negligence, evidence of the ordinary practice or of the uniform custom, if any, of persons in the performance of acts under similar circumstances like those which are alleged to have been done negligently is generally competent evidence.
7. ———: ———. It is the general rule that custom need not be pleaded, since evidence of custom in negligence cases is admitted not on the theory that a breach of custom is negligence per se, but as evidence of negligence, or of due care, as the case may be, and it is no more necessary to plead it than it is to allege other evidentiary facts which prove the ultimate facts pleaded.

APPEAL from the district court for Scotts Bluff County: RICHARD VAN STEENBERG, JUDGE. *Reversed and remanded.*

Wright, Simmons & Harris, for appellant.

Holtorf & Hansen, Charles F. Fitzke, Atkins & Ferguson, and *Clark G. Nichols,* for appellee.

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

MESSMORE, J.

This is an action brought in the district court for

Scotts Bluff County by Ruth Brackman as next friend of Kenton Dean Schaub, a minor, as plaintiff, against George Brackman, defendant, to recover damages for personal injuries sustained by Kenton Dean Schaub while operating a cornpicker owned by the defendant. The defendant was charged with negligence in furnishing Kenton Dean Schaub with an unsafe machine with which to work, and in not advising him of the dangerous nature of the work or the dangerous condition of the cornpicker. The case was tried to a jury resulting in a verdict in favor of the defendant. The plaintiff filed a motion for new trial which was overruled. From the overruling of the motion for new trial, the plaintiff perfected appeal to this court.

For all practical purposes we will refer to Kenton Dean Schaub as plaintiff, and to George Brackman as defendant.

The plaintiff's petition alleged that he was employed by the defendant as a farm laborer on or about September 16, 1957; that said employment continued up to and including November 15, 1957; that on November 15, 1957, while engaged in the employment of the defendant, the plaintiff sustained an accident with a cornpicker; that as a result of same, he received personal injuries which disabled him; that the direct and proximate cause of the accident was the negligence of the defendant in furnishing the plaintiff with an unsafe machine with which to work, and in not warning and advising plaintiff of the dangerous nature of the work or the dangerous condition of the machine; that the defendant knew said machine was unsafe, was in poor repair, and had immediately prior to the date of accident had certain modifications made upon it which made the machine dangerous and unsafe; that on the date of the accident the defendant ordered the plaintiff to use the cornpicker in the condition described above, knowing its dangerous condition; that at the time of the accident the plaintiff was unfamiliar with cornpickers

in general, having never previously operated a cornpicker, and was not aware of the more dangerous condition of this particular cornpicker; that the defendant ordered the plaintiff to proceed, and to dig out the obstructions and plugs in the machine, after the plaintiff objected that said machine would not work without plugging in view of the moisture content of the corn and the unusual thickness of the corn; that the plaintiff was right-handed; and that as a result of the accident his right arm had to be amputated below the elbow. The plaintiff prayed for damages for the injuries sustained by him.

The defendant's answer denied all allegations in the plaintiff's petition not admitted, and alleged that the cornpicker involved in the accident was plainly marked with warning signs; that the defendant instructed the plaintiff in the use of the machine; that the plaintiff was familiar with the operation of the machine; that the defendant had warned and cautioned the plaintiff to always shut off the machine before getting off of it; that any injury suffered by the plaintiff was proximately caused by his own negligence, which was more than slight; and that the plaintiff assumed the risk of the accident in working on said cornpicker while it was running. The prayer was that the plaintiff's petition be dismissed.

It appears from the record that the plaintiff was employed by his stepfather to do farm work; that the plaintiff was 18 years of age at the time; that while operating a cornpicker on November 15, 1957, he left the motor running on the machine and endeavored to dig out the obstructions that were plugging the machine; that as a result his right hand was caught in the machine; and that due to the accident his right arm had to be amputated below the elbow. The plaintiff's testimony was to the effect that he did not receive proper instructions from the defendant pertaining to the proper operation of the cornpicker and what his duties were

with reference thereto. The defendant's evidence was to the effect that he specifically instructed the plaintiff in the use and operation of the cornpicker, and told him not to clean the machine of obstructions or plugs while the motor was running and to stop the motor before trying to unplug the machine.

The plaintiff contends that the trial court committed prejudicial error by defining slight and gross negligence in instruction No. 13; that the definitions as given in said instruction related to section 39-740, R. R. S. 1943, known as the automobile guest passenger statute; and that said definitions are not to be considered in the same light with reference to the comparative negligence statute, section 25-1151, R. R. S. 1943.

In support of the above contention, the plaintiff cites the case of Bezdek v. Patrick, 167 Neb. 754, 94 N. W. 2d 482.

It appears that the contention of the plaintiff in the instant case, as above stated, was directly raised for the first time before this court in Bezdek v. Patrick, *supra*. In that case this court said: "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."

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

"We think the rule announced in Morrison v. Scotts Bluff County, 104 Neb. 254, 177 N. W. 158, supports this view. It was therein said: 'The true rule is that, if plaintiff is guilty of negligence directly contributing to the injury, he cannot recover, even though the defendant was negligent, unless the contributory negligence of plaintiff was slight and the negligence of defendant was gross in comparison therewith. If, in comparing the negligence of the parties, the contributory negligence of the plaintiff is found to exceed in any degree that which under the circumstances amounts to slight negligence, or if the negligence of defendant falls

in any degree short of gross negligence under the circumstances, then the contributory negligence of plaintiff, however slight, will defeat a recovery.' It will be noted that the foregoing rule is predicated on a comparison of the negligence of the parties in determining the liability of both the plaintiff and the defendant, that is, the question of slight or gross negligence as used in the statute are both dependent upon a comparison of the negligence of the parties, one with the other." See, also, Hickman v. Parks Constr. Co., 162 Neb. 461, 76 N. W. 2d 403, 62 A. L. R. 2d 1040.

From the authorities above cited it will be observed that under the comparative negligence statute, section 25-1151, R. R. S. 1943, it is necessary that negligence of the plaintiff be compared with the negligence of the defendant to determine whether the negligence of one is slight or gross in comparison with the other, while under the automobile guest passenger statute, section 39-740, R. R. S. 1943, a standard of gross negligence is set up that is not based on the comparison of negligence. Before a guest may recover from the driver of an automobile under the guest passenger statute, the driver must be found guilty of gross negligence, that is, great or excessive negligence. Such is not true under the comparative negligence rule.

From an analysis of both sections of the statute heretofore referred to, it will be observed that each is distinct and separate from the other, and deals with entirely different subject matters, as pointed out above. Consequently, each of said statutes has a definite purpose. The automobile guest statute, section 39-740, R. R. S. 1943, is not involved in the instant case, and the definitions of "slight" and "gross" negligence as given in the trial court's instruction are wrong under the comparative negligence statute. We conclude that the trial court committed prejudicial error as contended for by the plaintiff.

"The question of the existence of negligence or con-

tributory negligence is for a jury where different minds may reasonably draw different conclusions from the evidence as to the existence of negligence or contributory negligence." Hickman v. Parks Constr. Co., *supra*.

We deem the following authorities relating to the duties of an employer in instructing a minor with reference to his employment to be pertinent to the instant case.

As expressed in Anderson v. Evans, 164 Neb. 599, 83 N. W. 2d 59: "This court, in Norfolk Beet-Sugar Co. v. Hight, 56 Neb. 162, 76 N. W. 566, quoted with approval the following from Jones v. Florence Mining Co., 66 Wis. 268, 28 N. W. 207, 57 Am. R. 269: 'We think it is now clearly settled that if a master employs a servant to do work in a dangerous place, or where the mode of doing the work is dangerous and apparent to a person of capacity and knowledge of the subject, yet if the servant employed to do work of such a dangerous character or in a dangerous place, from youth, inexperience, ignorance, or want of general capacity, may fail to appreciate the dangers, it is a breach of duty on the part of the master to expose a servant of such character, even with his own consent, to such dangers, unless he first gives him such instructions or cautions as will enable him to comprehend them, and do his work safely, with proper care on his part.' There has been no departure in the decisions from this pronouncement."

In the case of Omaha Bottling Co. v. Theiler, 59 Neb. 257, 80 N. W. 821, 80 Am. S. R. 673, it is said: "The general rule is that infants, like adults, assume the ordinary risks of the service in which they engage. They are entitled, however, to warning of dangers which, on account of their youth and inexperience, they do not fully comprehend; and if such warning be not given, or if it be inadequate, the master is in fault and must answer for the consequences." See, also, Evans Laundry Co. v. Crawford, 67 Neb. 153, 93 N. W. 177; Burnett

v. Roanoke Mills Co., 152 N. C. 35, 67 S. E. 30.

In the instant case there is conflicting evidence as to whether or not the employer (defendant) had sufficiently instructed the employee (plaintiff) as to the dangerous character of the cornpicker which the employee was to operate, therefore, a question of fact in such regard was for the jury to determine.

The plaintiff contends that the trial court committed prejudicial error in a statement contained in instruction No. 9 wherein the trial court instructed the jury as follows: "For the purpose of this instruction you shall consider any assumption of the risk by the plaintiff to be identical to contributory negligence."

In Landrum v. Roddy, 143 Neb. 934, 12 N. W. 2d 82, 149 A. L. R. 1041, this court quoted with approval from 38 Am. Jur., Negligence, § 172, p. 847, as follows: "The defense of assumption of risk is closely associated with the defense of contributory negligence. One who does not exercise ordinary care for his own safety is said, speaking broadly, to assume the risk, that is, take the chance, of being hurt. The defense of assumption of risk is not incompatible with contributory negligence; the two defenses may arise under the same state of facts. Some courts regard the defenses as interchangeable. However, there is a clear distinction between the defense of assumption of risk and the defense of contributory negligence, notwithstanding they may arise under the same set of facts and may sometimes overlap. There is a line of demarcation which, if carefully scrutinized and followed, will allow the court to differentiate between them. Assumption of risk rests in contract or in the principle expressed by the ancient maxim, 'volenti non fit injuria,' whereas contributory negligence rests in tort. The former involves a choice made more or less deliberately and negatives liability without reference to the fact that the plaintiff may have acted with due care, whereas the defense of contributory negligence implies the failure of the plaintiff

to exercise due care. As stated in some decisions, assumption of risk is a mental state of willingness, whereas contributory negligence is a matter of conduct." A discussion of the distinction as pointed out above may be found in 65 C. J. S., Negligence, § 117, p. 709.

It is obvious that the trial court committed prejudicial error in instructing that the defense of assumption of risk and the defense of contributory negligence were identical. We conclude that the trial court committed prejudicial error as contended for by the plaintiff.

The plaintiff contends that certain evidence was admitted by the trial court, over objection, with reference to the repairs, alterations, or changes made to the shucking rolls on cornpickers in the area in which the defendant farmed and the plaintiff was employed. We need not determine the validity of the objections to this evidence made by the plaintiff in the instant case, however, evidence of this nature may be admitted when proper foundation is laid for its admission into evidence. See, O'Dell v. Goodsell, 152 Neb. 290, 41 N. W. 2d 123; 38 Am. Jur., Negligence, § 317, p. 1015; Annotation, 137 A. L. R. 611; Tite v. Omaha Coliseum Corp., 144 Neb. 22, 12 N. W. 2d 90, 149 A. L. R. 1164.

Plaintiff also contends that custom and usage must be pleaded in order for the defendant to produce evidence relating to this subject matter.

In 38 Am. Jur., Negligence, § 267, p. 957, it is said: "It is the general rule that custom need not be pleaded, since evidence of custom in negligence cases is admitted not on the theory that a breach of custom is negligence per se, but as evidence of negligence, or of due care, as the case may be, and it is no more necessary to plead it than it is to allege other evidentiary facts which prove the ultimate facts pleaded." See, also, Crooker v. Pacific Lounge & Mattress Co., 34 Wash. 191, 75 P. 632; Towner v. Western Contracting Corp.,

164 Neb. 235, 82 N. W. 2d 253; 41 Am. Jur., Pleading, § 366, p. 541.

We hold that it was not necessary for the defendant to specifically plead custom in the instant case. The general denial in defendant's answer was sufficient to raise the issue.

The plaintiff contends that the use of the word "some" in an instruction on negligence means more than one of the elements of negligence which the plaintiff was required to prove by a preponderance of the evidence before the plaintiff may recover.

In instruction No. 19, the trial court instructed in part as follows: "You are instructed that the mere happening of an accident does not of itself prove negligence on the part of either party. Negligence is never presumed but the burden of proof is on the plaintiff to prove by a preponderance of the evidence that the accident was caused by some of the acts of negligence alleged and submitted to you by the Court."

It is true that in instruction No. 8 given to the jury by the trial court, the jury was informed that the burden of proof was on the plaintiff, before he could recover in this action, to prove that the defendant was negligent in one or more of the acts of negligence referred to in instruction No. 3. In this connection, see Johnson v. Hansen, 139 Neb. 428, 297 N. W. 643; and Holtz v. Plumer, 133 Neb. 878, 277 N. W. 589.

There is a clear distinction between the two above-cited cases relating to the word "some" and it would serve no useful purpose to make that distinction here. The use of the word "some" in an instruction could be misleading to a jury, and place a greater burden on the plaintiff than the law requires.

Inasmuch as there must be a new trial in this case, doubtless the instructions of the trial court will be corrected in the respects as heretofore set forth and in such other respects as may be required, depending upon what occurs in the new trial.

In the light of what we have heretofore said, the cross-appeal of the defendant need not be determined.

Other assignments of error asserted by the plaintiff need not be determined.

For the reasons given herein, we conclude that the judgment of the trial court should be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

E. A. PULLIAM, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.
100 N. W. 2d 704

Filed January 22, 1960. No. 34687.

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. ———. The decision of an appellate court becomes the law of the case, and the legal effect of evidence once determined will not be reconsidered here on a second appeal where there has been no material change in the evidence on the second trial.
4. ———. When this court determines the law of the case on appeal, the trial court is bound thereby and its judgment in accordance therewith will not ordinarily be disturbed on a subsequent appeal.

ERROR to the district court for Washington County: L. ROSS NEWKIRK, JUDGE. *Affirmed.*

Chester N. Sutton, for plaintiff in error.

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

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

MESSMORE, J.

This is the second appearance of this case in this court. See Pulliam v. State, 167 Neb. 614, 94 N. W. 2d 51.

The plaintiff in error, hereafter referred to as the defendant, was charged by information in the district court for Washington County under section 69-109, R. R. S. 1943, with the crime of selling, transferring, or disposing of mortgaged personal property without the consent of the owner or holder of the debt secured by a mortgage, and under section 69-110, R. R. S. 1943, of the crime of removing, permitting, or causing to be removed any personal property out of the county in which such property was situated at the time a mortgage was given thereon, with intent to deprive the owner of the mortgage of his security. Both sections of the statute above mentioned prescribed a penalty for violation thereof. The defendant was found guilty of the crime of disposing of mortgaged property under count II of the information, and was found guilty of the crime of the removal of mortgaged property out of the county on counts III and IV thereof. The defendant filed a motion for new trial which was overruled. The trial court sentenced the defendant to serve a term in the Nebraska State Penitentiary and assessed a fine on counts III and IV set out in the information. The defendant brings proceedings in error for a review of his case in this court.

We deem it unnecessary to set forth the facts in this case. The material and relevant facts are meticulously set out in our former opinion and it would serve no useful purpose to repeat them. There was no material change in the evidence adduced at the first trial and the evidence adduced at the second trial of this case.

In the instant case the defendant sets forth two as-

signments of error, as follows: (1) That the trial court erred in overruling objections to questions and exhibits making the defendant's character an issue, thereby abusing the discretion of the trial court which prevented the defendant from having a fair and impartial trial; and (2) that the trial court erred in overruling objections to testimony regarding other acts of the defendant which prevented the defendant from having a fair and impartial trial.

In the former opinion this court said: "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 Minick v. Huff, 41 Neb. 516, 59 N. W. 795, 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."

There is no distinction between the assignments of error in this case and in the previous case relating to the overruling of objections to questions and exhibits making the defendant's character an issue, or that the court erred in overruling objections to testimony regarding other acts of the defendant which prevented him from having a fair and impartial trial. This subject matter is thoroughly discussed in our previous opinion.

The defendant has failed to meet the requirement of the law in his assignments of error. See Yost v. State, 149 Neb. 584, 31 N. W. 2d 538.

In Floyd v. Edwards, 152 Neb. 673, 42 N. W. 2d 292, this court said: "The decision of an appellate court becomes the law of the case, and the legal effect of evidence once determined will not be reconsidered where, without material change, it is again brought to the court on a second appeal."

And in Snyder v. Lincoln, 156 Neb. 190, 55 N. W. 2d 614, this court said: "When this court determines the law of the case on appeal, the trial court is bound thereby and its judgment in accordance therewith will not ordinarily be disturbed on a subsequent appeal. * * * The decision of an appellate court becomes the law of the case and the legal effect of evidence once determined will not be reconsidered here on a second appeal where there has been no material change in the evidence on the second trial." See, also, Hiatt v. Brooks, 17 Neb. 33, 22 N. W. 73; Meyer v. Shamp, 26 Neb. 729, 42 N. W. 757; City of Omaha v. Bowman, 63 Neb. 333, 88 N. W. 521; Porter v. State, 73 Neb. 792, 103 N. W. 669.

We believe that in the light of the afore-cited authorities the assignments of error contended for by the defendant are settled by our previous decision, and the doctrine of the law of the case prevails.

For the reasons given herein, the judgment on the verdict is affirmed.

AFFIRMED.

LOYD S. TILGHMAN, APPELLANT, V. R. D. MILLS, FIRST AND REAL NAME UNKNOWN, DOING BUSINESS AS R. D. MILLS CONSTRUCTION CONTRACTOR, APPELLEE.
100 N. W. 2d 739

Filed January 22, 1960. No. 34712.

1. **Workmen's Compensation.** Section 48-151, R. R. S. 1943, provides in part: "The word 'accident' as used in this act shall, unless a different meaning is clearly indicated by the context, be construed to mean an unexpected or unforeseen event happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury."
2. ———. In an action under the Workmen's Compensation Act the burden is on the claimant to establish by a preponderance of the evidence that he sustained a personal injury by an accident arising out of and in the course of his employment.
3. ———. Such facts must be proved by the claimant by sufficient evidence leading to the direct conclusion, or by a legitimate legal inference therefrom, that such an accidental injury occurred and caused the disability. There must be shown a causal connection between an accident suffered by the claimant and the cause of his disability.
4. ———. Symptoms of pain and anguish such as weakness or expressions of pain clearly involuntary or any other symptoms indicating a deleterious change in bodily condition may constitute objective symptoms within the requirements of the Workmen's Compensation Act.
5. ———. It is sufficient to show that the injury and preexisting disease combined to produce disability, and it is not necessary to prove that the injury accelerated or aggravated the disease, in order to satisfy the requirement of the statute that the disability arose out of the employment.
6. ———. The applicable rule of construction of the Workmen's Compensation Act is that it be liberally construed to the end that its beneficent purposes may not be thwarted by technical refinement of interpretation.
7. ———. In considering the sufficiency of the proof, the rule of

liberal construction, as it relates to the Workmen's Compensation Act, applies to the law and not to the evidence offered to support a claim by virtue of the law.

8. ———. For workmen's compensation purposes, "total disability" does not mean a state of absolute helplessness, but means disablement of an employee to earn wages in the same kind of work, or work of a similar nature, that he was trained for, or accustomed to perform, or any other kind of work which a person of his mentality and attainments could do.

9. ———. An employee may be totally disabled for all practical purposes and yet be able to obtain trivial occasional employment under rare conditions at small remuneration. The claimant's status in such respect remains unaffected thereby unless the claimant is able to get, hold, or do any substantial amount of remunerative work either in his previous occupation or any other established field of employment for which he is fitted.

10. ———. A recovery by an employee against an employer by virtue of the Workmen's Compensation Act may include the reasonable expenses incident to and necessary for obtaining medical and hospital services.

11. ———. Section 48-125, R. R. S. 1943, does not authorize the Supreme Court to grant an attorney's fee to the employee for services in the Supreme Court, where the employee has appealed from the decision of the district court denying an award of compensation and the Supreme Court reverses the judgment of the district court and holds that the employee is entitled to compensation under the Workmen's Compensation Act.

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

Heaton & Heaton, for appellant.

Clinton & McNish, for appellee.

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

MESSMORE, J.

This is an action arising under the provisions of the Nebraska Workmen's Compensation Act. The case was tried before one of the judges of the workmen's compensation court who entered an order of dismissal of the plaintiff's case. The plaintiff waived rehearing before

the entire compensation court and appealed directly to the district court for Cheyenne County. Although the accident involved in this case occurred in Scotts Bluff County, by stipulation of the parties the cause was to be tried in the district court for Cheyenne County on the pleadings filed in the compensation court. Trial was had in the district court. The district court rendered judgment against the plaintiff and dismissed his cause of action. The plaintiff filed a motion for new trial. From the order overruling his motion for new trial, the plaintiff appealed to this court.

There is no apparent dispute in the record as to the following facts: That on June 25, 1957, the relationship between the plaintiff, Loyd S. Tilghman, and R. D. Mills, first and real name unknown, doing business as R. D. Mills Construction Contractor, defendant, was that of employee and employer as defined by the Nebraska Workmen's Compensation Act, and each was subject to its provisions; that on June 25, 1957, the plaintiff was being paid $1.75 an hour for a 40-hour week and time and a half for overtime, holidays, and Sundays, by the defendant; that on said date, while the plaintiff was being transported to work with other employees of the defendant as a passenger in a station wagon, an accident occurred causing the station wagon to overturn and roll, and become demolished; that on said date the plaintiff was on duty and engaged in the work of his employer; that prior to June 25, 1957, while in the employ of the defendant, the plaintiff at all times was physically able to carry on his part of the work and perform his duties as a manual laborer; that the plaintiff had been paid no compensation, nor had any of the medical and hospital bills incurred by him as a result of the accident been paid; that the plaintiff is married and the father of three minor children; that the plaintiff has a physical disability known as a spondylolisthesis which is a forward displacement of one vertebra over another, usually the fifth lumbar over

the body of the sacrum, or the fourth lumbar over the fifth lumbar; and that the plaintiff was 40 years of age at the time of trial, had an eighth-grade country school education, and had no training for any work except common, manual labor.

The plaintiff's petition alleged that on June 25, 1957, the plaintiff, while in the employ of the defendant, sustained personal injuries in an automobile accident arising out of and in the course of his employment, for which injuries the plaintiff is entitled to compensation; that as a result of the accident the plaintiff suffered a physical disability known as a spondylolisthesis resulting in total and permanent disability; that it will be necessary to have surgery to correct such condition; that to do so will require hospitalization; that the plaintiff will continue to have permanent disability after surgery for 6 months and then will have permanent partial disability for the remainder of his life of approximately 10 to 20 percent of his body as a whole; and that the plaintiff has been and will be required to expend sums of money for hospitalization, medicine, and surgery in the future as a direct result of the accident. The plaintiff prayed to recover compensation as provided for by law.

The defendant's answer admitted the overturning of the station wagon in which the plaintiff was a passenger in the course of his employment; denied that the injuries complained of by the plaintiff were the result of an accident arising out of and in the course of his employment by the defendant; specifically denied the nature and extent of said injuries; and contended that any existing spondylolisthesis or intervertebral disc disease was not the result of said accident. The defendant's answer also alleged that the spondylolisthesis of which the plaintiff complained, and the alleged intervertebral disc disease, were a condition preexisting the accident of June 25, 1957, and were unrelated thereto. Defendant prayed for dismissal of the plaintiff's action.

We deem the following authorities pertinent to a determination of this appeal.

Section 48-151, R. R. S. 1943, provides in part: "The word 'accident' as used in this act shall, unless a different meaning is clearly indicated by the context, be construed to mean an unexpected or unforeseen event happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury." See, also, Mook v. City of Lincoln, 143 Neb. 254, 9 N. W. 2d 184.

In an action under the Workmen's Compensation Act the burden is on the claimant to establish by a preponderance of the evidence that he sustained a personal injury by an accident arising out of and in the course of his employment. See, Hassmann v. City of Bloomfield, 146 Neb. 608, 20 N. W. 2d 592; Schwabauer v. State, 147 Neb. 620, 24 N. W. 2d 431; Pittenger v. Safeway Stores, Inc., 166 Neb. 858, 91 N. W. 2d 31.

Such facts must be proved by the claimant by sufficient evidence leading to the direct conclusion, or by a legitimate legal inference therefrom, that such an accidental injury occurred and caused the disability. There must be shown a causal connection between an accident suffered by the claimant and the cause of his disability. Anderson v. Cowger, 158 Neb. 772, 65 N. W. 2d 51; Rose v. City of Fairmont, 140 Neb. 550, 300 N. W. 574; Pixa v. Grainger Bros. Co., 143 Neb. 922, 12 N. W. 2d 74.

Symptoms of pain and anguish such as weakness or expressions of pain clearly involuntary or any other symptoms indicating a deleterious change in bodily condition may constitute objective symptoms within the requirements of the Workmen's Compensation Act. Knudsen v. McNeely, 159 Neb. 227, 66 N. W. 2d 412.

It is sufficient to show that the injury and preexisting disease combined to produce disability, and it is not necessary to prove that the injury accelerated or aggravated the disease, in order to satisfy the require-

ment of the statute that the disability arose out of the employment. Skelly Oil Co. v. Gaugenbaugh, 119 Neb. 698, 230 N. W. 688; Sporcic v. Swift & Co., 149 Neb. 246, 30 N. W. 2d 891.

The applicable rule of construction of the Workmen's Compensation Act is that it be liberally construed to the end that its beneficent purposes may not be thwarted by technical refinement of interpretation. Haler v. Gering Bean Co., 163 Neb. 748, 81 N. W. 2d 152.

In considering the sufficiency of the proof, the rule of liberal construction, as it relates to the Workmen's Compensation Act, applies to the law and not to the evidence offered to support a claim by virtue of the law. Anderson v. Cowger, *supra.*

On an appeal to this court in a workmen's compensation case the cause will be considered de novo upon the record before us. Anderson v. Cowger, *supra.*

With the foregoing authorities in mind, we come to a summary of the evidence.

The plaintiff testified that he resided in Sidney, Nebraska; that he was 5 feet 5 inches in height and weighed 140 pounds; that on June 25, 1957, he was employed by R. D. Mills Construction Company which was engaged in setting up oil pumps; that his duties were to set up oil pumps, lay pipe, and do any type of manual labor required in that type of work, including lifting; that prior to working for the defendant he worked for Keith Deaver at the Colton Grain Company sacking millet; that he ran the fanning mill and loaded boxcars; that in loading the boxcars he was required to lift 100-pound sacks and pile them 7, 8, and sometimes 9 high, which was over his head and which he was able to do; that prior to working for Keith Deaver he helped in the construction of the National Guard Armory in Sidney where, in putting on the roof, he used a sledge hammer; and that after the armory was constructed he cleaned the floor, which was covered with dirt and paper over the cement, and wheeled the dirt out in a wheel-

barrow. He further testified that prior to working on the armory he drilled wheat for a farmer by driving a tractor; that prior to that time he stacked 4,800 bales of hay in 4 days for George Baird; that he stacked the hay 13 bales high, lifting them manually; that the above jobs were the same type of manual labor he had done prior to June 25, 1957; that he had no training for any other kind of work; and that he experienced no pain or discomfort in his back in doing heavy manual labor and was in good health prior to the accident.

The plaintiff further testified that on June 25, 1957, he went to work at 7 a.m. He and four other workmen were transported in a station wagon furnished by the employer. He sat in the back seat, behind the driver, with another employee of the defendant. There were 400 or 500 pounds of tools in the aisle and the space behind the back seat. These tools consisted of pipe wrenches, pipe dies, posthole diggers, shovels, and rakes that were used on the job. The driver of the station wagon attempted to pass a truck, and the station wagon began "whipping" and rolled over on the highway. When the station wagon came to a stop, it was resting on its top. The plaintiff endeavored to get out, and the station wagon started to roll again and rolled back onto its wheels. When it stopped, he was tangled up under the tools with the posthole digger between his legs. The back door of the station wagon was open, and the plaintiff finally was able to get out. A great many of the tools were scattered along the road. The station wagon was completely demolished. The plaintiff was unable to state which of the tools struck him. After the accident he was taken to Scottsbluff. When he arrived there, he had to buy a new shirt and overalls because the ones he wore to work were practically destroyed in the accident. He was taken to a hospital where a nurse put a little salve on his arms, and also a piece of tape. He guessed that he had been burned by coffee, as they had coffee in the station wagon. As a result

of the accident he was "shook up." He further testified that he sat around the hospital, and the longer he did so the more stiff he became. To use his expression, he was "bunged up," and his back was hurting. He arrived at the hospital at approximately 9:30 a.m. He was returned to Sidney by the foreman for the defendant who came after the workmen, and arrived home about 6 p.m. He further testified that by that time he was stiff and sore all over, and his pain was getting worse all the time; that he was stiff and sore during the night and unable to go to work the next morning; that he went back to work the second day after the accident, but never did any heavy work after that time; that the first day he returned to work his back hurt and his arm was sore; that he worked 4 or 5 days, but had to lay off, he could not go back to work; and that he told the foreman that he could not return to work. He further testified that he had a conversation with Mills about the accident wherein Mills told the plaintiff that if he could not go back to work Mills would have to replace him. He testified further that he went to see Dr. Taylor 5 or 6 days after the accident, and told the doctor about his back; that he received no treatment for his back; and that the doctor treated him for his arm, but took no X-ray pictures. He testified that he went to see Dr. Dorwart on or about July 24, 1957, at the request of the defendant. Later he was sent by Dr. Dorwart to Dr. Kline of Cheyenne, Wyoming, and placed in a hospital there. He remained in the hospital 7 days, but no surgery was performed on his back. He further testified that since the date of the accident he had done only light work; that he and his brothers did a little farming; that in doing this type of work he had pain in his back, his legs hurt, and he was unable to sleep at night due to the pain; that if he was on his legs too long they became in such condition that he was unable to move them; and that he suffered pain continuously

and had never had such pain or discomfort prior to the accident.

On cross-examination the record shows that when the plaintiff went to work after the accident he did light work; and that in the event the work required back bending, he would have to get on his knees to do it. The plaintiff further testified that after the accident he worked for the defendant on the following days: On June 27, 1957, 10 hours; June 28, 12 hours; July 5, 12 hours; July 8, 8 hours; July 9, 8 hours; July 10, 12 hours; July 13, 10 hours; July 15, 8 hours; July 16, 14 hours; July 17, 16 hours; July 18, 10 hours; and July 19, 15 hours. He detailed what he did relating to his work on each of the days shown above. It appears from the record that no heavy lifting was required in doing the type of work he did during those days, except that if he did any lifting he had to get on his knees to do it as heretofore mentioned.

The plaintiff testified that he gave certain answers to questions in the compensation court, one of which was to the effect that he gave a statement, which is in evidence, to the defendant's counsel on July 1, 1957, to the effect that he was shaken up by the accident and burned on his left arm and back by some coffee in a thermos bottle that was broken in the accident, and another to the effect that he told the doctor in Scottsbluff that he did not believe he got hurt in the accident. The plaintiff admitted that those answers were given by him in the compensation court.

The plaintiff's wife testified that the plaintiff was physically strong and had done manual labor all during their married life, which was for 14 years; that when the plaintiff returned home the evening of June 25, 1957, he looked pale; that during the night he was awake three or four times; that the next morning the plaintiff got out of bed, but was unable to go to work; that he said he was sore all over, his back hurt, and his neck was stiff; that after June 25, 1957, the plaintiff

complained of his back hurting all the time; that he was not able to do much of any kind of work since the accident; that if he did any kind of work, even yard work, his back and legs hurt him and he had to lie down; that he had no such disability prior to June 25, 1957; that he no longer slept well, and walked the floor at night; and that he seemed to be getting worse.

R. D. Mills testified that he lived in Sidney and was a labor contractor engaged in construction work in oil fields; that the plaintiff was employed by him; that on July 19, 1957, he had a conversation with the plaintiff at the defendant's home; that the reason for the conversation was that some time after the accident this witness received a report from the foreman to the effect that the plaintiff was hurt in the accident and unable to carry on his part of the work; that this witness told the plaintiff he wanted plaintiff to see a doctor as he was not able to work; that the plaintiff told this witness that he had to work, that he did not get hurt in the accident, and that he had "had that little old trouble a long time" and "In just a few days it will go back into place and I will be all right." This witness told the plaintiff that he could have been hurt in the accident and that if he had been, he should have treatment.

On rebuttal the plaintiff testified that he did not tell Mr. Mills in the conversation in July 1957 that he had had pain in his back before the accident.

Expert testimony was given for both the plaintiff and defendant. This testimony is quite extensive and we summarize the principal parts thereof.

It appears that many X-ray pictures were taken of the plaintiff and examined by most of the expert witnesses.

Dr. Taylor testified that he was an osteopathic physician who carried on his profession in Sidney; that the plaintiff came to his office on July 1, 1957; and that at that time the plaintiff complained of burns on his left shoulder and arm following an automobile accident.

The doctor treated him for the burns. He next saw the plaintiff on July 3, at which time he treated the burns and gave him treatment for low back pains. Dr. Taylor further testified that on July 6, he checked the burns and released the plaintiff.

Dr. Dorwart, a physician and surgeon who had practiced his profession in Sidney for 22 years, testified that he examined the plaintiff on July 24, 1957. He made a complete examination and took X-ray pictures. He also took additional X-ray pictures of the plaintiff on August 13, 1957. Dr. Dorwart testified that from his examination he felt that the plaintiff had a fracture of the fourth lumbar vertebra, of the right process, and a fracture of the articular facet of the fourth lumbar vertebra. He diagnosed the plaintiff's condition as a spondylolisthesis. He took the X-ray films to a radiologist to confirm his opinion that there were fractures. The radiologist was dubious about Dr. Dorwart's opinion of the fractures. However, Dr. Dorwart testified that he was "unshaken" by the radiologist's opinion as to the fractures. He further testified that on July 24, 1957, when he examined the plaintiff, he felt that plaintiff had a spondylolisthesis, and when the plaintiff returned on August 13, 1957, he felt the plaintiff's condition was about the same; that he saw the plaintiff next on August 26, 1957, and again on September 6, 1957; and that he referred the plaintiff to Dr. Kline, an orthopedic surgeon at Cheyenne, Wyoming. Dr. Dorwart conferred with Dr. Kline as to the diagnosis of the spondylolithesis, to which diagnosis Dr. Kline agreed and expressed the opinion that quite possibly, with rest and exercise, the plaintiff might be able to return to work after a short time. He testified that Dr. Kline hospitalized the plaintiff for a short time, and as soon as the plaintiff became active again his pain and symptoms returned. At that time Dr. Kline said he felt that surgery would be the only means of correcting the problem. Dr. Dorwart further testified that the next

time he saw the plaintiff was on January 6, then on January 20, 1958, and again on January 23, 1959. At that time the spondylolisthesis still persisted, and he felt that it would persist until surgery corrected the condition. He further testified that a spondylolisthesis is a condition whereby there is a slipping forward of one vertebra upon the other. The doctor gave his opinion that a spondylolisthesis could be greatly aggravated by injury and trauma in any number of instances, and as a consequence, in this particular case, he felt it was definitely attributable to the injuries that the plaintiff suffered. He further testified that the plaintiff's disability for any type of work would be 50 percent, but that the plaintiff was not able to do any arduous manual labor and was totally disabled from doing any such type of labor; that the plaintiff's condition would improve with surgery; and that the plaintiff would have a "fairly good chance of reducing his present disability 10 to 20 percent with surgical intervention."

On cross-examination this witness testified that spondylolisthesis is a congenital or predisposed condition of the spine which could be present at the time of birth and might only be brought to the surface with an injury, or when some trauma caused it to do so.

Dr. Hull Cook, a physician and surgeon practicing his profession in Sidney for 21 years, testified that on January 24, 1959, he examined the plaintiff for low back pain and took X-ray pictures. He testified that from his examination he felt that the plaintiff had a spondylolisthesis, the duration of which he was unable to determine, but he subsequently found that it was of long duration and had been quiet, without showing any disabling symptoms. His diagnosis was that there was an irritated or aggravated spondylolisthesis. This doctor was asked a hypothetical question containing substantially the facts as shown by the record relating to the plaintiff, and was asked to give his opinion as to whether or not the accident of June 25, 1957, was the

cause of the plaintiff's present disability. His answer was that the accident served as a precipitating factor to bring about the disability the plaintiff then had. He stated: "We see this, not infrequently, with spondylolisthesis, and could assume congenital back deformities, where a man will go along for many years, getting by comfortably, many times, without being aware that he has any deformity, until some traumatic factor of this nature causes difficulty; and while it is impossible for anyone to say with certainty, just what the situation is, this seems to fall into that pattern quite conclusively." He further testified that his opinion was based upon the facts as shown by the X-rays, the complaints of the plaintiff, and his knowledge of the plaintiff's condition prior to the accident; that it would seem that the plaintiff would be unable to do any heavy manual labor at that time; that the plaintiff's condition would remain permanent unless corrections were made; and that he would expect the plaintiff to have to have a spinal fusion, a surgical operation to fuse together the area which was causing pain, to explore areas where there might be nerve pressure, and relieve the pressure, and with good luck the plaintiff might have an excellent result.

Dr. Claussen, an orthopedic surgeon who practiced his profession at North Platte, testified in behalf of the defendant that he had examined the X-ray films of the plaintiff designated as exhibits Nos. 1 to 10 and 12 to 15, inclusive; and that he had had special training in the reading and interpretation of X-ray films. He further testified that from an examination, exhibit No. 2, an X-ray film, showed the spinous process of the fourth and fifth lumbar vertebrae were closer together than would be expected, and also showed sclerosis; and that exhibit No. 3 showed a defect of the pars interarticularies, which is a congenital defect. He examined the X-ray films taken at De Paul Hospital in Cheyenne, Wyoming, one of which showed that the spondylolisthe-

sis, which had slipped half-way, of the fifth lumbar on the first sacral, and the intervertebral disc space of the fifth lumbar and first sacral vertebrae was completely gone. He also stated that there was evidence of bone building up; that there was a little piece of bone which appeared to have been present for years; that in the area which he examined there was arthritis; and that the bones had been grinding on each other for years. He testified that exhibit No. 6 showed essentially the condition of the spondylolisthesis, with the degenerative arthritis, sclerosis, and loss of disc space. He further testified that the spondylolisthesis could not have been caused by trauma on June 25, 1957, and gave the reasons for his opinion as follows: "The reasons for this are the long-standing degenerative processes that are apparent on the X-rays, between the 5th lumbar vertebra and the 1st sacral. You don't get that amount of degenerative change in a few months' or few days' time; it takes years. Q And does that, or does that not, indicate, Doctor, that the disc space between the 5th lumbar and the sacrum has existed in that condition for a long time, also? A That disc space has been collapsed for a long, long time. Q Antecedent to June 25, 1957? A Yes." He further testified that if the accident of June 25, 1957, caused any aggravation of the man's condition he would expect severe back symptoms within 48 hours from the time of the accident.

On cross-examination this witness testified as follows: "Q It is possible that a spondylolisthesis can be asymptomatic prior to some sort of physical trauma to that area, whatever trauma you would like to describe, even an excessive physical force to that area, which would make that spondylolisthesis symptomatic? A Such is possible."

Dr. Tennant testified by deposition that he was a physician and radiologist practicing his profession in Sterling, Colorado, and a consultant radiologist on the staff of the Cheyenne County Memorial Hospital at

Sidney. The doctor examined the X-ray films taken by Dr. Dorwart and identified the defect of the pars interarticularies as a congenital malfusion, and not a fracture. He testified that sclerosis is a condensation of bone, usually due to repeated stress changes in the bone substance; and that the sclerosis which he observed in exhibits Nos. 2, 3, and 4 indicated repeated, long-standing bone stress. The doctor further testified that by spondylolisthesis is meant the presence of a bilateral defect of the pars interarticularies, associated with a slippage of the vertebra, and that in this case the fifth lumbar had moved in front of the sacrum. He examined the X-ray films from the De Paul Hospital in Cheyenne, Wyoming, and diagnosed what he termed a spondylolisthesis of a second degree, and sclerosis of the sacral plate, and stated that there was no evidence of a healing fracture. The following questions were asked and answers given by this witness: "Q Now Doctor, do you have an opinion as to whether or not pain and disability would immediately follow, if a spondylolisthesis such as you have seen in these X-rays, was traumatically caused? The question is, do you have an opinion? A I have. Q And what is that opinion? A Were it possible to produce a fracture simulating a spondylolisthesis in effect, the clinical manifestations would be extremely severe with regard to pain and disability. Q And they would be immediate, is that correct? A I would say they would be immediate. Q And when you say the clinical manifestations would be severe, what do you mean? A The patient would be unable to carry on normal activities; he would be quite disabled."

It is obvious that the testimony given by the experts is in conflict. However, from a review of all the evidence we conclude that the plaintiff has proved by a preponderance of the evidence that he sustained personal injuries as a result of an accident arising out of and in the course of his employment.

The question arises, what was the extent of the disability the plaintiff suffered?

For workmen's compensation purposes, "total disability" does not mean a state of absolute helplessness, but means disablement of an employee to earn wages in the same kind of work, or work of a similar nature, that he was trained for, or accustomed to perform, or any other kind of work which a person of his mentality and attainments could do. See, Elliott v. Gooch Feed Mill Co., 147 Neb. 309, 23 N. W. 2d 262; Elliott v. Gooch Feed Mill Co., 147 Neb. 612, 24 N. W. 2d 561.

"An employee may be totally disabled for all practical purposes and yet be able to obtain trivial occasional employment under rare conditions at small remuneration. The claimant's status in such respect remains unaffected thereby unless the claimant is able to get, hold, or do any substantial amount of remunerative work either in his previous occupation or any other established field of employment for which he is fitted." Sporcic v. Swift & Co., *supra*. See, also, Elliott v. Gooch Feed Mill Co., 147 Neb. 309, 23 N. W. 2d 262; Crable v. Great Western Sugar Co., 166 Neb. 795, 90 N. W. 2d 805.

In the instant case there is evidence which shows that the plaintiff is unable to perform the duties of his former employment and that he has been totally and permanently disabled to do so. As we view the record, the plaintiff is entitled to recover from the defendant for permanent total disability the sum of $30 a week for the first 300 weeks of such disability, and the sum of $25 a week for the remainder of his life, as provided for in section 48-121, R. S. Supp., 1955.

The record discloses a statement of the De Paul Hospital, Cheyenne, Wyoming, in the amount of $149.65; a statement of Duane M. Kline, Jr., M. D., Cheyenne, Wyoming, in the amount of $38.50; and a statement of C. B. Dorwart, M. D., Sidney, Nebraska, in the amount of $51. However, this doctor testified that the reason-

able value of his services was $97. Dr. Cook testified to the value of his services being $35. The West Nebraska General Hospital of Scottsbluff submitted a statement for $2.45.

As stated in Pittenger v. Safeway Stores, Inc., *supra:* "A recovery by an employee against an employer by virtue of the Workmen's Compensation Act may include the reasonable expenses incident to and necessary for obtaining medical and hospital services."

The plaintiff is entitled to recover from the defendant for the medical and hospital expenses as set forth above.

While the plaintiff in his testimony states that he made three trips to see Dr. Kline at Cheyenne, Wyoming, by direction of Dr. Dorwart, and testifies as to the distance between Sidney, Nebraska, and Cheyenne, Wyoming, he failed to testify as to the amount of expenses incurred in making these trips, consequently, in the absence of competent proof as to the amount expended for such trips, no allowance can be made.

The plaintiff contends that he is entitled to recover an attorneys' fee for services rendered in the district court and in this court, to be taxed as costs under the authority of section 48-125, R. R. S. 1943.

In Lee v. Lincoln Cleaning & Dye Works, 145 Neb. 124, 15 N. W. 2d 330, this court said: "Section 48-125, Comp. St. Supp. 1941 (now section 48-125, R. R. S. 1943), covers the allowance of attorney's fees in compensation cases. In Rexroat v. State, 143 Neb. 333, 9 N. W. 2d 305, the exact point in the instant case was contested, and it was held that, when the employee appeals from an adverse decision in the district court which denied an award of compensation, and this court reverses the district court, and holds that the employee is entitled to compensation, this court is not authorized to allow the employee an attorney's fee under the section of the statute just quoted, and therefore we grant no attorney's fee on this appeal. See Updike Grain Co. v.

Swanson, 104 Neb. 661, 178 N. W. 618." See, also, Elliott v. Gooch Feed Mill Co., 147 Neb. 309, 23 N. W. 2d 262.

In the light of the above authorities we allow no attorneys' fee to be taxed as costs for plaintiff's counsel in the instant case.

The judgment is reversed and the cause remanded to the district court for Cheyenne County with directions to render and enter judgment for the plaintiff and against the defendant in accordance with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

BAUM REALTY CO., A CORPORATION, APPELLANT, V. BOARD OF EQUALIZATION WITHIN AND FOR DOUGLAS COUNTY, NEBRASKA, ET AL., APPELLEES.
100 N. W. 2d 730

Filed January 29, 1960. No. 34607.

1. **Taxation: Appeal and Error.** An appeal to the district court from action of the county board of equalization is considered and decided as in equity and an appeal from that court to this court is tried de novo.
2. **Taxation.** Generally the valuation of property made by the county assessor for taxation purposes is presumed to be correct; but if he does not make a personal inspection of the property but accepts a valuation thereof fixed by another person, the presumption does not exist.
3. ———. In the situation last stated the value of the property is a fact to be determined from evidence, unaided by presumption, and the burden is upon the protesting party to establish that the assessment of the property is excessive.
4. **Taxation: Appeal and Error.** The presumption that a board of equalization in considering and passing on an assessment of property acted upon sufficient evidence to justify its action disappears if there is competent evidence on an appeal to the contrary and thereafter the reasonableness of the valuation fixed by the board is one of fact to be determined from evidence, unaided by presumption, and the burden of showing that the valuation is excessive is upon the complaining party.
5. ———: ———. If the evidence discloses that the value of

real estate for assessment purposes was arbitrarily determined without explanation of the method used or elements considered, the value thus fixed is not supported by competent evidence and is legally erroneous.

6. ———: ———. If on the trial of an appeal from the action of a county board of equalization the appellee introduced no proof of the value of the property involved, the facts which the evidence on behalf of the appellant tends to prove are considered established for the purpose of finding the existence of a prima facie case in favor of appellant.

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

Kennedy, Holland, DeLacy & Svoboda and *Robert A. Skochdopole,* for appellant.

Eugene F. Fitzgerald, John J. Hanley, and *John C. Burke,* for appellees.

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

BOSLAUGH, J.

The issue on this appeal is the basic value of real estate in the city of Omaha, Douglas County, owned by appellant and correctly described in the record, for taxation purposes for the year 1956. The basic value assigned to the real estate for that year by the county assessor was $1,200,000. This was approved by the Douglas County Board of Equalization by denial of the complaint of appellant that the assessment was excessive and its request that the valuation of the real estate be reviewed and reduced by the board. The appeal therefrom by the owner to the district court for Douglas County resulted in a finding that the statutory formula for determining the basic value of property was not sufficiently observed; that the evidence did not sustain a basic value of the real estate of $1,200,000; that it was excessive in the amount of $163,000; and that the basic value of the property should be reduced by that

amount. The adjudication of the basic value of the real estate for the year 1956 for taxation purposes was the sum of $1,037,000. The motion of appellant for a new trial was denied and this appeal is a challenge of the correctness of the action of the district court.

The real estate involved is located at the southwest corner of the intersection of Sixteenth and Harney Streets in Omaha. Its dimensions are 132 feet from north to south on Sixteenth Street and 176 feet from east to west on Harney Street. A four-story brick building of mill construction and a basement occupies the area. It was constructed in 1900 or 1901 and faces east on Sixteenth Street. The real estate as a whole is generally referred to as the Kresge Building and it is given that designation herein. The building was designed for and was generally desirable only for retail merchandising business. The W. R. Bennett Company secured the ground at a cost of $150,000, erected the building thereon at an expense of $200,000, and conducted a department store there for several years with unfavorable results. Persons interested in the Baum company acquired the Bennett company and refinanced and operated the department store in the building for a period of time without satisfactory results. The store business was discontinued but the Baum company has since owned and managed the Kresge Building.

It was leased and occupied 2 years by Orkin Brothers Company for a net rental of $50,000 a year. The lessee failed and Burgess-Nash Company became a tenant of the building at the same rental for the first 3 months and thereafter at a rental of $72,000 a year. This tenancy continued for 3 years to about the end of 1924 when the lease was terminated because of financial difficulty of the lessee.

The net rental from the Kresge Building commencing with 1922 and continuing through 1927 was $72,000 a year. From the latter date until the Kresge company lease terminated in the month of July 1955 the net

rental therefrom was $80,000 a year except for the period from 1933 to 1945 the net rental was $82,500 a year. The owner of the property during these periods had no expenditure for real estate taxes, insurance, and expense of maintenance of the building. Thereafter the first floor of the building and the basement, except the part of the first floor leased to the Carman Store hereafter described, were, commencing July 31, 1955, leased to the Kresge company for a rental of $60,000 a year. The part of the first floor occupied by the Carman Store was a space with a 28-foot frontage and a depth of 100 feet. The rental therefor was $24,000 a year. Each of these leases provided for additional rent if the gross sales of the respective tenants exceeded a designated yearly minimum which was never realized. The sales of the Kresge company were $135,000 less in 1957 than they were in 1956 and the volume of their sales has continued to decrease. The Kresge lease may be terminated at the end of each 5-year period and this may be done in July 1960. The business of the Carman Store decreased to the extent that it was operating at a loss because of which it retired from business. The space it occupied in the building became vacant and was in that condition at the time of the trial. It cannot, according to the evidence, be rented for more than about half of what the Carman Store paid for its use. The third and fourth floors were rented to Kelley Bowling Alleys for $22,000 a year. That tenant moved out of the building but made a sublease the terms of which are not shown by the record. The second floor of the building had been for a considerable time and was at the time of the trial vacant. The rental provided by the three leases last mentioned was gross and the owner had to pay the expenses of maintaining and operating the building except the cost of any inside decorating done. The tenants paid this expense.

The gross income of the Kresge Building for the year 1956 was $106,000 and the net income was only $42,362.

The taxes thereon on the basis of the 1956 assessment which is in issue on this appeal are $36,300, about 34 percent of the annual gross income from the building or an amount about equal to the gross rent from the building for 4 months. Comparisons made at the trial in these respects of somewhat similar properties in the vicinity of the Kresge Building showed results substantially and uniformly unfavorable to the latter property.

There was evidence to the effect that the most valuable real estate in the retail area of downtown Omaha is on Sixteenth Street south from Douglas Street to Farnam Street and that the center of that area is considered to be Sixteenth and Farnam Streets. The value of the land from Farnam Street south on Sixteenth Street decreases and the value of the land on which the Kresge Building is located is about 50 to 60 percent of the value of the land at Sixteenth and Farnam Streets. The Kresge Building is on the south fringe of the retail area.

A count of the traffic has been made once each year at about the identical date for 2 hours both in the morning and afternoon since 1926 by checkers stationed in about the middle of the blocks to count the traffic passing the locations of the checkers during the period when the count is being made. A record is made and kept of the result of the traffic count. This activity is sponsored jointly by the Omaha Real Estate Board and the Building Owners and Managers Association. The traffic counts over a period of years are considered valuable in determining the value of real estate for rental purposes. In 1952 the traffic count from Douglas Street to Farnam Street on Sixteenth Street was 13,643 and was about the same until 1954. Thereafter, in 1956, it was 11,924. From Farnam Street to Harney Street on Sixteenth Street in that period the count decreased from 11,635 to 7,903. From Harney Street to Howard Street on Sixteenth Street in that period the count decreased

from 6,771 to 5,912. Each traffic count is given a number indicating the place where taken and the standing thereof in relation to other places. No. 1 is from Douglas Street to Farnam Street on Sixteenth Street and No. 6 is from Harney Street to Howard Street on Sixteenth Street. Howard Street is the first one south of Harney Street and is immediately south of the block in which the Kresge Building is located.

A survey was made by the Building Owners and Managers Association of Omaha in 1954 concerning the vacancy situation in downtown offices of 22 buildings. The vacancies were then found to be a fraction of 1 percent. In 1955 the vacancies had increased to about 2½ percent and in 1956 vacancies amounted to 7.9 percent. This affects the value of the Kresge Building because the persons who were engaged, employed, or had business in the vacated offices ceased to come downtown, and shopping was materially diminished. It also indicated that the development of suburban areas has been very effective in decreasing the occupancy of downtown buildings. The Aquila Court Building on the northeast corner of Sixteenth and Howard Streets, a half-block south of the Kresge Building, had been vacant for about 9 months at the time of the trial of this case.

The Kresge Building is not constructed or in condition to produce at the present time a maximum or satisfactory income. It is obsolescent. It has been used for more than half a century. The floor of each story is in very bad condition. There is more unevenness and distortion of the floor of each story from the first to and including the fourth story. There is not much difference in the floors but there is always a worse condition on the upper floors of an old building than on the lower floors because as the building settles or sags, the undesirable condition of the floors becomes more apparent on the higher levels.

The elevator arrangement of the building is very un-

satisfactory. It is necessary on the Sixteenth Street side to go through one of the stores to get to any of the floors above the first story. The elevator for the second, third, and fourth floors on the Harney Street side is at the extreme west part of the building. The evidence is that the Kresge Building is obsolete and not properly usable for the location and ground it occupies. It is an outmoded, old-style structure with extremely high ceilings which have no utility or value for retail business and they do have disadvantages. The physical condition of the building is very bad. The hallways and the walls are in unsatisfactory condition. There are large open areas in the building which are not appropriate for or desired by present tenants. It is very difficult to have such a building produce an advantageous sum of money that will pay a fair return on what may be termed the depreciated physical value of the building. The cost of redeveloping and remodeling the building to make it desirable would be so great as to make it uneconomical to attempt it. It was the expressed opinion of an expert that the building is functionally and physically obsolete.

Appellant has owned the Kresge Building since 1922. The president of appellant testified that he had kept the accounts concerning the building for more than 25 years and that he had been active in the management and rental of it and other property of the company for more than 20 years. He was and had been for more than 25 years fully advised as to the value, sales, and leases of real estate in downtown Omaha. He properly qualified as a witness as to the value of the real estate involved in this litigation. He testified that the basic value of the Kresge Building at the time important to this case was $640,000. He said he considered, in arriving at this conclusion, the income of the property; a comparison of it with other comparable properties; the relative location of the building as compared with other

properties; and the desirability of the building as far as tenants, actual and prospective, were concerned.

The testimony of Edwin Bedford was as follows: He had been in the real estate business for 48 years and had specialized in making appraisals of property for about 22 years. He was engaged as a realtor in general real estate brokerage and appraisal work and had been since 1926 a member of the firm of Stuht-Bedford of Omaha. He was and had been for many years a member of and active in the activities of the National Association of Real Estate Boards and was one of its principal officers during the year 1948. He was for many years a member of the American Institute of Real Estate Appraisers and was one of its principal officers for 3 terms. He was a member of the Omaha Real Estate Board and was its president in 1936. He was an approved appraiser for the General Service Administration, United States Government, as to all kinds of real estate, including industrial and commercial properties. He appraised and developed reports in 1942 and 1943 for the Corps of Engineers of the United States of all leased properties in the Missouri River Division from Great Falls, Montana, to St. Louis, Missouri. He had appraised many properties in Omaha, including the Woodmen of the World Building, the City National Bank Building, the Hill Hotel, the Paxton Block known as the Goldstein-Chapman Building, and the Omaha Athletic Club. He was engaged by appellant in 1956 to and he did appraise the Kresge Building. In appraising it and forming an opinion of its value he took into consideration the earning capacity of the Kresge Building, its relative location in relation to the central business district, its desirability and functional use, its reproduction cost less depreciation, and comparisons with other properties of known or recognized value. He testified that in his opinion the market or actual value of the Kresge Building at the time important to

this case was $690,000, consisting of $460,000 for the land and $230,000 for the improvements.

Alexander D. Frank, vice president of the H. A. Wolf Company of Omaha, stated: He had been with the company for 32 years, had been engaged in appraisal work for 12 years, and before that he had been in the sales and loan department of the company. He was a member of the American Institute of Real Estate Appraisers and president of the Nebraska chapter of it in 1957. He was presently a member of its board of directors. He was a member of the National Association of Real Estate Boards, Omaha and Lincoln Real Estate Board, Mortgage Bankers Association, and Brokers Institute. He had appraised many properties in downtown and suburban Omaha, among others, the Securities Building, Brandeis Theatre Building, World Insurance Building, Redick Tower, and United Benefit Insurance Building. H. A. Wolf Company is the owner and manager of many properties in downtown and other areas of Omaha. The witness was in charge of its real estate sales and real estate loan and appraisal departments. He made an examination and appraisal of the Kresge Building at the request of appellant. He included in his investigation and consideration of the value of the building its earning capacity, its relative location, its desirability and functional use, its reproductive cost less depreciation, and a comparison of it with other properties of known and recognized value. His judgment of the value of the Kresge Building was $620,436, consisting of the value of the land as $462,000 and the value of the building on the land as $158,436. He spoke of this as market value but corrected that by saying that it was an error and that he intended to say basic value.

The single witness examined by appellees was the Douglas County assessor who testified as to the location, area of the land, and generally as to the size of the building constituting the property involved in this case and designated as the Kresge Building. He said he in-

spected it and also that he assessed it March 1, 1956, but when he was asked the method and means used in making the assessment of the property he said that he made the assessment of the Kresge Building on the same basis according to the statutory provisions that all other property in Douglas County was made, but he did not want the court to believe that he made the assessment personally. It was later in his examination established that the inspection of the building made by the county assessor mentioned above was made 2 weeks before the trial of this case in the district court which was held on May 28 and 29, 1958, more than 2 years after the date of the assessment. The witness did not identify the person who made the assessment of the property involved and he was not otherwise identified or presented at the trial. The record shows nothing more definite than that the valuation of the property was fixed by some member of the staff in the office of the county assessor. There is no competent evidence as to what was considered as a basis of the 1956 assessment of the Kresge Building. It is significant, however, that the county assessor testified that he presumed the property had the same assessed value in 1956 that it had in 1955. If the evidence discloses that the value of real estate for assessment purposes was arbitrarily determined without explanation of the method used or elements considered, the value thus fixed is not supported by competent evidence and is legally erroneous. Matzke v. Board of Equalization, 167 Neb. 875, 95 N. W. 2d 61; Adams v. Board of Equalization, 168 Neb. 286, 95 N. W. 2d 627.

The Douglas County Board by resolution of June 25, 1956, designated the ratio of basic value of property in the county as 70 percent of the actual or market value.

The trial of this appeal is de novo as an equitable proceeding. Adams v. Board of Equalization, *supra*.

Generally the valuation of property made by the assessor for taxation purposes is presumed to be cor-

rect; but if he does not make a personal inspection of the property or does not act upon his own information and judgment, this presumption does not obtain. There is no presumption under the circumstances of this case that the valuation of the Kresge Building for taxation purposes for the year 1956 was correct. In such a situation the basic value of the property is one of fact to be determined from the evidence, unaided by presumption, and the burden is on appellant to establish that the assessment is excessive. Adams v. Board of Equalization, *supra;* Omaha Paxton Hotel Co. v. Board of Equalization, 167 Neb. 231, 92 N. W. 2d 537.

It is presumed that a board of equalization has properly performed its official duties and that in making an assessment of property for tax purposes it acted upon sufficient legal evidence to justify its action. However, the presumption disappears if there is evidence on appeal to the contrary and thereafter the reasonableness of the assessment is one of fact to be determined by the evidence, with the burden on the contesting party to establish that an excessive valuation has been placed on the property, the subject of the controversy. Adams v. Board of Equalization, *supra.*

The statute which required that all real property in the state, not exempt therefrom, should be subject to taxation at its basic value, and should be assessed at 50 percent of such basic value, and that the assessed value should be its taxable value, is applicable to this litigation. § 77-201, R. S. Supp., 1955. Section 77-112, R. S. Supp., 1955, is relevant to this case. It 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." Basic value was made 70 percent of

actual or market value in Douglas County for the year 1956 by resolution of the county board.

Appellant had the burden of establishing prima facie the basic value of the real estate involved. Appellees introduced no competent proof as to the basic value of the property. In this condition of the record the facts which the evidence on behalf of appellant tended to prove will be considered established for the purpose of a prima facie case in its favor. Aurora Hotel, Inc. v. Board of Equalization, 140 Neb. 511, 300 N. W. 419.

The finding of the district court that the basic value of the Kresge Building as shown by the assessment thereof for the year 1956 was excessive in the amount of $163,000 and that the assessment of the property should be reduced by that amount is not sustained by any evidence. That finding and the adjudication of the trial court based thereon are each incorrect. The basic value of the Kresge Building as of March 1, 1956, should be and it is determined to be the sum of $640,000.

The judgment should be and it is reversed and the cause is remanded with directions to the district court for Douglas County to render a judgment in this cause in harmony with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

SIMMONS, C. J., not participating.

IN RE APPLICATION OF PREISENDORF TRANSPORT, INC. PREISENDORF TRANSPORT, INC., APPELLEE, V. HERMAN BROS., INC., ET AL., APPELLANTS, IMPLEADED WITH RUAN TRANSPORT CORPORATION ET AL., APPELLEES.

100 N. W. 2d 865

Filed January 29, 1960. No. 34628.

1. **Public Service Commissions.** The Nebraska State Railway Commission has original jurisdiction and the sole power to grant, amend, deny, revoke, or transfer common carrier certificates of

public convenience and necessity and such proceedings are administrative and legislative in character.

2. **Public Service Commissions: Appeal and Error.** On an appeal to the Supreme Court from an order of the Nebraska State Railway Commission, administrative or legislative in character, the only questions to be determined are whether the commission acted within the scope of its authority and whether the order complained of is reasonable and not arbitrarily made.
3. **Judgments.** A case must be determined on the law as it stands when judgment is rendered therein.
4. **Public Service Commissions: Motor Carriers.** In conformity with the constitutional provision, the Legislature has the right to prescribe how the Nebraska State Railway Commission may proceed and what authority it may exercise in granting certificates of public convenience and necessity for operation of motor vehicles for hire intrastate.
5. ———: ———. The power of the Nebraska State Railway Commission to issue a certificate of public convenience and necessity is grounded on the filing of an application, the giving of notice to interested persons, and a hearing.
6. ———: ———. A temporary certificate is subject to the same requirements under the statute as any other certificate of public convenience and necessity. The statute makes no distinction between classes or types of certificates.
7. ———: ———. The burden is on the applicant for a certificate of public convenience and necessity to show that he is fit, willing, and able to perform the service he proposes; that he will conform to the provisions of sections 75-222 to 75-250, R. R. S. 1943, and the requirements, rules, and regulations of the commission promulgated thereunder; and that the proposed service is or will be required by the present or future public convenience and necessity.
8. **Public Service Commissions.** Color of authority means an appearance or semblance of authority as distinguished from real; that is, an apparent right of authority.
9. **Public Service Commissions: Appeal and Error.** Rulings by the Interstate Commerce Commission in dealing with the subject of transportation by common carriers in interstate commerce may properly be considered by the Nebraska State Railway Commission, and by this court on appeal therefrom, when dealing with comparable situations in intrastate commerce.

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

Nate Holman and *Viren, Emmert, Hilmes & Gunderson,* for appellants.

Nelson, Harding & Acklie, for appellee Preisendorf Transport, Inc.

Robert E. Powell, for appellee Ruan Transport Corp.

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

WENKE, J.

On December 20, 1957, Preisendorf Transport, Inc., a Nebraska corporation, filed an application, No. M-9267, Supplement No. 1, with the Nebraska State Railway Commission "for authority to operate as a motor carrier of property for hire in intrastate commerce upon the highways of Nebraska," specifically seeking authority to transport "Petroleum Products" over "irregular routes from within 125 mile radius of Grand Island to and from points within 150 mile radius of Grand Island, and occasionally to and from points in Nebraska at large; all shipments to originate or terminate within said 125-mile radius of Grand Island."

The commission caused notice of the application and of the date set by the commission for hearing thereon, which was January 8, 1958, to be served on all parties interested therein by mail. Six common carriers of petroleum products in intrastate commerce by motor vehicle, authorized to operate in the same area for which authority is sought by applicant, filed protests with the commission objecting thereto. Hearing was had before the commission at the time and place specified in the notice. Thereafter, on January 10, 1958, the commission granted the applicant the authority he asked for "on a temporary basis pending full and complete hearing before an examiner and final adjudication thereof by the Commission; * * *."

Hearing on the application was had before an examiner on May 19 and 23, 1958.

Thereafter, on July 1, 1958, the examiner filed his report with the commission recommending that the application be granted. Exceptions were filed to the examiner's report by five of the protestants. On December 5, 1958, the commission overruled these exceptions, approved the examiner's report, granted the application, and ordered that a certificate of public convenience and necessity be issued to applicant authorizing the following operations: "Petroleum products exclusively. * * * Between points and places within a 125-mile radius of Grand Island, Nebraska, and between points and places within said radial area on the one hand, and, on the other hand, points and places within the State of Nebraska over irregular routes."

Five of the protestants filed motions for rehearing or for rehearing and reconsideration and four of them perfected this appeal on March 26, 1959, from the commission's overruling thereof on February 27, 1959. The transcript was filed in the office of the Clerk of this court on April 15, 1959.

"The Nebraska State Railway Commission has original jurisdiction and the sole power to grant, amend, deny, revoke, or transfer common carrier certificates of convenience and necessity and such proceedings are administrative and legislative in character." Houk v. Peake, 162 Neb. 717, 77 N. W. 2d 310. See, also, In re Application of Petersen & Petersen, Inc., 153 Neb. 517, 45 N. W. 2d 465.

"Courts should review or interfere with administrative and legislative action of the Nebraska State Railway Commission only so far as is necessary to keep it within its jurisdiction and protect legal and constitutional rights." Houk v. Peake, *supra*.

"Courts are without authority to interfere with the findings and orders of the railway commission except where it exceeds its jurisdiction or acts arbitrarily." In re Application of Effenberger, 150 Neb. 13, 33 N. W. 2d 296. See, also, Dalton v. Kinney, 160 Neb. 516, 70

N. W. 2d 464; Johnson v. Peake, 163 Neb. 18, 77 N. W. 2d 670.

"On an appeal to the Supreme Court from an order of the Nebraska State Railway Commission, administrative or legislative in character, the only questions to be determined are whether the commission acted within the scope of its authority and whether the order complained of is reasonable and not arbitrarily made." Houk v. Peake, *supra*. See, also, In re Application of Neylon, 151 Neb. 587, 38 N. W. 2d 552; Basin Truck Co. v. R. B. "Dick" Wilson, Inc., 166 Neb. 665, 90 N. W. 2d 268; Miller v. Consolidated Motor Freight, Inc., 168 Neb. 712, 97 N. W. 2d 265.

On September 5, 1959, appellee Preisendorf Transport, Inc., filed its motion to dismiss this appeal for the reason that it is now moot because of the passage of L. B. 578 by the 1959 Legislature. See Laws 1959, c. 342, § 1, p. 1227. L. B. 578 provides that: "All certificates of public convenience and necessity and all permits issued pursuant to sections 75-222 to 75-250, inclusive, Reissue Revised Statutes of Nebraska, 1943, prior to July 7, 1949, without notice and hearing and without a finding of public convenience and necessity are hereby validated and shall not be subject to formal complaint or collateral attack." The act contained an emergency clause and, by reason thereof, became effective on June 17, 1959. In order to understand the basis for this motion it is necessary to relate the factual situation which brought about the filing of the application by appellee.

On March 4, 1938, the commission issued to Lawrence F. Wise, doing business as Wise Service of Grand Island, Nebraska, the identical authority which it issued to appellee on December 5, 1958. Wise's authority is referred to as a "Grandfather" certificate, coming within section 7(a) of L. B. 178 as enacted into law by the 1937 Legislature. See Laws 1937, c. 142, § 7, p. 531. On June 22, 1945, on the joint application of Lawrence F. Wise, doing business as Wise Service of Grand Island,

Nebraska, and Harold L. Wise and Clarence I. Cates, doing business as Wise Service of Grand Island, Nebraska, the commission transferred this authority to Harold L. Wise and Clarence I. Cates, doing business as Wise Service of Grand Island, Nebraska, and ordered that a certificate of public convenience and necessity authorizing the same operations as held by Lawrence F. Wise be issued to the transferees. On August 6, 1946, the commission, on joint application of Harold L. Wise and Clarence I. Cates, doing business as Wise Service of Grand Island, Nebraska, and Wise Service, Inc., a corporation, authorized transfer of this same authority to Wise Service, Inc., a corporation, and ordered a certificate of public convenience and necessity authorizing the same operations as held by Harold L. Wise and Clarence I. Cates be issued to the transferee. On August 2, 1947, the commission, on joint application of Wise Service, Inc., a corporation, and Harry Preisendorf of Grand Island, Nebraska, authorized transfer of this same authority to Harry Preisendorf and ordered a certificate of public convenience and necessity authorizing the same operations as were held by Wise Service, Inc., be issued to the transferee. On February 25, 1949, the commission, on joint application of Harry Preisendorf of Grand Island, Nebraska, and Preisendorf Transport, Inc., a Nebraska corporation of Grand Island, Nebraska, authorized transfer of this same authority to Preisendorf Transport, Inc., and ordered a certificate of public convenience and necessity authorizing the same operation as was held by Harry Preisendorf to be issued to the transferee. All the stock issued by Preisendorf Transport, Inc., was then owned by Harry Preisendorf, his wife, and their daughter; that is, it was a family-owned corporation. All action taken by the commission on these joint applications was done in ex parte proceedings without notice or hearing and, in view of our holding in In re Application of Neylon, *supra,* released July 7, 1949, were null and void. As therein stated: "We

have therefore come to the conclusion that where certificates have already been issued and applications are made seeking to transfer the operating rights thereunder to others such applications come within the provisions of section 75-229, R. S. 1943, and require a hearing thereon after notice has been had upon all interested parties. This, for the purpose of finding not only if 'the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity,' but also if 'the applicant is fit, willing and able properly to perform the service proposed, and to conform to the provisions of sections 75-222 to 75-250 and the requirements, rules and regulations of the State Railway Commission thereunder * * *.' § 75-230, R. S. 1943.

"No hearing having been had on or notice given to interested parties of application M-8664 before the order entered on December 26, 1947, it was made without authority and therefore null and without force and effect." See, also, In re Application of Richling, 154 Neb. 108, 47 N. W. 2d 413.

Appellee operated under the authority granted it by the commission on February 25, 1949, and the commission took no action to prevent its doing so. It appears the commission, after our holding in In re Application of Neylon, *supra,* took the position that its orders and certificates of public convenience and necessity, issued pursuant thereto, were not subject to collateral attack and continued to treat all holders of such transferred authority as valid operators. We released our opinion in R. B. "Dick" Wilson, Inc. v. Hargleroad, 165 Neb. 468, 86 N. W. 2d 177, on November 22, 1957. Therein we held: "* * * a certificate holder has a right under his certificate to take action to prevent one who is operating unlawfully and without any authority from continuing to operate to his injury and damage."

We further stated: "An action for injunctive relief by an interested party may properly be maintained

against a party who is engaged in intrastate commerce as a common carrier under a void certificate of public convenience and necessity."

It appears that the commission, very shortly after our opinion was released in R. B. "Dick" Wilson, Inc. v. Hargleroad, *supra,* sent every holder of a certificate authorizing operations in intrastate commerce on the highways of Nebraska a copy thereof.

Thereafter, on December 11, 1957, five carriers who held valid certificates from the commission authorizing them to engage in intrastate commerce, including some of the appellants, brought an action in the district court for Hall County, the purpose of which is to permanently enjoin appellee from operating under the authority granted it by the commission's order of February 25, 1949. Thereafter, on December 20, 1957, the appellee filed an application commencing this proceeding and pursuant to which the commission entered its order of December 5, 1958, which order is the basis of this appeal. L. B. 578, as passed by the 1959 Legislature, has no application thereto. We said in City of Fremont v. Dodge County, 130 Neb. 856, 266 N. W. 771, that a case must be determined on the law as it stands when judgment is rendered therein. In view of that fact we cannot properly pass on the constitutionality of L. B. 578, but overrule the motion of appellee to dismiss, which is based thereon.

Appellants contend the commission exceeded its authority by granting appellee the authority it requested on a temporary basis, which it did on January 10, 1958. As we have frequently held: "In conformity with the constitutional provision, the legislature has the right to prescribe how the Nebraska state railway commission may proceed and what authority it may exercise in granting certificates of public convenience and necessity for operation of motor vehicles for hire intrastate." In re Application of Hergott, 145 Neb. 100, 15 N. W. 2d

418. See, also, In re Application of Neylon, *supra;* Miller v. Consolidated Motor Freight, Inc., *supra.*

"The power of the Nebraska State Railway Commission to issue a certificate of public convenience and necessity is grounded on the filing of an application, the giving of notice to interested persons, and a hearing." R. B. "Dick" Wilson, Inc. v. Hargleroad, *supra.*

"A temporary certificate is subject to the same requirements under the statute as any other certificate of convenience and necessity. The statute makes no distinction between classes or types of certificates." In re Application of Richling, *supra.*

The record shows that after the application was filed by appellee the commission fixed the time and place for hearing thereon as Wednesday, January 8, 1958, at 9:30 a. m., in the Commission Hearing Room, Capitol Building, Lincoln, Nebraska, and caused service of notice thereof to be given upon all interested parties by mail, which included all of the protestants. Thereby the commission obtained authority to act in regard to the application. It is true that all six protestants, for various reasons, filed requests with the commission that the hearing on the application of appellee be continued. These the commission overruled, as it had a right to do. Whether the commission exceeded its authority by granting this temporary authority in the form in which it did or by letting it continue in force for the length of time that it did are now moot questions for the temporary authority granted by the commission was revoked by its order of December 5, 1958, from which this appeal was taken. It would only be material if we were to set aside the commission's order of December 5, 1958, and thereby, in effect, restore the order granting such authority on a temporary basis.

Section 75-228, R. R. S. 1943, provides that no common carrier by motor vehicle shall engage in intrastate operations on any public highway in Nebraska without having a valid certificate of public convenience and

necessity issued by the commission authorizing such services. See R. B. "Dick" Wilson, Inc. v. Hargleroad, *supra.*

We come then to the sufficiency of the evidence adduced by the appellee to authorize the commission to grant it the authority which it did. In this respect section 75-230, R. R. S. 1943, provides: "Subject to section 75-237, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing and able properly to perform the service proposed, and to conform to the provisions of sections 75-222 to 75-250 and the requirements, rules and regulations of the State Railway Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied." The limitation therein contained has no application here.

The burden is on the applicant for a certificate of public convenience and necessity to show that he is fit, willing, and able to perform the service he proposes; that he will conform to the provisions of sections 75-222 to 75-250, R. R. S. 1943, and the requirements, rules, and regulations of the commission promulgated thereunder; and that the proposed service is or will be required by the present or future public convenience and necessity. § 75-230, R. R. S. 1943; Houk v. Peake, *supra;* Miller v. Consolidated Motor Freight, Inc., *supra.*

The evidence adduced by appellee shows that it is fit, willing, and able to perform the service it proposes to perform and that it will conform to the provisions of sections 75-222 to 75-250, R. R. S. 1943, and the requirements, rules, and regulations of the commission promulgated thereunder unless the fact that it has performed, since February 25, 1949, and up to January 10, 1958, under and pursuant to the certificate of public conven-

ience and necessity issued to it by the commission pursuant to an ex parte order of the commission entered without notice or hearing makes it unfit. It is apparent that even after our decision in In re Application of Neylon, *supra,* the commission permitted all holders of certificates issued prior thereto to continue to operate thereunder, apparently feeling such authority was not subject to collateral attack in the courts. Although the judgment of the commission was wrong, as is evidenced by our holding in R. B. "Dick" Wilson, Inc. v. Hargleroad, *supra,* we cannot say the holders of these certificates were intentionally doing wrong by continuing to operate thereunder and did not do so in good faith. They had some right to trust in the judgment of the commission, a body which, under the Constitution and laws of this state, was created for and given authority to regulate the rates and services of common carriers and have general control thereof. Art. IV, § 20, Constitution of Nebraska. It is true that ordinarily ignorance of the law is no excuse, as was held in City of Plattsmouth v. Murphy, 74 Neb. 749, 105 N. W. 293. However, under the situation here presented, we do not think this rule controlling for appellee was operating under color of authority, color meaning an appearance or semblance, as distinguished from real; that is, an apparent right.

We think, as suggested by both appellants and appellee and in view of section 75-222, R. R. S. 1943, that rulings by the Interstate Commerce Commission in dealing with the subject of transportation by common carriers in interstate commerce may properly be considered by the commission, and by this court on appeal therefrom, when dealing with comparable situations in intrastate commerce.

In John R. Lesoine Extension, 61 M. C. C. 77, decided October 15, 1952, the Interstate Commerce Commission, in discussing the fitness of an applicant, said: "In the past this Commission has been very lenient, particularly

during the early stages of regulation, toward truck operators who were engaged in unlawful operations and sought to have the Commission legalize their unlawful acts, principally because of the confusion and misunderstanding on the part of many with respect to the various provisions of the act and their obligations thereunder. However, in Miller and Cahill Common Carrier Application, 30 M. C. C. 737, (decided October 6, 1941), the Commission stated, at page 742—'It may be, however, that in the near future we shall, in the light of several years of administration of the provisions of the act, with ample opportunity on the part of motor carriers to familiarize themselves therewith, adopt a more strict and inflexible rule to the effect that evidence of unlawful operations renders an applicant unfit properly to perform the services for which authority is sought and precludes a grant of authority therefor.'

"Now, at this late date we are confronted with five applicants who have continued the performance of unlawful operations *in virtual open defiance of the act.* It is difficult to conceive that prior to the date these five applicants instituted their unlawful operations they were not aware of the certificate or permit requirements of the act. At any rate they received actual notice prior to the filing of the considered applications and have since continued to operate. *There are, and no doubt will be in the future, occasions when a past unlawful operation does not require a finding of lack of fitness but such is not the case here.* We are convinced that the time for adoption of the more strict and inflexible rule forecast in Miller and Cahill Common Carrier Application, supra, is long overdue." (Emphasis ours.)

In The L. Nelson & Sons Transportation Co., 13 F. C. C. 40,556, decided June 9, 1959, the Interstate Commerce Commission stated: "It has been consistently found in many reports in proceedings under section 5, involving motor carriers, that a prior unlawful consummation of a transaction for which authority is sought, or the un-

lawful accomplishment of the control or management in a common interest of the carriers involved, is not an absolute bar to approval of the transaction. The law violation has been viewed as only one of the elements to be considered. A similar view has been expressed in determining applications for certificates under section 207 of the Act, past violations of law by such applicants having been considered in appraising their fitness to hold the authority sought. Thus, some applications have been granted under section 5 in spite of the unlawful control, * * *." Many of its decisions are cited in support thereof. Therein the commission came to the conclusion that: "* * * law violations are not necessarily a bar to approval of an application, if the public interest will best be served by approval of the transaction presented." To like effect, see, Miller and Cahill Common Carrier Application, 30 M. C. C. 737; D. A. Beard Truck Lines Co. Common Carrier Application, 34 M. C. C. 395; Salyards Extension of Operations, 46 M. C. C. 303; Bindloss Common Carrier Application, 47 M. C. C. 353; C. J. Skjonsby and Orville Heglie Common Carrier Application, 13 F. C. C. 40,569. As stated in C. J. Skjonsby and Orville Heglie Common Carrier Application, *supra:* "It should be emphasized that we do not condone these unauthorized operations but under some conditions past unauthorized operations have been found not to operate as a bar to the granting of authority." The commission held: "* * * that applicants should not be found unfit to perform the proposed operations because of their past unlawful operations since the violations were not wilful and since applicants were willing to conform to ICC regulations."

Under the situation here presented, where appellee has for many years very satisfactorily rendered the service to the public, under color of authority, that it herein seeks authority to continue, we think these holdings apply. In view thereof, we find the evidence shows that appellee is fit, willing, and able to properly

perform the services proposed; that it will fully conform to the provisions of sections 75-222 to 75-250, R. R. S. 1943; and that it will, as it has in the past, fully conform to the requirements, rules, and regulations of the commission promulgated and issued thereunder. In view thereof, we do not think the commission acted either unreasonably or arbitrarily in so finding.

Appellee offered and the commission received evidence of the appellee's past operations under its color of authority. The evidence of these operations went as far back as May 1950. These operations were substantial and apparently, as evidenced by the testimony of some of appellee's customers, very satisfactory. While so operating the evidence shows appellee complied with and fully performed all duties required of it under the rules and regulations promulgated by the commission and other statutory duties imposed upon the holders of such authority while operating thereunder. Appellants objected to the admission of this evidence and here contend it was not admissible and should not have been considered by the commission in determining whether or not the proposed service is or will be required by the present or future public convenience and necessity. The basis for the objection is that since the certificate held by appellee, under which such operations were conducted, was void, the operations were illegal and there was no proper basis of fact upon which the commission could act.

In Bowman Transportation, Inc., 9 F. C. C. 596, the Interstate Commerce Commission held: "The Commission finds that the applicant is improperly operating into and out of the same radial base under the same authority, that the evidence of applicant's past operations may not be introduced as evidence of public need since it was operating without authority, * * *." However, the commision went on to say: "While we have, in some instances, given considerable weight to evidence of past operations as reflecting a need for service,

this has generally been confined to so-called late-grandfather or interim applications. In order that evidence of past operations may be considered in determining whether there is a present or future public need for their continuance, it is prerequisite that such operations must be shown to have been conducted *under color of right.*"

In McBride's Express, Inc. v. United States, 13 F. C. C. 50,152, it is said: "The Commission found that: applicant's past operations between points in Illinois were unauthorized; the joint board properly refused to consider evidence of tonnage transported without prior authority in determining the issues; and no need for the new service proposed had been proved." The United States District Court, Eastern District of Illinois, affirmed the commission's decision. 72 M. C. C. 32. However, in doing so, the court made the following observation: "In order for such evidence to be entitled to admission and consideration in determining whether there was a present or future need for resumption of such past operations, it is a prerequisite that such operations must be shown to have not been unlawful or at least conducted under some color of right." Authorities are cited in support thereof.

In D. A. Beard Truck Lines Co. Common Carrier Application, *supra,* the commission said: "In the instant proceedings, applicants cannot be considered new operators, since their operations were conducted under color of 'grandfather' rights. The facts of past operations are closely interrelated with the testimony of the interested shipper- or receiver-witnesses dealing with the convenience of, and the need for, the proposed service. Where, as here, the past operations have been conducted under claims of 'grandfather' rights, openly and without subterfuge, we conclude that they should be given consideration in determining the issue of public convenience and necessity."

In Fitterling Transp. Co., Inc., Extension, 43 M. C. C.

581, the commission said: "As stated, applicant has operated over the described combination of its authorized routes in the belief that its certificates permitted such operation. The question of whether a motor carrier may lawfully operate over a combination of two routes which connect at a point not authorized to be served by such carrier was definitely determined only a comparatively short time prior to the hearing herein. In the circumstances, we think that applicant had reason to believe that he could so operate, and that the evidence of such operations should be given appropriate consideration in reaching our conclusions herein."

Under the situation here, as disclosed by the record, we think the commission was right in admitting the evidence of appellee's past operations and that it could properly consider that evidence for the purpose of determining whether or not the service proposed by appellee is or will be required by the present or future public convenience and necessity.

But appellants contend that even if the evidence of the past operations of the appellee is considered, the appellee has not met the burden of proof necessary to support the commission's finding that the proposed service is, or will be, required by the present or future public convenience and necessity.

In cases where new or extended original authority was sought, we have held that: "In determining the issue of public convenience and necessity, controlling questions are whether the operation will serve a useful purpose responsive to a public demand or need; whether this purpose can or will be served as well by existing carriers; and whether it can be served by applicant in a specified operation without endangering or impairing the operations of existing carriers contrary to the public interest." In re Application of Moritz, 153 Neb. 206, 43 N. W. 2d 603. See, also, In re Application of Canada, 154 Neb. 256, 47 N. W. 2d 507; Christensen v. Highway Motor Freight, 158 Neb. 601, 64 N. W. 2d 99; Houk v.

Peake, *supra;* Miller v. Consolidated Motor Freight, Inc., *supra.* Appellants offered evidence in support of each of these issues. However in cases such as now before the court, where the applicant seeks to obtain a lawful certificate to continue in a business which it has been operating under color of authority, we do not think it controls. Here it is apparent that this same business has been operated long enough that the original authority therefor from the commission was under a "Grandfather" certificate. True the subsequent transfers of the authority were void but the various owners thereof continued to operate the business thereunder in good faith and, it is apparent, are still doing so. Six customers of the appellee testified that they had been using appellee's services for various periods of time, that such services were very satisfactory, and that they would like to see appellee continue in business so they could use its services in the future. Under this situation we think the following quotations have application:

"Successful operation in the past creates a presumption that public convenience and necessity require a continuance of such operation." Dougherty Storage & Van Co. Common Carrier Application, 3 M. C. C. 427.

"His past operations were successful and satisfactory, and he merely desires to resume a service so rendered for approximately 10 years. Relying upon the advice of our representative, he failed to include the instant operation in his seasonably filed 'grandfather' application. Through no fault of his own he was thereby deprived of the authority sought herein. Applicant is not a new carrier entering the field. If the application is granted it will not materially adversely affect the operations of existing carriers. In our opinion, the evidence warrants the granting of the authority sought." Salyards Extension of Operations, *supra.*

"We have in numerous cases granted authority on a finding of public convenience and necessity to continue operations, which have been conducted successfully for

some extended period of time, and there is a natural presumption raised in favor of an applicant based on such past successful operation." Werner Transportation Co., 8 F. C. C. 155.

We do not think the commission's finding "That the present and future public convenience and necessity require the proposed service" is either unreasonable or arbitrary. To hold otherwise would destroy a business that has been operated in good faith by the owners thereof since prior to April 1, 1936. In view of what we have herein held and said we affirm the action of the commission.

AFFIRMED.

MILDRED SMITH, ALSO KNOWN AS MILDRED R. SMITH, ET AL., APPELLANTS, V. LYNN R. WADE ET AL., APPELLEES.
100 N. W. 2d 770

Filed January 29, 1960. No. 34652.

1. **Infants.** Necessaries, within the meaning of section 69-402, R. R. S. 1943, are goods suitable to the condition in life of an infant or other person, and to his actual requirements at the time of delivery.
2. ———. The question of what are necessaries is a mixed one of law and fact which must be determined from the particular facts and circumstances of the case.
3. **Appeal and Error.** In an equity action the Supreme Court will, in determining the weight of evidence which is in irreconcilable conflict on a material issue, consider the fact that the trial court observed the witnesses and their manner of testifying.
4. **Infants.** A minor may repudiate and rescind his contracts before he reaches his majority.
5. **Homesteads.** A homestead is the house and land where the family dwells.
6. **Homesteads: Husband and Wife.** Ordinarily, a 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 husband and wife.

APPEAL from the district court for Keith County:

ISAAC J. NISLEY, JUDGE. *Reversed and remanded with directions.*

Frank B. Morrison, for appellants.

McGinley, Lane, Powers & McGinley, for appellees.

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

YEAGER, J.

This is an action in equity by Mildred R. Smith in her own behalf and as next friend of Ralph Smith, a minor, plaintiffs and appellants, against Lynn R. Wade and Naomi Wade, defendants and appellees, to have declared null, void, and of no effect a real estate mortgage for $3,256.23, dated July 9, 1956, on the north half of Lot 2, Goodrich's Subdivision of that portion of Lots 2, 3, 4, and 13 lying north of U. S. Highway No. 30 in Smith's Subdivision of that portion of the west half of Section 5 lying south of the public road in Township 13 North, Range 38 West of the 6th P.M. in Keith County, Nebraska, which mortgage was executed by the plaintiffs, who are husband and wife, in favor of the defendants, who are husband and wife, as joint tenants with right of survivorship, and to also have declared null and void any promissory note or notes or claimed indebtedness which the mortgage was given to secure.

As grounds for the right to have the mortgage, the note or notes, or claimed indebtedness declared null and void the plaintiffs alleged that they were husband and wife; that Mildred R. Smith had attained her majority by marriage at the time the mortgage was signed, but that Ralph Smith was at the time under the age of 21 years and a minor, and thus the action was brought by her as next friend of her husband; that the mortgage was null and void for the reason that it is upon the homestead of the parties and is repudiated by Ralph Smith; that it was procured by threats and duress and was not the voluntary act and deed of the plaintiffs;

and that it was without valid consideration. No promissory notes are described in the petition but it is declared that all notes and other evidence of indebtedness claimed by defendants are null and void for the reason that they were procured by threats and duress. The prayer is that the mortgage, any pretended indebtedness, and any notes or checks be declared null and void.

The defendants filed an answer in the case in which they generally denied all allegations of the petition the truth of which was not admitted. The execution of the mortgage was admitted. It was pleaded that along with the mortgage seven notes were executed for the total amount of $3,256.23. They alleged that $794.62 of this amount was represented by necessaries of life furnished by Lynn R. Wade to the plaintiffs. They further alleged that the real estate mortgaged was solely owned by Mildred R. Smith. They further alleged that since $794.62 of the amount involved represented necessaries of life for the plaintiffs the defense of infancy was not available, and that since $1,655.61 of the amount was procured by artifice, fraud, and deceit of Ralph Smith he is estopped from asserting the defense of infancy.

By the answer it is asserted that Ralph Smith may not rescind until he attains his majority but this is not urged in the brief. The plaintiffs however present the opposite of this viewpoint by assignment of error.

By cross-petition the defendants prayed for adjudication of the validity of the mortgage and of the seven promissory notes secured by the mortgage, and for a declaratory judgment as to the rights of the parties with regard to the mortgage and the notes.

A trial was had after which a decree was rendered wherein relief was denied to plaintiffs and their action was dismissed. The district court by its decree specifically found that Ralph Smith was a minor. The court also found that a part of the amount involved was for

necessaries of life, the particular amount not being declared. The following appears in the decree: "IT IS FURTHER * * * DECREED that the Notes and Real Estate Mortgage executed by Plaintiffs in favor of the Defendants set forth in Answer and Cross-Petition of the Defendants are decreed to be valid and enforceable according to their terms by the Defendants as against the Plaintiffs, and each of them."

A motion for new trial was filed by plaintiffs which was overruled. Thereafter the plaintiffs perfected an appeal to this court from the decree and the order overruling the motion for new trial.

The brief contains numerous assignments of error which the plaintiffs contend constitute grounds for reversal of the decree rendered. As a whole however they present in essence the questions (1) of whether or not a minor, or infant, within the meaning of legal terminology, may repudiate a contract before attainment of majority; (2) of whether or not a minor may repudiate a mortgage on real estate the title to which is in his wife who is not a minor within the meaning of law which real estate is the homestead of the parties, and thereby invalidate the mortgage; (3) of whether or not, if notes were executed which were in payment of necessaries of life, a mortgage on a homestead to secure them signed by the wife who was not a minor and by the husband who was a minor, could be repudiated by the husband, thus invalidating the mortgage; (4) of whether or not the repudiation of the notes by Ralph Smith was valid; and (5) of whether or not the mortgage and notes were void for the reason that they were procured by duress.

The third of these propositions will be considered first. It may be disposed of by the statement that the record does not require us to determine the question of whether or not a mortgage given to secure notes given in payment of necessaries of life signed by an infant may be repudiated for the simple reason that

the record discloses that these notes were not given in payment for necessaries of life. Section 69-402, R. R. S. 1943, defines them as follows: " 'Necessaries' in this section means goods suitable to the condition in life of such infant or other person, and to his actual requirements at the time of delivery."

In Cobbey v. Buchanan, 48 Neb. 391, 67 N. W. 176, it was said: "The meaning of the term 'necessaries' cannot be defined by a general rule applicable to all cases; the question is a mixed one of law and fact to be determined in each case from the particular facts and circumstances of such case."

The account or accounts which provide the basis for the notes cover a long period of time and consist of charges for merchandise commonly sold by one engaged in the retail sale of motor fuels and supplies, amounts taken from the cash register, shortages in station merchandise, checks which did not clear, and the sale price of an automobile which was $750. The automobile had been delivered back to the defendants and at the time of trial was in their possession. None of the specific items however was identified as being devoted to the necessaries of Ralph Smith or his family.

We do not therefore pass upon the question of whether or not the signature of Ralph Smith could be repudiated if it were proved that the mortgage was given to secure notes given for necessaries of life, but hold only that there was a lack of sufficient evidence to sustain a finding that the notes were given in lieu of cash payment for necessaries.

As to the fifth proposition it must be said that there is evidence to support the contention of the plaintiffs that the notes and mortgage were procured by duress. There is also evidence to the contrary. This court is not able on the record of the evidence to resolve this conflict. Resort is had to the following rule and on this basis the determination on this proposition is made in favor of the defendants: "In an equity action the

Supreme Court will, in determining the weight of evidence which is in irreconcilable conflict on a material issue, consider the fact that the trial court observed the witnesses and their manner of testifying." Cary v. Armbrust, 160 Neb. 392, 70 N. W. 2d 427.

In the light of this rule the conclusion is reached that the notes and mortgage were not executed under duress.

Returning now to the first proposition it must be said that a minor may repudiate and rescind his contracts before he reaches his majority unless this court now decides to depart from what it has said on previous occasions. There is no disposition to so depart.

In Star v. Watkins, 78 Neb. 610, 111 N. W. 363, it was said: "It has been held that an infant may avoid his personal contracts during his minority." This statement of principle was adhered to in the case and no case has been found in this jurisdiction which departs therefrom. The text in 43 C. J. S., Infants, § 75, p. 172, contains the following: "In most jurisdictions, however, an infant has the right and power to avoid, on the ground of infancy, his personal contracts during his minority, as well as after he has attained full age; and this rule has been held to apply generally to all contracts, whether executory or executed." The holding therefore in this respect is that Ralph Smith had the right and power during his minority to and that he did so avoid the mortgage and notes in question.

As to the second proposition there can be no question that if this was a mortgage on the homestead of the plaintiffs and it became void as to Ralph Smith it became void for all purposes. The defendants do not seriously contend otherwise and they cite no authorities to the contrary.

The record in the light of the decisions of this court unequivocally discloses that this was the homestead of the plaintiffs. In Meisner v. Hill, 92 Neb. 435, 138 N. W. 583, this court said in definition of homestead: "Our

statute uses the term 'homestead' in its commonly accepted meaning—the house and land where the family dwells." This was approved in the following cases: Engen v. Union State Bank, 121 Neb. 257, 236 N. W. 741; Berggren v. Bliss, 122 Neb. 801, 241 N. W. 544; J. H. Melville Lumber Co. v. Maroney, 145 Neb. 374, 16 N. W. 2d 527.

This avoidance of the mortgage by Ralph Smith left it with only the signature of Mildred R. Smith, his wife. Under these circumstances the mortgage became void under the statute. The pertinent provision is contained in section 40-104, R. R. S. 1943, as follows: "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 husband and wife, * * *." There are exceptions to this but none of them are of importance in this proceeding.

The district court was therefore in error in refusing to find and decree that the mortgage in question is void and in refusing to quiet title to the real estate in plaintiffs as prayed by them.

For reasons which are apparent, the notes being a part of the mortgage transaction and being rescinded along with the mortgage, the district court was also in error in failing and refusing to adjudicate that as to Ralph Smith the notes are also void. This disposes of the fourth proposition favorable to Ralph Smith.

It does not however appear advisable or proper at this time to attempt to pass upon the individual liability or nonliability of Mildred R. Smith on the notes, although the defendants have by their cross-petition asked, not for judgment, but for a declaratory determination with relation to them. It appears that this matter should be left, without prejudice to either party, for determination in an action, if one shall be instituted, for recovery on the notes.

The judgment of the district court is therefore reversed and the cause remanded to the district court with

directions to render a judgment in accord with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

JOHN E. OLNEY, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.
100 N. W. 2d 838

Filed January 29, 1960. No. 34656.

1. **Criminal Law: Evidence.** In laying a foundation in a criminal case for the admission of a confession in evidence it is sufficient to establish affirmatively all that occurred immediately prior to and at the time of making the confession, provided such affirmative proof shows it to have been freely and voluntarily made and excludes the hypothesis of improper inducements or threats.
2. ———: ———. While a voluntary confession is insufficient, standing alone, to prove that a crime has been committed, it is, nevertheless, competent evidence of that fact, and may, together with sufficient corroborative circumstances, establish the corpus delicti as well as the defendant's guilty participation.
3. **Automobiles: Homicide.** The unlawful operation of a motor vehicle is not necessarily an included offense in a prosecution for motor vehicle homicide.
4. **Homicide: Criminal Law.** In a homicide prosecution it is not proper to give an instruction submitting lesser offenses unless such an instruction is applicable and authorized by the evidence.
5. **Criminal Law.** Where the punishment of an offense created by statute is left to the discretion of a court within prescribed limits, a sentence prescribed within such limits will not be disturbed unless there appears to be an abuse of such discretion.

ERROR to the district court for Lancaster County: PAUL W. WHITE, JUDGE. *Affirmed.*

Crosby, Pansing & Guenzel and *Donn E. Davis,* for plaintiff in error.

Clarence S. Beck, Attorney General, and *Bernard L. Packett,* for defendant in error.

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

CARTER, J.

This is a criminal action in which the defendant, John E. Olney, was charged with the crime of motor vehicle homicide, as defined by section 28-403.01, R. R. S. 1943. The defendant entered a plea of not guilty. The jury found the defendant guilty as charged and the defendant was sentenced to serve from 1 to 2 years in the Nebraska State Reformatory for Men, pay a fine of $500, and suffer a suspension of his operator's license for a period of 1 year. By a petition in error the defendant seeks a reversal of the conviction.

It is provided by section 28-403.01, R. R. S. 1943, that whoever shall cause the death of another without malice while engaged in the unlawful operation of a motor vehicle shall be deemed guilty of the crime of motor vehicle homicide. The information charged the defendant with unlawfully causing the death of Constance L. Lane without malice while engaged in the unlawful operation of a motor vehicle on October 6, 1958. The question of unlawful operation of the vehicle was limited to whether or not defendant was driving at a speed in excess of that permitted by law in any one of the following particulars: (1) Greater than was reasonable and proper, having regard for the traffic, the use of the road, and the condition of the road, (2) in excess of 55 miles an hour between the hours of sunset and sunrise, and (3) at a rate of speed such as to endanger the life or limb of any person.

The accident occurred on October 6, 1958, at approximately 9:30 p.m. It happened at a point a short distance south of the city of Lincoln in Lancaster County on a county road immediately west of the paved highway known as the No. 2 cutoff. The No. 2 cutoff is a connecting road between No. 2 highway and U. S. Highway No. 77. It begins at the intersection of Fifty-sixth Street and Highway No. 2 southeast of Lincoln and joins U. S. Highway No. 77 due south of the city of Lincoln. The cutoff is approximately 3 miles long and has a 22-

foot asphalt pavement with a white reflectorized stripe in the center. The cutoff road follows section lines until it reaches a point 1,343 feet east of U. S. Highway No. 77 at which point it leaves the section line on a six-degree curve to the southwest. The pavement was banked to the extent of an elevation of 8 to 11 inches on the outside of the curve. The section-line road continues on west from the cutoff and intersects U. S. Highway No. 77 at a point 1,343 feet distant. The accident occurred on the section-line road a short distance beyond the point where the paved cutoff road left the section line.

The section-line road west of the point where the paved cutoff road leaves it is a dirt road not recently maintained by the county. At a point 383.5 feet west of the cutoff road the dirt road is crossed by the Rock Island railroad tracks. For a distance of 100 feet west of the cutoff road the dirt road is fairly level. It then drops rather rapidly to the railroad tracks at which point it is 18.5 feet lower than the cutoff road. The dirt road is very narrow after the first 100 feet and contained a number of old ruts at the time of the accident which had been dished out and widened by vehicular traffic. The road was safe for vehicular traffic at slow speeds but was clearly unsafe for such use at high speeds. The location and condition of the cutoff and dirt roads was meticulously explained to the jury by plats and photographs, including some 15 three-dimension views. This evidence presented the situation to the jury with much greater accuracy and detail than we can explain it here.

The evidence shows that the defendant was driving a 1956 model Chevrolet automobile which his father had purchased in May 1958 for his use. Defendant was 17 years of age and had been driving motor vehicles since he was 16. The automobile was a second-hand one that had been driven 30,000 miles when purchased. Defendant made many repairs and changes in the mech-

anism of the car, performing most of the labor himself. He replaced the motor with a new standard Chevrolet motor. The new motor was a factory-rated 220-horsepower engine. The old motor was a 205-horsepower engine. Defendant replaced the single carburetor with three two-barrel carburetors and installed mechanical linkage for their operation. As thus installed, the car would operate on the single center carburetor until the accelerator was two-thirds depressed, at which time the two end carburetors would open up and deliver more gas and air mixture to the firing chambers. He replaced the standard cams with Iskenderian cams made to be used with mechanical valve lifters rather than the hydraulic type. He replaced the standard wiring with a heavier copper base wire. He replaced the valve covers with aluminum ones. He replaced the transmission with one that was stronger and more durable. The gear ratios for first and second gears were increased to attain higher speeds while those gears were being used. Dual exhausts were installed which were cut in ahead of the muffler. When open they were very noisy but would increase the speed of the car to some extent while in use. He equipped the car with a tachometer, an instrument for telling the speed at which the engine was running. The car also was equipped with a speedometer which was not working at the time of the accident. The defendant denied that the car was "souped up" and described it as a car with modified equipment. Defendant testified that he had once participated in drag racing at Grand Island and had engaged in drag racing at the Lincoln Air Base the Sunday afternoon preceding the accident.

With his automobile thus equipped the defendant and Constance Lane contacted Bill Wertz, a young man who had assisted defendant with the mechanical work on his car. Wertz had a car of his own. He inquired of defendant how the new transmission worked which had been installed the day before. They decided to have

what the defendant described as a "friendly drag." They proceeded to the cutoff road at the intersection of Fifty-sixth Street in their respective cars with Constance Lane riding with the defendant. The evidence shows that defendant followed Wertz west on the cutoff road to a point approximately south of Thirty-seventh Street when they stopped. Defendant removed the caps from the lake pipes on the exhaust cutout. The defendant states that when they started up, Constance said "Go." They stopped after a short distance and started again from a side by side starting position. They again stopped at a point south of Twenty-fourth Street. There it was determined that Wertz had shifted into second gear at the speed of 42 miles an hour and defendant had checked his tachometer at that speed. Defendant testifies that they had traveled at a maximum speed of 55 miles an hour between Thirty-seventh and Twenty-fourth Streets, but might have reached 60 or 65 miles an hour. Defendant admitted on cross-examination that he had stated under oath at the inquest that he probably reached 70 miles an hour. At Twenty-fourth Street they again started up from a side by side position. Defendant shifted to second gear when Wertz reached a speed of 45 or 50 miles an hour. After further acceleration of the car defendant shifted to high gear. As they approached the dirt road, Wertz slowed down and defendant began pulling into the right-hand lane. The defendant in his written statement said that he was traveling about 65 miles an hour, plus or minus 10 miles an hour. He came over the rise in the road but failed to see the curve which was approximately 400 feet distant. He knew the curve existed but states that he did not see it until he was very close to it. He decided to go straight ahead instead of trying to turn. No warning signs were posted indicating that the curve was immediately ahead. He says as he entered the dirt road he saw the dropoff. As he went over the dropoff his head struck the top of his car and he has no recollection

of what happened thereafter until after the accident. He next remembers being pinned under the car until help arrived, after which he was taken directly to a hospital by ambulance.

The record shows that defendant's car left the road, struck the bank on the north side of the road, hit a cross-arm type railroad signal, and overturned to the west of the railroad tracks more than 383 feet west of the paved road. The evidence is sufficient to support a finding of the jury that defendant was engaged in a race or "drag" as the defendant described it; that defendant's car was being driven in the nighttime in excess of 55 miles an hour; that his car was being driven at a greater speed than was reasonable and proper, having regard for the traffic and the use and condition of the road; and that such unlawful conduct resulted in the death of Constance Lane. The contention that the evidence does not sustain the verdict is without merit.

The defendant contends that the court erred in admitting in evidence the written statement signed by the defendant. In this respect the evidence shows that defendant was taken to a hospital shortly after the accident. Patrolman Emmons went to the hospital during the early morning of October 7, 1958, to obtain a statement from the defendant. He was advised that defendant was under sedation and in no condition to be interviewed, and that he should return the next morning. The following morning Patrolman Emmons was permitted to take the statement of the defendant in the presence of defendant's father, Robert C. Olney, who is a physician, and defendant's attorney. The patrolman reduced the statement to writing. After it was completed it was handed to defendant's father and then to the defendant for examination. Thereafter the defendant signed the statement and returned it to the patrolman. Patrolman Emmons testified that the statement was freely and voluntarily given. The defendant now asserts that he was in no condition to give a state-

ment and that because of his condition his statements were inaccurate and in part untrue. The record shows, however, that defendant made a similar statement under oath at a cornoner's inquest held sometime later. We point out that the statement was made in the presence of his father, Dr. Robert C. Olney. It seems that, if defendant was in the physical and mental condition now described, objection would have been made for that reason. Likewise, the statement was made in the presence of defendant's attorney, who raised no objection thereto on any ground. We think the trial court in passing on the sufficiency of the foundation for the admission of the statement into evidence correctly determined that issue. The weight and credibility of such evidence was thereafter a question for the jury to determine. Under all the circumstances surrounding the making of the statement and the evidence of its voluntary nature, the evidence was properly admitted and considered by the jury.

The applicable rule as to the admission of a confession in evidence is stated in Parker v. State, 164 Neb. 614, 83 N. W. 2d 347. We there stated the rule to be as follows: In laying a foundation in a criminal case for the admission of a confession in evidence it is sufficient to establish affirmatively all that occurred immediately prior to and at the time of making the confession, provided such affirmative proof shows it to have been freely and voluntarily made and excludes the hypothesis of improper inducements or threats. The admission of defendant's statement in evidence in the instant case met the requirements of the foregoing rule.

It is the contention of defendant that, before a confession or admission of a person charged with crime may be admitted in evidence against him, the crime must first be established by independent proof. It is fundamental in the law of this state that a defendant may not be properly convicted solely on an admission or confession made by him. While a voluntary confession is

insufficient, standing alone, to prove that a crime has been committed, it is, nevertheless, competent evidence of that fact, and may, with sufficient corroborative circumstances, establish the corpus delicti as well as the defendant's guilty participation. Gallegos v. State, 152 Neb. 831, 43 N. W. 2d 1. In the latter case this court dealt with the question as to whether or not the corpus delicti must be established by evidence independent of extrajudicial admissions or confessions by quoting the following with approval: " '* * * although there is authority which holds that the corpus delicti must be established by independent evidence alone and the extrajudicial statements, admissions, or confession of accused cannot be used in aid of the establishment of any necessary element thereof, as a general rule it is not required that the corpus delicti shall be established by independent evidence alone. Extrajudicial admissions, declarations, or confessions of accused may be considered in connection with other independent evidence in determining whether the corpus delicti is sufficiently proved; and it is sufficient when the evidence independent of the confession, together with the confession, establishes the corpus delicti. It is not required that the suppletory evidence be conclusive in its character; and slighter evidence of the corpus delicti is sufficient for its establishment where the commission of the crime has been confessed by accused; but it is necessary that there be such extrinsic corroborative circumstances as will, taken in connection with the confession, produce a conviction of guilt.' "

After giving the foregoing rule application the trial court was not in error in refusing to direct a verdict for the defendant. The evidence was sufficient to go to the jury, its weight and credibility being exclusively for the jury to determine under proper instructions by the court as to the law applicable to the case.

The defendant next contends that the trial court erred in refusing to give instruction No. 9 requested by the

defendant. This proposed instruction, if given, would have submitted lesser offenses than motor vehicle homicide for the consideration of the jury. The general rule is that the unlawful operation of a motor vehicle is not necessarily an included offense in a prosecution for motor vehicle homicide. State v. Weise, 75 Idaho 404, 273 P. 2d 97. See, also, State v. Gibler, 182 Kan. 578, 322 P. 2d 829; People v. Gallagher, 164 Cal. App. 2d 414, 330 P. 2d 464.

In this respect the statutes of this state provide: "Upon an indictment for an offense consisting of different degrees the jury may find the defendant not guilty of the degree charged, and guilty of any degree inferior thereto; and upon an indictment for any offense the jury may find the defendant not guilty of the offense but guilty of an attempt to commit the same, where such an attempt is an offense." § 29-2025, R. R. S. 1943. We do not here decide whether or not the violation of the motor vehicle laws of the state is a lesser and included offense in the crime of motor vehicle homicide within the meaning of the above-cited statute. Assuming that it is, the contention of the defendant is without merit.

The elements necessary to be proved in a charge of motor vehicle homicide are: (1) The death of a person, (2) without malice, (3) while engaged in the unlawful operation of a motor vehicle. It is conclusively established under the evidence in this case that Constance Lane met her death as the result of the accident of October 6, 1958, without malice, while riding in defendant's motor vehicle. The evidence is not in conflict on these points and the defendant does not even contend otherwise. The only issue of fact for the jury, upon which the evidence was in conflict, was whether or not the defendant was operating his automobile unlawfully at the time of the accident. It is clear, therefore, that if defendant was operating his automobile unlawfully at the time of the accident he was guilty of motor vehicle homicide. If he was not operating his

automobile unlawfully he was not guilty of motor vehicle homicide or of violating the motor vehicle laws of the state, the asserted lesser offenses. Under such circumstances the trial court is not required, and ought not, to submit the asserted violation of the motor vehicle laws as included offenses. To do so would authorize the jury to find the defendant not guilty of a violation of the motor vehicle laws in the greater offense and to find him guilty of a violation of the motor vehicle laws on the lesser charge. We necessarily hold that the trial court, under the evidence, did not err when it refused to submit the asserted lesser offenses to the jury. The defendant was either guilty of motor vehicle homicide under the evidence adduced or he was not guilty of any offense at all.

This view of the case is not without precedent in this state. In Mantell v. State, 141 Neb. 15, 2 N. W. 2d 586, we said: "Where the evidence is conclusive that the defendant shot with intent to wound, it is not error for the court to fail to instruct the jury with reference to the offense of simple assault, or assault and battery." This case was cited with approval in Moore v. State, 147 Neb. 390, 23 N. W. 2d 552. In Grandsinger v. State, 161 Neb. 419, 73 N. W. 2d 632, this court stated: "Defendant argued that the trial court erred in refusing to give his tendered instruction No. 16 which purported to submit the lesser charge of assault and battery. As stated in 41 C. J. S., Homicide, § 396, p. 232: 'In a homicide prosecution, it is not proper to give an instruction as to assault in any of its grades unless such instruction is applicable and authorized by the evidence.' In Clarence v. State, 89 Neb. 762, 132 N. W. 395, it is said: 'The eighth instruction asked and refused was to the effect that the jury might find defendant guilty of assault and battery, if they believed the evidence so warranted. This was properly refused, as there was no evidence which could require the instruction to be given.' See, also, Mantell v. State, 141 Neb. 15, 2 N. W. 2d 586;

State v. Johnston, 221 Iowa 933, 267 N. W. 698. Such authorities are applicable and controlling in the case at bar. Defendant's contention should not be sustained."

It is clear, under the foregoing authorities, that defendant's requested instruction No. 9 was properly refused. To permit the jury to find the defendant guilty of any of the asserted included offenses would require it to find directly contrary to its finding of not guilty on the charge of motor vehicle homicide. The trial court is not required to give such an instruction which, under the evidence, would afford the jury the opportunity only of debasing itself after finding the defendant not guilty on the charge of motor vehicle homicide.

The defendant contends that the sentence was excessive and requests this court to exercise its powers under section 29-2308, R. R. S. 1943, to reduce the same. The rule of this court consistently adhered to is: Where the punishment of an offense created by statute is left to the discretion of a court within prescribed limits, a sentence prescribed within such limits will not be disturbed unless there appears to be an abuse of such discretion. Guedea v. State, 162 Neb. 680, 77 N. W. 2d 166; Pribyl v. State, 165 Neb. 691, 87 N. W. 2d 201. We find nothing in this record to indicate that the trial court abused its discretion in imposing the sentence that it did.

The record is free from prejudicial error and the judgment of the district court is affirmed.

AFFIRMED.

IN RE APPLICATION OF PAUL ABLER.
PAUL ABLER, DOING BUSINESS AS CENTRAL TRANSPORT COMPANY, APPELLEE, V. WHEELER TRANSPORT SERVICE, INC., ET AL., APPELLANTS, IMPLEADED WITH MELTON TRANSPORT COMPANY OF NEBRASKA, APPELLEE.
101 N. W. 2d 476

Filed February 5, 1960. No. 34613.

Public Service Commissions: Motor Carriers. The syllabus as set forth in Preisendorf Transp., Inc. v. Herman Bros., Inc., *ante* p. 693, 100 N. W. 2d 865, is applicable to the instant case, and reference is made thereto.

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

Nate C. Holman, Robert E. Powell, and *Viren, Emmert, Hilmes & Gunderson,* for appellants.

Nelson, Harding & Acklie, for appellee Abler.

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

MESSMORE, J.

On December 20, 1957, Paul Abler, doing business as Central Transport Company, hereinafter referred to as Central Transport, filed an application with the Nebraska State Railway Commission, hereinafter referred to as the commission, seeking approval of a transfer of a certificate of public convenience and necessity, hereinafter referred to as a certificate, from a partnership composed of Aaron E. Brodhagen, Erwin L. Brodhagen, and Lorene B. Rathjen doing business as Central Transport Company, Pierce, Nebraska, to himself. Such certificate, No. M-7305, authorized motor common carrier transportation of crude oil and refined petroleum products in bulk as follows: "From all producing and refining points in the state of Nebraska as points of origin, on one hand, to Wayne, Stanton, Madison, Pierce, Antelope, Knox, Cedar, Dixon, Dakota, Boone Counties, as

points of destination, on the other hand, over irregular routes."

As stated in the application, the proposed service would be in competition with Transit, Inc., which after March 1, 1958, became known as Ruan Transport Corporation, Herman Bros., Inc., R. B. "Dick" Wilson, Inc., of Nebraska, Melton Transport Company of Nebraska, and Wheeler Transport Service, Inc.

Transit, Inc., Wheeler Transport Service, Inc., R. B. "Dick" Wilson, Inc., of Nebraska, Herman Bros., Inc., and Melton Transport Company of Nebraska, motor carriers, filed protests to the transfer application and petitions in intervention in the order to show cause against the transferor, the partnership composed of Aaron E. Brodhagen, Erwin L. Brodhagen, and Lorene B. Rathjen. All of the protestants named above except Melton Transport Company of Nebraska, are now joined as appellants in this appeal from the order of the commission vacating the order to show cause and granting the application of Paul Abler.

P. J. O'Gorman filed application No. M-2606 to establish vested rights as of April 1, 1936, to operate as a motor carrier of property for hire upon the highways of Nebraska. By order of the commission on February 24, 1938, a "grandfather" certificate was duly issued to P. J. O'Gorman, Norfolk, Nebraska, authorizing certain motor carrier operations in the transportation of bulk petroleum and petroleum products in Nebraska intrastate commerce. This certificate was subsequently extended and broadened by application made to the commission to include the same service and territory as that authorized in the certificate involved in the proceedings now before this court.

In November 1941, P. J. O'Gorman transferred his "grandfather" certificate to the Central Transport Company, a partnership consisting of E. A. Lambrecht, Aaron E. Brodhagen, Erwin L. Brodhagen, and Paul E. Brodhagen, an uncle, two sons, and their father. After the

death of Paul E. Brodhagen, the certificate was transferred in 1944 to the partnership composed of Aaron E. Brodhagen, Erwin L. Brodhagen, and Lorene B. Rathjen, two brothers and their sister, doing business as Central Transport Company of Pierce, Nebraska. Both of the above transfers were the result of properly executed applications filed with the commission and payment of fees therefor, and both of such transfers were duly authorized by orders of the commission. These transfers were approved by the commission in ex parte proceedings without hearing or notice.

The application of Paul Abler was set for hearing before the commission on January 9, 1958. Notice was given to all parties interested as provided for by law, and hearing was held in the commission hearing room, Capitol Building, Lincoln, Nebraska, at 9:30 a.m., January 9, 1958. Certain protestants, including appellants, filed motions for continuance on the grounds that their counsel would, by necessity, be engaged in other legal business at various places on that date. The motions for continuance were overruled by the commission, and the commission had a right to make such an order. The application of Paul Abler came on for hearing along with an order to show cause issued against the transferor, at Lincoln, Nebraska. No appearance was made by or on behalf of any of the protestants at this hearing.

The record made before the commission on January 9, 1958, disclosed that an inspector of the commission checked the equipment lease between Paul Abler and Central Transport, and the equipment to be used in the operation of such business. The inspector also investigated Abler's character references and financial standing, and found the same to be good. In addition, the inspector testified that Central Transport, to his knowledge, had never refused to give service to any shipper when such service was requested by the shipper, and that he found no complaints or dissatisfaction by any

consignee relating to the operations of Central Transport service.

The assistant chief of the Division of Motor Fuels of the Department of Agriculture and Inspection testified that Central Transport had held a transporter's permit for many years and had filed insurance covering public liability and property damage with the department throughout all of that period of time. It was also shown by the testimony of this witness that Central Transport had filed reports of shipments transported by it from 1950 through 1957, all of which had been checked by those authorized by the division to do so; that Central Transport had never held an importer's license and as a consequence all of the shipments shown by the reports would be movements in intrastate commerce of common carrier shipments in nature; and that the relationship between Central Transport and the Division of Motor Fuels had been very satisfactory.

Aaron E. Brodhagen testified that R. C. plates had been purchased every year for Central Transport since 1941; that the required and proper insurance had been carried and maintained at all times; that common carrier transportation service had been rendered by Central Transport continuously; and that at no time had service been refused to any persons or company of the shipping public seeking to utilize the service of Central Transport within the scope of its right to do business as authorized by the commission.

Seven witnesses appeared in support of the application of Paul Abler. All of these witnesses were dealers of petroleum products or bulk plant operators handling petroleum products. To detail this testimony would unnecessarily lengthen this opinion. Each of these witnesses testified that Central Transport had been operating under its certificate for a long period of time, and in addition testified as to the manner in which they used the services of Central Transport. These witnesses further testified that in utilizing the services of

Central Transport they had no complaints against the service, and described such service as very good, satisfactory, or excellent. Some of such witnesses testified that the service so rendered was superior to service rendered by any other common carrier with which they had transacted business. Six of these witnesses testified that they preferred the service of Central Transport and desired to retain such service. One witness testified he had used Central Transport service in an emergency and found such service satisfactory. These witnesses further testified that they had confidence in Paul Abler's ability and his capacity to handle the operation of Central Transport should the commission see fit to grant the transfer application, and that they would continue to use his service.

On January 10, 1958, the commission issued its joint order wherein the order to show cause issued against the applicant, Paul Abler, and the transferor was continued to a date later to be determined, and granted temporary approval of the transfer to the appellee, Paul Abler, pending further hearing before an examiner of the commission.

Pursuant to notice, the matters again came on for hearing before an examiner of the commission on May 21, 1958, and June 3, 1958. The testimony presented by Paul Abler at the hearing before the examiner was essentially the same as that given at the hearing before the commission on January 9, 1958, and need not be discussed further.

The four witnesses who testified in behalf of the protestants represented common carriers who were in competition with Central Transport. All of them serve the same territory as Central Transport, are prepared to serve additional business interests, are actively engaged in soliciting business, and have all the necessary facilities to handle any business that may come to them. Ruan Transport Company, formerly Transit, Inc., and

Wheeler Transport Service, the testimony disclosed, had lost business to Central Transport.

The appellee requested the commission to expedite the hearing on his application due to the fact that this court, on November 22, 1957, rendered a decision in the case of R. B. "Dick" Wilson, Inc. v. Hargleroad, 165 Neb. 468, 86 N. W. 2d 177, which indicates that certificates of public convenience and necessity transferred to present holders, without the benefit of notice and hearing, may be null and void and that a competitor may properly seek injunctive relief through the courts to restrain such certificate holders from continued operations. The motion for rehearing in the above-cited case was overruled. A further reason for expediting the hearing on this application was that on or about December 10, 1957, the appellants Wheeler Transport Service, Inc., R. B. "Dick" Wilson, Inc., of Nebraska, Transit, Inc., Herman Bros., Inc., and Melton Transport Company filed a petition in the district court for Pierce County seeking a temporary and permanent injunction against any further operations by Central Transport, alleging that Central Transport's certificate was null and void for lack of notice and hearing when said certificate was transferred by the commission to it.

As stated in In re Application of Neylon, 151 Neb. 587, 38 N. W. 2d 552, released July 7, 1949: "We have therefore come to the conclusion that where certificates have already been issued and applications are made seeking to transfer the operating rights thereunder to others such applications come within the provisions of section 75-229, R. S. 1943, and require a hearing thereon after notice has been had upon all interested parties. This, for the purpose of finding not only if 'the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity,' but also if 'the applicant is fit, willing and able properly to perform the service proposed, and to conform to the provisions of

sections 75-222 to 75-250 and the requirements, rules and regulations of the State Railway Commission thereunder * * *.' § 75-230, R. S. 1943.

"No hearing having been had on or notice given to interested parties of application M-8664 before the order entered on December 26, 1947, it was made without authority and therefore null and without force and effect." See, also, In re Application of Richling, 154 Neb. 108, 47 N. W. 2d 413.

On September 5, 1959, appellee filed a motion to dismiss the appeal for the reason that it was moot because of the passage of L. B. 578 by the 1959 Legislature. See Laws 1959, c. 342, § 1, p. 1227. Legislative bill 578 provides that: "All certificates of public convenience and necessity and all permits issued pursuant to sections 75-222 to 75-250, inclusive, Reissue Revised Statutes of Nebraska, 1943, prior to July 7, 1949, without notice and hearing and without a finding of public convenience and necessity are hereby validated and shall not be subject to formal complaint or collateral attack." This act contained the emergency clause and by reason thereof became effective on June 17, 1959.

O'Gorman's authority previously mentioned is referred to as a "grandfather" certificate coming within section 7 (a) of L. B. 178 as enacted into law by the 1937 Legislature. See Laws 1937, c. 142, § 7, p. 531.

Legislative bill 578, as passed by the Legislature, has no application here. We said in City of Fremont v. Dodge County, 130 Neb. 856, 266 N. W. 771, that a case must be determined on the law as it stands when judgment is rendered therein. In view of that fact we cannot properly pass upon the constitutionality of L. B. 578, but overrule the motion of appellee to dismiss, which is based thereon. See Preisendorf Transp., Inc. v. Herman Bros., Inc., *ante* p. 693, 100 N. W. 2d 865.

As stated in the case of Preisendorf Transp., Inc. v. Herman Bros., Inc., *supra:* "We think, * * * in view of section 75-222, R. R. S. 1943, that rulings by the

Interstate Commerce Commission in dealing with the subject of transportation by common carriers in interstate commerce may properly be considered by the commission, and by this court on appeal therefrom, when dealing with comparable situations in intrastate commerce."

In the instant case we adopt the reasoning of the authorities cited in the case of Preisendorf Transp., Inc. v. Herman Bros., Inc., *supra,* setting forth rulings by the Interstate Commerce Commission and such other authorities appearing therein relating to the subject matter here involved.

In the instant case it is apparent that this same business has operated long enough that the original authority therefor from the commission is under a "grandfather" certificate. True, the subsequent transfers of the authority were void, but the various owners thereof continued to operate the business thereunder in good faith and, it is apparent, are still doing so.

As shown by the record presented before this court, Central Transport, a partnership, for many years has rendered service to the public under color of authority, and Paul Abler, the applicant herein, has been manager of Central Transport for more than 2 years and seeks authority to continue such service. We find the evidence shows that Paul Abler, the applicant, is fit, willing, and able to properly perform the services proposed and will fully conform to the provisions of sections 75-222 to 75-250, R. R. S. 1943, and that Central Transport will, as it has in the past, fully conform to the requirements, rules, and regulations of the commission promulgated and issued thereunder.

The law as set forth in Preisendorf Transp., Inc. v. Herman Bros., Inc., *supra,* is applicable to the facts in the instant case. Therefore, we adopt the reasoning and the law as announced therein as controlling in the instant case on this appeal. Consequently, it would serve no useful purpose to repeat the authorities set forth in

said-cited case, but we make reference thereto to support our decision in this appeal.

As stated in Preisendorf Transp., Inc. v. Herman Bros., Inc., *supra:* "It is apparent that even after our decision in In re Application of Neylon, *supra,* the commission permitted all holders of certificates issued prior thereto to continue to operate thereunder, apparently feeling such authority was not subject to collateral attack in the courts. Although the judgment of the commission was wrong, as is evidenced by our holding in R. B. 'Dick' Wilson, Inc. v. Hargleroad, *supra,* we cannot say the holders of these certificates were intentionally doing wrong by continuing to operate thereunder and did not do so in good faith. They had some right to trust in the judgment of the commission, a body which, under the Constitution and laws of this state, was created for and given authority to regulate the rates and services of common carriers and have general control thereof. Art. IV, § 20, Constitution of Nebraska."

We do not think the commission acted either unreasonably or arbitrarily, nor do we think that the commission's finding that the present and future public convenience and necessity require the proposed service is either unreasonable or arbitrary. To hold otherwise would destroy a business that has been operated by the owners thereof covering the same type of service and in the same trade territory at least since November 1940.

In view of what we have herein held and said, we affirm the action of the commission.

AFFIRMED.

FRANCIS S. MILLER, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.

100 N. W. 2d 876

Filed February 5, 1960. No. 34633.

1. **Rape.** A person may not be convicted of the crime of assault with intent to commit rape on the testimony of the prosecutrix alone. Her testimony must be corroborated by other competent evidence.
2. ———. In a prosecution for assault with intent to commit rape, it is not essential to a conviction that the prosecutrix should be corroborated by the testimony of other witnesses as to the particular act constituting the offense. It is sufficient if she is corroborated as to material facts and circumstances which tend to support her testimony, and from which, together with her testimony as to the principal fact, the inference of guilt may be drawn.
3. ———. On a trial for assault with intent to commit rape, admissions by the defendant showing that he planned and procured an opportunity to commit the act charged, with evidence of what was done, furnish sufficient corroboration of the prosecutrix's positive testimony to support a conviction.
4. ———. Testimony which discloses that the prosecutrix, as the result of an attack, had bruises and discolorations and immediately thereafter was observed to be hysterical, is corroboration which will support a verdict of guilty of assault with intent to commit rape.
5. **Witnesses: Criminal Law.** In the absence of any appearance of prejudice the violation of an order for the segregation or sequestration of witnesses on a trial does not furnish a basis for granting a new trial.
6. **Criminal Law.** Where the punishment of an offense created by statute is left to the discretion of the court, to be exercised within certain prescribed limits, a sentence imposed within such limits will not be disturbed unless there appears to be an abuse of discretion.

ERROR to the district court for Otoe County: JOHN M. DIERKS, JUDGE. *Affirmed.*

Wellensiek & Morrissey, for plaintiff in error.

Clarence S. Beck, Attorney General, and *John E. Wenstrand,* for defendant in error.

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

YEAGER, J.

This is a criminal action wherein, in the district court for Otoe County, Nebraska, Francis S. Miller, defendant, was tried to a jury on a charge of assault with intent to commit rape upon one Shirley Reeves, who will be referred to as the prosecutrix. The action was prosecuted in the name of the State of Nebraska by the county attorney. The jury returned a verdict of guilty. A motion for new trial was duly filed and overruled. The defendant was sentenced to serve a term of 8 years in the State Penitentiary. From the conviction and the order overruling the motion for new trial the defendant, as plaintiff in error, has brought the case here for review by petition in error. For convenience the plaintiff in error will be referred to in this opinion as the defendant, and the defendant in error as the State.

To the extent necessary to state here the information on which the defendant was charged stated that on October 17, 1958, the defendant committed an assault upon the prosecutrix with intent to commit rape upon her. Of this charge he was convicted.

As grounds for reversal the defendant assigns numerous grounds of alleged error. These however fall within four general classifications. These classifications are (1) the overall sufficiency of the evidence to sustain the verdict; (2) the admissibility of evidence adduced; (3) misconduct of the county attorney; and (4) excessiveness of the sentence imposed.

Whether or not the first of these classifications has merit depends upon the question of whether or not there was admissible evidence of sufficient probative value to sustain the charge.

No good purpose could be served by a relation of the full details of what occurred, therefore only the ultimate of proof in this connection will be set forth here.

The record discloses by the testimony of the prosecutrix and a confession of the defendant that on October 17, 1958, after school had closed and all children had departed, the defendant came to a country schoolhouse where the prosecutrix was the teacher, and there violently attacked her with the avowed intent and declared purpose of having sexual intercourse with her. The evidence further discloses that the prosecutrix resisted to the full the advances and as soon as possible she broke away and drove immediately to a house nearby which was a home occupied by a family by the name of Balfour, where she reported what had happened, at which time she was observed to be in a hysterical condition. Shortly thereafter her person was examined, as well as her clothing, and observations made. As soon as possible the matter was reported to the office of the county sheriff and the police headquarters at Nebraska City, Nebraska.

There is no dispute here as to the existence of the evidence outlined, and there is no evidence in the record to the contrary. The defendant does not contend otherwise.

The substantial theory of the defendant on this proposition is that the testimony of the prosecutrix, under law, stands without corroboration and therefore the evidence is not sufficient to sustain the conviction. He contends substantially that some of the evidence, although admissible, could not be regarded as corroborative, and other evidence, which was not admissible, was admitted over objection, hence it could not be considered as being in support of the verdict.

It is of course true that a person may not be convicted of the crime with which the defendant was charged on the testimony of the prosecutrix alone. Her testimony must be corroborated by other competent evidence. See, Frank v. State, 150 Neb. 745, 35 N. W. 2d 816; Pew v. State, 164 Neb. 735, 83 N. W. 2d 377; Shepperd v. State, 168 Neb. 464, 96 N. W. 2d 261. The particular act how-

ever does not require corroboration. The appropriate rule is stated as follows in Hughes v. State, 154 Neb. 86, 46 N. W. 2d 904: "In a prosecution for assault with intent to commit rape, it is not essential to a conviction that the prosecutrix should be corroborated by the testimony of other witnesses as to the particular act constituting the offense. It is sufficient if she be corroborated as to material facts and circumstances which tend to support her testimony, and from which, together with her testimony as to the principal fact, the inference of guilt may be drawn." See, also, Shepperd v. State, *supra*. In truth the defendant himself furnished sufficient corroboration to sustain the charge. His own statements satisfied the requirement of corroboration. In Loar v. State, 76 Neb. 148, 107 N. W. 229, it was said: "In a trial for statutory rape, admissions by the defendant showing that he planned and procured an opportunity to commit the act charged, with evidence of familiarities between them, furnishes sufficient corroboration of the girl's positive testimony to support a judgment of conviction."

There was, within the meaning of the rule, other corroboration of the testimony of the prosecutrix. The testimony as to what she said and as to her appearance and condition on arrival at the Balfour home, where she went upon leaving the schoolhouse, was corroboration. Testimony which discloses that a woman, as the result of an attack, had bruises and discolorations and was hysterical, coupled with evidence by the prosecutrix that she was attacked, is corroboration which will support a verdict of guilty. See, Prokop v. State, 148 Neb. 582, 28 N. W. 2d 200, 172 A. L. R. 916; Hughes v. State, *supra*.

There is therefore no basis for relief in favor of the defendant on account of lack of corroboration of the testimony of the prosecutrix. This being true it may not well be said that the evidence was not sufficient to sustain the verdict.

Under the second classification it is contended that the court erroneously admitted in evidence eight exhibits. Two of these were the slip and blouse worn by the prosecutrix at the time she was attacked. These were sufficiently identified and it may not well be said that they were not admissible in the case. The defendant does not appear to contend that the exhibits were not proper evidence in the case, but only that the chain of identification was defective.

The defendant assigns as error the admission in evidence of exhibits Nos. 8, 9, 10, 11, and 12. A sufficient answer to this assignment of error is that they were offered but were never received in evidence.

Exhibit No. 5 is a slide on which appeared a specimen for microscopic examination taken from one of the garments which was worn by the prosecutrix at the time of the attack. It is not contended that this specimen would not be admissible if the evidence was sufficient to properly identify it. The contention is that the chain of identification was not complete. The contention may not be sustained. The evidence discloses a complete chain of identification.

A physician made an examination of the prosecutrix on October 20, 1958. He was called as a witness on behalf of the State. Before testifying as to his findings he was asked to and he gave testimony as to a history communicated to him by the prosecutrix. The history given was broader than the testimony of the prosecutrix given on the trial. On this ground the defendant urges that the testimony of the doctor was inadmissible. The contention is without merit for two reasons. The testimony of the doctor as to what he found was based, not upon history, but upon his own subjective and objective findings. The other reason is that the entire history which the prosecutrix gave to the doctor substantially appears in the testimony of the other witnesses for the State given at the trial.

There is no rule of law which requires that the his-

tory employed by a physician in arriving at an opinion must have been in the possession and given by a single witness on the trial of a case.

There is a charge of misconduct of the county attorney in the closing argument. It relates to argument relative to the character of the act charged against the defendant. A question was raised of improper argument, an objection was made thereto, and a motion was made for a mistrial on this ground, which was overruled. The content of that motion is far different and much narrower than what is presented by the brief herein. The mistrial was asked in the motion on the ground that the county attorney referred to this as a "brutal act"; that she told the jury that it should find the defendant guilty; and that it could not bring in a verdict of simple assault. The portion of the motion relating to the act simply condemns the use of the two words. The context of which it was a part was not called to the attention of the district court. The true meaning could not have been arrived at by the district court except by reference to the context which was not presented to it by the motion. Taken alone and without the context it must be regarded as having no comprehensible meaning.

At the commencement of the trial the defendant moved for an order sequestering witnesses. Such an order was entered. By the motion for new trial and supporting evidence it was shown that testimony of a witness for the State was transcribed and given by the county attorney to another witness for perusal before he testified. The defendant asserts that this was misconduct on the part of the county attorney on account of which he was entitled to have the verdict of the jury vacated and set aside.

There can be little doubt that this was a violation of the spirit, if not even of the letter, of the sequestration order. Obviously the purpose of an order of sequestration is to prevent the accomplishment of what was done here and the readily apparent dangerous possi-

bilities. In the light of the record here bearing upon this subject however this did not furnish grounds for setting aside the verdict. On this subject this court stated in Swartz v. State, 121 Neb. 696, 238 N. W. 312: "In the absence of any showing of prejudice to the defendants, we cannot say that the court abused his discretion or that the defendants were in fact prejudiced because the court did not keep all the witnesses segregated after they testified as well as before."

In the text of 23 C. J. S., Criminal Law, § 1439, p. 1145, the following appears: "Failure of the court to enforce strict sequestration of witnesses is not ground for a new trial, where an abuse of discretion does not clearly appear, where no objection was made at the time, nor, even when proper objection is made, where accused is not prejudiced. So in the absence of a showing of resulting injury, a new trial is not required by the court's action in permitting a witness to testify who has failed to observe an order of sequestration, or in excluding such a witness from testifying."

In the present case it was not made to appear that by this infraction the defendant was in anywise prejudiced. It may well be said on the record made on this subject that he was not prejudiced.

It is urged that the sentence imposed was excessive. The penalty provided by statute for the offense charged in this case is imprisonment for "not more than fifteen nor less than two years" in the penitentiary. § 28-409, R. R. S. 1943. As pointed out the sentence was for 8 years in the penitentiary.

The rule applicable in a situation such as this was stated in Bright v. State, 125 Neb. 817, 252 N. W. 386, as follows: "Where the punishment of an offense created by statute is left to the discretion of a court, to be exercised within certain prescribed limits, a sentence imposed within such limits will not be disturbed unless there appears to be an abuse of such discretion." See, also, Carr v. State, 152 Neb. 248, 40 N. W. 2d 677; Kirk-

endall v. State, 152 Neb. 691, 42 N. W. 2d 374; Taylor v. State, 159 Neb. 210, 66 N. W. 2d 514. There is nothing in the record to justify a finding and conclusion by this court that the sentence imposed was excessive.

For the reasons set forth herein it is concluded that the judgment of the district court should be and it is affirmed.

AFFIRMED.

WILLIAM RICKERTSEN, APPELLEE, V. CLAY CARSKADON, APPELLANT.
100 N. W. 2d 852

Filed February 5, 1960. No. 34654.

1. **Contracts: Damages.** Where a contract has been established the measure of recovery is the price agreed upon in the contract, less the damages sustained by the breach of the same.
2. **Trial: Appeal and Error.** It is mandatory that the trial court, without request, correctly instruct the jury as to all issues in the case which are supported by evidence, and a failure to do so ordinarily constitutes prejudicial error.
3. **Evidence.** Evidence of prior transactions of one of the parties to the action with other persons, even though similar to the transaction involved in the case before the court, is generally not admissible.
4. ———. Evidence of such prior transactions is not ordinarily admissible because there is no logical or necessary relation between the several transactions that anything done in connection with the one could be relied on to prove or disprove anything in issue in connection with the other.
5. ———. Where there is a conflict in the evidence relating to a material issue in the case, any collateral fact or circumstance tending in any reasonable degree to establish the probability or improbability of the fact in issue is relevant evidence and proper for the consideration of the jury.
6. ———. When the facts which form the basis of a conclusion cannot be adequately exhibited to a jury, the estimate of them made by a witness who observed them is ordinarily competent as evidence. It is only where such an estimate is based on pure speculation and conjecture that it is not admissible.

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

Beatty, Clarke, Murphy & Morgan, Donald W. Pederson, Frank E. Piccolo, Jr., and *William A. Stewart, Sr.*, for appellant.

Smith Brothers, for appellee.

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

CARTER, J.

Plaintiff commenced this action against the defendant to recover the sum of $1,586.06 as compensation for 20,760 pounds of anhydrous ammonia delivered to defendant's lands, and the agreed price for applying the same, all done at the special instance and request of the defendant. The defendant denied the alleged oral agreement with the plaintiff. For a second defense the defendant alleged that he entered into an agreement to purchase the anhydrous ammonia, for which plaintiff sued, from the Gothenburg Co-op Oil Company of Gothenburg, Nebraska, for which he agreed to pay the sum of $1,586.06 upon proper application thereof to his lands. Defendant further alleged, if it be found that he is obligated to the plaintiff for the anhydrous ammonia, and for the application thereof to his lands, that the anhydrous ammonia was improperly, negligently, and carelessly applied in such a manner that it was wholly worthless and of no value to defendant's lands, and that because thereof defendant is not indebted to plaintiff in any amount. The jury returned a verdict for plaintiff for $1,586.06 and defendant has appealed.

The evidence shows that defendant went to the office of the Gothenburg Co-op Oil Company and inquired as to the cost of various types of fertilizer, including anhydrous ammonia. He also inquired about persons available to apply it to his land. The plaintiff's name, among others, was given to him. He thereafter called at the

home of plaintiff and, according to the plaintiff, entered into an oral agreement for plaintiff to apply it as soon as possible under the terms stated in his petition. Defendant asserted that the agreement was made with the Gothenburg Co-op Oil Company. The evidence shows that the anhydrous ammonia was charged to the account of the plaintiff by the Gothenburg Co-op Oil Company. It also shows that the latter billed the defendant for the anhydrous ammonia. Plaintiff explains this by stating that after defendant refused to pay for the ammonia and its application, he requested the Gothenburg Co-op Oil Company to send out statements as a matter of convenience to him. Without further discussion of the evidence we conclude that the issue was one for the jury.

Plaintiff and an employee who assisted him in applying the anhydrous ammonia testify that it was applied properly in the recognized and customary manner. The defendant and a neighbor who examined the land after the application of the ammonia by the plaintiff testify that it was negligently and improperly applied, in that it was in many parts of the land not put into the ground at a sufficient depth; that in many places it was not put into the ground at all; and that in the land described as gumbo, of which there was considerable, the anhydrous ammonia was not covered and sealed, which permitted it to evaporate and be of little value to the land. The issue as to whether or not the anhydrous ammonia was purchased and applied in accordance with the oral agreement was also a question for the jury.

The evidence shows that plaintiff was an independent applicator of anhydrous ammonia. He testified that it was necessary to induct the anhydrous ammonia into the ground at a depth of 6 to 9 inches. It was necessary also that the ground be moist and be loose enough on the surface to cover and seal the ammonia gas in the ground to avoid evaporation. Plaintiff had the proper equipment to apply the anhydrous ammonia. The only

question before the court was whether or not it was properly applied in accordance with the terms of the contract. If the ammonia was applied in accordance with the terms of the agreement, plaintiff was entitled to judgment for the full amount under the evidence adduced. If the ammonia was not applied in accordance with the agreement, the defendant was entitled to reduce the amount of the contract price by the amount of damages resulting from the breach. In other words, we think the trial court was in error in submitting the case on two forms of verdict, one of which found for the defendant and the other finding for plaintiff for the full amount prayed for. The jury should have been permitted to find for the plaintiff in an amount to be determined by it from the evidence. It is mandatory that the trial court, without request, correctly instruct the jury as to all issues in the case which are supported by evidence, and a failure to do so ordinarily constitutes prejudicial error. Clark v. Oldham, 166 Neb. 672, 90 N. W. 2d 329; Barton v. Wilson, 168 Neb. 480, 96 N. W. 2d 270.

It is a general rule that when a contract has been established the measure of recovery is the price agreed upon in the contract, less the damages sustained by the breach of the same. McMillan v. Malloy, 10 Neb. 228, 4 N. W. 1004, 35 Am. R. 471; West v. Van Pelt, 34 Neb. 63, 51 N. W. 313; Winfield Mutual Housing Corp. v. Middlesex Concrete Products & Excavating Corp., 39 N. J. Super. 92, 120 A. 2d 655. The case should have been submitted on this theory.

The plaintiff called four witnesses who testified that plaintiff had applied anhydrous ammonia to their lands and that he had done a good job. This evidence was objected to as incompetent, irrelevant, and immaterial. A motion to strike the evidence of these four witnesses was subsequently made. The objections were overruled. The rulings on the admission of this evidence were erroneous and prejudicial.

The rule is: Evidence of prior transactions of one of the parties to the action with other persons, even though similar to the transaction involved in the case before the court, is generally not admissible, since there is no logical or necessary relation between the several transactions that anything done in connection with the one could be relied on to prove or disprove anything in issue in connection with the other. Monitor Plow Works v. Born, 33 Neb. 747, 51 N. W. 129; Hunt v. Van Burg, 75 Neb. 304, 106 N. W. 329.

In the instant case it makes no difference how efficiently plaintiff may have performed similar work for others. The issue tendered by the defendant related solely to the agreement between plaintiff and the defendant, and whether or not the service had been rendered in accordance with that agreement. The rule is aptly stated in Turpin v. Branaman, 190 Va. 818, 58 S. E. 2d 63, as follows: "Except in certain cases where the knowledge, motive or intention of the party is a material fact in the case, as it was not in this case, the general rule is that no reasonable presumption can be formed as to the making or execution of a contract by a party with one person in consequence of the mode in which he has made or executed similar contracts with other persons. Neither can parties be affected by the conduct or dealings of strangers. Transactions which fall within either of these classes are res inter alios acta, and evidence of this description is uniformly rejected."

The plaintiff in this case testified that the contract was entered into by him and the defendant. The defendant asserted in his answer and by his testimony that the contract was between himself and the Gothenburg Co-op Oil Company. In support of his contention the defendant offered evidence that the manager and directors of the company called at his home and demanded payment of the amount due under the contract for applying the ammonia. Objection to this evidence

was sustained as hearsay. We think the evidence was admissible.

The evidence was clearly collateral evidence insofar as plaintiff was concerned. But all collateral evidence is not inadmissible. In Shepherd v. Lincoln Traction Co., 79 Neb. 834, 113 N. W. 627, this court quoted the following with approval: "As a general proposition, therefore, it may be said that any evidence that tends in any reasonable degree to establish the probability or improbability of a fact in issue, no matter how slight its weight may be, is relevant. * * * It is not necessary, however, that it should in itself bear directly upon the point in issue, for if it is but a link in the chain of evidence tending to prove the issue by reasonable inference, it may nevertheless be relevant. Indeed, evidence which tends to make the testimony of witnesses probable or improbable may sometimes be competent." See, also, Bowers v. Pixley, 111 Neb. 698, 197 N. W. 410; In re Estate of House, 145 Neb. 670, 17 N. W. 2d 883; Heusser v. McAtee, 151 Neb. 828, 39 N. W. 2d 802.

We hold the applicable rule to be: Where the fact sought to be shown, even though independent of the fact being litigated, has an actual and substantial tendency to establish or disprove such fact, it must be admitted. Evidence is relevant not only when it tends to prove or disprove the precise fact in issue, but when it tends to establish a fact from which the existence or nonexistence of the fact in issue can be directly inferred. On the other hand, when it can be seen that the evidence is without any weight whatever in determining the issue it is error for the court to admit it in evidence.

The defendant contends that the trial court erred in refusing to permit the defendant to estimate that not more than one-third of the fertilizer actually went into the soil in any shape, manner, or form. The trial court sustained an objection to this proffered evidence on the ground that there was insufficient foundation as to the qualifications of the witness to accurately state the

amount of fertilizer actually injected into the soil, and that there was no showing of an accurate measurement of the tracks and surface marks indicating an improper application of the ammonia. Ordinarily, of course, conclusions of fact are to be drawn from the evidence by the jury. There is, however, a general principle which permits witnesses to express opinions upon nontechnical subjects because of the impossibility or the difficulty of reproducing data. It is most frequently applied when witnesses are called upon to make estimates of speed, distance, height, age, area, dimensions, size, elevation and grade, and matters of like import. Testimony as to such matters can rarely be given with mathematical exactness and a witness is ordinarily permitted to give his estimate as direct evidence of an observed fact. 20 Am. Jur., Evidence, § 802, p. 675; Tully v. Mahoning Express Co., Inc., 161 Ohio St. 457, 119 N. E. 2d 831, 45 A. L. R. 2d 1144. The value of such evidence can ordinarily be fairly tested by cross-examination. Where the estimate of the witness is nothing more than pure speculation and conjecture, it is, of course, not admissible. In this connection we point out that such estimates are without probative value when competent witnesses have submitted actual measurements as to the matters which had been made the subject of estimate. In other words, estimates must give way to that which is based on actuality. While the trial court is invested with considerable discretion in ruling on the admissibility of such evidence, we think the trial court, under the evidence in this case, should have permitted the defendant to estimate the number of acres to which fertilizer had not been properly applied in accordance with the terms of the agreement.

Complaint is made as to several instructions given by the court. We do not deem it necessary to consider the correctness of the instructions. A submission of the case to the jury on a retrial in accordance with the con-

trolling law as declared by this opinion will eliminate the claims of error assigned by the defendant.

Because of the failure of the trial court to properly submit the issues to the jury and for the erroneous rulings of the trial court on the admission and rejection of evidence, the judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

PATRICIA MAXINE HALE CAPORALE, APPELLEE AND CROSS-APPELLANT, V. WALTER GENE HALE, APPELLANT AND CROSS-APPELLEE, ARNOLD A. JOHNSON ET AL., INTERVENERS-APPELLEES AND CROSS-APPELLANTS.
100 N. W. 2d 847

Filed February 5, 1960. No. 34700.

1. Divorce. The decree of a district court in a divorce action, insofar as minor children are concerned, is never final in the sense that it cannot be changed.
2. ———. The proper rule in a divorce case, where the custody of a minor child is involved, is that the custody of the child is to be determined by the best interests of the child, with due regard for the superior rights of fit, proper, and suitable parents.
3. Parent and Child. Courts may not properly deprive a parent of the custody of a minor child unless it is shown that such parent is unfit to perform the duties imposed by the relation, or has forfeited that right.
4. ———. The natural rights of a parent to the custody of his or her child are not absolute. They must yield to the best interests of the child where the preferential right has been forfeited.
5. Divorce. In a divorce case it is generally the best policy to keep minor children within the jurisdiction of the court.
6. ———. The decree for child support in a divorce action is at all times subject to review and adjustment in the light of changing conditions regardless of the particular language of the award.

APPEAL from the district court for Gage County: ERNEST A. HUBKA, JUDGE. *Affirmed in part, and in part reversed and remanded with directions.*

Frederick W. Carstens, for appellant.

Philip M. Everson, Jr., for appellees.

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

WENKE, J.

This is an appeal from the district court for Gage County involving an application filed by Walter Gene Hale to have a decree of divorce originally rendered by that court on December 21, 1951, and modified September 16, 1953, changed insofar as it affects the care, custody, and control of his two minor children.

The record shows that Walter Gene Hale and Patricia Maxine Johnson were married, apparently sometime in 1949. At the time of their marriage they were respectively 17 and 15 years of age. Two children were born to this marriage, both boys. Gary Gene Hale was born on August 1, 1950, and Arnold Dee Hale on September 9, 1951. We shall herein refer to these two minor Hale children as the two boys.

On December 21, 1951, the district court for Gage County granted Patricia Maxine Hale, who will hereinafter be referred to as the mother, a divorce from Walter Gene Hale, who will hereinafter be referred to as the father, and awarded custody of their two boys to the mother with certain visitation rights to the father. The decree also provided that the father should make certain monthly payments to the clerk of the district court for the support of the two boys.

Thereafter, on September 16, 1953, the district court for Gage County, on joint application of the mother and father, modified its decree of December 21, 1951, insofar as it related to the custody of the two boys, by awarding their care, custody, and control to Arnold A. Johnson and Mary Eleanor Johnson, who are the boys' maternal grandparents. The court also relieved the father of any further payments for their support.

It is apparent the father, probably because of his age at the time of his marriage, was unprepared to meet

the responsibilities thereof, especially that of fatherhood. It is also apparent that at about the time of the change in custody of the two boys to their maternal grandparents the father had become somewhat unstable and became involved in a good many serious difficulties. He was, at that time, substantially in arrears in the payment of child support and heading for trouble because of that fact. In view of all these circumstances it was agreed that if this change in custody was made no requirements as to child support would be made on the father and it would appear the court agreed thereto.

Subsequent to their divorce both father and mother remarried. The father remarried in June 1953. This couple have one child, a son born November 8, 1954. The family moved to California in 1955 and have, ever since, lived in Vista in that state where the father is gainfully employed. The mother remarried in June 1955, her name now being Patricia Maxine Caporale. The Caporales have two children, a daughter born May 5, 1956, and a son born December 10, 1957. Caporale is a member in the regular armed forces (Air Force) of the United States and presently assigned to duty in Puerto Rico.

Although the care, custody, and control of the two boys were given to the mother by the decree rendered December 21, 1951, the fact is that ever since the younger of the two boys was born they have both lived in the home of their maternal grandparents in Wymore, Nebraska.

On April 14, 1959, the father filed an application in the district court for Gage County seeking to have the previous order of that court modified so as to give him the care, custody, and control of the two boys now living with their maternal grandparents and, if that is done, for permission to take the boys to the State of California to reside in his home now located there. The application to modify was filed shortly after the maternal grandparents, for good and proper reasons, inquired

of the father, through their counsel, if he would voluntarily consent to their adopting the two boys. When he did not do so no action was taken by them for that purpose. The mother and maternal grandparents filed an answer objecting, for reasons therein set forth, to the father's request for modification and in addition prayed for an order of the court requiring the father to make payments in support of the two boys. A hearing was had therein and, on June 24, 1959, the trial court denied the father's request for a change of custody and control of the two boys, leaving their care, custody, and control in the maternal grandparents; denied the prayer of the mother and maternal grandparents that the father be required to contribute to the support of the two boys; and taxed all costs to the father, including an attorney's fee in the sum of $100. The father filed a motion for new trial and this appeal is from the overruling thereof. The mother and maternal grandparents have filed a cross-appeal.

The matter is before this court for trial de novo. See, Schalk v. Schalk, 168 Neb. 229, 95 N. W. 2d 545; McNamee v. McNamee, 154 Neb. 212, 47 N. W. 2d 383. The trial court's original authority in such matters is provided by section 42-311, R. R. S. 1943, and the right to make changes therein by section 42-312, R. R. S. 1943. As stated in Carlson v. Carlson, 135 Neb. 569, 283 N. W. 214: "The decree of the court, in so far as the minor children are concerned, is never final in the sense that it cannot be changed."

"The proper rule in a divorce case, where the custody of minor children is involved, is that the custody of the child is to be determined by the best interests of the child, with due regard for the superior rights of fit, proper, and suitable parents." Schalk v. Schalk, *supra*. See, also, Speck v. Speck, 164 Neb. 506, 82 N. W. 2d 540; Williams v. Williams, 161 Neb. 686, 74 N. W. 2d 543; Campbell v. Campbell, 156 Neb. 155, 55 N. W. 2d 347; Swanson v. Swanson, 137 Neb. 699, 290 N. W. 908;

Norval v. Zinsmaster, 57 Neb. 158, 77 N. W. 373, 73 Am. S. R. 500. As stated in Norval v. Zinsmaster, *supra*: "The statute does not make the judges the guardians of all the children in the state, with power to take them from their parents, so long as the latter discharge their duties to the best of their ability, and give them to strangers because such strangers may be better able to provide what is already well provided."

"In awarding the custody of minor children the court looks to the best interests of the children and those of tender age are usually awarded to the mother if she is a fit and proper person to have their custody." Speck v. Speck, *supra*. See, also, Schalk v. Schalk, *supra;* Campbell v. Campbell, *supra;* Hanson v. Hanson, 150 Neb. 337, 34 N. W. 2d 388; Crandall v. Luhnow, 137 Neb. 13, 288 N. W. 29.

"The father is entitled to the custody of the daughter, rather than the maternal grandparents, where he is an entirely proper person, and has a satisfactory place to keep her, considering all facts relating to her age, care, education, and maintenance." Hobza v. Hobza, 128 Neb. 598, 259 N. W. 516. See, also, Crandall v. Luhnow, *supra*.

However, as stated in Williams v. Williams, *supra*: "The courts may not properly deprive a parent of the custody of a minor child unless it is shown that such parent is unfit to perform the duties imposed by the relation, or has forfeited that right." See, also, Norval v. Zinsmaster, *supra*.

"The natural rights of a parent to the custody of his child are not absolute. They must yield to the best interests of the child where the preferential right has been forfeited." Williams v. Williams, *supra*.

The maternal grandparents have lived in Wymore, Nebraska, since 1941, Johnson being 52 years of age and his wife 42. Mr. Johnson is a carpenter by trade and has been quite regularly employed as such. They purchased a home in Wymore in 1941 and have been and are

raising a family therein of five girls and one boy, the oldest being the mother of the two boys. At the time of the hearing herein in June 1959, three of the Johnson children were living at home. The three consisted of two girls, who are 17 and 15 years of age, respectively, and a boy about 5 years old. The home, which is fully furnished, is adequate to house the parents and all five children. The maternal grandparents seem to have been thrifty for they are free from debt and reasonably well fixed and fully capable of supporting their present family, including the two boys.

These two boys seem to be happy in the only home they have ever really known. They are in good health, get along well with the Johnson children, as well as those in the neighborhood, and are treated by the maternal grandparents as part of their family. Gary is now in the fourth grade and Arnold in the third grade of the public schools of Wymore, and their report cards for the school year of 1958-59 show they are doing very well. They are growing up in a home with which no one finds fault, not even the father, and the maternal grandparents have given the two boys good care, including proper discipline, and are willing to continue to do so.

On the other hand, the father has shown very little interest in the welfare of these two boys. Since the order of September 16, 1953, he has contributed neither money nor clothing for the boys' care. He has seldom sent them a greeting card at Christmas or on their birthdays, and he has very infrequently visited them in the home of their maternal grandparents. We think the father by such conduct has forfeited any natural right he may have had to the custody and control of his two boys.

As stated in Williams v. Williams, *supra*: "While it is true that a parent has a natural right to the custody of his child, the court is not bound as a matter of law to restore a child to a parent under any and all

circumstances. The welfare of a child of tender years is paramount to the wishes of the parent, where it has formed a natural attachment for persons who have long stood in the relation of parents with the parents' approval and consent." The court therein went on to say: "The best interests of the child require that he remain in the custody of the respondents who have occupied the relation of parents throughout the 8 years (here about the same length of time) of the child's life and whose home has been the only home the child has ever known." That is the situation here. See, also, In re Burdick, 91 Neb. 639, 136 N. W. 988, 40 L. R. A. N. S. 887; Gorsuch v. Gorsuch, 148 Neb. 122, 26 N. W. 2d 598; Stohlmann v. Stohlmann, 168 Neb. 401, 96 N. W. 2d 40. As stated in In re Burdick, *supra*: "The welfare of an infant is paramount to the wishes of the parent, where it has formed a proper and natural attachment for another person who has long stood in the relation of a parent with the parent's consent."

We affirm the trial court's order of June 24, 1959, continuing the care, custody, and control of the two boys in the maternal grandparents but note that, although the trial court found the parents should have the right to visit the two boys in the home of the maternal grandparents, it made no order to provide such right. We think the decree should so provide and direct the trial court to amend its order to that effect as follows: That either parent shall have the right to visit the two boys at reasonable and proper times either in the maternal grandparents' home or at some other place in Wymore, Nebraska, agreed upon by them, but under no circumstances is either parent, upon the occasion of such visit, to take either or both of the boys out of the State of Nebraska. See, Young v. Young, 166 Neb. 532, 89 N. W. 2d 763; Campbell v. Campbell, *supra*. As stated in Young v. Young, *supra*: "In a divorce case it is generally the best policy to keep minor children within the jurisdiction of the court."

The mother and maternal grandparents have filed a cross-appeal wherein they contend that the trial court erred in not finding and determining that there had been a change of circumstances to such an extent as to require the father to pay a reasonable amount for the support and maintenance of the two boys.

As stated in Saum v. Saum, 144 Neb. 842, 14 N. W. 2d 844: "The decree for child support in a divorce action is at all times subject to review and adjustment in the light of changing conditions regardless of the particular language of the award." See, also, § 42-312, R. R. S. 1943; Griess v. Griess, 161 Neb. 1, 71 N. W. 2d 513; Schrader v. Schrader, 148 Neb. 162, 26 N. W. 2d 617; Gibson v. Gibson, 147 Neb. 991, 26 N. W. 2d 6. As stated in Schrader v. Schrader, *supra:* "An application for a change with respect to an allowance for support and maintenance of minors, as provided in a decree of divorce, made at any time after the decree has been entered must be founded upon new facts or circumstances which have arisen subsequent to the entry of the decree. In the absence of such facts and circumstances the matter will be deemed res adjudicata."

The fact that the mother and father agreed to a change in the custody of the two boys in 1953, on the basis that the father would be relieved of child support payments, does not now prevent this court, or the trial court, from considering that question, for the liability of a father for the support of his minor children is a continuing liability and one in which the public has an interest.

The evidence shows that in September 1953, the father was in financial as well as other difficulties and clearly not in position to pay very much child support, if any. Now he is regularly and gainfully employed, having a take-home pay of $325 per month. We think the time has come when he should contribute to the support of his two boys. It is true the maternal grandparents testified they wanted to keep the two boys and would fully support them without such aid but that fact is not neces-

sarily controlling. We hold the father should be required to support the two boys by contributing for that purpose the sum of $25 per month for each boy, or a total of $50 per month commencing with February 1, 1960. The trial court is directed to modify its order accordingly and direct that such payments be made by the father to the clerk of the district court for Gage County.

The mother and maternal grandparents ask that a reasonable fee be allowed as attorney's fee for services of their attorney in this court. That such a fee can properly be allowed the mother is evidenced by the following opinions of this court. See, Chambers v. Chambers, 75 Neb. 850, 106 N. W. 993; Schrader v. Schrader, *supra;* Campbell v. Campbell, *supra;* Griess v. Griess, *supra.* The mother's attorney was allowed an attorney's fee of $100 by the trial court. We find the request, in view of all the circumstances, to be well taken and allow the mother a fee of $150 for the services of her counsel in this court, the same to be taxed as costs. All costs in this court, including such attorney's fee, are taxed to the father.

We, therefore, affirm the judgment of the trial court in continuing the care, custody, and control of the two boys in their maternal grandparents, but remand the cause to it with directions to modify its judgment, doing so in the manner and form as we have herein determined should have been rendered.

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

IRENE HOPWOOD (NOW GIBB), APPELLANT, V. FREDERICK HOPWOOD, APPELLEE.

100 N. W. 2d 833

Filed February 5, 1960. No. 34706.

Judgments. The district court may, on motion and satisfactory proof that a judgment had been fully paid or satisfied by the act of the parties thereto, order it discharged and canceled of record.

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

Ray E. Sabata and *Thomas & Thomas,* for appellant.

Mills, Mills & Mills, for appellee.

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

CHAPPELL, J.

Frederick Hopwood was defendant in an original divorce suit instituted by Irene Hopwood as plaintiff, wherein on December 11, 1940, a judgment was rendered granting plaintiff an absolute divorce from defendant, awarding plaintiff custody of their two minor children, and ordering defendant to "pay toward the support and maintenance of said children the sum of $10.00 per month until further order of the court, said payment to be made on the first of each and every month to the plaintiff." By agreement, plaintiff and defendant had theretofore made "a complete property settlement * * * of any and all alimony, temporary and permanent" and said property settlement was "approved and confirmed" by the trial court's decree. Thus, defendant was never legally obligated to pay plaintiff any amount except $10 a month as child support.

Section 25-2210, R. R. S. 1943, provides in part that: "* * * whenever any judgment is paid and discharged, the clerk shall enter such fact upon the judgment record in a column provided for that purpose." Referring thereto, this court held in Manker v. Sine, 47 Neb. 736,

66 N. W. 840, that: "The district court may, on motion and satisfactory proof that a judgment had been fully paid or satisfied by the act of the parties thereto, order it discharged and canceled of record."

In that connection, on April 22, 1958, defendant filed a motion in the original divorce case for satisfaction of the judgment for child support, alleging in substance that the judgment had been paid in full up to the time when the children respectively became self-supporting on October 18, 1950, and of age on March 18, 1954, but upon demand, plaintiff, now a resident of Colorado Springs, Colorado, had refused as demanded on January 15, 1958, to satisfy and discharge the judgment of record.

Thereafter, on May 2, 1958, the parties filed a stipulation, agreeing that plaintiff, Irene Hopwood, now Mrs. Irene Gibb, claimed that $1,440 remained unpaid upon the judgment for child support; that such sum was presently in controversy and in dispute by the parties in this proceeding; that to secure satisfaction and discharge of the judgment of record by plaintiff without prejudice to the controversy, defendant agreed to immediately deposit $1,440 with the clerk of the district court for Polk County pending determination of the controversy by judicial action or agreement of the parties; and that upon said determination, any amount found due plaintiff and unpaid to her should be paid to plaintiff's attorney for plaintiff. Such sum was so deposited by defendant, and accordingly plaintiff executed a satisfaction and discharge of the judgment for child support on May 2, 1958, and same was filed of record.

Thereafter, on September 26, 1958, defendant filed an amended motion for satisfaction of the judgment and for a decree distributing said sum of $1,440. Such motion generally renewed the allegations set forth in defendant's original motion; and alleged that between the time of the decree and November 1, 1945, defendant had paid plaintiff personally and she had received a sum in

excess of defendant's total liability under the judgment by payments made thereon before entering military service of the United States, and thereafter by monthly allotments for child support, payable to plaintiff as authorized by law.

After hearing, whereat evidence was adduced by the parties, the trial court rendered a judgment finding and adjudging that: "* * * defendant has paid or caused to be paid to and the plaintiff has received a sum in excess of $1440.00 stipulated by the parties to be the amount of the accrued child support under the decree of this court entered in this cause on December 11th, 1940, said sum of $1440.00 being now on deposit with the Clerk of the District Court of Polk County, Nebraska, in accordance with the stipulation of the parties filed herein on May 2nd, 1958. * * * said judgment for child support has been paid in full and * * * that the defendant * * * is not indebted to the plaintiff in any sum of money by reason of said judgment"; and that said defendant "is the owner of and entitled to the immediate return of said sum of $1440.00 so deposited and the Clerk of the District Court * * * is hereby ordered to pay said sum to the defendant instanter, all at the cost of the defendant * * *."

Thereafter, plaintiff's motion for new trial was overruled, and she appealed, assigning that the judgment was contrary to law and was not sustained by the evidence. We do not sustain the assignment.

The facts heretofore and hereafter recited are not in dispute except with regard to the amount of child support paid to plaintiff by defendant before he entered the United States Army. However, that issue is of little importance here, because admittedly if defendant were entitled to have the allotments made by him and paid to plaintiff and received by her for child support, as she requested, while he was serving in the United States Army, credited on the judgment for child support, then the total thereof was admittedly in excess of the

total amount for which plaintiff claimed he was liable under such judgment, which was never modified by the trial court, and defendant's legal liability to continue to pay an additional $10 a month as child support admittedly terminated and became inoperative when the children became self-supporting or reached their majority and no longer needed or required support, which occurred long before this proceeding was instituted by defendant.

In that connection, on or about May 13, 1942, defendant received a notice that the local draft board had classified him as 1-A for military service. Thereafter, defendant was drafted into the army and went on active duty August 14, 1942, during the war. About that time, the matter of allowances for his children was brought to his attention when he took out government insurance for his children, and premiums therefor were deducted from his monthly pay, but nothing was done at that time about making allotments to plaintiff for his children, although defendant then disclosed his liability of $10 a month for their support to his military superiors. Herein it was stipulated that a named lawyer in David City represented plaintiff and that he was deceased. Plaintiff herself testified that he represented her for the divorce in 1940, and that he thereafter represented her in getting child support and allowances from the government. The matter of allowances for defendant's children was again brought to defendant's attention by army authorities about March 1943, after they had received a letter from plaintiff's counsel relating thereto. Thereupon defendant informed his company commander that he had two children for whose support he was supposed to pay plaintiff $10 a month. Defendant then made an allotment of $10 a month out of his pay to plaintiff for child support, and from March 1943, to and including February 1944, plaintiff was paid and received such $10 each month, which totalled $120.

Effective in 1943, the Servicemen's Dependents Allow-

ance Act of 1942 (Title 37, U.S.C.A., §§ 201 to 221) was amended as approved October 26, 1943, "so as to liberalize family allowances" and permit plaintiff to be paid $62 a month for child support under section 105 of the act as amended, if defendant was willing to make such allotment and have his "monthly pay * * * reduced by, or charged with, the amount of $22," under subsection 106a of the 1942 act, as directed in the act as amended. Thus, in February 1944, while defendant was in foreign service, plaintiff's counsel again wrote a letter to defendant's superiors seeking the additional allowances as provided in the act as amended, so defendant's Captain again called defendant in for consultation, whereat a warrant officer figured up the total amount of such child support allowances as could be lawfuly made to plaintiff by defendant. It will be remembered that defendant was never legally obligated to pay plaintiff more than $10 a month for child support, but believing that the entire allotment of $62 a month as requested by plaintiff's counsel would be credited in satisfaction and liquidation of the judgment for child support, and that plaintiff had agreed thereto as well, defendant then made such an allotment, which he was not legally required to do, and his pay was reduced or charged with $22 a month. In such respect, the evidence that plaintiff agreed that the allotments of $62 a month would be credited in satisfaction of the judgment for child support was hearsay, but be that as it may, the record discloses that plaintiff's counsel requested that such allotments should be paid to plaintiff for child support, and both plaintiff and her counsel well knew at all times that defendant was only liable for $10 a month. Further, after the allotments of $62 a month were so made, plaintiff was paid and voluntarily received them in the manner and amount herein set forth, and thereafter she instituted no legal action to enforce the judgment and made no claim to defendant that the judgment was not lawfully paid in full for almost 13 years, after the allot-

ments terminated and defendant was discharged from the United States Army. Now plaintiff contends that defendant was still liable for $10 a month with interest for child support payments which she claims had accrued and were unpaid before defendant entered military service and those which she claims had accrued and were unpaid after defendant was discharged from the service; and that the excess of the allotments paid by the government should not be credited thereon. We do not agree.

In that connection, it is admitted that such allotment of $62 was made retroactive for all purposes by defendant and the government from February 1944, when plaintiff's counsel requested that defendant make such allotment, to November 1, 1943. Thus, plaintiff was paid and received $270 in April 1944, as child support, which included $52 a month for 4 months from November 1, 1943, to and including February 1944, or $208, plus $62 for March 1944, and defendant made up the difference in his monthly pay deductions. Thereafter, from April 1944, to and including October 1945, plaintiff was paid and received $62 a month, all of which made a total of $1,448. Thus, from March 1943, to and including October 1945, plaintiff was paid and received a total of $1,568 from the allotments as child support up to the time defendant was discharged from the service. Such sum, without adding any sums paid by defendant before he entered the service, was admittedly in excess of the total amount for which plaintiff claimed that defendant was liable under the judgment for child support. The question presented is whether or not under the circumstances presented herein, defendant was entitled to credit for all such allotments on the total amount of the judgment for child support. If he was, the judgment of the trial court should be affirmed, and we conclude that it should be.

Concededly, the amount of $10 a month, which the trial court ordered defendant to pay plaintiff as child

support, measured at all times the entire extent of defendant's legal obligation. Also, of course, the federal statute could not set aside, nullify, or modify that judgment, and no contention is made that it did. The sole question here is whether or not the judgment had been personally paid in full to plaintiff as she requested. Contrary to plaintiff's contention, Ruehle v. Ruehle, 161 Neb. 691, 74 N. W. 2d 689, is entirely distinguishable factually from the case at bar.

Plaintiff relies primarily upon Palow v. Kitchin, 149 Me. 113, 99 A. 2d 305, which cited and relied upon Keen v. Goodwin, 28 Wash. 2d 332, 182 P. 2d 697, Hinton v. Hinton, 211 Ark. 159, 199 S. W. 2d 591, and Kipping v. Kipping, 186 Tenn. 247, 209 S. W. 2d 27. Such authorities conclude in effect that the right of a soldier to dependents' allowances under the Servicemen's Dependents Allowance Act is not a gift or gratuity flowing from the government to the soldier's dependents, but is an integral part of his contract of enlistment, and lawfully enforceable. They also conclude that while the federal act was not a substitute for and did not of itself discharge the liability of a serviceman under the judgment for child support, nevertheless the payments of allotments thereunder, including the amount deducted from the soldier's pay and that allowed by the government, when actually made, they being in sufficient amount therefor, discharged a soldier's liability under a child support judgment both before he enlisted and thereafter until the allotments terminated by his discharge from the service. However, such cases concluded that thereafter, if the judgment was still existing, operative, and unsatisfied by the parties, and proceedings were then brought to recover thereunder for existing and continuing necessary support of the children, then the amount received from allotments over and above the payments due and accruing under such a judgment did not constitute prepayment of amounts accruing and unpaid after termination of the allotments.

Be that as it may, such a situation does not exist in the case at bar. In that connection, the judgment for child support here involved has long since admittedly terminated and become inoperative as heretofore stated, and the children long ago reached their majority and required no further support. Therefore, this cause is simply a controversy between plaintiff and defendant in which, as a defense to defendant's motion for satisfaction of the judgment for child support, plaintiff seeks to recover child support payments, not for necessary support of the children but for her own benefit, which payments without dispute plaintiff has long ago been personally paid in full by defendant in the manner and amounts as requested by plaintiff.

In that connection, defendant relies primarily upon Brooks v. Brooks, 204 Ga. 412, 49 S. E. 2d 881, decided October 13, 1948, which we believe is identical in principle and comparable in all material factual respects with the case at bar. In that case, on September 3, 1934, Mrs. Effie Edna Brooks, as plaintiff, was granted an absolute divorce from defendant, James C. Brooks, who was ordered by the judgment to pay plaintiff $20 a month for the support of two minor children until they reached majority. By answer to a contempt proceeding instituted by plaintiff against defendant and heard on May 31, 1948, some 13 years, 8 months, and 27 days after rendition of the judgment for child support, defendant urged, as here, that by crediting the total amount due under the judgment with the amounts alloted to his children and paid to plaintiff under the Servicemen's Dependents Allowance Act, while defendant was serving in the armed forces, the judgment would be liquidated and there would be no balance due under the judgment. The judgment in the trial court was for defendant, and plaintiff took error to the Supreme Court where such judgment was affirmed. As pointed out by that court, the record presented the sole question whether payments made by the United States govern-

ment under the Servicemen's Dependents Allowance Act in excess of the amounts deducted from defendant's pay were to be credited against defendant's judgment liability for child support. The court then said: "An affirmative answer will necessarily affirm the judgment of the trial court, to which exception is here taken, since it was stipulated by the parties that, if the defendant was entitled to such credits, there would be no balance due under the judgment."

A stipulation identical thereto in all material respects, when viewed in the light of undisputed evidence, appears in the case at bar. In Brooks v. Brooks, *supra,* after citing and quoting from certain sections of the Servicemen's Dependents Allowance Act, the court said: "The two minor children of the defendant were entitled to receive, under the express terms of this act, irrespective of the alimony judgment, and did receive the sum of $62 per month as a 'family allowance.' Of this amount $22 was deducted from the service pay. The remaining $40 was paid by the Government. It seems to be clear that it was not the intention of the Congress that the $40 should be considered as a gift to the children simply because the father was serving in the Armed Forces, but that it was contributed toward their support in recognition of the fact that their father was still obligated to support them, and being in the enlisted ranks, his regular service pay was inadequate. By this act the Government undertook to help support the dependents of the servicemen at the time when the men themselves might have been unable to do so because their full time and energies were demanded in the defense of their homes and country. The right to this additional allowance from the Government was wholly dependent on the fact that the father was serving in the Armed Forces, and as compared to the services actually rendered it was but an additional token of appreciation from a grateful nation.

"To hold that only the amount actually deducted from

the serviceman's pay could be applied toward liquidation of the alimony judgment, would seem to be in direct conflict with the intent and purpose of the act, and would work an unjust hardship on those under similar circumstances who have honorably served their country."

The reasoning of that opinion appears to be perfectly logical, equitable, and just, and we deem it applicable and controlling in the case at bar.

For reasons heretofore stated, we conclude that the judgment of the trial court should be and hereby is affirmed. All costs in this court are taxed to defendant.

AFFIRMED.

YEAGER, J., concurs in result.

IN RE ESTATE OF LAURA B. GORTHY, DECEASED. ANNA L. BENGE, APPELLEE AND CROSS-APPELLANT, V. HAZEL SUTTON, APPELLANT AND CROSS-APPELLEE.
100 N. W. 2d 857

Filed February 11, 1960. No. 34676.

1. Wills. In a will contest upon the ground of undue influence the burden is upon the contestant to prove by a preponderance of the evidence (1) that testator was subject to undue influence; (2) that there was opportunity to exercise undue influence; (3) that there was a disposition to exercise undue influence for an improper purpose; and (4) that the result was clearly the effect of undue influence.
2. ———. Undue influence cannot be inferred from motive or opportunity alone. There must be evidence to show that undue influence not only existed but that it was exercised at the time the will was executed.
3. ———. In order to invalidate a will executed in conformity with law by a testator having testamentary capacity, the undue influence must be of such character as to destroy the free agency of the testator and substitute the will of another therefor.
4. ———. In a will contest on the ground of undue influence, if the evidence is insufficient to sustain a verdict upon such issue

in favor of the contestant, it is the duty of the trial court to direct a verdict for the proponent.

5. ———. The natural affection, confidence, and gratitude of a parent to a child which inspires a preference in the disposition of his property by will, is a natural and lawful influence which, standing alone, does not constitute undue influence.

6. ———. It is only where natural affection, confidence, and gratitude have been improperly used by a person as a means of substituting his will for that of the testator that it may afford proof of undue influence.

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

Daniel E. Owens and *Ross D. Druliner*, for appellant.

Leon C. Hines and *George B. Hastings*, for appellee.

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

CARTER, J.

This is a contest of the will of Laura B. Gorthy, deceased, on the ground of her incompetency when the will was made and that it was the result of undue influence. The trial court determined as a matter of law that deceased was competent at the time she made the will and submitted only the issue of undue influence to the jury. The jury found by its verdict that the will was the result of undue influence. The trial court sustained a motion for a new trial because of an erroneous instruction given to the jury. The contestant has appealed, asserting that there was no prejudicial error in the record and that the order of the trial court should be reversed and her verdict reinstated. By cross-appeal the proponent contends that the trial court erred in refusing to grant her motion for a directed verdict and in not sustaining her motion for judgment notwithstanding the verdict. No contention is made on this appeal that the trial court erred in holding as a matter of law that Laura B. Gorthy was competent at the

time she made the will involved in this contest.

James Gorthy and Laura B. Gorthy, after their marriage in 1888, established their home on a farm in Cheyenne County, Kansas, where they resided until 1914. During these years they accumulated 1,680 acres of farm land which became involved in this litigation. Five children were born as a result of this marriage: Walter Gorthy, Paul Gorthy, Hazel Sutton, Mildred Smith, and Anna L. Benge, who will hereafter be referred to by their given names. Anna was the youngest child and was 53 years of age at the time of the trial. Paul died in 1940, leaving his widow, Vera, and two children, Paul Gorthy, Jr., and Anna Daurene Maring, both of whom have reached their majority. This group, exclusive of Anna, will be collectively referred to as the heirs.

In 1914 James and Laura B. Gorthy left the farm and moved to Benkelman, Nebraska, where they spent the remainder of their lives. About 1918 James Gorthy built a new home in Benkelman, which is referred to in the record as the "big house." While living in Benkelman, James Gorthy acquired several town properties which included places of business, small residences, and some cabins. He managed his own business affairs until he suffered a stroke of paralysis in 1945. From the date of James Gorthy's illness Laura B. Gorthy managed his affairs until his death on May 5, 1950. James Gorthy left all of his property to Laura B. Gorthy, who managed it until she fell and broke a hip in November 1952. Thereafter, until her death on June 23, 1956, she was assisted in the management of the property by her daughter, Anna.

Laura B. Gorthy, after the death of James Gorthy, filed her petition for the probate of the will of James Gorthy and prayed that she be appointed administratrix with will annexed. The will nominated Hazel to be the executrix of the estate. The hearing on the petition offering the will of James Gorthy for probate was set

for June 12, 1950. On the day preceding, to wit, June 11, 1950, Hazel was instrumental in calling a family meeting at the home of Laura B. Gorthy to find out where the heirs stood with reference to the property then belonging to Laura B. Gorthy. Anna was not invited to attend until the other heirs, except Mildred who resided in California, had convened. Anna was called and came to the meeting some time later. The heirs, other than Anna, had consulted a lawyer previous to the meeting. After a complete discussion of their family affairs and an indication by Laura B. Gorthy that she thought her will executed in 1939 was about right, Anna called Leon Hines, her mother's attorney, to the meeting. He arrived about 10 p.m. In the meantime Ross Druliner, the attorney for the heirs, was called and had arrived. After some further discussion Hines said to Laura B. Gorthy: "* * * you don't have to sign anything, I will take care of you, and to hell with the rest of them." The meeting immediately broke up and ended all further attempts by the heirs to enter into a contract with their mother, Laura B. Gorthy, concerning the distribution of her property on her death.

On the following day, June 12, 1950, the hearing on the petition to probate the will of James Gorthy was held in the county court of Dundy County. Hazel objected to the appointment of her mother, Laura B. Gorthy, as administratrix with will annexed and insisted upon her appointment as executrix in accordance with her nomination contained in the will. The county court appointed Laura B. Gorthy administratrix with will annexed. Hazel appealed to the district court which, after trial, sustained the appointment of Laura B. Gorthy.

On January 8, 1951, approximately 6 months after the hearing on the probate of the James Gorthy will, Laura B. Gorthy called Leon Hines to her home and advised him that she had concluded to make a will and

asked him to prepare it for her. He discussed the terms of the will and caused a preliminary draft to be prepared. He went over it with Mrs. Gorthy and made the changes she desired. The will was redrawn to the satisfaction of Mrs. Gorthy. On the evening of January 13, 1951, Leon Hines took the will to the home of Mrs. Gorthy and in the presence of three witnesses summoned by her the will was duly executed.

On the same day she made her will Laura B. Gorthy executed a deed to Anna for the identical real estate devised to her by the will. The deed was prepared by Leon Hines and acknowledged by Mora Herring, his secretary. Laura B. Gorthy handed the deed to Anna on the following day in a sealed envelope and requested her not to open it. Anna took the sealed envelope to Leon Hines, who retained it. It was found in the files of Leon Hines after his death. Anna did not see the deed until the Saturday previous to the trial of the instant case in the district court. When produced, it showed a statement had been typed on the face of the envelope. Mora Herring testified that she had typed the statement which was placed on the envelope at the time when Anna delivered the sealed envelope at the office of Leon Hines. The statement was: "This envelope contains a deed from Laura B. Gorthy to Anna L. Benge. Deposited with me for safe keeping on January 13, 1951, to be delivered to Anna L. Benge upon demand. Delivery made by Anna L. Benge." The deed was never recorded.

On February 4, 1956, more than 5 years after she executed her will, Laura B. Gorthy decided to execute deeds to her real estate for her heirs. She requested Leon Hines to prepare the deeds, which he did. Due to the serious illness of Leon Hines, attorney Dan Owens was present at the delivery of the deeds on the recommendation of Leon Hines. Laura B. Gorthy called the heirs to her home, all of whom came except Mildred, who resided in California. She delivered the

deeds with the statement: "I want to give it to you myself because I don't want any more trouble in court over this estate." The deeds, which reserved a life estate in Laura B. Gorthy, were accepted and recorded. Since the death of Laura B. Gorthy the heirs have retained the real estate conveyed by the deeds, including all of the income therefrom.

The record indicates that several suits were commenced by the heirs against their mother with reference to the ownership of certain improvements placed upon the lands, as shown by an answer filed by her in the district court for Dundy County on January 15, 1951, all of which was in addition to the litigation in connection with the James Gorthy will. It is evident that these actions were commenced prior to January 13, 1951, the date of the execution of the last will of Laura B. Gorthy.

The foregoing factual situation existed when Laura B. Gorthy died on June 23, 1956. Anna thereupon petitioned for the probate of the will of Laura B. Gorthy. Objections were filed by Hazel on the ground, among others, that the will was the result of undue influence on the part of Anna. The county court admitted the will to probate and appointed Anna as administratrix with will annexed. Hazel gave notice of appeal to the district court, where a trial was had to a jury. This appeal is from a final order resulting from that trial.

The evidence offered by the proponent is substantially as follows: Anna is the youngest child of James and Laura B. Gorthy and was 53 years of age at the time of the trial. She had moved to Benkelman with her parents in 1914. She had attended the University of Nebraska for 2 years and had been a teacher in the public schools in and around Benkelman for some 30 years and was so engaged at the time of trial. She was married to Boyd Benge in 1941 when she was about 36 years of age. She had resided with her parents in Benkelman until her marriage, except when she was

attending college or necessarily away on account of her teaching. After her marriage she and her husband rented a home in which they lived. About a year after her marriage they rented a residence from Mrs. Gorthy and paid her $35 a month as rental until the latter's death. Her parents resided in the "big house" until some time after her father's death, when Mrs. Gorthy moved into a small residence, which she owned, located across the alley from Anna's residence. Anna testified that she and her mother were very close in their relationship and that she looked after her mother more and more as she grew older. In her mother's later years she was in and out of her mother's home several times a day and night in attending to her needs. Anna was present at the family gathering at the "big house" on June 11, 1950. She testifies that her mother became angry and upset because of the attempts by the heirs to get her to agree to the disposition to be made of her property on her death. She admits that she caused Leon Hines to be called to this gathering. She denies that Leon Hines was her attorney and asserts that he was at all times the attorney for Laura B. Gorthy. She testifies that her mother was hurt by the conduct of the heirs and stated repeatedly that she could not understand what they were trying to do to her. She testifies that her mother told her on January 13, 1951, that she had some business to attend to and that she desired her, Anna, to remain at home that evening. Her mother informed her the next day that she had executed a will the evening before and at that time handed her a sealed envelope in which, her mother stated, was a deed. Her mother asked her not to examine the deed, and in conformity with her mother's wishes she delivered the sealed envelope to the office of Leon Hines the next day, as has been heretofore related. She says she was not consulted about the will and did not know its contents until after her mother's death. She says also that she did not see the deed until the Saturday before the trial,

as heretofore related. She was present when the deeds were delivered to the heirs on February 4, 1956, and she did not know that they were in conformity with her mother's will until after her mother's death.

Anna testified that her father managed his own affairs until he suffered a stroke of paralysis in 1945, after which her mother handled their affairs until she broke her hip in November 1952. Thereafter Anna assisted her mother in handling her properties. She kept her mother's bank account separate from her own. She says, and the records corroborate her statement, that the income from her mother's properties went into her bank account and only her mother's expenses were paid therefrom. She testifies that her mother voluntarily placed the bank accounts in joint tenancy with her in order that Anna could pay her mother's expenses when she was unable to do so. She testifies that she placed no funds of her own in these accounts and drew none out for her personal benefit until after her mother's death. The bank records in evidence support Anna's statements except for one check for $600 which will hereafter be referred to.

One of the witnesses to the will of Laura B. Gorthy, Dr. G. Albert Morehouse, was called as a witness at the trial. The other two witnesses to the will were nonresidents of the state and were not available to testify. Dr. Morehouse testified that he had known Mrs. Gorthy since he was a small boy. On January 13, 1951, she asked him to come to her home, which he did about 7 p.m. Leon Hines was present with a will, which he had prepared, along with the two other witnesses, Dr. Wright and Rev. Woodworth. She informed them that she was about to execute her will. She talked of her children and her properties and evidenced a full and complete knowledge of both. Dr. Morehouse states that she knew exactly what she wanted to do with her property and stated that the prepared will was exactly what she wanted. Because of the provisions of the

will favoring Anna, Dr. Morehouse asked her if Anna had influenced her in any way. In answer thereto she expressed concern about the treatment accorded her by her other children and expressed some fear that trouble and litigation would ensue. She expressed her desire to give one-half of the estate, which she considered her husband's half, equally to all her children, including Anna. She stated that she desired to give the other half, which she considered her half, to Anna. The evidence of Dr. Morehouse was that she fully understood what she was doing and intended it to be exactly as the will provided.

The evidence adduced by the contestant was substantially as follows: Their mother had made a will in 1939 wherein the 1,680 acres of land in Cheyenne County, Kansas, were devised to her children, other than Anna who was devised real estate in Benkelman. The meeting of June 11, 1950, was described as a family gathering called for the purpose of ascertaining the interest each was to have in their mother's property. There is little conflict in the evidence as to what occurred at this meeting. Witnesses for contestant do say that Anna, before calling Leon Hines, made the statement that it was about time for her to call her lawyer. Contestant and her witnesses testify that there was a coolness between Mrs. Gorthy and the heirs after the June 11, 1950, meeting. They say that family ties were strained from that time on and that it became impossible to discuss family matters as before. The heirs admitted that they resisted the appointment of Mrs. Gorthy as administratrix with will annexed in the James Gorthy estate matter. They admitted the bringing of other actions against Mrs. Gorthy. Walter testified that he attempted to patch up the family troubles with Anna after their mother's death, without success. He quotes Anna as saying: "I will spend every god dam cent I got before I let her (Hazel) have one cent." Anna denies that she ever made any such statement.

Hazel likewise testifies to the bad feeling her mother had toward the heirs after the June 11, 1950, family meeting. Their evidence indicated that there was bad feeling between Mrs. Gorthy and Anna on one side and the heirs on the other. Hazel testifies to some conversation with her mother when the latter was in the hospital shortly before her death. She quoted her mother as saying: "There was a few things, Hazel, I tried to straighten out, it got beyond my control and I couldn't do anything about it, will you forgive me?" Also, "I tried to change a few things and then it got out of my hands, and oh, Hazel, I couldn't do anything about it then." And further, "Never trust your business to somebody else, Hazel." Hazel testifies that her mother suffered mentally and asked their forgiveness for what she had done.

On cross-examination Anna admitted that a check for $600 had been given to an automobile dealer on Mrs. Gorthy's account in her lifetime. Anna testified that she had agreed to trade in her old car for a different one and that her mother agreed to and paid the $600 cash difference.

There is also the evidence of a cousin of Anna's that she heard Anna say, some time prior to her father's death, that her father must not outlive her mother. Anna denies that she said this.

The foregoing, we think, is a fair summary of the evidence in a record of more than 350 pages and numerous documentary exhibits. It is the contention of contestant that the will was the result of undue influence on the part of Anna. There are some implications, also, that Leon Hines played some part in procuring the result. We find nothing in this record to indicate that Leon Hines did not at all times conduct himself as an ethical and trustworthy lawyer and counselor to Mrs. Gorthy, or that he failed in any respect to carry out the latter's expressed desires.

We have carefully examined the evidence in this

record and have come to the conclusion that it is insufficient to sustain a finding that the will was procured by the undue influence of Anna or any other person. We shall elaborate upon the evidence of contestant and its apparent deficiency.

There is nothing in this record to indicate any family differences prior to the family gathering on June 11, 1950. This was before the will of James Gorthy had been admitted to probate. The meeting was instigated by the heirs, who evidently had some feeling that their interests were different than Anna's since she was belatedly invited to the family gathering. All agree that after this family gathering their mother's attitude toward her children other than Anna materially changed. The evidence clearly indicates that Mrs. Gorthy was concerned and resentful of the attempts by the heirs to establish their claimed rights in her property. We find no evidence of undue influence on the part of Anna at this family gathering. The evidence would indicate that their manner of calling and conducting the meeting had caused Mrs. Gorthy to become angry, displeased, and hurt. It is true, of course, that Anna and her mother enjoyed a close relationship, cemented in part no doubt by the willingness of Anna to care for her mother and father during ill health and old age, while others with the same moral obligations were apathetic about it. Such conduct is to be commended and, standing alone, is no evidence of undue influence.

There is evidence in the record of certain statements made by Mrs. Gorthy to Walter and Hazel while she was in the hospital shortly before her death in which she asked them foregiveness for what she had done. The evidence came into the record without objection. But disregarding its self-serving character and the fact that Mrs. Gorthy because of her death was not available to give her version, the evidence is not subject to the interpretation which the contestant would have us give it. Mrs. Gorthy was no doubt concerned about her

relationship with her children and at that time desired their forgiveness for any contributions she had made to it. But it is quite noticeable that she did not say she in any way regretted making her will as she did. If she had any desire to undo what she had done she was not foreclosed from doing it. She could have corrected an undesired disposition of her property at that time by the simple expedient of executing a new will. Walter and Hazel did not gather from her statements that she desired to change her will. It is quite evident that she had no such desire, although she regretted the family quarrels that resulted from it.

The evidence shows that at the time Laura B. Gorthy executed her will she had formulated a definite pattern for disposing of her property. She stated she intended to devise one-half of the property, her husband's half, as she described it, equally among her children, and that she desired to give her half to Anna. She followed this pattern in making the deed to Anna at the time she executed her will, or shortly thereafter. She adhered to that same pattern when, more than 5 years later, she executed deeds to the heirs in an attempt, as she said, to keep the estate out of court. She accomplished this result with the aid of her attorney, Leon Hines, who advised her of her rights and assisted her in carrying out her wishes. There is no evidence in this record that Anna was Mrs. Gorthy's adviser or consultant in these matters. In fact, the record discloses an intent on the part of Mrs. Gorthy to rely on Leon Hines, her attorney, in making disposition of her property and to avoid discussion of that subject with Anna.

A testator may dispose of his property as he pleases. He is not required to recognize his relatives, and the law places no obstacle in the way of the aged or infirm in making disposition of their property if their mental capacity is in conformity with accepted tests at the time of the execution of the testamentary instrument, and the will was not procured by undue influ-

ence. In re Estate of Scoville, 149 Neb. 415, 31 N. W. 2d 284. No right of a citizen is more valued than the power to dispose of his property by will. The right is in no manner based upon its judicious exercise. The very purpose of a will is ordinarily to produce inequality among heirs of the same class for reasons that appear sufficient only to the testator. He may desire to benefit the helpless, to reward the affectionate, and to punish the disobedient. He may be unjust to his children or other relatives. He is entitled to the control of his property during his lifetime and to direct its disposition after his death, subject only to the legal requirements as to mental capacity and that the act is his own and not the will of another resulting from undue influence. Where a testator has the required mentality to make a will and he has not been unduly influenced in its making, courts are without authority in any manner to interfere with the disposition he has made of his property. Reynolds v. Knott, 164 Neb. 365, 82 N. W. 2d 568.

In a will contest upon the ground of undue influence the burden is upon the contestant to prove each of the following elements by a preponderance of the evidence (1) that testator was subject to undue influence; (2) that there was opportunity to exercise undue influence; (3) that there was a disposition to exercise undue influence for an improper purpose; and (4) that the result was clearly the effect of undue influence. In re Estate of Hagan, 143 Neb. 459, 9 N. W. 2d 794, 154 A. L. R. 573; Reynolds v. Knott, *supra*.

In Reynolds v. Knott, *supra*, it was said: "* * * undue influence cannot be inferred from motive or opportunity alone. There must be competent evidence, direct or circumstantial, to show that undue influence not only existed but that it was exercised at the very time the will was executed. Mere suspicion, surmise, conjecture, or speculation is not enough to warrant a finding of undue influence, but there must be a solid foundation of established facts upon which to rest an

inference of its existence. There may be influences directing the will-maker's attention to proper obligations which it might be thought ought to be satisfied by testamentary provisions. Such influences may be persuasive and effective, but so long as not coercive, they are not undue influence. Circumstances often arise where such conduct is proper and wholly justifiable. Also, in order to invalidate a will duly executed as provided by law by a testator having testamentary capacity, undue influence must be of such character as to destroy the free agency of the testator and substitute another's will for his own."

"It is the duty of trial courts to determine the issues upon which there is competent evidence and submit them, and them only, to the jury. In a will contest on the ground of mental incompetency and undue influence, if the evidence is insufficient to sustain a verdict upon either of such issues in favor of the contestants, then the trial court should withdraw both issues from the jury and direct a verdict." In re Estate of Inda, 146 Neb. 179, 19 N. W. 2d 37. See, also, In re Estate of Frazier, 131 Neb. 61, 267 N. W. 181.

After an examination of the whole record we conclude that the evidence is sufficient to sustain a finding that Anna had the opportunity to exercise undue influence. We find no evidence that Mrs. Gorthy was subject to undue influence, or that Anna had a disposition to exercise undue influence, or that the result, under all the facts shown, was clearly the effect of undue influence. We think the trial court was in error in submitting the issue of undue influence to the jury.

This holding makes it unnecessary for us to discuss other assignments of error presented on this appeal.

The judgment of the district court is reversed and the cause remanded with directions to the trial court to sustain the motion of proponent for judgment notwithstanding the verdict.

REVERSED AND REMANDED WITH DIRECTIONS.

RAYMOND W. JOHNSON, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.
100 N. W. 2d 844

Filed February 11, 1960. No. 34701.

1. **Constitutional Law: Criminal Law.** Any person charged with a criminal offense in the State of Nebraska is guaranteed, under the Constitutions of the United States and of the state, due process of law, which includes the right to trial by jury and the right to defend in person or by counsel.
2. ———: ———. The rights to trial by a jury and to be represented by counsel are personal privileges which may be waived.

ERROR to the district court for Buffalo County: ELDRIDGE G. REED, JUDGE. *Affirmed.*

Dryden & Jensen, for plaintiff in error.

Clarence S. Beck, Attorney General, and *John E. Wenstrand,* for defendant in error.

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

YEAGER, J.

In a criminal action in the district court for Buffalo County, Nebraska, prosecuted by the county attorney in the name of the State of Nebraska, Leonard Sebring and Raymond W. Johnson were charged by information with the offense of robbery. They were arraigned, pleaded guilty, and were sentenced to serve a term of 3 years in the State Penitentiary. The date of the arraignment, plea, and sentence was October 9, 1958.

On January 17, 1959, Johnson filed in the action an application for a writ of error coram nobis the purpose of which was to have the plea of guilty vacated and set aside and to have a trial to a jury on the charge of robbery. This application, after a hearing thereon by the court, was denied. Johnson, by petition in error filed in this court, seeks a reversal of the order denying his application for writ of error coram nobis. Johnson, who is plaintiff in error, will be referred to here-

inafter as defendant and the State of Nebraska, as defendant in error, will be referred to as the State.

The application for the writ is of considerable length but in the light of the record made, the assignments of error, and the brief of the defendant, it becomes necessary to say with reference thereto only that the defendant pleaded that he was denied his constitutional right to be represented by counsel. The other pleaded matters on this account are not before the court for consideration. The pleaded matter was denied by the State. The State asserts in its brief that the cause of action was based upon the ground that the plea of guilty was induced by persons in authority and that the defendant did not knowingly waive his right to be represented by counsel.

These are matters which were set forth in the application and on which evidence was adduced but they do not appear in the assignments of error, which assignments of course provide the basis of consideration of the case by this court.

On this question of whether or not the defendant was denied the right to be represented by counsel, from the evidence given in person and the other evidence adduced on his behalf, it is clear that there was no such direct denial. The evidence of these witnesses was directly to the contrary. These witnesses, including the defendant, testified positively and unequivocally that the defendant was informed by the court that he was entitled to be represented by counsel. The evidence discloses without contradiction that when the defendant was brought before the court for arraignment the trial judge fully and carefully, at great length, explained to him his constitutional rights. The trial judge read to defendant the statute pursuant to which the information had been drawn; orally explained it; directed attention to the penalty for the offense and the authority of the court in relation thereto; told him that he could plead not guilty, guilty, nolo contendere, or stand mute; and ex-

plained the effect of each such plea or a failure to plead. The trial judge also advised him that he should not plead guilty unless he was guilty. The trial judge further advised him that he was entitled to a trial to a jury and that he was entitled to be represented by counsel. After having been thus advised the defendant counseled privately with his father and mother who were present with him in the courtroom, and perhaps more than 2 hours after he had been advised of his rights and without anything remotely in the nature of coercion or advice on the part of anyone else he came before the court and effectually told the court that he did not want to be represented by counsel but that it was his desire to plead guilty to the charge against him. He thereupon did plead guilty and following the plea was sentenced.

The only claim in actuality that the defendant makes as ground for the relief which he seeks is that he was not informed that he was entitled to have counsel provided at the expense of the State. Substantially he asserts in this connection that since he was not so informed he understood that he was entitled to counsel only if he made provision therefor himself, which he was unable to do, or if it was made by his father, upon whom he was unwilling to impose the burden. In the light of this misunderstanding and this failure to receive this information he contends that he was deprived of his constitutional rights.

There is of course no doubt that the defendant was, under the Constitution of the United States and the Constitution of Nebraska, entitled at the time of his prosecution to due process of law. Fifth Amendment and Fourteenth Amendment, section 1, Constitution of the United States; Article I, section 3, Constitution of Nebraska. Also under the Constitution of the United States and the Constitution of Nebraska he was entitled to trial by jury. Sixth Amendment, Constitution of the United States; Article I, sections 6 and 11, Constitution

of Nebraska. Article I, section 11, of the Constitution of Nebraska, provides: "In all criminal prosecutions the accused shall have the right to appear and defend in person or by counsel, * * *." See, also, Sixth Amendment, Constitution of the United States.

The rights guaranteed under Article I, section 11, Constitution of Nebraska, are personal privileges which may be waived. In Hawk v. State, 151 Neb. 717, 39 N. W. 2d 561, it was said: "It has long been the rule in this state that all of the rights guaranteed by Article I, section 11, of the Constitution of Nebraska are personal privileges and not having been conferred from any consideration of public policy are not inalienable but may be insisted upon or abandoned at pleasure." See, also, In re Application of Carper, 144 Neb. 623, 14 N. W. 2d 225; Duggan v. Olson, 146 Neb. 248, 19 N. W. 2d 353; Hawk v. Olson, 326 U. S. 271, 66 S. Ct. 116, 90 L. Ed. 61.

In the light of the résumé of evidence set out herein it is apparent that the defendant was fully and fairly and with a high degree of care informed of his constitutional rights. He did not contend otherwise on the hearing in this case. In this light he waived his right to counsel and pleaded guilty to the offense with which he was charged.

Arguendo, but without assignment of error, it is suggested that the defendant lacked capacity to understand what he was doing when he pleaded guilty to the charge against him, and that he was improperly induced to waive his right to representation and to plead guilty. There is however no support in the record for these suggestions.

The record fully justifies the judgment of the district court and it is accordingly affirmed.

AFFIRMED.

IN RE APPLICATION OF GERALD STRASHEIM, DOING BUSINESS AS JERRY'S TANK SERVICE, KIMBALL, NEBRASKA. GERALD STRASHEIM, DOING BUSINESS AS JERRY'S TANK SERVICE, KIMBALL, NEBRASKA, APPELLANT, V. EARL MARTIN ET AL., APPELLEES.

101 N. W. 2d 161

Filed February 11, 1960. No. 34707.

1. **Public Service Commissions.** Article IV, section 20, of the Constitution of Nebraska, provides that there shall be a State Railway Commission with powers and duties to include the regulation of rates, service, and general control of common carriers as the Legislature may provide by law.
2. **Public Service Commissions: Appeal and Error.** Section 75-405, R. R. S. 1943, provides that if any common carrier shall be dissatisfied with the decision of the State Railway Commission with reference to any order made upon which there has been a hearing before the commission, such dissatisfied common carrier may institute proceedings in the Supreme Court of Nebraska to reverse, vacate, or modify the order complained of.
3. ———: ———. Section 75-406, R. R. S. 1943, provides the procedure to obtain a reversal, modification, or vacation of any order or regulation made and adopted, upon which a hearing has been had before the State Railway Commission.
4. **Public Service Commissions: Motor Carriers.** In conformity with the constitutional provision, the Legislature has the right to prescribe how the State Railway Commission may proceed and what authority it may exercise in granting certificates of public convenience and necessity for operation of motor vehicles for hire intrastate.
5. ———: ———. Section 75-225, R. R. S. 1943, confers jurisdiction upon and vests the State Railway Commission with the duty to regulate common carriers by motor vehicle, and to administer, execute, and enforce all provisions and make all necessary orders in connection therewith, and to prescribe rules, regulations, and procedure for such administration, except that proceedings before the commission, appeals to the Supreme Court, and the enforcement of orders by the commission shall be governed in all respects by sections 75-401 to 75-423, R. R. S. 1943.
6. ———: ———. Section 75-416, R. R. S. 1943, provides that the orders provided for in sections 75-412, 75-413, and 75-415, R. R. S. 1943, shall be in force and effect from and after the date fixed by the State Railway Commission, and shall so

remain until annulled, modified, or revised by the commission, or until finally adjudged to be unreasonable and unjust in a court of competent jurisdiction.

7. ———: ———. The State Railway Commission, in order to revoke, change, or suspend a certificate of public convenience and necessity, must proceed in accordance with the provisions of section 75-238, R. R. S. 1943.

8. **Public Service Commissions: Appeal and Error.** By the enactment of section 75-405, R. R. S. 1943, the Legislature provided that any order of the State Railway Commission upon which there has been a hearing before the commission is reviewable for the purpose of securing its reversal, vacation, or modification.

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

Torgeson & Hurlbut, for appellant.

Martin, Davis, Mattoon & Matzke, for appellees.

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

MESSMORE, J.

On December 8, 1957, Gerald Strasheim, appellant, filed application No. M-10877 with the Nebraska State Railway Commission, hereinafter referred to as the commission, seeking a certificate of public convenience and necessity to operate as a common carrier of property by motor vehicle in Nebraska intrastate commerce, authorizing him to transport water, mud, and crude oil for drilling and completion purposes only, in tank vehicles, between all points and places in Nebraska over irregular routes.

On January 27, 1958, a protest was filed by R. B. "Dick" Wilson, Inc., of Nebraska. On February 3, 1958, a protest was filed by Earl Martin, doing business as Martin Water Service, Kimball, Nebraska; A & W Water Service, Sidney, Nebraska; Reliable Tank Truck Service, Inc., Sidney, Nebraska; Pfeiffer Water Service, Kimball, Nebraska; and V & M Tank Truck Service, Sterling, Colorado. These protests were to the effect that

present and future public convenience and necessity did not require the service proposed; and that these protestants held certificates of public convenience and necessity issued by the commission. The prayers were for a denial of the application.

On February 17, 1958, the matter having been referred to an examiner for the commission, the examiner filed his report recommending denial of the application.

On February 24, 1958, exceptions to the examiner's report and recommendation were filed with the commission by the applicant.

On June 24, 1958, the commission entered an order sustaining objections to the examiner's report, overruling the examiner's report, and granting the application as amended.

On August 11, 1958, the order of the commission dated June 24, 1958, was mailed to all parties interested.

On August 21, 1958, motion for rehearing was filed with the commission by the protestants.

On November 24, 1958, oral argument on the motion for rehearing was waived by the protestants.

On April 29, 1959, the commission overruled the motion for rehearing filed by the protestants on August 21, 1958.

On April 29, 1959, the commission reconsidered its action taken on June 24, 1958, wherein the commission granted the applicant's application for a certificate of public convenience and necessity by a majority vote, and then denied the application by a majority vote.

On June 1, 1959, the applicant filed a motion for rehearing and reconsideration with the commission.

On July 2, 1959, oral argument on the applicant's motion for rehearing and reconsideration was had before the commission, and on the same date the commission overruled the applicant's motion for rehearing and reconsideration. The applicant appeals to this court.

Hearing was held on February 7, 1958, before an examiner for the commission in the commission hearing

room, Capitol Building, Lincoln, Nebraska, on the application of Gerald Strasheim, doing business as Jerry's Tank Service, application No. M-10877, for certificate of public convenience and necessity. Due and proper notice to all interested parties was given by mail dated January 21, 1958. We deem it unnecessary to set forth the evidence adduced at the hearing before the examiner. We consider an assignment of error raised by the appellant which we believe determines this appeal.

The appellant contends that the commission's order entered April 29, 1959, captioned "Action taken June 24, 1958, reconsidered and application denied by majority vote of the commission" is unlawful, null, and void for the reason that the commission had no jurisdiction to enter said order, its jurisdiction having ceased upon the entry of its order dated April 29, 1959, overruling the motion for rehearing, which order was a final determination of said application and which became conclusive by virtue of no appeal having been taken from said order.

The appellant makes reference to Article IV, section 20, of the Constitution of this state, which provides in part: "There shall be a State Railway Commission. * * *. The powers and duties of such commission shall include the regulation of rates, service and general control of common carriers as the Legislature may provide by law."

Section 75-405, R. R. S. 1943, provides in part: "If any * * * common carrier, * * * shall be dissatisfied with the decision of the State Railway Commission * * * with reference to any * * * order, * * * made * * * upon which there has been a hearing before the commission, * * * such dissatisfied * * * common carrier, * * * may institute proceedings in the Supreme Court of Nebraska to reverse, vacate, or modify the order complained of; Provided, the time for appeal from the orders and rulings of the commission to the Supreme Court shall be limited to one month from the

date of the entry of the order or ruling to which complaint is made."

Section 75-406, R. R. S. 1943, provides: "The procedure to obtain such reversal, modification, or vacation of any such order or regulation made and adopted, upon which a hearing has been had before the State Railway Commission, shall be governed by the provisions in force with reference to appeals from the district courts to the Supreme Court of Nebraska; Provided, no motion for a new trial shall be required to be filed, but instead a motion for rehearing shall be filed within ten days after the mailing of a copy of such order by the commission to the persons affected, and the time for appeal shall run in case such motion is filed from the date of the ruling of the commission on the motion for rehearing."

In the case of In re Application of Hergott, 145 Neb. 100, 15 N. W. 2d 418, it was said: "In conformity with the constitutional provision, the legislature has the right to prescribe how the Nebraska state railway commission may proceed and what authority it may exercise in granting certificates of public convenience and necessity for operation of motor vehicles for hire intrastate." See, also, In re Application of Neylon, 151 Neb. 587, 38 N. W. 2d 552; R. B. "Dick" Wilson, Inc. v. Hargleroad, 165 Neb. 468, 86 N. W. 2d 177.

Section 75-225, R. R. S. 1943, reads in part as follows: "Jurisdiction is hereby conferred upon and vested in the State Railway Commission, and it shall be its duty * * * (3) to administer, execute and enforce all other provisions of said sections, to make all necessary orders in connection therewith, and to prescribe rules, regulations and procedure for such administration, except that proceedings before the commission, appeals to the Supreme Court, and the enforcement of orders by the commission shall be governed in all respects by sections 75-401 to 75-423; * * *."

Section 75-416, R. R. S. 1943, provides in part: "The

order or orders provided for in sections 75-412, 75-413 and 75-415 shall be in force and effect from and after the date fixed by the State Railway Commission, and shall so remain until annulled, modified or revised by the commission, or until finally adjudged to be unreasonable and unjust in a court of competent jurisdiction, * * *."

In the case of Airline Ground Service, Inc. v. Checker Cab Co., 151 Neb. 837, 39 N. W. 2d 809, this court said: "Under the provisions of section 75-416 the order takes effect from the time prescribed and continues in force for the time specified unless the order is annulled, revised, or modified by the commission, or set aside by a court of competent jurisdiction."

In the case of Miller v. Consolidated Motor Freight, Inc., 168 Neb. 712, 97 N. W. 2d 265, the procedure before the commission was as follows: On March 6, 1958, Miller filed an application with the commission wherein he sought an extension of his regular route certificate of public convenience and necessity. On May 27, 1958, Consolidated Motor Freight, Inc., and Burlington Truck Lines, Inc., as protestants, filed a formal protest objecting to the granting of the application of Miller. On July 1, 1958, an examiner for the commission filed a report with the commission wherein he recommended that Miller's application be granted in its entirety. On July 7, 1958, the protestants filed exceptions to the examiner's report and recommendation. On July 28, 1958, oral argument on the objections filed by the protestants to the examiner's report and recommendation was had before the commission. On August 1, 1958, the commission entered its order sustaining the exceptions filed by the protestants to the examiner's report, and denied Miller's application in part. On September 8, 1958, Miller filed a motion for rehearing and reconsideration of the commission's order entered August 1, 1958. On September 9, 1958, a motion for rehearing of the commission's action of August 1, 1958, was filed by the

protestants. On September 24, 1958, the protestants made request in writing that their motion for rehearing filed under date of September 9, 1958, be withdrawn. This request was granted by the commission. On September 22, 1958, hearing was had on Miller's motion for rehearing and reconsideration before the commission. On November 11, 1958, the commission issued its order in which it sustained Miller's motion for reconsideration, vacated and set aside its prior order dated August 1, 1958, approved the examiner's report as previously referred to, and granted Miller's application in its entirety.

We have set forth the procedural history of the Miller case and the case at bar. In Miller v. Consolidated Motor Freight, Inc., *supra,* Miller's motion for rehearing and reconsideration was sustained. In the case at bar the protestants' motion for rehearing was overruled. In Miller v. Consolidated Motor Freight, Inc., *supra,* the commission still retained jurisdiction to reconsider any action it had taken. In the case at bar the commission lost jurisdiction of the cause on April 29, 1959, when it overruled the protestants' motion for rehearing.

When the commission overruled the protestants' motion for rehearing on April 29, 1959, the commission, by its action, granted the application of Strasheim. Thus, there is a distinct difference between the action taken by the commission in the case of Miller v. Consolidated Motor Freight, Inc., *supra,* and the case at bar. Therefore, section 75-238, R. R. S. 1943, becomes applicable to the case at bar. It provides as follows: "Permits and certificates shall be effective from the dates specified therein, and shall remain in effect until terminated as herein provided. Any such permit or certificate may, upon application of the holder thereof, in the discretion of the State Railway Commission, be revoked or may, upon complaint or on the commission's own initiative, after notice and hearing, be suspended, changed or revoked in whole or in part, for willful

failure to comply with any of the provisions of sections 75-222 to 75-250, or with any lawful order, rule or regulation of the commission promulgated thereunder, or with any term, condition or limitation of such permit or certificate."

In Abler Transfer, Inc. v. Lyon, 161 Neb. 378, 73 N. W. 2d 667, this court said: "Section 75-238, R. R. S. 1943, must be considered a special statutory provision with regard to a particular subject and, as such, controls the general provisions with regard to such subject. The Nebraska State Railway Commission, in order to revoke, change, or suspend a certificate of public convenience and necessity, must proceed in accordance with the provisions thereof." See, also, Doher v. Herman, 159 Neb. 438, 67 N. W. 2d 421.

As stated in In re Application of Neylon, *supra:* "The Nebraska State Railway Commission, in order to revoke, change, or suspend a certificate of public convenience and necessity, must proceed in accordance with the provisions of section 75-238, R. S. 1943." See, also, In re Application of Hergott, *supra.*

For the reasons herein stated, we conclude that when the commission, by its order of April 29, 1959, overruled the protestants' motion for rehearing, the commission lost jurisdiction of the cause. As a consequence, the appellant's application granted by the commission remains in full force and effect.

The appellees contend that the action of the commission denying the appellant's application entered on April 29, 1959, was a final order, and that the appellant's notice of intention to appeal was filed on July 24, 1959, consequently the appellant failed to file his notice of appeal within the statutory period. Section 75-406, R. R. S. 1943, heretofore mentioned, is cited. Therefore, the notice of appeal filed by the appellant is out of time and this appeal should be dismissed.

We are not in accord with the appellees' contention. The Legislature clearly did not limit the right of review

to final orders but has conferred the right and limited its exercise to any order upon which there has been a hearing before the commission for the purpose of securing the reversal, vacation, or modification thereof. See Airline Ground Service, Inc. v. Checker Cab Co., *supra*.

We hold that the order of the commission complained of by the appellant was entered without legal authority and is null and void; and that the order of the commission granting appellant a certificate of public convenience and necessity is final.

In view of the foregoing, we reverse the commission's order of April 29, 1959, wherein the commission, after overruling the protestants' motion for rehearing reconsidered its action taken on June 24, 1958, granting the appellant's application for a certificate of public convenience and necessity and denied the appellant's application.

REVERSED.

THE COMMONWEALTH COMPANY, A CORPORATION, APPELLEE, v. ROBERT D. FAUVER, APPELLANT.
101 N. W. 2d 150

Filed February 19, 1960. No. 34698.

1. Usury. An automobile dealer may in good faith sell a car on time for a price in excess of the cash price without tainting the transaction with usury, though the difference in prices may exceed lawful interest for a loan.
2. ———. In order to have the foregoing principle apply it must appear that the buyer actually was informed of and had the opportunity to choose between a time sale price and a cash sale price.
3. **Appeal and Error.** In an action in equity where the evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite.

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

Nelson, Harding & Acklie, for appellant.

Ginsburg, Rosenberg & Ginsburg and *Norman Krivosha,* for appellee.

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

WENKE, J.

This is an appeal from the district court for Lancaster County in an action brought by The Commonwealth Company, a Nebraska corporation, to foreclose a chattel mortgage on a 1957 Ford Tudor automobile owned by the defendant, Robert D. Fauver, and to hold said defendant personally liable for any deficiency owing on his debt to plaintiff, for which the chattel mortgage on the automobile was given as security, after the net proceeds from the sale of the car are applied thereon. The debt is evidenced by a negotiable promissory note in the principal amount of $2,777.25 which is payable in 36 installments. Defendant filed an answer and cross-petition in which he alleged the negotiable promissory note set out in plaintiff's petition was a loan made by plaintiff to finance the balance defendant owed on the 1957 Ford Tudor, which he had purchased from N. E. Copple, and, since the terms of said note violated the laws of Nebraska relating to loans by industrial loan and investment companies, it was void and uncollectible. Trial was had and the trial court found for the plaintiff and rendered judgment accordingly. Defendant then filed a motion for new trial and has perfected this appeal from the overruling thereof.

Appellee was, at all times herein material, chartered and licensed to do business in this state as an industrial loan and investment company under the provisions of Chapter 8, article 4, R. R. S. 1943, and had its principal place of business located in Lincoln, Nebraska.

Consequently, if the indebtedness here sought to be enforced was in fact a loan, it was subject to the limitations and restrictions of the act relating thereto and, if in violation thereof, is void and uncollectible. See § 8-432, R. R. S. 1943. On the other hand if the note was given to pay the amount owing on a bona fide time sale then the limitation and restriction of the act would have no application thereto. The question then, as put by the appellant, is, was the purchase of the automobile by the defendant Robert D. Fauver a bona fide time sale transaction or was it on a cash basis and a loan made to pay the balance thereof?

This court has frequently stated that in cases of this type it is not bound by the form of the transaction but will look through the form thereof to the real substance. State ex rel. Spillman v. Central Purchasing Co., 118 Neb. 383, 225 N. W. 46; State ex rel. Beck v. Associates Discount Corp., 162 Neb. 683, 77 N. W. 2d 215; McNish v. General Credit Corp., 164 Neb. 526, 83 N. W. 2d 1. However, there is no presumption against the validity of such a contract merely because it arises out of the sale of an automobile. State ex rel. Beck v. Associates Discount Corp., 168 Neb. 298, 96 N. W. 2d 55. The burden of proof to show the nature of the transaction is on the appellant, since he claims it was a loan. McNish v. General Credit Corp., *supra*. The action being one in equity we will consider the record de novo.

We recently restated in Robb v. Central Credit Corp., *ante* p. 505, 100 N. W. 2d 57, that: "An automobile dealer may in good faith sell a car on time for a price in excess of the cash price without tainting the transaction with usury, though the difference in prices may exceed lawful interest for a loan. * * * in order to have the foregoing principle apply it must appear that the buyer actually was informed of and had the opportunity to choose between a time sale price and a cash sale price."

Newton E. Copple, also referred to as N. E. Copple,

was, at all times herein material, engaged in the sale of new and used cars at 500 North Forty-eighth Street in Lincoln, Nebraska, under the name of Copple Brothers Motors. During the evening of Saturday, July 27, 1957, the appellant came to N. E. Copple's place of business and, after first conferring with a salesman, finally met N. E. Copple and negotiated with him for the purchase of the 1957 Ford Tudor herein being foreclosed. As to just what happened thereafter the testimony of these two parties is in irreconcilable conflict. In view thereof the following has application: "In an action in equity where the evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite." Nitzel & Co. v. Nelson, 144 Neb. 662, 14 N. W. 2d 197.

From a careful reading of the record we can understand why the trial court came to the conclusion that it did for we are of the same opinion, that is, that N. E. Copple's testimony correctly reflects what actually happened during the negotiations and sale of the car to appellant. In view thereof we will not set out the testimony of appellant in conflict therewith.

The record shows that on the evening of Saturday, July 27, 1957, N. E. Copple gave appellant both a cash and time sale price on the 1957 Ford Tudor, both offers being made on the basis that appellant would be given a trade-in allowance of $445 for his 1951 Mercury. Appellant did not accept either offer at that time but came back on Monday, July 29, 1957, and accepted the time sale price offer. He then signed all necessary instruments for this purpose, including the note involved in this action and the chattel mortgage which is herein being foreclosed. The instruments which appellant signed on July 29, 1957, were fully completed when he signed them and he had the opportunity to examine

them if he so desired. They set forth the total amount he was owing on the deal as $2,777.25 payable in monthly installments as follows: 20 at $70, 15 at $90, and 1 at $27.25. Without going into more detail we think the record establishes that the obligation herein involved grew out of a bona fide time sale and that, because thereof, the limitations and restrictions contained in Chapter 8, article 4, R. R. S. 1943, have no application thereto.

On Wednesday, July 31, 1957, N. E. Copple sold the note and chattel mortgage to appellee for a consideration of $2,340. S. E. Copple, father of N. E. Copple, is the president and principal stockholder of appellee. The record discloses that all the officers and stockholders of appellee are members of the S. E. Copple family. However, the record also shows that neither S. E. Copple nor appellee ever had any interest in N. E. Copple's business nor that N. E. Copple ever had any interest in appellee. It is apparent they deal with each other on an ordinary business basis.

Having paid a valuable consideration for the note and mortgage and the same not having been paid by appellant according to its terms and being in default, the appellee was and is entitled to the relief granted it by the trial court. We therefore affirm the judgment of the trial court.

AFFIRMED.

FRANK GILCRIST, APPELLEE, V. ANDY WRIGHT ET AL., APPELLEES, IMPLEADED WITH WILLIAM A. EHLERS ET AL., APPELLANTS, WILLIAM A. EVANS ET AL., INTERVENERS-APPELLEES.

101 N. W. 2d 158

Filed February 19, 1960. No. 34734.

Judgments. When a question of fact is once determined on its merits, that question is settled so far as the litigants and those

in privity are concerned and it may not be relitigated between the same parties.

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

W. A. Ehlers, for appellants.

Kelley & Grant, for appellee Gilcrist.

Davis & Pittman, Peter E. Marchetti, and *McCulloch, Leigh & Koukol,* for appellees Wright et al.

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

YEAGER, J.

The determination of the matter for consideration in the proceeding now before the court requires a statement of historical background which is found in the transcript of an earlier proceeding in this court of which the present one is part and parcel, and the opinion and mandate of this court in that proceeding. The opinion in that proceeding appears as Gilcrist v. Wright, 167 Neb. 767, 94 N. W. 2d 476.

The action was by Frank Gilcrist, plaintiff, against Andy Wright and Iola B. Wright, Mary Fruits and James Fruits, William A. Ehlers and Margaret C. Ehlers, Fred Minor and Thelma Minor, and Earnest Wiggins, defendants. The purpose of the action was to foreclose a claimed mechanic's lien upon Lot 4, Block 3, Hulst Addition to the city of Omaha, Douglas County, Nebraska. The defendants were made parties because they had or claimed some interest in the property. William A. Evans and Allen D. Evans filed in the action a petition of intervention in which they claimed a mechanic's lien. They asked foreclosure thereof. By an order of court others were made parties to the action. One of these parties, Robert W. Fitzpatrick, by answer and cross-petition set forth a claim of a mechanic's lien. He also asked foreclosure.

The case was tried to the court after which the court found and decreed that Earnest Wiggins had a lien of $1,300 without interest; that Frank Gilcrist had a lien of second priority for $860 plus interest; that Robert W. Fitzpatrick had a lien of third priority for $249 plus interest; and that William A. Evans and Allen D. Evans had a lien of fourth priority for $635 plus interest. The declared lien of Wiggins was not based on a mechanic's lien but on an assignment of a part of a mortgage which at the time of the assignment was held by James Fruits, the total of which mortgage was $4,750. The assigned portion of the mortgage was $1,770. The fixation of $1,300 by the decree instead of $1,770 was based on the theory that the transaction was usurious in consequence of which $1,300 only was enforceable.

From the decree in the former proceeding an appeal was taken and an opinion rendered. Gilcrist v. Wright, *supra*. By that opinion the decree of the district court was reversed and the cause remanded with directions. It is not contended here that there was not a compliance with the directions contained in the opinion.

Insofar as the matter is pertinent here the only direction was that it should be decreed that Earnest Wiggins had a mortgage lien in the amount of $1,770 with interest, with a priority date of November 17, 1955, and that the three mechanics' liens should have equal priority and that they were inferior to the lien of Earnest Wiggins. In other pertinent respects the decree of the district court was not disturbed. This direction was complied with by the district court.

On November 11, 1955, Andy Wright and Iola B. Wright, the then title holders to the real estate, gave a mortgage to James Fruits in the amount of $4,750. It was $1,770 of this amount which was assigned to Earnest Wiggins. The assignment was dated November 17, 1955. Thereafter, on September 19, 1956, Andy Wright and Iola B. Wright conveyed title to the property to Mary Fruits, the wife of James Fruits. On October 1, 1956,

Mary Fruits and James Fruits executed a mortgage to Fred Minor and Thelma Minor in the amount of $5,000. On the same day this mortgage was assigned to William A. Ehlers.

This mortgage is not a matter of any controlling significance in this proceeding. It was, however, in the former proceeding. It is mentioned so that it will be understood that what is said herein about mortgage has no reference to this one, but to the one of which the assigned $1,770 is a part, or the $4,750 mortgage, which furnishes the basis for this proceeding. The title to this property was conveyed to Margaret C. Ehlers and William A. Ehlers as joint tenants on January 4, 1957. They are the owners of the fee title thereto.

This leads to the subject of the present proceeding, which is the legal status of the difference between the face of the $4,750 mortgage and the $1,770 portion thereof which was adjudicated to be a first mortgage lien in favor of Earnest Wiggins. The amount involved is of course $2,980.

William A. Ehlers and Margaret C. Ehlers, who are appellants herein, filed a motion in the district court in which they asked leave to file a supplemental petition. In the motion it was asserted in substance that the court found that the $4,750 mortgage was a valid and subsisting mortgage lien subject to a partial assignment of $1,770, leaving undisposed of a balance in the amount of $2,980 which has not been claimed in the pleadings by any party, and that no judicial determination of its true ownership and status has been made. It is further stated, again substantially, that this balance is a valid and subsisting mortgage lien and that it is necessary that proper pleadings be filed, a trial had, and determination of the rights of all parties made to the end that good and sufficient title may be obtained by a purchaser at a judicial sale of the property. The motion was overruled. A motion for rehearing on the motion

was filed, which was overruled. From these orders an appeal has been taken by the appellants.

The proper answer to the question of whether or not the district court erred in refusing to allow the filing of a supplemental petition for the purposes outlined in the motion must flow from what is to be found to have transpired in the former proceeding. The questions suggested were presented, we think, by pleadings filed in that proceeding and the adjudication thereon rendered.

As pointed out, the appellants contend in their motion that the court found that there was a valid and subsisting mortgage lien for $4,750, the right to $1,770 of which was determined and the right to $2,980 of which was left undetermined. The record fails to sustain this contention. The decree in this respect goes no further than to say that the $1,770 was a first mortgage lien. No direct reference was made in any adjudication as to the difference between the face of the mortgage and the $1,770.

This being true it becomes necessary to refer to the pleadings and the decree or decrees to ascertain whether or not there has been an adjudication of the status of that portion of the mortgage.

By cross-petition Earnest Wiggins pleaded the existence of the mortgage and assignment of $1,770 of that mortgage to him.

The appellant William A. Ehlers responded to the cross-petition of Earnest Wiggins by answer and cross-petition. In his answer he pleaded: "* * * that said purported mortgage and purported assignment * * *, are null and void, and without force and effect as against this answering defendant, or as a lien against the said real estate, * * * to-wit:

"That the mortgage * * * is not a lien or mortgage on the real estate therein described."

This answer and cross-petition of appellant William A. Ehlers was adopted by the appellant Margaret C.

Ehlers as her answer and cross-petition by reference and declaration.

It becomes clear therefore that the status of the $4,750 mortgage was presented to the court for consideration and determination. In truth it was so presented by the appellants, and on a theory contrary to that contained in the motion for leave to file a supplemental petition.

The status of the $2,980 portion of the $4,750 mortgage was not disposed of by specific reference in the original decree, but in general terms it was disposed of adversely to the appellants. In general disposition the following appears: "* * * and that the defendants William A. Ehlers and Margaret C. Ehlers have no interest in said property arising out of any mortgage, * * *."

This amounts to a determination and adjudication of any right of the appellants, adversely to them, to file a supplemental petition for the apparent purpose for which they seek to file it. That purpose is of course to have the $2,980 given a priority in their favor equal to the priority given the lien for $1,770.

On the appeal the effect of this as to the $5,000 mortgage was presented to this court, and incidentally the decree as to that mortgage in this respect was reversed, but at no time has the decree in relation to the $2,980 portion been presented for review. The adjudication made that the appellants herein have no interest in the property arising out of the $4,750 mortgage is a valid, binding, and subsisting judgment, which is not now and was not at the time the motion was made for leave to file a supplemental petition subject to judicial interference or change. The decree in this respect is res judicata. When a question of fact is once determined on its merits, that question is settled so far as the litigants and those in privity are concerned and it may not be relitigated between the same parties. See, Shepard v. City of Friend, 141 Neb. 866, 5 N. W. 2d 108; City of Wayne v. Adams, 156 Neb. 297, 56 N. W.

2d 117; Niklaus v. Phoenix Indemnity Co., 166 Neb. 438, 89 N. W. 2d 258.

Analysis of the pleadings in the action, with particular reference to parties having or claiming an interest in the real estate, of the decrees before and after appeal, of the decision of this court, and of the disposition of rights made thereby and thereunder discloses that the rights of all parties were adjudicated and it becomes clear that nothing remains with regard to any interest in the $4,750 mortgage for adjudication.

The district court did not err in overruling the motion of the appellants to file a supplemental petition, and accordingly the judgment of the district court is affirmed.

AFFIRMED.

JOHN J. BAUMANN, JR., APPELLEE, V. ELENORE BAUMANN, APPELLEE, HERMAN O. MEYER ET AL., INTERVENERS-APPELLANTS.
101 N. W. 2d 192

Filed February 19, 1960. No. 34739

1. **Divorce: Parent and Child.** A parent may not be deprived of the custody of his child by the court until it is established that the parent is unfit to perform the duties of the relationship of parent and child or has forfeited the right to the custody of the child.
2. ———: ———. The natural and statutory rights of parents are of important consideration, and, in the absence of special circumstances, the child or children should be awarded to the parent or parents as against more distant relatives or third persons.

APPEAL from the district court for Gage County: ERNEST A. HUBKA, JUDGE. *Affirmed.*

Frederick W. Carstens, for appellants.

McCown, Wullschleger & Baumfalk, for appellee.

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

MESSMORE, J.

The plaintiff, John J. Baumann, Jr., brought this action in the district court for Gage County to modify a decree of divorce relating to the custody of a minor child of which he is the father. On December 5, 1958, a decree of divorce was granted upon the answer and cross-petition of Elenore Baumann, against John J. Baumann, Jr. This decree, among other things, provided that the custody and care of the minor child of the parties, Stephen Anthony Baumann, born June 24, 1958, be placed in Elenore Baumann, the defendant and cross-petitioner. On June 19, 1959, Elenore Baumann died, leaving Stephen Anthony Baumann, the minor child of the parties, in the care and custody of her parents, the maternal grandparents of the minor child and the interveners in this action. The trial court decreed that the custody and care of the minor child, Stephen Anthony Baumann, should be placed in his natural parent, John J. Baumann, Jr. The interveners filed a motion for new trial which was overruled. From the order overruling the motion for new trial, the interveners perfected appeal to this court.

The interveners assign as error that the judgment of the trial court is contrary to the evidence and the law.

The record discloses that John J. Baumann, Jr., the father of Stephen Anthony Baumann, a minor child 1 year and 2 months old at the time of the trial, lived with his parents in Beatrice; that he was employed as a nurseryman by his father who operates a nursery and landscaping business; and that he was paid $1.50 an hour and was usually guaranteed a 40-hour week. The plaintiff testified that he earned approximately $250 a month. The record further shows that at the time of the marriage of the parties they were both approximately 20 years old; and that Stephen Anthony Bau-

mann, the issue of this marriage, was born on June 24, 1958. Shortly thereafter the plaintiff sued Elenore Baumann for divorce. On December 5, 1958, a decree of divorce was granted to Elenore Baumann on her cross-petition and she was awarded the custody of the minor child, Stephen Anthony Baumann. Elenore Baumann died on June 19, 1959.

The record further discloses that there is no evidence but that the plaintiff, John J. Baumann, Jr., is a fit and proper person to have the care, control, and custody of the minor child, Stephen Anthony Baumann. The evidence also discloses that the maternal grandparents and the paternal grandparents are respectable people, have good homes, and could, if necessary, provide for the minor child here involved.

We believe the following authorities to be applicable to a determination of this appeal.

Section 38-107, R. R. S. 1943, provides: "The father and mother are the natural guardians of their minor children and are equally entitled to their custody, services, and earnings, and to direct their education, being themselves competent to transact their own business and not otherwise unsuitable. If either dies or is disqualified for acting, or has abandoned his or her family, the guardianship devolves upon the other."

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

Parents have a natural right to the custody of their children unless they are affirmatively shown to be unfit. See Voboril v. Voboril, 115 Neb. 615, 214 N. W. 254.

In Terry v. Johnson, 73 Neb. 653, 103 N. W. 319, this court held: "The right of a parent to the custody of a minor child of tender years is not lightly to be set

aside, and it should not be done where unfitness is not affirmatively shown or a forfeiture of such rights clearly established." In the cited case the evidence disclosed that the grandparents were highly respected people, had a good home, and were in easy financial circumstances. There was no affirmative evidence showing that the father, who desired to obtain the custody of one of the children, was an unfit or improper person. It was said: "This, then, presents the question as one of law as to which has the superior right to the custody of a child of tender years, the father of the child or its grandparents, when each is shown to be a proper party for the exercise of such a duty. It is urged by counsel for respondents that only the best interest of the child should be considered, and that the question of the natural right of the parent should be regarded as only of secondary importance. * * * 'The father and mother are the natural guardians of their minor children, and are equally entitled to their custody, * * *.'"

In Norval v. Zinsmaster, 57 Neb. 158, 77 N. W. 373, 73 Am. S. R. 500, the court said: "We are aware that this court has several times asserted that in such controversies as the present the order should be made with sole reference to the best interests of the child. But this has been broad language applied to special cases. The court has never deprived a parent of the custody of a child merely because on financial or other grounds a stranger might better provide. The statute declares and nature demands that the right shall be in the parent, unless the parent be affirmatively unfit. The statute does not make the judges the guardians of all the children in the state, with power to take them from their parents, so long as the latter discharge their duties to the best of their ability, and give them to strangers because such strangers may be better able to provide what is already well provided. If that were the law, it would be soon changed, by revolution if necessary." See, also, Hobza v. Hobza, 128 Neb. 598, 259 N. W. 516;

Morehouse v. Morehouse, 159 Neb. 255, 66 N. W. 2d 579; Lung v. Frandsen, 155 Neb. 255, 51 N. W. 2d 623.

In Morehouse v. Morehouse, *supra,* the court said: "A parent may not be deprived of the custody of his child by the court until it is established that the parent is unfit to perform the duties of the relationship of parent and child or has forfeited the right to the custody of the child. * * * The natural and statutory rights of parents are of important consideration, and, in the absence of special circumstances, the child or children should be awarded to the parent or parents as against more distant relatives or third persons. * * * The unfitness which deprives a parent of the right to the custody of his child must be positive, and not comparative, and the mere fact that the children would be better nurtured or cared for by a stranger is not sufficient to deprive a parent of his right to their custody."

The evidence in the instant case does not show that John J. Baumann, Jr., the father of Stephen Anthony Baumann, a minor child, was an unfit, unworthy, or improper father to have the care and custody of such minor child.

For the reasons given in this opinion we affirm the judgment of the district court.

AFFIRMED.

LEWIS R. RICKETTS ET AL., APPELLANTS, V. THE CONTINENTAL NATIONAL BANK OF LINCOLN, LINCOLN, NEBRASKA, APPELLEE.
101 N. W. 2d 153

Filed February 19, 1960. No. 34758.

1. **Judgments.** A judgment is the final determination of the rights of the parties in an action.
2. ———. A judgment is rendered when the court announces its decision upon the law and the facts in controversy as ascertained by the pleadings.

3. ———. The entry of a judgment upon the records is not an integral part of the judicial act of rendering a judgment, although the entry thereof may be required before it can become available for certain purposes.
4. ———. The rendition of a judgment, the making of a final order, or the overruling of a motion for a new trial, as contemplated and intended by section 25-1912, R. R. S. 1943, means the announcement by the court of the judgment, the final order, or the denial of the motion for a new trial and does not necessarily require the notation thereof in any record or the entry thereof in the journal of the court.
5. **Appeal and Error.** Our opinion in Sloan v. Gibson, 156 Neb. 625, 57 N. W. 2d 167, clarified accordingly.
6. **New Trial.** The time for filing a motion for new trial begins to run from the time the decision was rendered, and not from the date it was filed or entered on the journal of the court.
7. ———. A motion for new trial which is not filed within the time specified by statute is a nullity and of no force and effect.
8. ———. A motion for new trial not filed within time cannot form the basis for extension of the time within which an appeal can be taken.
9. **Appeal and Error.** A trial court has no inherent power, directly or indirectly, to extend time for taking appeal.
10. ———. The notice of appeal must be filed in the office of the clerk of the district court and the docket fee must be deposited with the clerk within 1 month after the rendition of the judgment, if there is no motion for a new trial, or within 1 month from the overruling of a motion for a new trial timely filed in the cause or there can be no appeal from the district court to this court.
11. ———. It is necessary that the notice of appeal shall be filed in accordance with the terms of section 25-1912, R. R. S. 1943, in order to confer jurisdiction upon this court to entertain the appeal.
12. **Judgments.** The proper function of a nunc pro tunc order is not for the purpose of correcting some affirmative action of the court which ought to have been taken, but its true purpose is to correct the record which has been made, so that it will truly record the action really had, but which through some inadvertence or mistake has not been truly recorded.

APPEAL from the district court for Lancaster County: HARRY R. ANKENY, JUDGE. *On motion to dismiss appeal. Appeal dismissed.*

Field & Ricketts, Raymond E. McGrath, and *Joel O'D. Cornish,* for appellants.

Mason, Knudsen, Dickeson & Berkheimer, for appellee.

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

WENKE, J.

Appellee, defendant below, has filed a motion herein asking that we dismiss appellants', plaintiffs below, appeal for the reason that this court is without jurisdiction thereof. It bases its contention on the following situation as disclosed by the transcript:

The district court tried the case on April 7, 8, and 9, 1959. On the latter date, after the trial had been concluded, the appellants were given 30 days in which to file a brief and appellee was given 30 days thereafter for the purpose of filing an answer brief. The trial judge's notes, on July 2, 1959, show he considered the case as having been finally submitted on that date. Thereafter, on August 21, 1959, the record shows the trial judge rendered a judgment in favor of the appellee. On the same day the trial judge mailed to counsel for each of the respective parties a copy of his notes doing so, with the following statement in regard thereto: "Enclosed find copy of Notation which I am entering on the docket this day in the above entitled case." Pursuant to directions in these notes counsel for the appellee prepared a decree that was ultimately satisfactory to the trial judge who then signed it on October 8, 1959, and, on the same day, it was entered in the records of the clerk of the district court.

"A judgment is the final determination of the rights of the parties in an action." Rumbel v. Ress, 166 Neb. 839, 91 N. W. 2d 36. See, also, § 25-1301, R. R. S. 1943.

"A judgment is rendered when the court announces its decision upon the law and the facts in controversy as ascertained by the pleadings." Sloan v. Gibson, 156

Neb. 625, 57 N. W. 2d 167. See, also, Pallas v. Dailey, *ante* p. 277, 99 N. W. 2d 6.

"The entry of a judgment upon the records is not an integral part of the judicial act of rendering a judgment, although the entry thereof may be required before it can become available for certain purposes." Sloan v. Gibson, *supra.* See, also, Lockard v. Lockard, *ante* p. 226, 99 N. W. 2d 1.

We do not think, in view of the foregoing, that the following language found in Sloan v. Gibson, *supra,* is entirely correct. Therein we stated: "§ 25-1912, R. R. S. 1943. The rendition of a judgment, the making of a final order, or the overruling of a motion for a new trial as contemplated and intended by this statute means the announcement by the court of the judgment, the final order, or the denial of the motion for a new trial, *and not the notation thereof in any record* or the entry thereof in the journal of the court." It should read as follows: The rendition of a judgment, the making of a final order, or the overruling of a motion for a new trial, as contemplated and intended by section 25-1912, R. R. S. 1943, means the announcement by the court of the judgment, the final order, or the denial of the motion for a new trial *and does not necessarily require the notation thereof in any record* or the entry thereof in the journal of the court. (Emphasis ours.)

On October 13, 1959, appellants filed a motion for new trial. It was overruled by the trial court on the same day. With certain exceptions, not here material, section 25-1143, R. R. S. 1943, requires that a motion for new trial must be filed within 10 days and, if not filed within such period, we have said it is a nullity. As stated in Molczyk v. Molczyk, 154 Neb. 163, 47 N. W. 2d 405: "* * * motion for new trial not having been filed within the time required by statute was a nullity and of no force and effect. * * * In other words, the time for filing a motion for new trial begins to run from the time the 'decision was rendered' and not from

the time it was filed or entered on the journal of the court. Such requirement is not directory merely but wholly mandatory, and only the date the decision was rendered is to be considered in determining the time within which a motion for new trial must be filed, except as provided by section 25-1143, R. R. S. 1943, * * *." See, also, Campbell v. Campbell, 168 Neb. 533, 96 N. W. 2d 417; Pallas v. Dailey, *supra.* As stated in Campbell v. Campbell, *supra:* " 'The time for filing a motion for new trial begins to run from the time the decision was rendered, and not from the date it was filed or entered on the journal of the court.' " And, as stated in Pallas v. Dailey, *supra:* "A motion for new trial which is not filed within the time specified by statute is a nullity and of no force and effect."

When a motion for new trial is filed out of time the overruling thereof does not extend the time for appeal. See, Pallas v. Dailey, *supra;* Lockard v. Lockard, *supra;* Campbell v. Campbell, *supra.* As stated in Lockard v. Lockard, *supra:* "A motion for new trial not filed within time cannot form the basis for extension of the time within which an appeal can be taken." Nor does the trial court have inherent power for that purpose. See, Morrill County v. Bliss, 125 Neb. 97, 249 N. W. 98, 89 A. L. R. 932; Campbell v. Campbell, *supra.* As stated in Campbell v. Campbell, *supra:* " 'Trial court has no inherent power, directly or indirectly, to extend time for taking appeal.' "

Notice of appeal was filed by the appellants with the clerk of the district court for Lancaster County on November 9, 1959. Section 25-1912, R. R. S. 1943, requires that an appeal must be taken within 1 month from the time the judgment is rendered in the absence of a motion for new trial being filed within time and appeal being taken from the overruling thereof. See, Campbell v. Campbell, *supra;* Lockard v. Lockard, *supra;* Pallas v. Dailey, *supra.* As stated in Sloan v. Gibson, *supra:* "The notice of appeal must be filed in the office

of the clerk of the district court and the docket fee must be deposited with the clerk within 1 month after the rendition of the judgment, if there is no motion for a new trial, or within 1 month from the overruling of a motion for a new trial timely filed in the cause or there can be no appeal from the district court to this court." And, if appeal is not taken within the time fixed by statute (one month) this court is without jurisdiction of the appeal. See, Sloan v. Gibson, *supra;* Campbell v. Campbell, *supra;* Lockard v. Lockard, *supra;* Pallas v. Dailey, *supra.* As stated in Lockard v. Lockard, *supra:* "It is necessary that the notice of appeal shall be filed in accordance with the terms of section 25-1912, R. R. S. 1943, in order to confer jurisdiction upon this court to entertain the appeal."

It thus becomes apparent that if the trial judge's notes of August 21, 1959, which he entered upon the court journal, constitute the rendering of a judgment, which we find they do, that this court is without jurisdiction of the appeal. However, we permitted the appellants to file a supplemental transcript to show the entry of an order nunc pro tunc by the trial judge relating to what he had done herein on August 21, 1959. The supplemental transcript shows that on January 25, 1960, which is subsequent to the date appellee filed its motion herein to dismiss this appeal, the appellants filed a motion in the district court for an order nunc pro tunc to clarify the trial judge's notes of August 21, 1959, and, in support thereof, filed an affidavit of the trial judge. Pursuant thereto the trial court did, on January 29, 1960, enter an order nunc pro tunc by adding the following to his notes of August 21, 1959: "This Notation is made merely for the purpose of instructing counsel for the defendant in the preparation of a draft of findings and decree herein, and is not intended as a final decision or judgment in the case."

The purpose and function of an order nunc pro tunc has been fully set out and discussed by this court in

the following cases: Lockard v. Lockard, *supra;* Bell v. Crook, 168 Neb. 685, 97 N. W. 2d 352; Watson Bros. Transp. Co. v. Red Ball Transf. Co., 159 Neb. 448, 67 N. W. 2d 475; North Loup River Public Power & Irr. Dist. v. Loup River Public Power Dist., 149 Neb. 823, 32 N. W. 2d 869. As stated in Watson Bros. Transp. Co. v. Red Ball Transf. Co., *supra:* "The proper function of a nunc pro tunc order is not for the purpose of correcting some affirmative action of the court which ought to have been taken, but its true purpose is to correct the record which has been made, so that it will truly record the action really had, but which through some inadvertence or mistake has not been truly recorded." However, as stated in these cases, the purpose of an order nunc pro tunc is not to correct, change, or modify action previously taken by the court.

The trial judge, and all the parties to this litigation were bound by the legal effect of what the trial judge did on August 21, 1959, and not by what he may have thought he was doing. He cannot now change or modify the legal effect of what he did by an order nunc pro tunc showing what he intended to do. It should again be called to the attention of trial judges that the formal drafting, signing, and entering on the records of a clerk of the district court of a judgment or decree is not, under the circumstances as here shown, a rendering of such judgment or decree within the meaning of section 25-1912, R. R. S. 1943.

In view of what has been herein said and held we find the appeal was not taken within the time provided therefor by statute and that, in view thereof, this court is without jurisdiction to consider the cause. We therefore sustain appellee's motion to dismiss the appeal of appellants.

APPEAL DISMISSED.

JOHN BAUM, APPELLEE, V. THE COUNTY OF SCOTTS BLUFF, A CORPORATION, ET AL., APPELLANTS.

101 N. W. 2d 455

Filed February 26, 1960. No. 34705.

1. **Constitutional Law.** Private property in this state cannot be damaged for public use without just compensation therefor under the provisions of Article I, section 21, of the Constitution.
2. **Constitutional Law: Waters.** Where an irrigation district and a county jointly construct a structure across a drainage ditch which causes damage to private property, they are liable for such damage under the self-executing provisions of Article I, section 21, of the Constitution.
3. **Waters: Drains.** While one who obstructs the flow of a drainage ditch in the furtherance of a public purpose is liable for damages thereby caused by the flooding of the lands of another, the burden of proof is on the latter to prove the obstruction, that there was an overflow, that the overflow would not have occurred if it were not for the obstruction, and the extent of the damage attributable to it.
4. **Waters: Negligence.** Negligence is not a necessary element to be proved in maintaining an action for such damage.
5. **Waters: Drains.** One who builds a structure in a drainage ditch is charged with a duty to provide for the passage of all waters, ice, and debris which may reasonably be anticipated to flow or be carried through the ditch.
6. **Trial: Appeal and Error.** Where it appears from all the instructions given, and the clarity of the evidence adduced at the trial, that a claimed error in an instruction could not have misled the jury in determining the issues, such error will not constitute prejudicial error.
7. ———: ———. Where a certain theory as to the measure of damages is relied upon by the parties to the trial as the proper one, it will be adhered to on appeal whether it is correct or not.
8. ———: ———. An instruction which erroneously puts the burden of proof on the defendant on a material issue is prejudicial to the rights of such defendant and ordinarily requires a new trial.
9. Waters. City of McCook v. McAdams, 76 Neb. 11, 114 N. W. 596, construed and harmonized.

APPEAL from the district court for Scotts Bluff County: RICHARD VAN STEENBERG, JUDGE. *Reversed and remanded.*

W. H. Kirwin and *Wright, Simmons & Harris,* for appellants.

Holtorf & Hansen and *Charles F. Fitzke,* for appellee.

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

CARTER, J.

Plaintiff brought this action against the County of Scotts Bluff and the Gering-Fort Laramie Irrigation District to recover damages to growing crops and personal property in the amount of $6,422.42 alleged to have resulted from floodwaters caused by a structure jointly constructed by the defendants in the district's drainage ditch. The jury returned a verdict for plaintiff in the amount of $3,853.45 and the defendants appealed.

Plaintiff was a tenant farmer on the southeast quarter of Section 21, Township 21 North, Range 55 West of the Sixth P. M., in Scotts Bluff County, which we shall hereafter refer to as plaintiff's land. A county road ran east and west along the south line of plaintiff's farm. A little east of the center of plaintiff's south line, the district's drainage ditch crossed to the north under a county bridge on the highway onto plaintiff's land, continued in a diagonal course to the northeast to about the center of plaintiff's east line, and then continued in a northerly direction. The ditch was crossed by a beet spur railroad track approximately 100 feet north of the highway bridge. In 1957 the county and district jointly constructed a single row of steel sheet piling across the ditch about 50 feet north of the highway bridge. The purpose of the district in assisting in the building of this structure was to stop the ditch from washing wider and deeper by retarding its flow. The purpose of the county in assisting in its construction was to prevent the washing out of the approach to the east end of the highway bridge. The structure was 15 feet high and about 60 feet in width. In the center

of the structure an opening 12 feet by 7 feet was left for the passage of the water carried by the ditch. The lip of the opening was at the old ground level of the ditch but when constructed it was 2 or 3 feet above the bottom of the existing ditch, and at the time of the flood on June 1, 1958, the lip of the opening was about 6 feet above the bottom of the ditch.

The ditch provided drainage for an area of about 5,000 acres of land lying to the south and west of plaintiff's land. Two main drainage channels carried the water to a point near the southwest corner of plaintiff's land where it turned east and paralleled the county highway to the highway bridge where it turned abruptly to the north under the highway bridge, through the steel structure, under the railroad bridge, and through plaintiff's land to the northeast as heretofore related.

The east channel comes out of the Wildcat Range of hills about 2 miles south of the southeast corner of plaintiff's land. It then goes north for a mile, turns west for 2,000 feet, turns north for a mile, and then turns east along the south side of the county highway. Approximately 2 miles south of plaintiff's land on the east channel is a dam creating a storage reservoir with a maximum capacity of 50.7 acre-feet. The west channel comes out of the hills about 1½ miles west of the east channel. It follows a northeasterly course to the county highway south of the southwest corner of plaintiff's land, where it turns east about 640 feet along the highway and at that point flows into the east channel.

About 5:30 p.m., on the afternoon of June 1, 1958, a heavy rainfall occurred in this area. Plaintiff testified that 1¾ inches of rain fell on this occasion. Other witnesses testified to varying amounts of rainfall between 1.4 inches and 5 inches.

The evidence of plaintiff and his witnesses is that the water came out of the banks of the ditch immediately above the steel structure and flooded out over plaintiff's land on both sides. Their evidence is that

the water destroyed and damaged the growing crops along the west side of the ditch and damaged the alfalfa growing on the east side thereof. The evidence shows also that the water ran into the yard and corrals around the buildings, covering the same with debris and silt. Plaintiff testified that he had 140 head of cattle in his feed lots that were damaged by standing in more than 2 feet of floodwater for approximately 4½ hours. There is evidence that two trees were carried into the steel structure where they lodged in the opening and retarded the flow of water through it. Three witnesses testified that they saw the water flowing out of the ditch immediately above the steel structure and onto plaintiff's land.

The engineer who constructed the steel structure for the defendants testified generally as to the size, nature, and purpose of the steel structure about which there is little dispute. He testified concerning the area within the watershed of the ditch, the directional flow of surface waters, and the effect of voluminous surface waters as they would affect the ditch and plaintiff's land. It was the opinion of this witness, based on elevations taken, the amount of surface water involved, his knowledge of the drainage channels in the area, and his expert knowledge in irrigation and drainage engineering, that the water causing plaintiff's damage came from sources wholly disconnected from the steel structure in the ditch. His testimony is that waters flowed out of the ditch west of the county highway bridge, flowed over the highway and railroad tracks onto plaintiff's land, causing the damage to plaintiff's land to the west of the ditch about which he complains. He testified that the waters from the hill area in the drainage area of the east channel flowed north for 1 mile to the point where the east channel turned west and there spilled out of the channel. These waters flowed north and east. Part of the water went east in the south borrow pit of the highway. The other part crossed the highway and rail-

road tracks onto plaintiff's land to the east of the ditch and caused the damage to the crops, livestock, and other personal property located on the east side of the ditch. He stated that the steel structure did not cause or contribute to any of the damages for which the action was brought.

On June 8, 1958, at about 5:30 p. m., a second storm struck the same area. Plaintiff testified that 2¼ inches of rain fell on this occasion in a matter of 40 minutes. Other witnesses testified to varying amounts of rainfall between 2½ inches and 7 inches. Plaintiff testified that his crops, yard, and corrals were flooded as before and the floodwaters did no, or little, additional damage. Defendants contend that the second rain caused the damage and that the steel structure made no contribution to it.

The evidence shows that the reservoir in the foothills on the east channel broke after the second rain and loosed its storage water into the drainage area. There is evidence that the dam did not wash out until 9 p. m. on the day of the second rain. According to plaintiff's evidence this was approximately 3 hours after the high watermark of the flood that caused the damage. There is no evidence in the record that the breaking of the resorvoir contributed to the floodwaters which damaged the plaintiff.

The evidence is in conflict as to whether or not the steel structure caused the damages for which the plaintiff seeks recovery. Three witnesses testified that they saw the water leave the ditch at the structure and flow onto plaintiff's lands. The engineer testified that the water doing the damage came from other sources and that the structure did not cause any water to overflow onto plaintiff's farm land. This issue is clearly one for the jury.

The Gering-Fort Laramie Irrigation District is a governmental subdivision organized to furnish irrigation water to privately owned lands within the district and to

provide drainage for such lands resulting from seepage and surface waters. It is clearly organized for a public purpose. The county of Scotts Bluff is likewise a governmental subdivision charged with the statutory duty of building and maintaining highways and bridges for public use. In so doing it is engaged in carrying out a public purpose. The plaintiff contends that these defendants are liable for damages caused by them in carrying out the public purposes for which they were organized, without proof of negligence, under the provisions of Article I, section 21, of the Constitution. This section provides: "The property of no person shall be taken or damaged for public use without just compensation therefor." The trial court instructed the jury on the theory that if the damages resulted from the construction of the steel structure placed in the district's drainage ditch by the defendants, negligence need not be shown. The defendants contend this was error.

The case is controlled in principle by Gledhill v. State, 123 Neb. 726, 243 N. W. 909. In that case a bridge over a drainage ditch washed out. The state erected a temporary bridge for the convenience of the public. A thaw caused the ice in the drainage ditch to break up. The ice moved downstream and lodged against the piling of the temporary bridge. The ice jam held back the flow of water above the bridge and flooded the land for which the plaintiff claimed damage. This court held that the damaging was a taking for a public use within the meaning of Article I, section 21, of the Constitution. In that case we quoted Douglas County v. Taylor, 50 Neb. 535, 70 N. W. 27, with approval in holding "that it was immaterial what technical name might be given to Taylor's action; for whether his petition stated a cause of action ex delicto or ex contractu, the averments thereof, if true, established the fact that his property had been taken and damaged for public use, and that by virtue of section 21 of the Bill of Rights (Const. art. I, sec. 21) he was entitled to compensation therefor."

The foregoing rule has been adhered to by this court as late as Patrick v. City of Bellevue, 164 Neb. 196, 82 N. W. 2d 274. See, also, Scully v. Central Nebraska Public Power & Irr. Dist., 143 Neb. 184, 9 N. W. 2d 207; Snyder v. Platte Valley Public Power & Irr. Dist., 144 Neb. 308, 13 N. W. 2d 160, 160 A. L. R. 1154. The rule is: One whose property is damaged by the construction of a public improvement by the state or a subdivision thereof, has been damaged for a public use within the meaning of Article I, section 21, of the Constitution. Negligence is not a necessary element to be proved in maintaining an action for such damage.

The defendant county assigns as error the failure of the trial court to instruct the jury on the duty of the county to repair and maintain its roads and bridges, and its right to protect the same from erosion by floods. The trial court did not err in failing to so instruct. Whatever the duty of the county may be in this respect it is liable for any damages it may cause to private property in so doing. The extent of its duty is not material.

The defendants contend that the trial court erred in giving instruction No. 8. The portion of the instruction objected to states: "That the opening in the structure placed in the drainage ditch by the defendants was too small to carry the water and debris that could reasonably be expected to flow in said ditch." In this connection it is common knowledge that floodwaters carry sediment and debris. The tendency of drainage ditches to scour and widen is common knowledge. The tendency of such ditches to slough their banks and to cause brush and trees to slide into the ditches is well known. It follows that those who build structures across or in drainage ditches are charged with a duty to provide for the passage of all waters, ice, and debris which may reasonably be anticipated to flow or be carried through such ditches. The measure of the duty is a rule of reasonableness. Since the case of Omaha & Republican

Valley R. R. v. Brown, 16 Neb. 161, 20 N. W. 202, decided in 1884, the foregoing rule appears to have been the law of this state. In that case we concluded that where there was sufficient evidence tending to prove that the openings between the piers of a railroad bridge were not sufficient to permit the free passage of such quantities of ice and water as might reasonably be expected to occur, the verdict of the jury would be permitted to stand. We fail to see any difference in principle where one fails to reasonably anticipate the flow of ice in a stream during a spring thaw and the carrying of debris in a drainage ditch during heavy run-offs of surface waters. It is only where the flow of water and debris is so great as to amount to an act of God that liability does not attach in such a case as we have here. We find no error in instruction No. 8 given by the trial court.

The defendants contend that instruction No. 10 was prejudicial to their rights. The portion of the instruction that is assigned as error states: "The defendants deny this contention on the part of the plaintiff and affirmatively allege that the damage to the plaintiff's land was caused either by an act of God, as defined elsewhere in these instructions, or was caused by other waters running upon the plaintiff's land which were never in the ditch and for which the defendants were never responsible, or both." It is asserted that the jury was misled by this instruction in that water that once was in the drainage ditch was claimed by defendants to have escaped therefrom and to have crossed the highway and railroad tracks onto plaintiff's land both to the east and to the west of the highway bridge without reaching the steel structure. It is clear that the instruction was intended to refer to the ditch immediately above the structure of which complaint is made. We do not think the jury was misled by this instruction. The contentions of the parties were carefully pointed out to the jury on a large plat of the area. The county's

engineer pointed out where the waters left the ditch and crossed the highway and railroad tracks. In addition thereto, the jury was told in instruction No. 8 that the plaintiff had the burden of proving that the damages sustained were proximately caused by the opening in the structure being too small. Considering the instructions as a whole, and the clarity of the testimony on the issues presented, we do not feel that the jury could have been misled by the language of the instruction. The instruction was not prejudicially erroneous.

The defendants assign as error the giving of instruction No. 12. By this instruction the trial court placed the burden of proof upon the defendants to establish that plaintiff's damages resulted from water from a source other than that claimed by the plaintiff and for which the defendants were in no way responsible.

The burden of proof is on the plaintiff in this case to show that the waters causing the damages for which he claims compensation came out of the drainage ditch onto his lands because of the structure placed in the ditch by the defendants. The trial court properly instructed the jury on this point. The defendants pleaded in their answers that the waters causing plaintiff's damage came onto plaintiff's lands from other sources than the drainage ditch at or near the structure and that the structure in no way affected the waters causing plaintiff's damage. This is a defense that could properly be asserted under a general denial. The plaintiff has the burden of proof to show that the structure caused the damage and the evidence is sufficient to sustain a verdict for the plaintiff in that respect. While the defendants have the burden of going forward with evidence thereafter to show that the waters causing the damages came from an independent source, the burden of proof is not upon them to establish such fact. This evidence merely disputes an issue of fact upon which the plaintiff has the burden of proof. The burden of proof remains with the plaintiff to show that the structure caused the

waters to overflow his lands and caused the damage of which complaint is made. It was prejudicial error for the trial court to instruct otherwise. It seems clear to us that it is incumbent on the plaintiff to show that his damages would not have been suffered if it were not for the structure erected by the defendants. Any instruction which would relieve the plaintiff of this burden and cast it upon the defendants would necessarily impose on the defendants a quantum of proof that rests only with the plaintiff throughout the trial. The burden of proof imposed on the plaintiff in this case to establish the necessary elements of his cause of action does not shift to the defendants merely because they plead facts that could properly be shown under a general denial. It is only the burden of going forward with the evidence that shifts after the plaintiff has made a case sufficient to go to the jury.

The plaintiff relies on City of McCook v McAdams, on second rehearing, 76 Neb. 11, 114 N. W. 596; Snyder v. Farmers Irr. Dist., 157 Neb. 771, 61 N. W. 2d 557, and similar cases. We point out that these cases involved the defense of an act of God. While the language of the McAdams case appears broad enough to lend some force to plaintiff's contention that the burden of proof is on the defendants to show that the offending waters came from a source wholly independent of the structure in the ditch, a careful reading discloses that the language employed therein related to the affirmative defense of an act of God. If it did not so relate itself, it is obiter dictum which does not meet the approval of this court.

We conclude that instruction No. 12 was prejudicially erroneous in that it improperly placed the burden of proof on the defendants to establish that the waters causing plaintiff's damage were from an outside source and wholly unaffected by the structure erected by the defendants in the ditch.

Defendants assign as error the giving of instruction

No. 13 in that it failed to state the evidence showed that two trees lodged in the opening in the structure during the first rain storm. The instruction in this respect stated: "In this case evidence has been introduced tending to show that two trees were lodged in the structure during the storm of June 1, 1958, causing the overflow and damage therefrom." No contention is made that the trial court did not instruct properly as to the legal effect of the lodging of the trees in the opening in the structure. We do not think there is any merit in this assignment or, in any event, that it in any manner prejudiced the rights of the defendants.

Error is assigned to the giving of instruction No. 18, which set out the measure of damages to be applied in determining the damages sustained by plaintiff's cattle in the flood of June 1, 1958. The evidence shows that plaintiff had 140 head of cattle on feed at the time of the flood alleged to have been caused by the structure placed in the drainage ditch by the defendants. Plaintiff testified that 56 head of cattle would have been ready for market and shipped before the June 8, 1958, flood. The evidence does not establish that the second flood was caused by defendant's structure in the drain ditch. The trial court directed, and properly we think, that plaintiff could not recover damages to his cattle, other than the 56 head, for the reason that plaintiff did not segregate the damages resulting from the two floods. As to the 56 head of cattle, the trial court instructed the jury that if it found that the 56 head would have been sold before the date of the second flood, except for the occurrence of the first flood for which the defendants were liable, then the measure of damages to the 56 head of cattle would be the amount of additional expense to which plaintiff was put as a result of both floods in placing the cattle in the condition they were in at the time of the first flood.

The plaintiff testified that the market value of the cattle at the time of the first flood was $26 per hundred-

weight. Their weight was estimated by the plaintiff to be 825 pounds per head. Plaintiff testified that it required 24 days to put the cattle in the same condition as before the first flood and that it cost him 35 cents per head per day to do so. Plaintiff also testified that he sold the 56 head for $26 per hundredweight. This evidence of damage was received in evidence without objection on the part of either of the defendants. No other evidence as to the damage to the cattle appears in the record.

It is the contention of the defendants that the proper measure of damages to these cattle is the difference in the fair and reasonable value of the cattle immediately before and immediately after the flood, and that the instruction given was prejudicially erroneous. The general rule is undoubtedly as stated by the defendants. The case was tried on the theory that the expenses incurred in putting the cattle in the same condition as before the first flood constituted the proper measure of damages. The evidence of the plaintiff was on this theory. The defendants made no objection to the offered evidence and evidently were willing to submit the matter on this basis, which the trial court did. We do not think the defendants are now in position to assert that the instruction of the trial court as to the measure of damages was prejudicially erroneous.

The rule is: Where a certain theory as to the measure of damages is relied upon by the parties to the trial as the proper one, it will be adhered to on appeal whether it is correct or not. Behle v. Loup River Public Power Dist., 138 Neb. 566, 293 N. W. 413; Welch v. Reeves, 142 Neb. 171, 5 N. W. 2d 275; Gillan v. Equitable Life Assurance Society, 143 Neb. 647, 10 N. W. 2d 693, 148 A. L. R. 496. The instruction given is consistent with plaintiff's evidence of damages to which no objection was made by the defendants. The verdict is sustained by evidence. No contention is here made that the verdict is excessive. It is not error for the trial court to

instruct on the measure of damages adopted by the parties to the action, even though it be incorrect.

In view of the result we have reached we do not deem it necessary to discuss other assignments of error which will not in all probability arise on the retrial of the case. The judgment of the district court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

EDWARD A. GERARD ET AL., APPELLANTS, V. GRACE STEINBOCK ET AL., APPELLEES.
101 N. W. 2d 194

Filed February 26, 1960. No. 34711.

1. **Pleading.** A demurrer ore tenus is recognized by this court as permissible practice, and if the pleading to which it is addressed is totally defective it is error to admit any evidence under such pleading.
2. ———. The failure of a petition to state a cause of action may be challenged at any time during the pendency of the litigation.
3. ———. A general demurrer admits all allegations of fact in the pleading to which it is addressed, which are issuable, relevant, material, and well pleaded; but does not admit the pleader's conclusions of law or fact.

APPEAL from the district court for Fillmore County: STANLEY BARTOS, JUDGE. *Affirmed.*

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

John E. Dougherty, for appellees.

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

CHAPPELL, J.

Plaintiff, Edward A. Gerard, and five other named plaintiffs, two of whom were minors represented by their mother and next friend, filed a petition in the

district court for Fillmore County against defendants, Grace Steinbock, the daughter and sole and only heir of decedent, Frank J. Gerard, and Carl E. Schneider, the administrator of decedent's estate, seeking specific performance of a purported oral agreement between plaintiffs and decedent, which allegedly provided that upon his death plaintiffs would receive all of his property. In that connection, it is admitted in plaintiffs' petition that after appointment of Carl E. Schneider as administrator, a decree was rendered by the county court which adjudged that Grace Steinbock was the surviving daughter and the sole and only heir of decedent, which judgment was affirmed upon appeal to the district court. Also, plaintiffs' brief admits that on appeal therefrom to this court, the appeal was dismissed and that the judgment establishing that defendant, Grace Steinbock, was a daughter of decedent and his sole and only heir, has become final.

Defendant, Carl E. Schneider, as administrator of the estate of Frank J. Gerard, deceased, filed an answer, denying generally the allegations of plaintiffs' petition. Defendant Grace Steinbock filed an amended answer denying generally; alleging that the judgment determining that Grace Steinbock was the daughter and the sole and only heir of decedent was res judicata and binding on plaintiffs, each and all of whom participated in said cause; and that they were estopped to claim otherwise. Plaintiffs' reply to said answers was a general denial.

When the cause came on for trial, and after plaintiffs' first witness was sworn to testify, defendants demurred ore tenus to the introduction of any evidence upon the ground that plaintiffs' petition failed to allege a cause of action against defendants or either of them, and the trial court sustained such demurrer. Thereupon, plaintiffs refused to plead further and the court dismissed plaintiffs' action at costs of plaintiffs. Therefrom, plaintiffs appealed to this court, assigning that the

judgment was contrary to law and that the trial court erred in sustaining defendants' demurrer ore tenus and dismissing plaintiffs' action. Thus, the primary question presented here is whether or not plaintiffs' petition stated a cause of action against defendants or either of them. We conclude that it did not.

"A demurrer ore tenus is recognized by this court as permissible practice, and if the pleading to which it is addressed is totally defective it is error to admit any evidence under such pleading." State ex rel. Spillman v. Commercial State Bank, 143 Neb. 490, 10 N. W. 2d 268.

"The failure of a petition to state a cause of action may be challenged at any time during the pendency of the litigation." Federal Ins. Co. v. International Harvester Co., 164 Neb. 698, 83 N. W. 2d 382.

"A general demurrer admits all allegations of fact in the pleading to which it is addressed, which are issuable, relevant, material, and well pleaded; but does not admit the pleader's conclusions of law or fact." Freeman v. Elder, 158 Neb. 364, 63 N. W. 2d 327.

In 81 C. J. S., Specific Performance, § 128, p. 686, citing numerous authorities, it is said: "The plaintiff's pleading must show what the contract is which is to be performed, and must state accurately, clearly, and precisely all its essential terms; the bill or complaint must not show a contract which appears vague, uncertain, or ambiguous. * * * The terms of the contract must be set forth with such particularity that specific performance may be decreed."

In O'Neal v. First Trust Co., 160 Neb. 469, 70 N. W. 2d 466, we reaffirmed the nature of and the law applicable to and controlling in the trial of cases comparable with that at bar. Therein, we held that: "Where one is claiming the estate of a deceased person under an alleged oral contract, the evidence of such contract and the terms of it must be clear, satisfactory, and unequivocal.

"Such contracts are on their face void as within the

statute of frauds, because not in writing, and, even though proved by clear and satisfactory evidence, they are not enforceable unless there has been such performance as the law requires.

"The thing done, constituting performance, must be such as is referable solely to the contract sought to be enforced, and not such as might be referable to some other and different contract—something that the claimant would not have done unless on account of the agreement and with the direct view to its performance —so that nonperformance by the other party would amount to fraud upon him.

"The burden in the light of these rules has devolved upon the plaintiffs to prove (1) an oral contract the terms of which are clear, satisfactory, and unequivocal, and (2) that his acts constituting performance were such as were referable solely to the contract sought to be enforced, and not such as might have been referable to some other or different contract.

"Each case is to be determined from the facts, circumstances, and conditions as presented therein."

In the light of such rules, we have examined plaintiffs' petition. It is of great length and we can only summarize its material allegations. Plaintiffs herein were Edward A. Gerard, a brother of decedent, and Edward A. Gerard's five named children who were nieces and nephews of decedent. After alleging formal matters relating to the death of decedent and the character of his estate, plaintiffs alleged that they were always close to decedent, who worked in Guam and died there on July 4, 1956, when he was 58 years of age; that decedent visited and stayed with plaintiffs on several unspecified occasions when he returned home temporarily during his lifetime; that he had great love and affection for all of plaintiffs; that he knew and realized that plaintiffs were a large family and needed financial assistance; and that he stated on several occasions, the exact times unknown, that plaintiffs would

receive all of his property at the time of his death if they would look after him in his ill health and old age should such occur after his retirement. However, we find no allegations pleading such a definite and certain contract to will, give, or devise all of decedent's property to plaintiffs upon his death, as the law requires. Rather, the allegations with regard thereto are so vague, equivocal, uncertain, and ambiguous that the remedy of specific performance cannot be based thereon. We find only general allegations of what decedent said he intended to do with his estate upon his death, because of his love and affection for and his knowledge of the financial needs of the plaintiffs. The substance of plaintiffs' allegations is simply that upon several occasions, the exact times unknown, decedent told plaintiffs that when he retired, which never occurred before his death, he would be alone and might need someone to look after him in ill health and old age, and if plaintiffs would so care for him, they would receive all of his property on the date of his death, and he would fix it so that others would share no part of it, but after diligent investigation and inquiry, plaintiffs had been unable to find any will doing so.

The specific allegations of performance were in substance that decedent visited and stayed with plaintiffs and they made him comfortable on several unspecified occasions when he returned home temporarily from Guam; that when decedent later became ill in Guam, plaintiff, Edward A. Gerard, carried on a correspondence with the hospital and decedent's employer, inquiring about decedent's health and physical condition; that said plaintiff made arrangements after decedent's death for the return of decedent's body from Guam and its burial at Geneva, Nebraska; and that he then handled all necessary business in connection with decedent and fully performed said contract until an administrator was appointed for decedent's estate, who then took possession of the assets thereof. Such alleged performance

would not be performance of or referable solely to plaintiffs' purported contract, but was simply something that plaintiffs, as near relatives, would generally and naturally have done without any contract. Plaintiffs, relying upon Peters v. Wilks, 151 Neb. 861, 39 N. W. 2d 793, argued that defendants, having filed only a general denial, could not rely upon nonperformance, and they thereby pleaded no such defense, which required the trial court to determine the issues by a trial on the merits. In doing so, plaintiffs assumed not only that they had sufficiently pleaded an oral contract, which they did not do, but also that plaintiffs had pleaded performance in only general terms as distinguished from specific, which is not the fact. In that connection, Peters v. Wilks, *supra,* was distinguished in O'Neal v. First Trust Co., *supra,* which is applicable and controlling here. Plaintiffs' contention has no merit.

We conclude that plaintiffs' petition did not state a cause of action for specific performance, and that the judgment of the trial court should be and hereby is affirmed. All costs are taxed to plaintiffs.

AFFIRMED.

STANLEY HERBRICK, APPELLEE, V. SAMARDICK & COMPANY, A PARTNERSHIP, ET AL., APPELLANTS.
101 N. W. 2d 488

Filed March 4, 1960. No. 34659.

1. **Trial.** A motion for a directed 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, and such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence.
2. **False Imprisonment.** False imprisonment consists in the unlawful restraint against his will of an individual's personal liberty.

3. ———. Any intentional conduct chargeable to defendant, that results in placing of a person in a position where he cannot exercise his will in going where he may lawfully go, may constitute false imprisonment.
4. **False Imprisonment: Trial.** Where there is a conflict of testimony in an action for false imprisonment, credibility of witnesses and weight of evidence are questions for the jury.
5. **Trial.** In an action where there is any evidence which will support a finding for a party having the burden of proof the trial court cannot disregard it and direct a verdict against him.
6. **False Imprisonment: Damages.** The law does not prescribe a definite rule for the ascertainment of the exact amount recoverable for false imprisonment.
7. **Damages: Trial.** Where a verdict 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.
8. ———: ———. Where it is clear that a verdict is excessive but there is no method by which the court can rationally ascertain the extent of the excess, a remittitur cannot be properly required since a remittitur would amount only to a substitution of the judgment of the court for that of the jury.

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

Gross, Welch, Vinardi & Kauffman, for appellants.

Sheldon J. Harris, for appellee.

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

MESSMORE, J.

Stanley Herbrick brought this action in the district court for Douglas County as plaintiff against Samardick & Company, a partnership, and Lewis & Smith Drug Co., Inc., a corporation, for damages for false arrest and imprisonment. The case was tried to a jury resulting in a verdict for the plaintiff in the amount of $1,250, and judgment was entered thereon. Motions to set aside the verdict and judgment, and for judgment in accordance with the motion for directed verdict or, in

the alternative, motions for new trial were overruled. The defendants appealed.

The plaintiff's petition alleged in substance that while in the defendant Lewis & Smith Drug Company store and not finding the items which he desired to purchase, the plaintiff left the store and was detained by a woman who was a store detective employed by the defendant Samardick & Company for the purpose of watching for shoplifters, acting within the scope of her employment; that the plaintiff was taken by the detective to the office of Lewis & Smith Drug Company and then and there accused of stealing pills from the drug store; that the plaintiff was detained by employees of the drug store and the detective for approximately 1½ hours during which time the plaintiff denied taking said pills; that said employees and detective would not release the plaintiff, and threatened him with imprisonment unless he would sign a release; that after said period of time the plaintiff was allowed to leave the store; and that said arrest and imprisonment by the defendants was without cause and as a result thereof plaintiff suffered shame, humiliation, disgrace, and mental anguish by reason of which he suffered damages. The prayer of the petition was for damages against the defendants.

The answer of the defendants to the plaintiff's petition, insofar as necessary to consider, denied each and every allegation contained in said petition; specifically denied that the plaintiff was falsely arrested and detained or deprived of his liberty; and prayed that the plaintiff's petition be dismissed.

The defendants set forth seven assignments of error. We will discuss the assignments of error we deem necessary to a determination of this appeal.

The first assignment of error is that the trial court erred in overruling the motions on behalf of defendants and each of them for a directed verdict or, in the alternative, to dismiss the action as against the defendants.

" 'A motion for a directed verdict must for the pur-

pose 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.'" Larsen v. Omaha Transit Co., 165 Neb. 530, 86 N. W. 2d 564.

False imprisonment consists in the unlawful restraint against his will of an individual's personal liberty. See Robertson v. Safe Way Stores, Inc., 130 Neb. 82, 264 N. W. 153.

In Dillon v. Sears-Roebuck Co., 126 Neb. 357, 253 N. W. 331, this court said: "The essential thing to constitute an imprisonment is restraint of the person, which may be by threats as well as by actual force, and if the words and conduct are such as to induce a reasonable apprehension or fear of force, of disaster, or disgrace, a person may be as effectually restrained and deprived of liberty as by prison walls.

"'Any intentional conduct chargeable to defendant, that results in placing of a person in a position where he cannot exercise his will in going where he may lawfully go, may constitute false imprisonment.' 25 C. J. 452. * * *

"'In ordinary practice, words are sufficient to constitute an imprisonment, if they impose a restraint upon the person, and the party is accordingly restrained; for he is not obliged to incur the risk of personal violence and insult by resisting until actual violence be used.' Martin v. Houck, 141 N. Car. 317."

The record discloses that the Lewis & Smith Drug Company, known as Smith Drugs, is located at 314-316 South Fifteenth Street in Omaha, Nebraska.

The plaintiff testified that he left home before noon on December 23, 1955, took a bus, and arrived at the Smith Drug Store about noon; that he was familiar with the store, which was a self-service type of store;

that before he left home he had been working on the property he lived in; that he had a coal stoker which he was firing with slack which is coke dust and coal dust mixed with stoker coal; that he did not clean up before going down town because he was going back to work; and that he had on blue denim work pants, a tight sweater under a light tan coat, a hat, and a muffler around his neck to conceal his grimy work shirt. He further testified that his reason for going to the Smith Drug Store was to purchase some caroid and charcoal tablets and some groceries; that he wanted to buy a half-size bottle of charcoal tablets; that he talked to a pharmacist whom he called Vince and whose name was Vincent Ochs; that Vince did not have what the plaintiff wanted in the prescription department and he pointed to a large counter to one side and in front of the prescription counter; that the plaintiff went to the counter and found a box containing a bottle of the pills; that he discovered it was a large bottle of pills which he did not want; that he stood and looked at the box for a while; that he looked up and saw a lady staring at him; and that the lady turned and walked away, about 15 to 20 feet. In the meantime the plaintiff put the bottle down on the counter because he did not want it. He had opened the box, did not know whether or not he closed it, and doubted that he put the box back where he had picked it up. The plaintiff further testified that he had to purchase some bread and canned goods and make a call at the Gas Company. He walked to the grocery department but concluded there was no use in buying bulky groceries and carrying them to the Gas Company office and back to the drug store where he would take the bus to go home. He walked out the front door, which faces east, and proceeded south. When he had walked about 20 or 30 feet from the door and was out on the public sidewalk, he was stopped by the lady he had seen in the store. She spoke in a loud tone of voice and told him to come back into the store. He

asked her what for, and she told him he was under arrest for theft. She did not identify herself at that time. He went back into the store accompanied by the lady. They went through the front door to the rear of the store and up some stairs to the office. The lady had her hand on his overcoat, held onto him, told him where to go, and steered him along. She later identified herself as a policewoman. As the plaintiff walked into the office, he was the first one to speak, and he said: "I don't have anything of yours, and before you go too far with it, look it over, you are going to be embarrassed." He then took off his coat, turned the pockets inside out to show that he did not have anything, and said: "I haven't got a thing." The plaintiff further testified that a man he called Peters came to the office. The man the plaintiff called Peters was in fact an employee of the store by the name of Knight. The plaintiff testified that Knight stood in the doorway with his arms in such a position as to block the entrance, and did not say anything. The lady went out and came back with a large bottle of pills, which she placed on the desk. Vince Ochs came into the office for a little while and then left. Later Lee Smith arrived. A man the plaintiff did not know, but whose name was Martin, was in the office when the plaintiff and the lady arrived. Mr. Martin asked the plaintiff to sign a release, and said: "You will either sign a release to us or you will go to jail." On other occasions he was asked to sign the release, but declined to do so. He was told that if he did not sign the release he would be prosecuted. The store detective accused him of stealing a bottle of pills, and later of taking a portion of the pills out of the bottle. The plaintiff further testified that he attempted to use the telephone and Knight "cuffed" him on the head with the telephone; and that Smith assured him that the lady detective was retained by the company through Samardick & Company and had full and complete authority and his support, and anything she did was proper.

The plaintiff further testified that he was in the office about 1½ hours and was finally permitted to use the telephone and call his attorney. After talking to his attorney, the plaintiff became angry and finally asked to be taken to the police station. The detective told him that they did not handle it that way. Martin told the plaintiff that the substance of the release was that there was somewhere between three and five cents worth of tablets taken and if he would sign the release they would let him go. The plaintiff further testified that he made no attempt to leave during the session; that he told them to go ahead and make the arrest, to call an officer; that he put his name and address on a piece of paper and said: "Now, I am leaving; if you aren't going to arrest me, I am leaving, I can't stay here all day listening to this, and I am going to be here and if you want me, you come out and get me * * * I am going to be there waiting for you"; and that he left the premises. Mr. Knight left the office approximately 20 minutes prior to that time. The plaintiff denied taking any pills from the bottle.

The cross-examination of the plaintiff disclosed that the plaintiff did not remember whether he arrived at the drug store at noon or at 1:30 p.m.; in addition that his face and hands were dirty; and that dark markings could come from charcoal tablets unless they were taken with water and he admitted that he had taken no water.

Isabella Shover, a witness for the defendants, testified that on December 23, 1955, she was employed by Samardick & Company as a store detective stationed at Smith Drug Store and had been working there since December 1, 1955; that her duties were to watch for shoplifters; that she first noticed the plaintiff directly in front of the drug counter in the drug department which is at the back of the store; that she observed the plaintiff take a box from the counter, step between the counters, take the cap off the bottle, take the

cotton out and pour some pills into his hand, recap the bottle, and put it back in the box; that he then stepped over to the counter where he had picked up the box, noticed this witness, and waited around for her to leave; and that he finally dropped the box on the counter and went out of the store. She went out onto the street and asked him to come back into the store. She did not tell him she was a policewoman, nor did she touch his person. The plaintiff turned around and came back into the store through the front door, went to the rear of the store and upstairs to the office, and sat down in Mr. Smith's chair. She further testified that Mr. Martin was the only one in the office at the time. Mr. Martin looked up when the plaintiff came in. She told Mr. Martin that the plaintiff had opened a bottle of pills, dumped some of them into his hand, and put the box back on the counter. Mr. Martin asked the plaintiff if that was true and the plaintiff said yes, that he just bought a bottle of these a couple of days ago and he needed a few so he just took what he needed. This witness further testified that the incident in the office lasted from 30 to 45 minutes; that the plaintiff, Mr. Martin, and Mr. Knight were there, as well as herself; that while she was there the plaintiff called his attorney; that Mr. Knight did not "cuff" the plaintiff with the telephone; that the plaintiff was sitting at the desk when he used the telephone which was to the right side of anyone sitting at the desk; that Mr. Martin asked the plaintiff to sign a release to get the matter over with; that the plaintiff said he would not sign anything; and that the plaintiff had called his lawyer to find out what to do. Later the plaintiff put his name on a piece of paper and walked out. No one tried to stop him.

On cross-examination this witness testified that at the time she did not know how many pills the plaintiff took out of the bottle, but she saw him pouring the pills into his hand, and he kept them in his hand until later when he was in the office and then he ate them.

Subsequently she determined that the plaintiff had taken seven pills in view of the fact that originally there were 150 pills in the bottle and when they were counted there were only 143 pills left in the bottle. She further testified that she did not tell the plaintiff that he was under arrest; that there was no "rumpus"; that no one said anything at all at that time; that the plaintiff went into Mr. Smith's office and sat down; and that she was in the office most of the time until the plaintiff left and during that time the plaintiff did most of the talking.

On redirect examination this witness testified that she noticed the plaintiff's teeth were all black and the corners of his mouth and lips were black. When the plaintiff's attention was called to that fact he said he had been eating licorice and that was the reason his lips were black.

Stewart Knight testified that he was employed by Smith Drug Company as a receiving clerk for the drug department; that on December 23, 1955, he went to the office 2 or 3 minutes after the plaintiff arrived there and stayed until about 10 minutes after Mr. Smith arrived; that in all he was there probably 25 or 30 minutes; that after he left the office he did not return to the office; that when he left the office the plaintiff, Mr. Martin, Mrs. Shover, and Mr. Smith were there; that he remembered the plaintiff wanted to call and talk to his attorney; and that he also noticed that every once in a while the plaintiff would lick his lips, and his mouth kept getting blacker. This witness asked the plaintiff what he had been eating, and the plaintiff replied that he was eating licorice. That was the extent of his conversation with the plaintiff. This witness denied that he had "cuffed" the plaintiff with the telephone or that he had laid hands on the plaintiff. He further testified that he did stand in the doorway of the office 4 or 5 feet from the desk. On cross-examination he testified that he moved out of the doorway

to let Mr. Smith enter and then moved back into the doorway; and that he was 6 feet tall and weighed 225 pounds.

Vincent Ochs testified that he was a registered pharmacist employed by the Smith Drug Company; that he remembered being in the store on December 23, 1955; that the plaintiff came to him and asked for a bottle of caroid and charcoal tablets; and that they had only one bottle on hand which he showed to the plaintiff. The plaintiff said he did not want such a large bottle and asked this witness if he could sell him a few pills, but was told that they could not break the bottle for that purpose. This witness then left the plaintiff, went back to work behind the counter, and did not see the plaintiff go to the office with Mrs. Shover.

Frank Martin testified that he was vice president of the Smith Drug Company; that on December 23, 1955, he was in Mr. Smith's private office when Mrs. Shover and the plaintiff entered the office and the plaintiff sat in Mr. Smith's chair; that he and Mr. Smith had desks back to back and Mr. Smith sat facing him; and that Mr. Smith had a telephone on the right side of his desk against the wall. As Mrs. Shover came into the office, the plaintiff was laughing and this witness stated that he guessed he laughed also as it was such a trivial matter. The plaintiff said: "She thinks I took a whole bottle, * * * I had a bottle at home and I wanted a few, so I just took a few out and ate them." This witness further testified that Mrs. Shover stated clearly to him that the plaintiff had not taken the whole bottle. The plaintiff stated it was "silly" and that if Mr. Smith were present he would just laugh about it. This witness agreed that was probably true and said: "It is silly." This witness told the plaintiff he would make out a statement that would contain the exact facts, that is, that the plaintiff had taken only a few pills, and if the plaintiff would sign the statement there would be no further conditions. The plaintiff refused to sign the

statement. He further testified that the plaintiff's lips were getting black but there was not much said to the plaintiff about this as the plaintiff freely admitted that he had eaten the pills; and that later Mr. Smith said something about the plaintiff's lips getting black and the plaintiff said he had been eating licorice. This witness said the plaintiff was in the office probably not over half an hour. On cross-examination this witness testified that neither he nor anyone asked the plaintiff to pay for the pills; that no formal charges were made against the plaintiff; and that the purpose of obtaining a release of the type he wanted the plaintiff to sign was so that if a similar occurrence would happen they might want to prosecute.

W. Lee Smith testified that he was president and treasurer of the Smith Drug Company; that when he arrived at his office on December 23, 1955, he found the plaintiff and others in his office; that he knew the plaintiff as a customer; that the plaintiff was sitting in the chair at this witness' desk; and that Mr. Martin, Mrs. Shover, and Mr. Knight were also in the office. This witness testified that he remained in the office not over 15 minutes while the plaintiff was there. This witness further testified that as he walked into the office the plaintiff arose from the chair and said: "They claim I have been shoplifting. I have nothing." This witness noticed that the plaintiff was black around his mouth. Mr. Martin remarked that the plaintiff had taken charcoal pills out of a bottle which was on a counter in the store and had eaten them. This witness sat down on the sofa, and the plaintiff picked up the telephone and started dialing his attorney. This witness remarked that he did not like to have things like that happen, and explained that there would be a shortage in the bottle and if another customer bought it, it would be injurious to the reputation of the store and the manufacturer. After Mr. Smith talked to the plaintiff about the seriousness of this matter, Mr. Martin remarked that he

concluded that it was too silly to continue any discussion, and that the plaintiff had admitted the act when he first came into the office. After the discussion, the plaintiff wrote his name and address on a piece of paper and said he was going to leave. He then left, and no one tried to detain or stop him. After the plaintiff left the store Mrs. Shover handed the bottle of pills to Mr. Smith and he took it to the prescription counter where the pills were counted. There were 143 pills in the bottle when there should have been 150. This witness on cross-examination testified that while he was in the office no one offered to arrest the plaintiff or take him to the police station although the plaintiff requested that he be taken there, nor during the time that this witness was in the office did anyone ask the plaintiff to sign the release; and that someone else could have taken the pills out of the bottle where it was on the display counter. He would not state as a fact that there were 150 pills in the bottle.

"Where there is a conflict of testimony in an action for false imprisonment, credibility of witnesses and weight of evidence are questions for the jury." Doescher v. Robinson, 132 Neb. 299, 271 N. W. 784.

"In an action where there is any evidence which will support a finding for a party having the burden of proof the trial court cannot disregard it and direct a verdict against him." Haight v. Nelson, 157 Neb. 341, 59 N. W. 2d 576, 42 A. L. R. 2d 1. See, also, Larsen v. Omaha Transit Co., *supra*.

In the light of the evidence and the above-cited authorities, we conclude that the evidence was sufficient to submit the case to the jury, and the trial court did not commit prejudicial error in overruling the defendants' motions for directed verdict or in the alternative motions to dismiss the plaintiff's cause of action.

This brings us to the defendants' assignment of error that the trial court erred in refusing to grant a new

trial on the ground that the damages were excessive and not sustained by the evidence.

"The law does not prescribe a definite rule for the ascertainment of the exact amount recoverable for false imprisonment." Doescher v. Robinson, *supra.*

It is difficult to determine just what the damages should be for false imprisonment of this sort. The plaintiff may recover such a sum as will fairly and reasonably compensate him for the shame, humiliation, disgrace, and mental anguish the evidence shows that he suffered by virtue of the false imprisonment. These are matters which cannot be measured with accuracy. See, Doescher v. Robinson, *supra;* Dillon v. Sears-Roebuck Co., *supra.*

The evidence relating to the damages for which the plaintiff claims he is entitled to recover may be summarized as follows: Mr. Knight had seen the plaintiff in the store on quite a few occasions previous to the incident, and knew the plaintiff only by his first name, Stanley. The plaintiff would go into the store and pass the time of day with the employees, including Mr. Knight whom the plaintiff referred to as Mr. Peters. Since the time of the incident, Mr. Knight no longer saw the plaintiff when they met on the street, and Mr. Smith did not speak to the plaintiff. The plaintiff testified that the detective steered him along the store to the office when the store was full of customers, more than at any other time that the plaintiff had been there; that all of the sales people he knew were on duty at that time; and that he felt "pretty cheap" when he was brought back into the store and went down the aisle with the detective. The plaintiff further testified that he had been connected with a rackets committee relative to the drug racket and had been working with and conveying his information to the two United States Senators from Nebraska; and that he had occasion to worry about the incident becoming known to his discredit when he attended a conference in Washington 2 weeks prior

to the time of trial. The plaintiff also testified that while he was in the office of the Smith Drug Company, the only exit was blocked by Mr. Knight who was 6 feet tall and weighed 225 pounds. Mr. Knight was an employee of the drug company, and he stood with his elbows in the doorjamb and did not say a word. The plaintiff further testified that during the time he was in the office of the Smith Drug Company he was "cuffed" on the head by Mr. Knight when he endeavored to use the telephone to call his attorney; and that during the period of time he was in the drug company office he was subjected to threats by Mr. Martin, Mr. Smith, and Mrs. Shover, the detective, of going to jail and not being turned loose until he signed a release.

As we view the damages awarded by the jury and the record relating to the damages the plaintiff claims he sustained, we conclude that the verdict was entirely disproportionate to any damages proved by the plaintiff. The plaintiff did not offer any evidence that anyone other than he and Mrs. Shover, the detective, knew what was occurring. The evidence fails to show that there was any loss of friends to the plaintiff by virtue of the incident, or any economic loss to him. For the most part, the evidence adduced by the plaintiff relative to damages is speculative and conjectural.

It is a well-established principle of law that where a verdict is excessive and that it appears to have been returned under the influence of passion and prejudice rather than upon the facts or that the jury misapplied the law, it is the duty of this court to set the verdict aside and grant a new trial. Peacock v. J. L. Brandeis & Sons, 157 Neb. 514, 60 N. W. 2d 643.

"Where it is clear that a verdict is excessive but there is no method by which the court can rationally ascertain the extent of the excess, a remittitur cannot be properly required since a remittitur would amount only to a substitution of the judgment of the court for that of the jury." Peacock v. J. L. Brandeis & Sons, *supra*.

We conclude that the verdict was excessive as contended for by the defendants.

Other assignments of error are not necessary to determine.

For the reasons given in this opinion, the judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

CARTER, J., dissenting.

In my opinion the judgment in this case should be reversed and the cause dismissed. I find no fault with the technical definitions of false arrest and false imprisonment set forth in the majority opinion. This dissent is directed at the failure of the majority to give consideration to the right of a storekeeper to protect his property and to reasonably detain a shoplifter or petty thief for the purpose of investigation. I submit that a detention to be unlawful must be unreasonable as to time and manner. The following text and case authorities sustain this position:

"Ordinarily, also, the owner of property, in the exercise of his inherent right to protect the same, is justified in restraining another who seeks to interfere with or injure it where the restraint or detention is reasonable in time and manner. In such cases, probable cause is a defense, even though the injury which is about to be inflicted constitutes only a misdemeanor, for it is the existence of reasonable grounds to suppose that one's person or property is in danger which gives rise to the right of protection." 22 Am. Jur., False Imprisonment, § 78, p. 408.

"Generally speaking, the owner may restrain one seeking to interfere with his property or to injure it without becoming liable for false imprisonment." 35 C. J. S., False Imprisonment, § 14, p. 515.

The most cited case on this subject appears to be Collyer v. S. H. Kress & Co., 5 Cal. 2d 175, 54 P. 2d 20. The facts are almost identical with the present case. The store detective, a Mrs. Croswell, and her assistant

saw the plaintiff pilfer certain articles from a display counter. He was intercepted as he was leaving the store and escorted back through the store to a room on the second floor for the purpose of investigation. He was accused of pilfering the articles which he denied, claiming that he had paid for them. As here, he refused to sign a statement. The police were called and he was placed under arrest. His cause of action for false imprisonment was predicated on his detention from the time he was accosted near the store entrance to the time he was taken into custody by the police. In holding the detention not to have been unlawful as a matter of law, the court said: "* * * where a person has reasonable grounds to believe that another is stealing his property, as distinguished from those where the offense has been completed, that he is justified in detaining the suspect for a reasonable length of time for the purpose of investigation in a reasonable manner * * * must necessarily proceed upon the theory that probable cause is a defense. And this is the law because the right to protect one's property from injury has intervened. In an effort to harmonize the individual right to liberty with a reasonable protection to the person or property of the defendant, it should be said in such a charge of false imprisonment, where a defendant had probable cause to believe that the plaintiff was about to injure defendant in his person or property, even though such injury would constitute but a misdemeanor, that probable cause is a defense provided, of course, that the detention was reasonable. * * * What is probable cause, as has been often announced, is not a question of fact for the jury, but one of law for the court, to be decided in accordance with the circumstances at the time of the detention, unhampered by the outcome of the charge against the plaintiff of the public offense or by the conclusions of the trial court. * * * So determined, it appears from the record in this case that the defendants were not only justified in detaining plaintiff, but also,

under the evidence, would have been justified in arresting plaintiff under the authority of subdivision one of section 837 of the Penal Code." Other cases supporting this view are: Swafford v. Vermillion (Okl.), 261 P. 2d 187; Banks v. Food Town, Inc. (La. App.), 98 So. 2d 719; Alterauge v. Los Angeles Turf Club, 97 Cal. App. 2d 735, 218 P. 2d 802; S. H. Kress & Co. v. Bradshaw, 186 Okl. 588, 99 P. 2d 508; Atchison, Topeka & Santa Fe Ry. Co. v. Hinsdell, 76 Kan. 74, 90 P. 800, 12 L. R. A. N. S. 94; Shinglemeyer v. Wright, 124 Mich. 230, 82 N. W. 887, 50 L. R. A. 129; Sweeney v. F. W. Woolworth Co., 247 Mass. 277, 142 N. E. 50, 31 A. L. R. 311; Jacques v. Childs Dining Hall Co., 244 Mass. 438, 138 N. E. 843, 26 A. L. R. 1329; Fenn v. Kroger Grocery & Baking Co. (Mo.), 209 S. W. 885; Foulke v. New York Consolidated R. R. Co., 228 N. Y. 269, 127 N. E. 237, 9 A. L. R. 1384.

Under the foregoing authorities, and a consideration of all the evidence and circumstances, I submit that the detention of the plaintiff was reasonable as to time and manner and, consequently, not unlawful. It follows that plaintiff failed to make a case and that defendants' motion for a directed verdict should have been sustained.

The effect of the majority opinion is to permit a shoplifter or petty thief to maintain an action for false arrest or false imprisonment irrespective of the rights of the owner of the property and the reasonableness of the detention. It permits such a plaintiff to go to the jury on the self-serving conclusions of the plaintiff that he was falsely arrested or falsely imprisoned, without a consideration of all the facts and circumstances shown by the record and the intervening rights of the store owner to protect his property. It leaves the store owner in the position where he subjects himself to an action for false arrest or false imprisonment if he undertakes to protect his property by detaining the shoplifter, however reasonable the detention or however great the

probable cause shown. In my judgment this is not and ought not to be the law.

The defendants pleaded in their answer that they had reasonable grounds to justify themselves in detaining the plaintiff to investigate the wrongful taking of the company's property, and that the facts and circumstances constituted probable cause for the investigation. The trial court did not submit this defense to the jury. The defendants assigned this as error. The majority opinion makes no reference to this assignment of error. I submit that the defendants are entitled to have this question answered, even though a retrial of the case is awarded. This court has consistently held that it is the duty of the trial court, without request, to properly instruct the jury upon all material issues presented by the pleadings and the evidence, including affirmative defenses, and that a failure to so do constitutes prejudicial error. Owen, Admr. v. Moore, 166 Neb. 226, 88 N. W. 2d 759. I submit that the trial court erroneously failed to submit defendants' theory of the case to the jury.

The trial court, by its instruction No. 5, instructed the jury that any arrest or detention of plaintiff's person without his consent and against his will for any length of time constituted the elements to be proved to permit the recovery of a judgment. The jury was not told that the arrest or detention had to be wrongful or unlawful. This was clearly error prejudicial to the rights of the defendants. Under this instruction the plaintiff is permitted to recover even if the arrest and detention were lawful. This is plain error and we so held in Barton v. Wilson, 168 Neb. 480, 96 N. W. 2d 270, wherein we said: "The instructions do not define either positively or negatively, in the light of the evidence adduced on the trial, what would amount to false arrest or false imprisonment. From the instructions given the jury could not comprehensively determine the paramount issue in this case, that is, whether or not plaintiff was unlawfully arrested

and detained by the defendants." The giving of instruction No. 5 was assigned as error and not considered in the majority opinion.

For the reasons herein stated I respectfully but firmly insist that the majority opinion does not properly dispose of the appeal.

CHAPPELL, J., concurs in this dissent.

IN RE APPLICATION OF FERGUSON TRUCKING CO., INC. FERGUSON TRUCKING CO., INC., APPELLANT, V. NEBRASKA STATE RAILWAY COMMISSION, APPELLEE.
101 N. W. 2d 444

Filed March 4, 1960. No. 34709.

1. **Public Service Commissions: Motor Carriers.** By the terms of section 75-238, R. R. S. 1943, permits and certificates of public convenience and necessity issued to common carriers by motor vehicles shall remain in effect until terminated by the Nebraska State Railway Commission.
2. ———: ———. A permit or certificate of public convenience and necessity may be revoked, in the discretion of the Nebraska State Railway Commission, upon the application of a holder thereof.
3. ———: ———. On complaint or on the initiative of the Nebraska State Railway Commission, a permit or certificate of public convenience and necessity may be suspended, changed, or revoked in whole or in part, after notice and hearing, for willful failure to comply with any of the provisions of sections 75-222 to 75-250, R. R. S. 1943, or with any lawful order, rule, or regulation of the commission promulgated thereunder, or with any term, condition, or limitation of such permit or certificate.
4. ———: ———. An order of revocation of a permit or certificate of public convenience and necessity by the Nebraska State Railway Commission without compliance with the provisions of section 75-238, R. R. S. 1943, as to notice and hearing is not effective as a revocation.
5. ———: ———. Sections 75-238 and 75-238.01, R. R. S. 1943, contain a sufficient grant of authority to the holder of a permit or certificate of public convenience and necessity to seek, by complaint or request, suspension of the permit or certificate

or operation thereunder, and to require the Nebraska State Railway Commission to give notice and grant a hearing thereon.

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

Nelson, Harding & Acklie and *Ronald D. Lahners,* for appellant.

Clarence S. Beck, Attorney General, and *Homer G. Hamilton,* for appellee.

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

YEAGER, J.

This is an appeal by Ferguson Trucking Co., Inc., appellant, from an order of the Nebraska State Railway Commission, which will be hereinafter referred to as the commission, appellee, wherein the commission denied an application of the appellant for suspension of its authority to operate as a common carrier of property by motor vehicle in Nebraska intrastate commerce, and from an order denying a rehearing on the application.

This does not conform to the definition of issues made by the appellant in its brief, but in the light of the record before this court, as will be pointed out herein, this is the only real issue which has come here for review. The review here must be made on the transcript of the proceedings before the commission since there is no bill of exceptions.

At the commencement of the proceedings involved here the appellant was the holder of a valid certificate of public convenience and necessity as an intrastate motor carrier. On April 14, 1959, the commission issued an order to the appellant directing it to file a certificate or certificates of insurance on or before May 14, 1959. This was based upon a declaration of the commission that the appellant was without insurance sufficient to permit it to retain its authority to operate as a carrier. In addition to the order directing the appel-

lant to file a certificate or certificates of insurance the commission ordered that for failure to secure insurance by May 14, 1959, the appellant would be required without further order to cease and desist from further operation effective May 15, 1959, "unless said respondent motor carrier appears before an Examiner * * * on or before May 14, 1959, * * * and shows cause, if any there be, why said operating authority should not be revoked * * *."

It is observable that in this connection the record fails to contain a complaint of violation, a date for hearing before the commission, a hearing, or anything evidentiary on which to base the order. The total obligation directed was that the appellant should appear before an examiner on or before May 14, 1959, and show cause.

The order of April 14, 1959, was never implemented by a further order of the commission either on or after May 15, 1959. It is true that an order was entered on May 15, 1959, but this order indicates only that the commission treated the order of conditional revocation of April 14, 1959, as having become absolute on May 15, 1959. In true essence the order of May 15, 1959, relates to an entirely different subject.

It is apparent that the commission, in its relation with the appellant, has treated this order of April 14, 1959, as a valid and binding revocation of the certificate of public convenience and necessity of the appellant. It therefore becomes necessary to ascertain and determine whether or not the order had that effect.

The validity of an order invalidating a motor carrier's certificate of public convenience and necessity depends upon whether or not the commission has complied with section 75-238, R. R. S. 1943, as follows:

"Permits and certificates shall be effective from the dates specified therein, and shall remain in effect until terminated as herein provided. Any such permit or certificate may, upon application of the holder thereof,

in the discretion of the State Railway Commission, be revoked or may, upon complaint or on the commission's own initiative, after notice and hearing, be suspended, changed or revoked in whole or in part, for willful failure to comply with any of the provisions of sections 75-222 to 75-250, or with any lawful order, rule or regulation of the commission promulgated thereunder, or with any term, condition or limitation of such permit or certificate."

From this it is to be seen that a certificate of public convenience and necessity may be terminated on application of the holder, or it may be terminated, suspended, changed, or revoked upon complaint or on the commission's own initiative. If however the suspension, change, or revocation is on complaint or the initiative of the commission it must be done after notice and hearing.

This court said in In re Application of Hergott, 145 Neb. 100, 15 N. W. 2d 418: "We hold that the commission, in order to revoke, change or suspend a certificate of public convenience and necessity, must proceed in accordance with the provisions of section 75-231, Comp. St. Supp. 1941, * * *." This is now section 75-238, R. R. S. 1943. This case does not deal with the failure to give notice and accord a hearing, but this pronouncement shows that the exactions of the statute are mandatory.

In In re Application of Neylon, 151 Neb. 587, 38 N. W. 2d 552, it was said: "The Nebraska State Railway Commission, in order to revoke, change, or suspend a certificate of public convenience and necessity, must proceed in accordance with the provisions of section 75-238, R. S. 1943."

In Abler Transfer, Inc. v. Lyon, 161 Neb. 378, 73 N. W. 2d 667, it was said: "Section 75-238, R. R. S. 1943, must be considered a special statutory provision with regard to a particular subject and, as such, controls the general provisions with regard to such subject. The Nebraska State Railway Commission, in order to revoke,

change, or suspend a certificate of public convenience and necessity, must proceed in accordance with the provisions thereof."

It is obvious that there was not performance of any of the statutory conditions precedent to a revocation of the certificate of public convenience and necessity of the appellant. In this light it must be said there was no revocation and that the pretense of the commission that there was is without any substance or merit.

The appellant by its attorneys did not in anywise respond to the order to show cause which has been mentioned. It did however by its attorneys unaccountably address and send personally to the director of the motor transportation department of the commission a letter dated May 8, 1959, containing a request for a formal suspension of operation under the certificate of public convenience and necessity of the appellant for a period of 1 year from January 14, 1959. Reasons for suspension were set forth at large in the letter. It is apparent that the commission treated this as an application to it for suspension of appellant's certificate.

There is nothing in the record to indicate that a hearing on the application was accorded or had. On May 15, 1959, the commission entered an order denying the application for suspension of operation. Notice of this order however was not given until May 26, 1959. The pertinent ground for denying the application was that the appellant had failed to file required certificates of insurance on or before May 14, 1959. The appellant filed a motion for rehearing on June 1, 1959. This motion for rehearing does not go in anywise to the question of whether or not its certificate of public convenience and necessity was revoked but only to the question of the propriety of the refusal to suspend. This motion was overruled on July 2, 1959.

A later motion for rehearing was filed on July 2, 1959, but it was filed more than 10 days from May 26,

1959, and therefore may not be considered. See § 75-406, R. R. S. 1943.

Notwithstanding the other matters discussed herein the only real issue is that of whether or not the commission was in error in refusing to sustain the application of the appellant for suspension of operations under its certificate of public convenience and necessity.

The position of the appellant as to this issue is that the order refusing to grant the application for suspension was void for the reason that it was arbitrary, unreasonable, and contrary to law, and with particularity that the commission failed to grant a hearing on the application.

As to this the commission urges that the contention of the appellant must fail for the reason that section 75-238, R. R. S. 1943, does not allow or recognize the right of the holder of a certificate of public convenience and necessity to seek suspension of a certificate or of operation thereunder. It contends that by the terms of the section the only action which a certificate holder may initiate is one for revocation.

The section by its terms does not grant voluntary action to a certificate holder to seek suspension of the certificate of public convenience and necessity or of operation thereunder. On the other hand, it does not say that a certificate holder may not initiate a complaint the purpose of which is to cause the commission to suspend, change, or revoke a certificate in whole or in part. If the right to complain does not extend to the holder of a certificate it may readily be perceived that great harm and injustice could flow therefrom to the certificate holder, with no process available to him for relief. Many hypothetical illustrations of this could be set forth, but it is believed that they would serve no useful purpose.

It appears from the terms of the section itself that the right of the certificate holder to file a complaint seeking suspension is reasonably inferable if not in fact

declared. If there should be any doubt of this it must be said to be removed by section 75-238.01, R. R. S. 1943. It is true that this section does not declare the specific right to seek suspension by complaint, but it does by inescapable inference provide for request for suspension by the certificate holder. This section contains the following: "Except for circumstances beyond the control of the motor carrier, such as strikes, embargoes, catastrophes, or other like circumstances, motor carrier service under a certificate of public convenience and necessity or a permit shall not be suspended without first obtaining approval of the State Railway Commission; * * *."

The letter by which suspension was asked was not denominated by the writer thereof as either a complaint or request, but by it the appellant sought approval by the commission of suspension. Approval was denied without notice and without hearing. The request was proper under both section 75-238 and section 75-238.01, R. R. S. 1943.

The appellant was entitled to a hearing on its application for suspension, and for failure to receive it the order was and is invalid. Except for the fact that the period for which suspension was sought has expired the order of the commission denying suspension would be reversed and the cause remanded for further proceeding. Because of this the order is only reversed. All costs are taxed to the commission.

REVERSED.

THOMAS M. DAY, APPELLANT AND CROSS-APPELLEE, V. CITY OF BEATRICE, A MUNICIPAL CORPORATION, ET AL., APPELLEES AND CROSS-APPELLANTS.
101 N. W. 2d 481

Filed March 4, 1960. No. 34710.

1. **Injunction.** A litigant may not complain of the refusal of the court to enjoin acts of his adversary when the litigant has, with knowledge of the facts, participated and acquiesced in the performance of the acts he seeks to enjoin.
2. ———. As a general rule a party may lose his right to injunctive relief through his own acquiescence in a breach of duty by the other party.
3. **Municipal Corporations.** Where the power of a city to contract exists but was irregularly exercised, it may subsequently be adopted or ratified with the same resulting effect as though properly done in the first instance.
4. ———. The authority of a city to enter into a contract may properly be questioned only by the parties to the contract or by a taxpayer of the city. A person in the status of an unsuccessful bidder for the contract cannot properly raise such issue.
5. ———. Ordinarily a city council possesses a discretionary power in the awarding of contracts in considering the responsibility of bidders and in determining questions of public interest and welfare.
6. ———. It will be presumed that a city council, in awarding a contract, acted in good faith, with honest motives, and for the purpose of promoting the public good and protecting the public interest.
7. ———. Where there is no showing that a city council in the awarding of a contract acted arbitrarily, or from favoritism, ill will, fraud, collusion, or other such motives, a court will not ordinarily substitute its judgment for that of the council.
8. **Public Contracts.** The failure to make an alternative bid at the letting of a public contract is not material where the alternative on which bids were asked played no part in the contract awarded.
9. **Equity: Actions.** In an equity suit a representative cause of action may not be properly joined with a personal cause of action.
10. **Public Contracts.** An unsuccessful bidder for public work ordinarily acquires no legal right to protect, in law or equity, since the letting of contracts to the lowest responsible bidder is regarded as being for the benefit of the public and not for individual bidders.
11. **Actions.** Where a plaintiff joins a person as a party defendant

against whom he has no cause of action, either in law or equity, such person is not a proper party defendant and an attack for misjoinder of parties defendant is valid.

12. ———. The inclusion of causes of action in a petition which the plaintiff is without standing to maintain is subject to attack for misjoinder of causes of action.

APPEAL from the district court for Gage County: ERNEST A. HUBKA, JUDGE. *Affirmed.*

Max Kier, for appellant.

Anne P. Carstens and *Perry, Perry & Nuernberger,* for appellees.

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

CARTER, J.

The plaintiff brought this suit as an unsuccessful bidder upon a public letting of a garbage disposal contract by the city of Beatrice to enjoin the performance of a contract entered into by the city and the defendant Vicars and to recover damages, and for a declaration of plaintiff's rights, status, and legal relationship with respect to said contract and the alleged extension of a former contract he had with the city. The trial court found for the defendants and dismissed the suit, subject to the right of plaintiff to proceed at law for damages for the violation of the alleged extension agreement. The plaintiff has appealed.

The evidence shows that the plaintiff and the city entered into a contract on September 16, 1952, by which plaintiff was to collect and dispose of garbage from October 1, 1952, to October 1, 1957, for a consideration stated in the contract. On August 31, 1957, the city council directed the city clerk to advertise for bids for the collection and disposal of garbage for a 5-year period commencing on October 1, 1957, the bids to be submitted not later than September 12, 1957, at 7 p.m. Bids were considered by the city council at the stated hour. A

motion was made to accept the bid of Vicars on which four councilmen voted in the affirmative and four voted in the negative. The mayor then voted in the affirmative and declared the motion carried. The mayor and clerk were then authorized to execute a contract with Vicars on behalf of the city. On September 30, 1957, the city council by a majority vote purported to ratify and confirm the contract between the city and Vicars for 5 years commencing on October 1, 1957, and directed the mayor to sign the contract.

The evidence shows further that on August 26, 1957, the city council voted to extend plaintiff's 5-year contract which terminated on October 1, 1957, for a period of 60 days. On September 30, 1957, the city council withdrew and canceled the offer to extend the former contract for 60 days, and a written notice to this effect was served at 7:25 a.m., on the following morning. The petition in this case was filed on September 21, 1957.

It is the contention of the plaintiff that he had a valid extension of his former contract from October 1, 1957, to December 1, 1957; that he was the low bidder at the letting of the new contract; and that the contract with Vicars was void in that it was not authorized by a majority vote of the council and that a valid appropriation of funds had not been made concerning the expenditures required by the contract.

With respect to the contention that plaintiff had a valid extension of the contract of September 16, 1952, the evidence is substantially as follows: At the council meeting held on August 26, 1957, the council voted to extend the contract of September 16, 1952, for a period of 60 days. On September 30, 1957, a motion withdrawing the offer to extend the contract for 60 days was adopted. No written agreement of extension was entered into. It is the contention of plaintiff that the mayor advised him of the extension and that he accepted it. The mayor denies offering the extension of the contract on behalf of the city, and that there was any acceptance of any

such extension. The evidence on this point is in direct conflict. The trial court made no findings of fact on this issue and in effect left it for determination in the action for damages for violation of the alleged extension agreement which was reserved to the plaintiff by the trial court's decree. Defendants have cross-appealed and contend the evidence shows that plaintiff has no cause of action for damages for the breach of the extension agreement, and that their motions to dismiss should have been sustained at the close of all the evidence.

The evidence is in direct conflict as to whether or not there was an offer by the city and an acceptance of the offer of the 60-day extension agreement. But assuming that an offer and acceptance was established, his subsequent conduct was such as to defeat the remedy he now seeks. Plaintiff contends that he had a valid oral extension agreement for 60 days commencing on October 1, 1957. Subsequent thereto, in response to the advertisement for bids, plaintiff placed his bid with the city for the 5-year contract for the period from October 1, 1957, to October 1, 1962. This latter contract included within its terms the 60-day period of the claimed extension of the former contract, which he knew was to be an exclusive contract for the collection of garbage in the city for the stated period. At the consideration of the bids on September 12, 1957, plaintiff was present when the bids were opened and considered, and the contract awarded to Vicars. He admits in his testimony that he did not object or make it known that he was claiming a valid extension agreement for the first 60 days of the exclusive contract upon which he bid. He did not furnish insurance policies required until September 30, 1957, a date subsequent to the consideration of the bids and the letting of the contract to Vicars. His conduct indicates a complete acquiescence in the manner pursued by the city in awarding the contract for 5 years commencing with October 1, 1957, with full knowledge on his part. Under such circumstances no basis

exists for the granting of equitble relief with respect to the asserted extension agreement. In Propst v. Board of Educational Lands & Funds, 156 Neb. 226, 55 N. W. 2d 653, an injunction suit involving a similar situation, this court said: "He made no effort to have the court by order in this case delay or postpone the sale proceedings until the case could be heard and decided. On the contrary he, will full knowledge of all the facts, concurred and assisted in, and became the beneficiary of the sale of the lease on the land, the identical thing he was by this action asking the court to prevent. His conduct was inconsistent to a degree sufficient to defeat the granting by the court of the relief he asked."

The general rule is that a party may lose his right to an injunction through his own acquiescence in a breach by the other party. Acquiescence may be shown in various ways, such as delay in making objection, or by consenting to the breach in question, whether the consent is express or implied from acts inconsistent with an intention to enforce the terms of the contract. 43 C. J. S., Injunctions, § 80, p. 554.

Plaintiff contends that the council did not authorize the contract with Vicars by the required vote. Without giving consideration to the question as to whether or not plaintiff could properly raise this question, we shall determine the merits of plaintiff's contention. The evidence shows the following: At the council meeting held on September 12, 1957, a motion to accept the bid of Vicars was duly made and the vote of the council thereon was equally divided. The mayor voted in the affirmative and declared the motion carried. The plaintiff contends that the mayor was not authorized to vote on the motion and consequently the motion failed of adoption. Under section 16-503, R. R. S. 1943, the mayor of a city of the first class is not authorized to cast the deciding vote on a resolution, order, or ordinance to enter into a contract or to accept work done under a contract. See Rohrer v. Hastings Brewing Co., 83 Neb.

111, 119 N. W. 27. The action of the council in accepting the bid of Vicars on September 12, 1957, was therefore a nullity. The evidence shows, however, that the city council, on September 30, 1957, with a majority of the council voting in the affirmative, ratified and confirmed the acceptance of the bid of Vicars and authorized the mayor to execute the contract with Vicars. The action of the council in this respect was sufficient to authorize a valid contract. It is a familiar rule, consistently upheld by this court, that where the power to contract exists but was irregularly exercised, it may subsequently be adopted or ratified with the same resulting effect as though properly done under previous authority. Neisius v. Henry, 142 Neb. 29, 5 N. W. 2d 291.

The plaintiff contends also that the contract between the city and Vicars was void because no sufficient appropriation of funds had been made to cover the obligation of the contract as required by section 16-501, R. R. S. 1943. In this connection we do not think the plaintiff, suing in his individual capacity, can properly raise this issue. Such an issue can be raised only by a party to the contract or by a taxpayer of the city. In the instant case, the plaintiff brings the action in his capacity as an unsuccessful bidder. He does not allege that he is a taxpayer or that he brings the action as such. It is fundamental that one who brings a representative action against a municipality must allege and prove that he is such a taxpayer. 64 C. J. S., Municipal Corporations, § 2164 (3), p. 998. An unsuccessful bidder in the letting of a contract is not a proper party to bring a representative action. 43 C. J. S., Injunctions, § 120, p. 659, and cases therein cited. We necessarily conclude that plaintiff cannot properly raise the question as to whether or not a proper appropriation of funds has been made to cover the obligation of the contract between the city and Vicars.

The defendant contends that he was the low bidder at

the contract letting and entitled as a matter of law to the contract for the collection and disposal of garbage. The nature of the contract required that bids be made on various phases of the operation of collecting and disposing of garbage. The city was required to pay for the operation of the sanitary land fill in securing the burial of garbage, rubbish, and trash. Plaintiff bid $500 a month on this item. Vicars' bid thereon was $400 a month. Plaintiff bid $1.50 a month as the customer charge for the collecting of garbage with a reduced charge of $1.25 a month if paid by the 10th of the month. Vicars' bid was also $1.50 a month as the customer charge with a reduced charge of $1.35 a month if paid by the 10th of the month. The proposed bids provided for an alternative bid for the disposal of garbage if the city at some future time installed an incinerator. Plaintiff bid $300 a month if this alternative operation came into existence. Vicars made no bid on the alternative operation. There is evidence in the record of improper disposal of garbage by the plaintiff under the terms of his previous contract with the city.

The difference in the two bids was sufficient to authorize the exercise of discretion by the council in determining the lowest responsible bidder. While the implication of section 73-103, R. R. S. 1943, is that contracts will be awarded to the lowest bidder, the money bid may not always constitute it the lowest responsible bid. Plaintiff relies upon State ex rel. Woodruff-Dunlap Printing Co. v. Cornell, 52 Neb. 25, 71 N. W. 961, but in that case, which involved a contract for printing, the only possible difference in the bids was the price bid. We held that the lowest bid must be accepted under such circumstances, and that no discretion existed in awarding the contracts. In the instant case there were differences in the amounts bid on the various phases of the operation as it affected the city and the users of the service. There was discretion to be exercised by the council in determining the lowest responsible bid.

Where the evidence indicates that a city council, in exercising its judgment, acted honestly upon the facts before it in the belief that its action was for the best interests of the city, and there is no showing that it acted arbitrarily, or from favoritism, ill will, fraud, or collusion, or similar motives, it is not the province of the courts to substitute their judgment for that of the city council. State ex rel. Nebraska B. & I. Co. v. Board of Commissioners, 105 Neb. 570, 181 N. W. 530. It is presumed that a city council acts in good faith, with honest motives, and for the purpose of promoting the public good and protecting the public interest. Best v. City of Omaha, 138 Neb. 325, 293 N. W. 116; 43 Am. Jur., Public Works and Contracts, § 64, p. 806. In the Best case we said: "The term 'responsible' as used in the statute is not limited in its meaning to mere financial responsibility, but includes within its purview the general ability and capacity of the bidder to perform the work, his facilities and suitability for the task, and those qualities which he must necessarily have in order that he be able to perform the contract strictly in accordance with its terms." Under the foregoing holdings of this court we find nothing in the record that warrants a judicial review of the action of the city council in determining Vicars to be the lowest responsible bidder.

Plaintiff contends that the failure of Vicars to make an alternative bid to become effective if and when the city installed an incinerator, nullifies his bid and any right to the garbage contract. We think not. This situation was before the court in State ex rel. Nebraska B. & I. Co. v. Board of Commissioners, *supra,* wherein it was said: "In the proposal to bidders certain items of the work to be let were submitted in the alternative. At the time of the opening of the bids, the board decided upon those items which were to be considered as the basis for the letting of the contract, and announced such conclusion." The court approved this manner of determining the lowest responsible bidder. If alterna-

tive bids may be disregarded in awarding a contract to the lowest responsible bidder, we fail to see any reason why alternatives on which no bids were made may not likewise be disregarded in awarding a contract. We find no merit in plaintiff's claim that Vicars' bid is nullified for failing to make an alternative bid. If the city council had concluded to award the contract on the basis of the alternative bids, Vicars would have, of course, no standing as a bidder.

The defendants throughout this case have insisted that there is a misjoinder of parties defendant and a misjoinder of causes of action. While we have determined the issues on the merits, the foregoing contentions of the defendants are not without merit. An unsuccessful bidder is not a proper party to bring an injunction suit to prevent an unlawful expenditure of funds by public officials unless he is also a taxpayer, which must be properly alleged and proved. In a suit in equity a representative cause of action cannot properly be joined with an individual cause of action. Niklaus v. Abel Construction Co., 164 Neb. 842, 83 N. W. 2d 904. An unsuccessful bidder has no contractual right to enforce. The plaintiff by his bid proposed to contract for certain work, but his bid was not accepted. It was a proposal only that bound neither party, and as it was never consummated by a contract the city acquired no rights against the plaintiff nor he against the city. The injury, if any, resulting from the rejection of his bid fell upon the public and not upon him personally. We do not say that in a proper case a bidder may not compel the acceptance of his bid where the rejection of it appears to be wholly arbitrary or fraudulent, and against the interests of the public. But ordinarily an unsuccessful bidder for public work has acquired no legal right to protect, either in law or equity, since the letting of contracts to the lowest bidder is regarded as being for the benefit of the public and not for individual bidders. State ex rel. Hron Bros. Co. v. City of Port Wash-

ington, 265 Wis. 507, 62 N. W. 2d 1. See, also, Annotation, 80 A. L. R. 1392; 43 Am. Jur., Public Works and Contracts, § 65, p. 808.

Clearly, plaintiff has no cause of action against the defendants Vicars, either for an injunction or for money damages. Talbot Paving Co. v. City of Detroit, 109 Mich. 657, 67 N. W. 979, 63 Am. S. R. 604. He has sought relief as an unsuccessful bidder on grounds that are available only to a party to the contract or a taxpayer in a representative capacity, neither of which he alleged himself to be. He joined Vicars as a defendant although he had no valid cause of action against him, either in law or equity. While there is a misjoinder of parties defendant and of causes of action, which have not been unobserved by this court, we find, as did the trial court, that the plaintiff, on the evidence adduced on the merits of the case, is not entitled to equitable relief. The judgment of the district court is affirmed.

AFFIRMED.

IN RE APPLICATION OF CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY ET AL.

CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY ET AL., APPELLEES, V. HEBRON CHAMBER OF COMMERCE ET AL., APPELLANTS.

101 N. W. 2d 448

Filed March 4, 1960. No. 34723.

1. **Public Service Commissions: Appeal and Error.** On appeal to the Supreme Court from an order of the Nebraska State Railway Commission, while acting within its jurisdiction, the question for determination is whether or not the order is arbitrary and unreasonable.
2. **Public Service Commissions: Railroads.** The purpose of commission control of railroads is to secure adequate, sustained service for the public at a minimum cost. The commission is not in the position of an owner. It has a duty to the railroads as well as to the public. It must protect and conserve the invest-

ments in the railroads and insure a reasonable return to railroads that are efficiently maintained and operated.

3. ———: ———. It is the duty of a carrier to seek, and of regulatory agencies to permit, the elimination of those services and facilities that are no longer needed or used by the public to any substantial extent.

4. ———: ———. When an application is made to discontinue an existing service or facility the issue presented is primarily to be determined by the public need or lack of need therefor, as distinguished from local convenience, for there is a general duty imposed upon railroads to provide those services to the public for which there is public need. In deciding such issue the cost of providing the service in comparison to the revenue derived therefrom is an important element to be considered although not necessarily controlling thereof.

5. ———: ———. However, when the duty sought to be discontinued is one of convenience rather than necessity the questions of expense to the company, the volume of business done, service required in meeting community needs, revenue return therefrom, and relative benefit to the public served are factors which cannot be disregarded.

6. ———: ———. Unless public necessity requires, the discretion of the railroad company in establishing and maintaining its stations should not be interfered with.

7. **Railroads.** The facilities and services to be furnished by a railroad company at any station need only be just, reasonable, and adequate to the requirements of the station, and should in a measure be commensurate with the patronage and receipts from that portion of the public to whom such service is rendered. The need for agency service should not be measured by financial results alone, but should be measured also by the agent's usefulness to the company as well as to the public.

8. ———. A carrier is not required to make expenditure of earnings, from a particular community in the community where earned, in excess of the requirements of reasonable service.

9. **Public Service Commissions: Railroads.** The matter of time necessary to be devoted to the performance of duties by an agent of a railroad is a matter of importance in determining whether or not the railway commission acted arbitrarily and unreasonably in denying an application for the discontinuance of an agency.

10. ———: ———. The ruling of the Nebraska State Railway Commission or of this court on the question of discontinuance of an agency at any given time does not amount to an adjudication for the future. It is only a judgment on the condition

presented by the application and relates only to the time and conditions presented.

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

Leonard J. Germer and *W. O. Baldwin,* for appellants.

Chambers, Holland, Dudgeon & Hastings, for appellees.

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

WENKE, J.

This is an appeal from an order of the Nebraska State Railway Commission granting the Chicago, Rock Island & Pacific Railroad Company and the Railway Express Agency authority to discontinue the agency at Hebron, Nebraska, and to retire the depot.

The Chicago, Rock Island & Pacific Railroad Company and the Railway Express Agency filed their joint application with the Nebraska State Railway Commission on January 6, 1958, for the purpose of obtaining the authority granted them. The Hebron Chamber of Commerce, consisting of some 87 business men of Hebron, and the Hebron Industrial Development Corporation, a corporation organized by some 90 professional and business men of Hebron to bring new business to that city, filed their written protest to the application and were represented by counsel at a public hearing held thereon on March 12, 1958, at the courthouse in Hebron. Although the hearing was held on March 12, 1958, the commission did not act on the application until June 12, 1959, a year and 3 months later, when it granted the applicants the authority which they sought. There is no reason shown for this delay. The protestants thereupon filed a motion for rehearing and have taken this appeal from the overruling thereof.

We shall herein refer to the Chicago, Rock Island & Pacific Railroad Company as the Rock Island; to Railway Express Agency as the Express Agency; and to the

Nebraska State Railway Commission as the commission.

We have often stated the rule applicable on appeal from an order of the commission as follows: "On appeal to the Supreme Court from an order of the Nebraska State Railway Commission, while acting within its jurisdiction, the question for determination is whether or not the order is arbitrary and unreasonable." Chicago & N. W. Ry. Co. v. Save the Trains Assn., 167 Neb. 61, 91 N. W. 2d 312. See, also, Skeedee Independent Tel. Co. v. Farm Bureau, 166 Neb. 49, 87 N. W. 2d 715; Chicago, B. & Q. R. R. Co. v. Keifer, 160 Neb. 168, 69 N. W. 2d 541; In re Application of Chicago, B. & Q. R. R. Co., 152 Neb. 367, 41 N. W. 2d 165; In re Application of Union P. R. R. Co., 149 Neb. 575, 31 N. W. 2d 552; Thomson v. Nebraska State Railway Commission, 143 Neb. 52, 8 N. W. 2d 552.

Hebron is the county seat of Thayer County and has a population of some 2,000 inhabitants. It is serviced by two railroads, the Burlington and the Rock Island. The Rock Island runs a branch line from Fairbury, Nebraska, on its main line to Ruskin, Nebraska. The city of Hebron is located on this branch line. A mixed train is now being operated over this branch line from Fairbury to Ruskin and return on 3 days of each week, that is, Monday, Wednesday, and Friday. However, very few passengers ride this train as only two tickets were sold by the agent in Hebron in 1957, for a total revenue of 75 cents. This train hauls only carload shipments, for all L. C. L. (less than carload) shipments handled by the Rock Island are transported by motor trucks operated by the Rock Island Motor Transit Company, a subsidiary. It should be noted that the application does not seek to have any of these transportation services discontinued nor does the order of the commission so authorize. It is only the convenience of securing some of these transportation services by the people of Hebron through the service of an agent located in a depot at that point that is of concern here,

for it is the plan of the Rock Island to have its agent at Deshler, which is some 9 miles from Hebron, perform the duties now being performed by its agent at Hebron.

The present agent at Hebron is on a 5-day, 40-hour week, Monday through Friday. A survey of his position shows that he is actually busy about 2 hours and 40 minutes of each day, of which 1 hour and 20 minutes are consumed in maintenance (housekeeping) work. This leaves a maximum of about 1 hour and 20 minutes of work that would be transferred to the agent at Deshler if the change is made. A survey of the agent's work at Deshler, who is also on a 5-day, 40-hour week, Monday through Friday, shows that he is actually busy about 5 hours a day, thus he will not be overburdened by the transfer of this work to his position. The average cost to the Rock Island in 1955, 1956, and 1957 for operating its depot and maintaining an agent at Hebron was in excess of $5,000 a year. This will be covered in more detail hereinafter.

As we said in Chicago & N. W. Ry. Co. v. Save the Trains Assn., *supra:* "The purpose of commission control of railroads is to secure adequate, sustained service for the public at a minimum cost. The commission is not in the position of an owner. It has a duty to the railroads as well as to the public. It must protect and conserve the investments in the railroads and insure a reasonable return to railroads that are efficiently maintained and operated." See, also, In re Application of Chicago, B. & Q. R. R. Co., *supra;* In re Application of Union P. R. R. Co., *supra;* Thomson v. Nebraska State Railway Commission, *supra.*

In this respect we said in Chicago, B. & Q. R. R. Co. v. Keifer, *supra:* "It is the duty of a carrier to seek, and of regulatory agencies to permit, the elimination of those services and facilities that are no longer needed or used by the public to any substantial extent." See,

also, In re Application of Chicago, B. & Q. R. R. Co., *supra.*

When an application is made to discontinue an existing service or facility the issue presented is primarily to be determined by the public need or lack of need therefor, as distinguished from local convenience, for there is a general duty imposed upon railroads to provide those services to the public for which there is public need. In deciding such issue the cost of providing the service in comparison to the revenue derived therefrom are important elements to be considered although not necessarily controlling thereof. See, Chicago & N. W. Ry. Co. v. Save the Trains Assn., *supra;* Chicago, B. & Q. R. R. Co. v. Keifer, *supra;* Chicago, B. & Q. R. R. Co. v. Order of Railroad Telegraphers, 155 Neb. 387, 52 N. W. 2d 238; In re Application of Chicago, B. & Q. R. R. Co., *supra;* In re Application of Chicago, B. & Q. R. R. Co., 152 Neb. 352, 41 N. W. 2d 157.

However, as stated in Thomson v. Nebraska State Railway Commission, *supra:* "* * * when the duty sought (to be discontinued) is convenience rather than necessity the questions of expense to the company, the volume of business done, service required in meeting community needs, revenue returned therefrom, and relative benefit to the public served, are factors which cannot be disregarded."

As stated in In re Application of Union P. R. R. Co., *supra,* by quoting from Chicago, R. I. & P. Ry. Co. v. Nebraska State Railway Commission, 85 Neb. 818, 124 N. W. 477, 26 L. R. A. N. S. 444: "* * * unless public necessity requires, the discretion of the railroad company in establishing and maintaining its stations should not be interfered with." See, also, Chicago, B. & Q. R. R. Co. v. Keifer, *supra.*

We said in Thomson v. Nebraska State Railway Commission, *supra:* "The facilities and services to be furnished by a railroad company at any station need only be just, reasonable and adequate to the requirements of

the station, and should in a measure be commensurate with the patronage and receipts from that portion of the public to whom such service is rendered. The need for agency service should not be measured by financial results alone, but should be measured also by the agent's usefulness to the company as well as to the public."

In Chicago, B. & Q. R. R. Co. v. Keifer, *supra*, we said: "A carrier is not required to make expenditure of earnings, from a particular community in the community where earned, in excess of the requirements of reasonable service."

"The matter of time necessary to be devoted to the performance of duties by an agent of a railroad is a matter of importance in determining whether or not the railway commission acted arbitrarily and unreasonably in denying an application for the discontinuance of an agency." In re Application of Union P. R. R. Co., *supra*.

After analyzing the evidence adduced in detail the commission found that there was no public need for an agent at Hebron and, based thereon, authorized the agency to be discontinued and the depot to be retired. The evidence is correctly analyzed by the commission and fully supports its order; however, we shall herein set forth some of the salient features thereof.

As we have already stated none of the transportation facilities and services for hauling carload and L. C. L. shipments to and from Hebron by the Rock Island will, in any respect, be curtailed by the granting of the order. There will be some changes in the method of handling shipments which, in some instances, will cause some inconvenience to a small number of the public using such facilities and services while, in other instances, they will provide better service.

The accounting method used by the Rock Island for assigning revenue and system operating costs is sufficiently realistic and practical for the purpose for which it is intended. See Chicago & N. W. Ry. Co. v. Save

the Trains Assn., *supra*. System operating costs are ascertained by taking all of the expenses of the Rock Island for any 1 year and deducting therefrom the direct amounts expended by it for station employees and station maintenance over the entire system. Using this method the system operating costs in 1955 were 69.97 percent of revenue received; in 1956, 70.98 percent of revenue received; and in 1957, 72.51 percent of revenue received. These are the 3 full calendar years immediately preceding the hearing on March 12, 1958. By using the accounting methods that it did the Rock Island assigned $13,530.33 of revenue to Hebron for the year 1955; $7,131.97 for the year 1956; and $17,573.18 for the year 1957. These totals included its carload operations at Gilead, Nebraska, which were handled through the agent at Hebron as the Rock Island has neither a station nor agent at Gilead. The Rock Island also assigned $9,467.17 of its system operating expenses to Hebron for the year 1955; $5,062.27 for the year 1956; and $12,742.31 for the year 1957. These sums, when taken together with the actual direct operating expenses had by the Rock Island in connection with maintaining its depot and agent at Hebron in the year 1955 of $4,715.26; in 1956 of $5,189.10; and in 1957 of $5,579.24, left a net loss for that station in the sum of $652.10 for 1955; $3,119.40 for 1956; and $748.37 for 1957. These losses would be much higher if the revenue received from the business done at Gilead was not included in that assigned to Hebron. It will be observed that the average cost of maintaining a depot and agent at Hebron, which could be saved if the order of the commission is affirmed, is $5,161.20 per year.

We shall hereinafter discuss the effect of the changes authorized by the commission's order on the situation as it presently exists.

Insofar as the carload shipments being sent from or received at Gilead are concerned, there being 120 carloads sent and 9 received in the 3-year period from

1955 through 1957, it would appear they could be handled through the agent at Deshler as well as is now being done through the agent at Hebron. No real inconvenience would result to the users of the transportation facilities and services of the Rock Island at Gilead.

During these same 3 years there were 173 carloads received and 61 sent from Hebron, or an average of 4.8 plus received and 1.7 minus carloads sent per month. The incoming carloads will, with very few exceptions, be handled the same as they are now, that is, set out at a proper place for the consignee thereof to unload as most inbound carloads are prepaid. The same would be true even if such carload shipment is not prepaid if the consignee is on the approved credit list of the Rock Island or has given it a bond to cover the payment of the freight, for then the car would be set out for unloading and the consignee billed for the freight. If that is not done, then, if the freight is not prepaid, the consignee will have to get in touch with the agent at Deshler for the car, together with the way bill, would be carried through Hebron to that point. However, if the consignee gets in touch with the agent at Deshler immediately and pays the freight then the car could be returned to Hebron on the same day and set out, thus causing very little delay or inconvenience. If a carload shipment arrives on a shipper's order it would be carried through to Deshler and the consignee would have to get the bill of lading from the bank, take it to the agent at Deshler, and pay the freight before the car could be set out for unloading. However, the division superintendent testified he is not aware of a carload ever having been received at Hebron on a shipper's order.

Shippers of carload lots out of Hebron would have to call the agent at Deshler instead of the agent at Hebron to get a car spotted for loading. This could be done at the expense of the Rock Island. When loaded the shipper can either fill out a bill of lading

and send it by motor truck to the agent at Deshler or he can have the agent at Deshler fill it out and sign it and, in either situation, it can then be mailed to the consignee, or any other person designated by the shipper, with a copy to the latter. This would be a little more inconvenient than at present but nothing of any serious nature. We think that the shippers and consignees of carload shipments would be put to very little inconvenience if the change was made and certainly all the transportation services that are now available to them would still be available.

At present incoming L. C. L. shipments, when they arrive in Hebron by truck, are taken to the depot and left there. They are then delivered to the consignee by dray. If the change is made the truck, instead of taking incoming L. C. L. shipments to the depot, will deliver them directly to the consignee. This should result in some benefit to those receiving L. C. L. shipments. During the past 3 years these have averaged about 22 per month. If a shipment coming in is not prepaid then similar arrangements for its delivery to the consignee will have to be made as in case of carload shipments. For those frequently receiving shipments that are not prepaid, this can be done by getting on the approved credit list of the Rock Island or by putting up a bond with it to cover such charges. During this same period of time about 10 L. C. L. shipments per month were made from Hebron. This presents a somewhat more difficult situation for the shipper if he wishes to send the shipment prepaid. If he does not he can call the agent at Deshler and have it picked up. Major shippers of L. C. L. shipments could make arrangements to send their shipments prepaid without going to Deshler by getting on the approved credit list or by putting up a bond, but there undoubtedly will be a small number of individuals who make only an occasional shipment who would have to go to Deshler

to send such a shipment prepaid. Deshler is 9 miles from Hebron.

The agent of the Rock Island has been handling the Express Agency's business for a commission of 10 percent of the charges made on both outgoing and incoming express. This commission is in addition to his regular salary as agent and is not paid by the Rock Island. The express is presently carried by motor trucks of the Rock Island Motor Transit Company and delivered to and picked up from the depot in Hebron. If the present order of the commission is affirmed it is the intention of the Express Agency to get some other agent in Hebron to handle its business there. If it can, it will be handled by these motor trucks in the same manner as L. C. L. shipments and there would be no change in the service. If the Express Agency cannot get someone to handle its business in Hebron then it will be handled through the agent of the Rock Island in Deshler.

As to passenger traffic, there were 14 tickets sold in Hebron in 1955; 9 in 1956; and 2 in 1957. Thus it becomes evident that no inconvenience will result to the public of Hebron in this area. United States mail is already being carried by a Star Route System, so it cannot be affected by the change. The agent at Hebron receives calls for Western Union and transmits them by telephone to the agent at Superior, Nebraska, for Western Union has no wire service at Hebron. For this service he gets a commission which is in addition to his regular salary as agent. No inconvenience will result to the public of Hebron, for if any of them need the services of Western Union they can call the agent at Superior as well as the agent at Hebron. There will also be some inconvenience in handling claims for damages to incoming shipments, both carload and L. C. L. Now they are handled through the agent at Hebron and, if the change is made, they will be handled through the agent at Deshler. This will cause a slight but insigni-

ficant delay. However, there were only 11 claims made in 1957.

There are other minor matters touched on by the witnesses but which we do not feel have sufficient importance to warrant their discussion. We have touched on the principal service rendered to Hebron by the Rock Island and the Express Agency and, to a certain extent, outlined the effect on the public's use of these services and the inconvenience, if any, that they may or will suffer by reason of the change authorized. We do not set out all of the details in relation thereto because, to do so, would greatly lengthen this opinion without serving any useful purpose. We do think, as the commission held, that the inconveniences, if any, that may be experienced by the public of the city of Hebron and the surrounding territory in using the transportation facilities and services of the Rock Island and the Express Agency do not justify requiring the Rock Island to expend in excess of $5,000 per year to avoid them. In view thereof we do not find the order of the commission to be either unreasonable or arbitrary, and therefore affirm its order granting the authority requested by the Rock Island and the Express Agency.

In view of certain statements made by the appellants' counsel we quote the following from Chicago, B. & Q. R. R. Co. v. Keifer, *supra:* "The ruling of the Nebraska State Railway Commission or of this court on the question of discontinuance of an agency at any given time does not amount to an adjudication for the future. It is only a judgment on the condition presented by the application and relates only to the time and conditions presented." See, also, In re Application of Union P. R. R. Co., *supra;* Thomson v. Nebraska State Railway Commission, *supra.*

AFFIRMED.

EVELYN GOTFREY, APPELLANT, V. SHIZUO SAKURADA ET AL., APPELLEES.

101 N. W. 2d 470

Filed March 4, 1960. No. 34735.

1. **Workmen's Compensation: Appeal and Error.** An appeal to this court in a workmen's compensation case is considered and determined de novo upon the record.
2. **Workmen's Compensation.** A compensable injury within the Workmen's Compensation Act is one caused by an accident arising out of and in the course of the employment.
3. ———. An accident within the Workmen's Compensation Act is an unexpected and unforeseen event happening suddenly and violently and producing at the time objective symptoms of injury.
4. ———. In order to recover, the burden of proof is upon the claimant in a workmen's compensation case to establish by a preponderance of the evidence that personal injury was sustained by the employee by an accident arising out of and in the course of his employment.
5. ———. An award of compensation under the Workmen's Compensation Act may not be based on possibilities, probabilities, or speculative evidence.
6. ———. The rule of liberal construction of the Workmen's Compensation Act applies to the law, not to the evidence offered to support a claim by virtue of the law. The rule does not dispense with the necessity that claimant shall prove his right to compensation within the rules above set forth nor does it permit a court to award compensation where the requisite proof is lacking.
7. 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 premises upon which it is based are shown to be true.

APPEAL from the district court for Scotts Bluff County: RICHARD VAN STEENBERG, JUDGE. *Affirmed.*

Lawrence W. Rice, for appellant.

Wright, Simmons & Harris, for appellees.

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

CHAPPELL, J.

Plaintiff, Evelyn Gotfrey, filed a petition in the Nebraska Workmen's Compensation Court against defendants, Shizuo Sakurada, Fred Ikeya, and Harry Hada, copartners, doing business as Eagle Cafe in Scottsbluff, seeking workmen's compensation for alleged injuries to her back caused by an accident arising out of and in the course of her employment by defendants on March 7, 1958. Defendants' answer denied generally, then admitted that plaintiff was so employed by defendants on March 7, 1958, but alleged that any disability presently suffered by plaintiff was not the result of anything that occurred in the course of her employment.

After a hearing before one judge of the compensation court, a judgment was rendered which dismissed plaintiff's action because plaintiff had not carried the burden of proof necessary to establish any right to an award of compensation. In that connection, it was found that there was no credible evidence, medical or otherwise, tending to prove that the symptoms and disability of which plaintiff complained resulted from the alleged accident on March 7, 1958. At a rehearing before the compensation court sitting en banc, such dismissal of plaintiff's action was affirmed. In that connection, it was found that the evidence was insufficient to prove with any degree of certainty that the symptoms and disability of which plaintiff complained resulted from an accident as alleged by her. Thereafter, plaintiff appealed to the district court for Scotts Bluff County, where, after hearing, a judgment was rendered which, for like reasons, affirmed the judgment rendered by the compensation court sitting en banc, and dismissed plaintiff's petition. Thereafter, plaintiff's motion for new trial was overruled, and she appealed, assigning in substance that the judgment was not supported by the evidence. We do not sustain the assignment.

In Jones v. Yankee Hill Brick Manuf. Co., 161 Neb. 404, 73 N. W. 2d 394, we reaffirmed that: "An appeal

to this court in a workmen's compensation case is considered and determined de novo upon the record.

"A compensable injury within the Workmen's Compensation Act is one caused by an accident arising out of and in the course of the employment.

"An accident within the Workmen's Compensation Act is an unexpected and unforeseen event happening suddenly and violently and producing at the time objective symptoms of injury.

"In order to recover, the burden of proof is upon the claimant in a compensation case to establish by a preponderance of the evidence that personal injury was sustained by the employee by an accident arising out of and in the course of his employment.

"An award of compensation under the Workmen's Compensation Act may not be based on possibilities, probabilities, or speculative evidence.

"The rule of liberal construction of the Workmen's Compensation Act applies to the law, not to the evidence offered to support a claim by virtue of the law. The rule does not dispense with the necessity that claimant shall prove his right to compensation within the rules above set forth nor does it permit a court to award compensation where the requisite proof is lacking." See, also, Feagins v. Carver, 162 Neb. 116, 75 N. W. 2d 379; Shanhols v. Scottsbluff Bean & Elevator Co., 168 Neb. 626, 97 N. W. 2d 220.

In the light of such rules, we have examined the record, which, as summarized, discloses the following: On the evening of March 7, 1958, plaintiff was employed by defendants as a pantry girl in defendants' restaurant. Plaintiff's husband had divorced her on December 26, 1957, but she was still going with him before and at the time of this trial. Plaintiff worked 7 days a week, and her salary averaged $35 a week. She testified that about 9 p. m., as she started to go down into the basement over an open stairway to get some supplies, she slipped and fell on the top step

and "hit on the lower part of my back and on my shoulder" then she slid down the stairs three or four steps. Later, she testified "I, also, hit my head" and that "I finished work that night" but had a headache and "I didn't feel good all night long." She had no other pain at that time. She went to work the next day and worked off and on for a few days. Thereafter, she claimed that she began to have backaches, so on March 10, 1958, she consulted with her physician with whom she had previously consulted on February 22, November 21, and November 22, 1957. She did not call such physician as a witness in her behalf, and although she had also consulted with other physicians, she did not call some of them as witnesses. Her physician was called as a witness by defendants. Plaintiff's purpose in consulting with him was to determine whether or not she was pregnant. She testified that at that time she told her physician about her fall and back pain. However, her physician testified that on March 10, 1958, plaintiff said nothing about a fall and made no complaint of back pain. His written records made at that time verify his testimony. He testified that a thorough examination was made on March 10, 1958, showing no abnormalities except tenderness to pressure of the ligaments that go to the uterus and a small amount of blood found in the cervical os. Her condition was diagnosed as "possible pregnancy, threatened abortion." He gave her a prescription and she was "sent home to get off her feet." After plaintiff had called him while at work, he examined her again in a hospital on March 13, 1958, at which time she first told him about the fall. That examination revealed a somewhat enlarged uterus, a slightly dilated cervix, and a small amount of material fragments which were removed from the uterus for examination by the pathologist, who reported his diagnosis as "Acute suppurative endometritis" which is an inflammation of the uterus. His report said in part: "From the areas of exudation and necrosis one wonders

whether there has not been some previous instrumentation in this patient, but the appearance of the endometrium would not suggest that implantation has recently occurred." With regard thereto, plaintiff's physician testified that plaintiff was not pregnant when he examined her in the hospital, but " 'Whether she was or was not pregnant prior to her visit to my office, I do not know, but suspicion that some instrumentation had been done prior to this time, and fear probably prompted her to seek medical attention.' " He also testified that he could find no evidence of back trouble or injury to her back as a result of the fall on March 7, 1958; that he "couldn't state that she had any disability"; and that the condition found in her uterus could not have resulted from a fall.

Plaintiff left the hospital March 15, 1958, and went back to work for defendants about March 23, 1958, although she claims that she did not feel good in her back and felt tired and weak. Thereafter, she worked almost steadily until July 20, 1958, but claimed that her back condition got worse and she had pain in her back while working, so she quit and has performed no remunerative work since.

Another physician who examined plaintiff at her counsel's request on October 15, 1959, was called as a witness by plaintiff. He gave her a thorough examination and detailed the extent thereof in his testimony. The substance of his testimony was that his examination showed plaintiff to be a normal, healthy person. After comparing his own X-rays with X-rays taken by another physician on February 16, 1959, he testified: "I can't see very much wrong anyplace," and that: "There are no physical findings at present to substantiate a claim of injury as a result of the fall * * *. All her symptoms are subjective * * *." In commenting upon an X-ray report of a radiologist, he said: "Well, I agree with it because he says it is perfectly normal." He thought that some inflammation might exist around

plaintiff's lumbosacral joint, but that everything else was essentially normal.

Another physician called as a witness by plaintiff examined her on February 16, 1959. In her history, she told him about a fall on March 7, 1958, while employed by defendants; that she had no severe pain at the time; and that she finished work that day. She related her hospital experience and that she was off work because of back pain which was aggravated by heavy lifting. Such physician's examination disclosed: "* * * a well developed, well nourished white female in no apparent pain or distress"; and that "she walks erect, no stoop or limp * * * she stands erect; she has a minimal anterior-posterior lumbar sacral curve, less than you would normally see." Her extremities disclosed nothing significant, and "Straight leg raising was 80 degrees bilaterally"; that "There was no parethesia or anesthesia"; and that "there was some adnexa tenderness," but "no masses." Such tenderness could be accounted for by a threatened or incomplete abortion about a year before. He found some "tenderness along both sacro-iliac joints" and his "impression at that time was" that she had a "functional low backache," which had no "organic basis." Thereupon he sent her to a hospital for X-rays, but he "did not find any definite organic disease" or "organic basis" for the back pain about which plaintiff complained. He found no "evidence of nerve root irritation," and he "did not find any evidence indicating * * * that her present complaints are the result of that alleged accident" on March 7, 1958.

At the request of plaintiff's counsel, an orthopedic surgeon in Cheyenne, Wyoming, examined plaintiff on March 9, 1959. Pursuant to a stipulation, his testimony with regard to plaintiff's condition was contained in a letter addressed to plaintiff's counsel as of March 20, 1959. The history given to him by plaintiff was as follows: "She advised me that she had injured her back in March of 1958 when she slipped and fell down

stairs. Her feet flew out from under her and she fell, striking her back against the edge of some steps. She experienced immediate onset of back pain which has been present since. The pain is constant; however, it is more severe on occasions. The patient continued to work until July of 1958. At that time she was forced to quit because of back pain. She became progressively worse. She localized the pain to the low back area and stated that it involved both hips and passed into both legs. The left leg was more involved than the right. The pain passed to the level of the calf, in both legs. Coughing and sneezing do not aggravate her pain, nor do changes in the weather. Leg pain appeared within the past three or four months. Lying down apparently relieves the discomfort on occasion. Occasionally she is forced to walk with a limp. She advised me that she has a tingling sensation in the legs and occasionally the aching nature of the pain is broken by episodes of sharp pain in the mid back as if something slips. She has experienced no previous back trouble. Her past history reveals that she has undergone no surgery. She has had no serious illnesses. She has been married and is divorced."

Such physician reported that on physical examination, plaintiff "localized her pain to the lumbo-sacral area of the back" and "She was extremely tender" over that area "on palpation and percussion." He found that "There was a pelvic tilt to the right. The left shoulder was higher than the right shoulder." He further found that "The range of motion present in the back was limited slightly to the terminal ranges of motion." A copy of the report of his X-rays taken March 9, 1959, recited that " 'The hips are unremarkable. The pelvis proper shows no abnormality. The sacroiliac joints appear normal * * *. Other than slight narrowing of the joint space at the L5 S1 level, no abnormality is seen in the lumbar spine.' "

It was his opinion that plaintiff was "suffering from

mild lumbo-sacral disc disease which could have occurred from the alleged injury *and on the basis of the history she presents, did.*" (Italics supplied.) It was further his opinion that "her present condition is mild and of a non-surgical nature" but "There may be some psychosomatic element to this problem" and he felt that she did have "a temporary partial disability which can be fixed at the present time at 10% of the body as a whole."

In that connection, it will be noted that his report does not disclose that he was ever advised of plaintiff's history of suspected pregnancy and possible abortion.

As we view it, the opinion of such orthopedist with regard to the cause of plaintiff's disability, if any, is based primarily upon the history given to him by plaintiff. However, such history is certainly magnified and concealed as well in material respects to fit the occasion, and is contrary to plaintiff's own testimony and the testimony of her physicians heretofore recited. Such orthopedist evidently based his opinion primarily upon plaintiff's recited fact that there was an immediate presence of pain in her back on the night of the fall which has persisted ever since, and other statements made by plaintiff which are simply not supported by the facts. Without in any manner criticizing the able orthopedist, we point out that he was simply misled by plaintiff and was thereby mistaken.

In that connection, we have held that: "The value of the opinion of an expert witness is dependent on, and is no stronger than, the facts on which it is predicated. The opinion has no probative force unless the premises upon which it is based are shown to be true." Hamilton v. Huebner, 146 Neb. 320, 19 N. W. 2d 552, 163 A. L. R. 1. See. also, Williams v. Watson Bros. Transp. Co., 145 Neb. 466, 16 N. W. 2d 199. Such rule is applicable and controlling herein with reference to the orthopedist's testimony.

A chiropractor who practiced in Scottsbluff, was called as a witness for plaintiff. He testified that his duties were "primarily to relieve nerve impingements, primarily of the spine." He first saw plaintiff on July 11, 1958, when she gave him a history of having fallen down some stairs at defendants' cafe several months previously when she hurt her lower back; that a few days later, she was admitted to a hospital for a miscarriage; and that she had worked part of the time and needed something to relieve the pain in her lower back on the right side and around in front. The chiropractor testified that he found some tenderness in plaintiff's lower back around the fifth lumbar portion, so on the third visit he took X-rays of plaintiff's back, one of which showed the "right ilium is slightly lower than the left" and a slight curvature of the spine, but he could not say what caused it. Another X-ray showed "a normal lumbar" but the "Sacral angle is a little more pronounced" which plaintiff may have had "at the time of injury or since that injury. That I don't know." He also found an abnormal "anglation up above the lumbar vertebrae" which he could not say was caused by an injury. However, he thought that you couldn't tell whether or not the condition shown in the X-rays would cause disability to perform any work or labor. He testified that he had no way of knowing whether the conditions he found were caused by any accident in recent months or theretofore; and that the condition shown by the X-rays was not such that he could say whether it was a natural condition or was caused by accident or something else. He found a congenital abnormality of the lumbar vertebrae which was of no significance. The last time he saw plaintiff was on July 23, 1958, and he testified that the condition in which he found plaintiff at the times he treated her was one that might be caused by something other than her fall in March 1958.

In the light of the evidence heretofore set forth, and rules of law heretofore cited, we conclude that the judgment of the trial court should be and hereby is affirmed. All costs are taxed to plaintiff.

AFFIRMED.

INDEX

Abatement and Revival.

The pendency of a former suit by the same parties may be shown in abatement when a judgment in such suit would be a bar to a judgment in the second action. That one is an equitable action and the other a suit at law is immaterial if both suits are based upon substantially the same facts. *Jourdon v. Commonwealth Co.* 482

Acknowledgments.

1. Any conveyance or encumbrance of the homestead of a married person is absolutely void and unenforceable unless voluntarily executed and acknowledged by both husband and wife. *Mazanec v. Lincoln Bonding & Ins. Co.* 629
2. Any conveyance or encumbrance of real estate, executed and delivered, is valid between the parties, though not lawfully acknowledged nor witnessed, and is sufficient to convey or encumber the land described therein, with the exception of the homestead of the grantor. *Mazanec v. Lincoln Bonding & Ins. Co.* 629

Actions.

1. A cross-petition for the partition of real estate owned in joint tenancy by the parties to a divorce action, in a suit in which the cross-petitioner alleged that the parties were never husband and wife, is not germane to the divorce action and cannot be properly joined therewith. *Ropken v. Ropken* 352
2. Property rights not growing out of the marriage relation cannot properly be joined with an action for divorce. *Ropken v. Ropken* 352
3. A litigant must maintain his equitable action upon equitable grounds or fail, even though he may prove a good cause of action at law on the trial. *Jourdon v. Commonwealth Co.* 482
4. If a cause of action for equitable relief and a cause of action at law are joined and equitable relief is not granted, the court is without authority to determine the issue of personal liability and render a judgment on the cause of action at law. *Jourdon v. Commonwealth Co.* 482

5. In such a situation the cause of action at law must be determined as any other law action and should be retained by the court for that purpose. *Jourdon v. Commonwealth Co.* 482
6. An action for the purpose of legitimating or determining the paternity of a child born out of wedlock and obtaining support and maintenance for such child depends upon statutory authority for its maintenance. *Paltani v. Creel* 591
7. In an action the sole purpose of which is to have determined the paternity of a child born out of wedlock, the proceeding must be in accordance with the provisions of the statute. *Paltani v. Creel* 591
8. In this case a valid cause of action within the meaning of statute relating to children born out of wedlock has not been pleaded or proved. *Paltani v. Creel* 591
9. In an equity suit a representative cause of action may not be properly joined with a personal cause of action. *Day v. City of Beatrice* 858
10. Where a plaintiff joins as a party defendant, a person against whom he has no cause of action, either in law or equity, such person is not a proper party defendant and an attack for misjoinder of parties defendant is valid. *Day v. City of Beatrice* 858
11. The inclusion of causes of action in a petition which the plaintiff is without standing to maintain is subject to attack for misjoinder of causes of action. *Day v. City of Beatrice* 858

Adverse Possession.

1. A 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. *Vrana v. Stuart* 430
2. 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. *Vrana v. Stuart* 430
3. The fact that a person never actually claimed to own a disputed tract of land and that his use and possession of it was based on a mistaken belief as to the boundary line of the tract is not a controlling

factor in determining whether or not his possession was adverse. *Vrana v. Stuart* 430

4. 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 belongs to him that constitutes its adverse character. *Vrana v. Stuart* 430
5. The title to land becomes complete in the adverse occupant when he and his grantors have maintained an actual, continued, notorious, and adverse possession thereof, claiming title to the same against all persons, for 10 years. *Thomas v. Flynn* 458
6. If the adverse possession of the occupant is a continuation of the possession of a prior adverse possessor claiming title, and such occupant claims title from such prior possessor, then the possession of the occupant may be tacked to that of such prior possessor. *Thomas v. Flynn* 458
7. Where there is no evidence that a claimant and his predecessors in title have been in open, notorious, hostile, and uninterrupted possession of land for 10 years or more, his claim to title by adverse possession necessarily fails. *Pallas v. Dailey* 533

Alteration of Instruments.

1. The filling of blanks in a written instrument is not, strictly speaking, an alteration of the instrument. Where a blank is filled in after the execution and delivery of a written instrument, it is a question of authority to do so. *Mazanec v. Lincoln Bonding & Ins. Co.* 629
2. The right to fill blanks in written instruments after execution and delivery is based upon an assumption of consent in the absence of specific instructions. The leaving of such blanks is considered to imply authority to fill them, and creates an agency in the receiver to do so in the way contemplated by the maker. *Mazanec v. Lincoln Bonding & Ins. Co.* 629
3. A material alteration, already made, may be ratified and adopted subsequently; and in such case the instrument, as altered, will be binding. *Mazanec v. Lincoln Bonding & Ins. Co.* 629
4. Any act or conduct showing an intention to recognize the instrument as altered is generally suffi-

cient to constitute a ratification of the alteration. *Mazanec v. Lincoln Bonding & Ins. Co.* 629

Appeal and Error.

1. An appeal to the district court from action of the county board of equalization is heard as in equity. Upon appeal therefrom to the Supreme Court it is tried de novo. *Collier v. County of Logan* 1
   Baum Realty Co. v. Board of Equalization 682
2. Where the evidence shows that the assessed value of tangible property has been determined by a formula in substantial compliance with 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. *Collier v. County of Logan* 1
3. 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. *Collier v. County of Logan* 1
4. Where a mandate of the Supreme Court makes the opinion a part thereof by reference, the opinion should be examined in conjunction with the mandate to determine the nature and terms of the judgment to be entered or the action to be taken thereon. *Ruehle v. Ruehle* 23
5. A judgment rendered by the district court which is free from error is not rendered invalid by the fact that the court gave an incorrect reason therefor. *Krueger v. Krueger* 82
6. While recital in a journal entry appearing in the transcript is presumptively true, an affirmative showing in the bill of exceptions that it is not true prevails over the presumption. *Waite v. State* 113
7. Amendment of pleadings rests within the discretion of the trial court, and error cannot be predicated on the action of the court in the absence of an abuse of discretion. *Anderson v. Moser* 134
8. A defective appeal bond which has been approved by the court rendering the judgment confers jurisdiction on the appellate court to have the defect corrected, and the appellate court is required to permit an amendment of the bond or to order the

filing of a new bond in the furtherance of justice. *State v. Kidder* 181

9. When a statute requires two sureties upon a bond for an appeal, and a bond containing but one surety is duly approved by the judge who rendered the judgment appealed from, the bond is not void and may be amended. *State v. Kidder* 181

10. When an application is made to amend the appeal bond on file or to provide a new one, the proper practice is to order the amendment of the bond or the filing of a new one within a reasonable time designated by the court, and in default thereof to direct the dismissal of the appeal. *State v. Kidder* 181

11. A motion for new trial not filed within time cannot form the basis for extension of the time within which an appeal can be taken. *Lockard v. Lockard* 226

12. Except in criminal actions, a notice of intention to appeal must be filed within 1 month from the date of rendition of judgment or order overruling a motion for new trial. *Lockard v. Lockard* 226

13. It is necessary that a notice of appeal shall be filed within time prescribed by statute in order to confer jurisdiction upon the Supreme Court to entertain the appeal. *Lockard v. Lockard* 226
Ricketts v. Continental Nat. Bank 809

14. In the absence of a bill of exceptions, the Supreme Court will presume that the trial court had before it competent evidence on which to base its findings sustaining the order of which complaint is made. *Lockard v. Lockard* 226

15. The Supreme Court takes judicial notice of the mandatory requirements of the statute as to the necessity and time of filing a notice of appeal, and the effect of failure to comply therewith. *Pallas v. Dailey* 277

16. The Supreme Court is without jurisdiction to entertain an appeal from the district court unless notice of appeal is filed in the office of the clerk of the district court within 1 month after rendition of the judgment or decree, or within 1 month from the overruling of a motion for new trial timely filed in the cause. *Pallas v. Dailey* 277

17. In determining whether or not there is evidence sufficient for submission of a case to a jury, the function of the Supreme Court is not to weigh evidence, but to ascertain whether or not there is evidence to sustain the verdict. *Harris v. Pullen* 298

18. The question of the qualification of a witness to state an opinion rests largely in the discretion of the trial court, and its ruling will not be disturbed on appeal unless there is a clear showing of abuse of discretion. *School Dist. No. 162 v. Grosshans & Petersen, Inc.* 357
19. Where the amount of a judgment is sustained by evidence as to which no objection is made and the defeated party makes no complaint as to the amount of the judgment, there is no reversible error in an instruction on the measure of damages. *School Dist. No. 162 v. Grosshans & Petersen, Inc.* 357
20. A slight error in an instruction will not cause a reversal of the judgment, where it is manifest the party complaining was not prejudiced thereby. *School Dist. No. 162 v. Grosshans & Petersen, Inc.* 357
21. An objection to the admission of evidence cannot be considered by the Supreme Court for some reason not properly and timely raised at the trial. *Fugate v. State* 420
22. The granting or refusing of a new trial rests in the sound discretion of the trial court, and its ruling thereon will not be disturbed unless there has been a clear abuse of such discretion. *Fugate v. State* 420
23. When the Supreme Court determines the law of the case on appeal, the trial court is bound thereby and its judgment in accordance therewith will not ordinarily be disturbed on a subsequent appeal. *Peterson v. Vak* 441
Armbruster v. Stanton-Pilger Drainage Dist. 594
Pulliam v. State 661
24. If other and different issues of fact and of law relating thereto have been properly adduced and presented in a new trial, the law of the case is not controlling thereof in a subsequent appeal. *Peterson v. Vak* 441
Armbruster v. Stanton-Pilger Drainage Dist. 594
25. It is error to refuse a request for a jury trial in an action at law, but where the one making the request has no substantial cause of action or defense, and the judgment of the trial court is the only one which could have been rendered in the case, such refusal is error without prejudice for which the judgment will not be reversed. *Robb v. Central Credit Corp.* 505
26. A judgment of the trial court in sustaining a mo-

tion for a directed verdict should be affirmed when the plaintiff fails to prove a material allegation of his petition essential to the proof of his case. *Bushon v. Fallon* 544

27. In an action in equity it is the duty of the Supreme Court to try it de novo on the record and to reach thereon an independent conclusion. *Wegner v. West* 546

28. On appeal, the authority of the Supreme Court is no greater than that of the trial court with reference to entry of judgment notwithstanding the verdict. *Springer v. Henthorn* 578

29. 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. *Springer v. Henthorn* 578
Pulliam v. State 661

30. Function of assignments of error in brief on appeal to Supreme Court stated. *Pulliam v. State* 661

31. The decision of an appellate court becomes the law of the case, and the legal effect of evidence once determined will not be reconsidered on a second appeal where there has been no material change in the evidence on the second trial. *Pulliam v. State* 661

32. In the assessment of property for taxation, the presumption of proper official action disappears where competent evidence is introduced on appeal to the contrary. Thereafter the question is one of fact to be determined from evidence, unaided by presumption. *Baum Realty Co. v. Board of Equalization* 682

33. If the evidence discloses that the value of real estate for assessment purposes was arbitrarily determined without explanation of the method used or elements considered, the value thus fixed is not supported by competent evidence and is legally erroneous. *Baum Realty Co. v. Board of Equalization.* 682

34. On appeal from the action of a county board of equalization, where the county introduces no competent evidence of the value of the property involved, the evidence offered by the taxpayer will be accepted as established for the purpose of establishing a prima facie case. *Baum Realty Co. v. Board of Equalization* 682

35. On an appeal to the Supreme Court from an order of the railway commission, administrative or leg-

islative in character, the only questions to be determined are whether the commission acted within the scope of its authority and whether the order complained of is reasonable and not arbitrarily made. *Preisendorf Transp., Inc. v. Herman Bros., Inc.* 693

36. Rulings by the Interstate Commerce Commission in dealing with the subject of transportation by common carriers in interstate commerce may properly be considered by the railway commission, and by the Supreme Court on appeal therefrom, when dealing with comparable situations in intrastate commerce. *Preisendorf Transp., Inc. v. Herman Bros., Inc.* 693

37. In an equity action the Supreme Court will, in determining the weight of evidence which is in irreconcilable conflict on a material issue, consider the fact that the trial court observed the witnesses and their manner of testifying. *Smith v. Wade* 710
Commonwealth Co. v. Fauver 795

38. It is mandatory that the trial court, without request, correctly instruct the jury as to all issues in the case which are supported by evidence, and a failure to do so ordinarily constitutes prejudicial error. *Rickertsen v. Carskadon* 744

39. By statute, any dissatisfied common carrier may appeal to the Supreme Court of Nebraska from any ruling of the railway commission upon which there has been a hearing. *Strasheim v. Martin* 787

40. The procedure to obtain a reversal, modification, or vacation of any order or regulation made and adopted, upon which a hearing has been had before the railway commission is provided by statute. *Strasheim v. Martin* 787

41. The Legislature has provided that any order of the railway commission upon which there has been a hearing before the commission is reviewable for the purpose of securing its reversal, vacation, or modification. *Strasheim v. Martin* 787

42. A trial court has no inherent power, directly or indirectly, to extend time for taking appeal. *Ricketts v. Continental Nat. Bank* 809

43. Time allowed for filing of motion for new trial stated. *Ricketts v. Continental Nat. Bank* 809

44. Where it appears from all the instructions given, and the clarity of the evidence adduced at the trial, that a claimed error in an instruction could not have misled the jury in determining the issues, such

error will not constitute prejudicial error. *Baum v. County of Scotts Bluff* 816

45. Where a certain theory as to the measure of damages is relied upon by the parties to the trial as the proper one, it will be adhered to on appeal whether it is correct or not. *Baum v. County of Scotts Bluff* 816

46. An instruction which erroneously puts the burden of proof on the defendant on a material issue is prejudicial to the rights of such defendant and ordinarily requires a new trial. *Baum v. County of Scotts Bluff* 816

47. 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, R. I. & P. R. R. Co. v. Hebron Chamber of Commerce* 867

48. An appeal to the Supreme Court in a workmen's compensation case is considered and determined de novo upon the record. *Gotfrey v. Sakurada* 879

Attorney and Client.

1. Attorneys' fees in divorce proceedings will ordinarily be denied where there appears no reasonable justification for the position taken by the party claiming them. *Ruehle v. Ruehle* 23

2. An attorney's fee is authorized by statute upon recovery against a surety on bond of a motor vehicle dealer. *Sun Ins. Co. v. Aetna Ins. Co.* 94

3. The making of a false jurat or acknowledgment by an attorney, while acting as a notary public, is a moral delinquency, justifying his suspension or disbarment. *State ex rel. Nebraska State Bar Assn. v. Butterfield* 119

4. The giving of false testimony by an attorney while under oath is an act involving moral turpitude which justifies suspension or disbarment regardless of the fact that he had not been theretofore convicted of the crime of perjury. *State ex rel. Nebraska State Bar Assn. v. Butterfield* 119

5. The importance of the reputation of an attorney in a proceeding to suspend or disbar him from the practice of law depends largely upon the facts and circumstances of each case. *State ex rel. Nebraska State Bar Assn. v. Butterfield* 119

6. A motion for judgment on the pleadings will lie only when, from the face of the pleadings, the

moving party is entitled to judgment as a matter of law. *State ex rel. Nebraska State Bar Assn. v. Mathew* 194

7. It is the duty of the court to render judgment in favor of a party where, from the pleadings, such party is entitled thereto. *State ex rel. Nebraska State Bar Assn. v. Mathew* 194
8. Under statute, the district court should, in a partition case, in the exercise of its judicial discretion, apportion attorney's fees fairly and equitably among the attorneys who participated in the case. *Stoddard v. Montgomery* 252
9. If the district court does not make a fair and equitable division of attorney's fees in a partition case and if the failure constitutes an abuse of discretion, the Supreme Court will, on an appeal therefrom, correct it. *Stoddard v. Montgomery* 252
10. A communication of a client to his attorney, to be accorded the privilege of confidence, must be one made in the course of professional employment with respect to the subject matter thereof and necessary and proper to enable the attorney to discharge the functions of his office. *Castle v. Richards* 339
11. The burden of establishing a confidential character of a communication made by a client to his attorney is on the party who objects to the disclosure of the communication. *Castle v. Richards* 339

Automobiles.

1. Under Motor Vehicle Dealer's License Act, a person is defined as "every natural person, firm, copartnership, association, or corporation." *Sun Ins. Co. v. Aetna Ins. Co.* 94
2. Under Motor Vehicle Dealer's License Act, a person desiring to act as a dealer must file under oath an application for a license. *Sun Ins. Co. v. Aetna Ins. Co.* 94
3. Under Motor Vehicle Dealer's License Act, a license may be revoked when licensee has been found guilty of willfully defrauding any person. *Sun Ins. Co. v. Aetna Ins. Co.* 94
4. Under Motor Vehicle Dealer's License Act, a dealer is required to furnish a corporate surety bond in the penal sum of $10,000. *Sun Ins. Co. v. Aetna Ins. Co.* 94
5. The word operate, as used in motor vehicle statute, relates to the actual physical handling of the

controls of an automobile by a person while under the influence of intoxicating liquor. *Waite v. State* 113

6. Essential elements of crime of motor vehicle homicide stated. *Rimpley v. State* 171
7. Duty of driver of an automobile to children stated. *Pullen v. Novak* 211
8. If a driver has reason to anticipate that a child might be near his automobile, it is his duty to see that the way is clear before starting the vehicle into motion. If he has no reason to anticipate the presence of children near his vehicle, negligence cannot be predicated on the mere fact that he started his vehicle and injured the child. *Pullen v. Novak* 211
9. Ordinarily a driver is not required to search for children on the far side of an automobile he is about to start, or for any that may be hidden underneath or in front of it, whom, by exercising reasonable care, he cannot see before starting. *Pullen v. Novak* 211
10. The "omnibus clause" of motor vehicle liability policies is for the purpose of giving additional insureds other than person named in liability policy as insured, with certain limitations, the benefit of the policy, and it extends protection to one permitted to use motor vehicle, although named insured may not be liable for accident. *Turpin v. Standard Reliance Ins. Co.* 233
11. The legislative act relating to title and transfer of motor vehicles constitutes an authorized exercise of police power on the part of the Legislature and does not violate any of the provisions of our state and federal Constitutions. *Turpin v. Standard Reliance Ins. Co.* 233
12. A purchaser who receives possession of a motor vehicle without obtaining the certificate of title thereto, as required by our statutes, acquires no title or ownership therein. *Turpin v. Standard Reliance Ins. Co.* 233
13. The purpose of the act relating to certificates of title to motor vehicles and transfers thereof is to provide a means of identifying motor vehicles, to ascertain the owners thereof, to prevent theft of motor vehicles, and to prevent fraud. *Turpin v. Standard Reliance Ins. Co.* 233
14. A certificate of title to a motor vehicle is generally conclusive evidence in this state of the ownership of the vehicle. *Turpin v. Standard Reliance Ins. Co.* 233

15. The word "owner" means one who has the legal title or rightful title, whether the possessor or not. *Turpin v. Standard Reliance Ins. Co.* 233

16. Under omnibus and proration clauses of policies of motor vehicle liability insurance, policy of owner of automobile was liable for entire judgment within policy limits, and policy of driver of automobile was excess insurance. *Turpin v. Standard Reliance Ins. Co.* 233

17. It is the duty of the driver of a motor vehicle to have his vehicle under such reasonable control as will enable him to avoid a collision with other vehicles, assuming that the drivers thereof will exercise due care. *Harris v. Pullen* 298

18. The driver of a motor vehicle has the duty to keep a proper lookout and watch where he is driving even though he has the right-of-way or is driving on the side of the highway where he has a lawful right to be. *Harris v. Pullen* 298
Thomas v. Owens 369

19. The driver of a motor vehicle on a highway who would otherwise have the right-of-way forfeits that right-of-way if he operates the vehicle at an unlawful rate of speed. *Thomas v. Owens* 369

20. The failure of the driver of a motor vehicle upon approaching an intersection to look in the direction from which another vehicle 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 recovery. *Thomas v. Owens* 369

21. When one, being in a place of safety, sees or could have seen the approach of a motor vehicle in close proximity to him and suddenly moves from the place of safety into the path of such vehicle and is struck, his own conduct constitutes contributory negligence more than slight in degree, as a matter of law, and precludes recovery. *Thomas v. Owens* 369

22. The duty of the driver of a motor vehicle to look for vehicles approaching on the highway implies the duty to see what is in plain sight. *Thomas v. Owens* 369

23. In order to constitute occupants of an automobile joint adventurers, there must be not only joint interest in the objects and purposes of the enterprise, but also an equal right, express or implied, to direct

and control the conduct of each other in the operation of the automobile. *Kleinknecht v. McNulty* 470

24. When two vehicles approach or enter an intersection at approximately the same time, the driver of the vehicle on the left must yield the right-of-way to the vehicle on the right if it is traveling at a lawful rate of speed. *Malcom v. Dox* 539

25. The drivers of vehicles approach an intersection at approximately the same time whenever the two vehicles are in such relative position that, upon appraisal of all the factors, it would 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, *Malcom v. Dox* 539

26. One having the right-of-way may not on that account proceed in disregard of the surrounding circumstances and potential dangers. One having a right-of-way is not thereby relieved from the duty of exercising ordinary care to avoid accidents. *Malcom v. Dox* 539

27. Where a motorist approaches an intersection from the left, looks to his right and observes the imminence of danger of a collision, then swerves to the left and accelerates the speed of his vehicle to avoid a collision, he is guilty of contributory negligence which is more than slight as a matter of law. *Malcom v. Dox* 539

28. Where it appears that a witness has no opportunity to formulate a basis for an opinion as to the speed of a motor vehicle, it is error to permit him to estimate such speed. *Malcom v. Dox* 539

29. The unlawful operation of a motor vehicle is not necessarily an included offense in a prosecution for motor vehicle homicide. *Olney v. State* 717

Bail.

1. Habeas corpus is available to review the action of the district court in fixing the amount of bail. *Kennedy v. Corrigan* 586

2. In a habeas corpus action the fixation of the amount of bail is a matter residing in the sound discretion of the court. *Kennedy v. Corrigan* 586

3. Where bail has been fixed the presumption that it is reasonable and not excessive prevails until the contrary is made to appear. *Kennedy v. Corrigan* 586

4. In a habeas corpus action, the petitioner and respondent may adduce evidence bearing on the ques-

tion of whether or not the bail fixed is reasonable and not excessive. *Kennedy v. Corrigan* 586
5. Matters proper to be considered in fixing bail stated. *Kennedy v. Corrigan* 586

Bonds.

1. A statutory bond will be construed in the light of the purpose for which it is required as expressed in the statute. *Sun Ins. Co. v. Aetna Ins. Co.* 94
2. The legal effect of a statutory bond is as much a part of the bond as if in terms incorporated therein. *Sun Ins. Co. v. Aetna Ins. Co.* 94
3. A defective appeal bond which has been approved by the court rendering the judgment confers jurisdiction on the appellate court to have the defect corrected, and the appellate court is required to permit an amendment of the bond or to order the filing of a new bond in the furtherance of justice. *State v. Kidder* 181
4. When a statute requires two sureties upon a bond for an appeal, and a bond containing but one surety is duly approved by the judge who rendered the judgment appealed from, the bond is not void and may be amended. *State v. Kidder* 181
5. When an application is made to amend the appeal bond on file or to provide a new one, the proper practice is to order the amendment of the bond or the filing of a new one within a reasonable time designated by the court, and in default thereof to direct the dismissal of the appeal. *State v. Kidder* 181

Boundaries.

1. The burden of proof upon an issue as to a boundary is upon the party having the affirmative of that issue. This burden must be established by a preponderance of the evidence. *Pallas v. Dailey* 533
2. A resurvey not shown to have been based upon the original survey is inconclusive in determining boundaries, and will ordinarily yield to a resurvey based upon known monuments and boundaries of the original survey. *Pallas v. Dailey* 533

Building and Loan Associations.

The method authorized by the Legislature for valuing the shares or stock of domestic building and loan associations results in discrimination against obligations of the United States. *Anderson v. Herrington* 391

Children Born Out of Wedlock.

1. An action for the purpose of legitimating or determining the paternity of a child born out of wedlock and obtaining support and maintenance for such child depends upon statutory authority for its maintenance. *Paltani v. Creel* 591
2. In an action the sole purpose of which is to have determined the paternity of a child born out of wedlock, the proceeding must be in accordance with the provisions of the statute. *Paltani v. Creel* 591
3. In this case a valid cause of action within the meaning of statute relating to children born out wedlock has not been pleaded or proved. *Paltani v. Creel* 591

Conflict of Laws.

1. Generally, if a judgment in an action provided by the law of the forum would impose on the defendant a more onerous duty than that imposed by the law of the state which created the right, or a substantially different duty, no action can be maintained. *Kindler v. Kindler* 153
2. A mere difference between the laws of two states, whether in statutory provisions, or otherwise, will not necessarily render the enforcement of a cause of action arising in one state contrary to the public policy of another state. *Kindler v. Kindler* 153
3. Comity is neither a matter of absolute obligation or mere courtesy or good will, but is the doctrine under which contracts made, rights acquired, and obligations incurred in one state are enforced by the courts of another state unless there is some definite public policy preventing recognition of such right or title. *Kindler v. Kindler* 153
4. The general rule is that a contract valid in a state under its governing law is considered valid everywhere, and will be enforced everywhere, unless the enforcement of the contract would violate the positive law or would violate the settled public policy of the forum or would work an injury to the state or to its citizens. *Kindler v. Kindler* 153

Constitutional Law.

1. Substantial compliance with the requirements of equalization and uniformity in taxation is all that is required. *Collier v. County of Logan* 1
2. The purpose and effect of home rule charter pro-

visions of the Constitution are to render cities, entitled to the benefit of the provisions, as nearly independent as possible of state legislation. *Mollner v. City of Omaha* 44

3. A city may include in its home rule charter any provision for its government that does not conflict with the Constitution or any general law of the state. *Mollner v. City of Omaha* 44

4. The requirement of the Constitution that justice be administered without delay does not create any new rights but is merely a declaration of a general fundamental principle. It is a primary duty of the courts to safeguard this declaration of right and remedy but, where no right of action is given or remedy exists under either the common law or some statute, this constitutional provision creates none. *Pullen v. Novak* 211

5. A legislative act which is amendatory of existing laws is unconstitutional where such act does not contain the section or sections amended and does not repeal said original sections. *Thompson v. Commercial Credit Equipment Corp.* 377

6. The method authorized by the Legislature for valuing the shares or stock of domestic building and loan associations results in discrimination against obligations of the United States. *Anderson v. Herrington* 391

7. The use of false testimony or the suppression of material evidence in a criminal case, which is within the knowledge of the prosecution, ordinarily constitutes a denial of due process of law when it is material to the guilt or innocence of the accused or to the penalty to be imposed. *Fugate v. State* 434

8. The due process principle that a prosecutor may not knowingly use false testimony or suppress material evidence to obtain a conviction does not ordinarily cease to apply merely because it goes only to the credibility of a witness. *Fugate v. State* 434

9. When land is taken outside the boundaries of the right-of-way condemned, it constitutes a second taking of private property for a public use and liability attaches therefor under Article I, section 21, of the Constitution. *Armbruster v. Stanton-Pilger Drainage Dist.* 594

10. In a suit to recover damages under the constitutional provision for damages to property taken or damaged for public use, it is immaterial whether the petition

states a cause of action ex delicto or ex contractu. If the fact is established that property has been damaged for public use, the owner is entitled to compensation. *Armbruster v. Stanton-Pilger Drainage Dist.* 594

11. Due process of law is guaranteed to any person charged with a criminal offense by the Constitutions of the United States and this state. It includes the right to trial by jury and the right to attend in person or by counsel. *Johnson v. State* 783
12. The rights to trial by a jury and to be represented by counsel are personal privileges which may be waived. *Johnson v. State* 783
13. Private property in this state cannot be damaged for public use without just compensation therefor under the Constitution. *Baum v. County of Scotts Bluff* 816
14. Where an irrigation district and a county jointly construct a structure across a drainage ditch which causes damage to private property, they are liable for such damage under self-executing provisions of the Constitution. *Baum v. County of Scotts Bluff* 816

Continuances.

1. A trial court may in a proper case order a continuance on its own motion. *Waite v. State* 113
2. The refusal of the trial court to grant a continuance in a criminal action will not constitute reversible error unless an abuse of discretion is shown which is prejudicial to the rights of the defendant. *Smith v. State* 199

Contracts.

1. The general rule is that a contract valid in a state under its governing law is considered valid everywhere, and will be enforced everywhere, unless the enforcement of the contract would violate the positive law or would violate the settled public policy of the forum or would work an injury to the state or to its citizens. *Kindler v. Kindler* 153
2. Every contract is made with reference to, and subject to, existing law, and every law affecting such contract is read into and becomes a part of the same. *Turpin v. Standard Reliance Ins. Co.* 233
3. It is not the province of the court in construing a contract to make a new agreement for the parties by construction; its duty is confined to the interpre-

tation of the one which the parties made for themselves. *Richardson v. Waterite Co.* 263
4. Contracts are to be given a reasonable construction in the courts so as to give effect to the intention of the parties thereto and carry out, rather than defeat, the purpose for which they were executed. *Richardson v. Waterite Co.* 263
5. A rescission is not effective unless the parties to the contract are placed in status quo so far as the circumstances will permit. *Wegner v. West* 546
6. Ordinarily in rescission a formal tender of property is not required if it appears that it would have been futile. However, a tender may not be regarded as valid, even if it appears that at the time it was made it would have been futile, if there was not a present ability to make the tender good. *Wegner v. West* 546
7. A party to a contract may not rescind on account of fraud or misrepresentation, or on account of breach by the other party, if for an unreasonable time after knowledge of the facts giving rise to the right he fails to declare a rescission and to disclaim the benefits of the contract. *Wegner v. West* 546
8. The question of whether or not there has been unreasonable delay in effecting a rescission is one which resides in the sound discretion of the court in the light of the particular facts and circumstances disclosed. *Wegner v. West* 546
9. Rescission by its nature implies the extinction of the contract which leaves the parties without a right of recovery on the contract itself. *Wegner v. West* 546
10. The rescission of a contract must be in toto and the parties must be placed in status quo so far as the circumstances will permit. *Wegner v. West* 546
11. Where a party to a contract, with full knowledge of the facts and with knowledge of a breach by the other party, receives money in the performance of the contract the breach will be deemed to have been waived. *Wegner v. West* 546
12. The assertion of the rescission of a contract is nullified by the subsequent acceptance of benefits growing out of the contract. *Wegner v. West* 546
13. The acceptance of benefits of a contract after breach whether before or after action is commenced waives the forfeiture. *Wegner v. West* 546
14. Where a contract has been established, the measure

of recovery is the price agreed upon in the contract less the damages sustained by the breach of the same. *Rickertsen v. Carskadon* 744

Counties.

Unless prohibited by statute, a county board may adopt such means to assist county officers to properly discharge the duties of their offices as in its judgment it shall deem necessary. *Collier v. County of Logan* 1

Courts.

1. Courts should not usurp the function of tribunals created by law for ascertaining the actual value of property for tax purposes or constitute themselves a taxing board or board of equalization. *Collier v. County of Logan* 1
2. The requirement of the Constitution that justice be administered without delay does not create any new rights but is merely a declaration of a general fundamental principle. It is a primary duty of the courts to safeguard this declaration of right and remedy but, where no right of action is given or remedy exists under either the common law or some statute, this constitutional provision creates none. *Pullen v. Novak* 211

Criminal Law.

1. Rule with respect to sufficiency of circumstantial evidence to sustain a conviction stated. *Rimpley v. State* 171
2. It is the province of the jury to pass upon the sufficiency of circumstances to sustain a conviction subject to the rule that, assuming the facts which the evidence tends to establish, the facts can be accounted for upon no rational theory which does not include the guilt of the accused. *Rimpley v. State* 171
3. Error may not be claimed because of the nature of cross-examination if it was not on the trial challenged by timely and proper objection thereto. *Rimpley v. State* 171
4. A plea of nolo contendere in a criminal action may not be used in evidence in a civil action against the party making the plea, but where a judgment has been entered on the plea, the record is competent

evidence of the fact of conviction. *State ex rel. Nebraska State Bar Assn. v. Mathew* 194
5. The fact that an accomplice has been guilty of willful false swearing on a material matter is a circumstance that may possibly, in a particular instance and situation, make his testimony unworthy of belief on its face, if it lacks corroboration. *Smith v. State* 199
6. Instruction in criminal case respecting the consideration to be given to the testimony of an accomplice was sufficient to adequately protect the rights of accused. *Smith v. State* 199
7. A collateral fact or circumstance is admissible as corroborative evidence when it tends in any reasonable degree to establish a material issue in the case. *Smith v. State* 199
8. The evidence of other acts is admissible in a criminal prosecution if they evidence a conspiracy, knowledge, design, disposition, plan, or scheme, or other quality, bearing upon the particular act charged. *Smith v. State* 199
9. A jury has the right to disregard the entire testimony of a witness if it believes that the witness has willfully testified falsely on any material matter. *Smith v. State* 199
10. The refusal of the trial court to grant a continuance in a criminal action will not constitute reversible error unless an abuse of discretion is shown which is prejudicial to the rights of the defendant. *Smith v. State* 199
11. Where the trial court has instructed generally as to the issues of a criminal prosecution, error cannot be predicated on its failure to instruct as to a particular phase of the case, where no proper instruction has been requested. *Smith v. State* 199
12. Under statute, a new trial may be granted in a criminal case for any of the reasons enumerated therein, including misconduct of the jury, which affect materially the substantial rights of the defendant. *Fugate v. State* 420
13. It is provided by statute that no judgment shall be set aside, or a new trial granted, in any criminal case, if the Supreme Court, after an examination of the entire cause, shall consider that no substantial miscarriage of justice has actually occurred. *Fugate v. State* 420
14. As a general rule a verdict will not be set aside

for reasons that would be sufficient to disqualify a juror in a challenge for cause, which existed before the juror was sworn, but which was unknown to the accused until after the verdict, unless it appears from the whole case that the substantial rights of the accused were materially affected by the fact that the juror served in the case. *Fugate v. State* 420

15. Where it appears that a juror made a one-dollar bet on the penalty that would be imposed on the defendant before he was sworn as a juror, which was unknown to the defendant until after the verdict, and his actions as a juror were wholly inconsistent with his interest in the result of the bet, it cannot be said that defendant was prejudiced by his serving on the jury. *Fugate v. State* 420

16. It is within the discretion of the court to permit in rebuttal the introduction of evidence not strictly rebutting. *Fugate v. State* 420

17. The receiving, over objection, of evidence of an immaterial fact constitutes no ground for a reversal, unless it is shown that such evidence is prejudicial to the complaining party. *Fugate v. State* 420

18. The correctness of a trial court's ruling on the admission of evidence must be determined by the record before it at the time the ruling was made. Such ruling presents a question of law which cannot be presented to the trial court by motion for a new trial through the medium of affidavits. *Fugate v. State* 420

19. The use of false testimony or the suppression of material evidence in a criminal case, which is within the knowledge of the prosecution, ordinarily constitutes a denial of due process of law when it is material to the guilt or innocence of the accused or to the penalty to be imposed. *Fugate v. State* 434

20. The due process principle that a prosecutor may not knowingly use false testimony or suppress material evidence to obtain a conviction does not ordinarily cease to apply merely because it goes only to the credibility of a witness. *Fugate v. State* 434

21. A new trial will not ordinarily be granted for newly discovered evidence which, when produced, will merely impeach or discredit a witness who testified at the trial. *Fugate v. State* 434

22. The granting or refusing of a new trial on the ground of newly discovered evidence rests in the

sound discretion of the trial court, and its ruling thereon will not be disturbed unless there has been a clear abuse of such discretion. *Fugate v. State* 434

23. The Supreme Court may not in a criminal case resolve conflicts in or weigh the evidence or pass upon the credibility of witnesses. *Wright v. State* 497

24. It is implicit in a verdict of guilty that the jury decided all controverted questions of fact unfavorably to the accused and the Supreme Court will not disturb the verdict if based on evidence unless as a matter of law it is insufficient to support a finding of guilt beyond a reasonable doubt. *Wright v. State* 497

25. Requirements for laying a foundation for admission of confession in evidence in a criminal case stated. *Olney v. State* 717

26. While a voluntary confession is insufficient, standing alone, to prove that a crime has been committed, it is, nevertheless, competent evidence of that fact, and may, together with sufficient corroborative circumstances, establish the corpus delicti as well as the defendant's guilty participation. *Olney v. State* 717

27. In a prosecution for homicide, it is not proper to give an instruction submitting lesser offenses unless such an instruction is applicable and authorized by the evidence. *Olney v. State* 717

28. Where the punishment of an offense created by statute is left to the discretion of the court, to be exercised within certain prescribed limits, a sentence imposed within such limits will not be disturbed unless there appears to be an abuse of discretion. *Olney v. State* 717
Miller v. State 737

29. In the absence of any appearance of prejudice the violation of an order for the segregation or sequestration of witnesses on a trial does not furnish a basis for granting a new trial. *Miller v. State* 737

30. Due process of law is guaranteed to any person charged with a criminal offense by the Constitutions of the United States and this state. It includes the right to trial by jury and the right to attend in person or by counsel. *Johnson v. State* 783

31. The rights to trial by a jury and to be represented by counsel are personal privileges which may be waived. *Johnson v. State* 783

Customs and Usages.

1. Upon the issue of negligence or contributory negli-

gence, evidence of the ordinary practice or of the uniform custom, if any, of persons in the performance of acts under similar circumstances like those which are alleged to have been done negligently is generally competent evidence. *Brackman v. Brackman* 650

2. Custom need not be pleaded in negligence cases. *Brackman v. Brackman* 650

Damages.

1. Damage which is uncertain, conjectural, or speculative as to the existence, nature, or proximate cause thereof can not be the basis of a recovery. *Johnsen v. Taylor* 280
2. Damage for permanent injury may not be based upon speculation, probability, or uncertainty but it must be shown by competent evidence that such damage is reasonably certain as a proximate result of the pleaded injury. *Johnsen v. Taylor* 280
3. A person to whom another has tortiously caused harm is entitled to compensatory damages therefor if he establishes by proof the extent of such harm and the amount of his damage with reasonable certainty. *Johnsen v. Taylor* 280
4. The element of time alone is not sufficient to establish causal connection between an accident and an alleged injury sustained thereby. *Johnsen v. Taylor* 280
5. Where the amount of a judgment is sustained by evidence as to which no objection is made and the defeated party makes no complaint as to the amount of the judgment, there is no reversible error in an instruction on the measure of damages. *School Dist. No. 162 v. Grosshans & Petersen, Inc.* 357
6. A motion for an additur to the verdict or, in the alternative, for a new trial on one cause of action limited to the question of damages, is not a motion for a new trial within the meaning of statute, and does not authorize the trial court to grant a new trial at a subsequent term of court. *Harman v. Swanson* 452
7. Such a motion, fairly construed, means that if the trial court concluded that a complete new trial was required, no action by the trial court was desired. *Harman v. Swanson* 452
8. Ordinarily, the measure of damages for breach of warranty of quality or condition is the difference between the value of the property at time of sale

and the value it would have had if as warranted. *Springer v. Henthorn* 578
9. Rule for determination of damages for breach of warranty stated. *Springer v. Henthorn* 578
10. The amount of damages awarded by a jury must be sustained by ascertained and established facts, or the verdict will be set aside. *Springer v. Henthorn* 578
11. The trial court should fully and fairly instruct the jury as to the various items of damages which it should take into consideration in arriving at its verdict. *Springer v. Henthorn* 578
12. Where a contract has been established, the measure of recovery is the price agreed upon in the contract less the damage sustained by the breach of the same. *Rickertsen v. Carskadon* 744
13. The law does not prescribe a definite rule for the ascertainment of the exact amount recoverable for false imprisonment. *Herbrick v. Samardick & Co.* 833
14. Excessive verdict should be set aside and new trial granted where it appears that the verdict was returned under the influence of passion and prejudice or where the jury misapplied the law. *Herbrick v. Samardick & Co.* 833
15. Where it is clear that a verdict is excessive but there is no method by which the court can rationally ascertain the extent of the excess, a remittitur cannot be properly required. *Herbrick v. Samardick & Co.* 833

Declaratory Judgments.

In an action to obtain a declaratory judgment, the plaintiff may, after obtaining a declaration of the validity of and rights under a contract, obtain a judgment for the amount due under the contract either under the original petition or by subsequent application. *Richardson v. Waterite Co.* 263

Divorce.

1. By statute, the court in a divorce action retains jurisdiction of the subject matter and the parties for the enforcement or modification of a judgment for maintenance of children, and the method by which a decree for child support may be modified is prescribed. *Ruehle v. Ruehle* 23
2. Where a divorce decree provides for the payment of stipulated sums monthly for the support of a minor child or children, contingent only upon a

subsequent order of the court, such payments become vested in the payee as they accrue. The courts are without authority to reduce the amounts of such accrued payments. *Ruehle v. Ruehle* 23

3. In a decree granting a wife a divorce and the custody of minor children, monthly installments of alimony and support become vested as they accrue, and unpaid, past-due portions thereof are final judgments beyond the power of the court to reduce by modification of the original decree. *Ruehle v. Ruehle* 23

4. Attorneys' fees in divorce proceedings will ordinarily be denied where there appears no reasonable justification for the position taken by the party claiming them. *Ruehle v. Ruehle* 23

5. Jurisdiction of the court in matters relating to divorce and alimony is given by statute, and every power exercised by the court with reference thereto must have its source in the statute, or it does not exist. *Ropken v. Ropken* 352

6. The decree of a district court in a divorce action, insofar as custody of minor children is concerned, is never final in the sense that it cannot be changed. *Caporale v. Hale* 751

7. In a divorce case, the custody of a child is to be determined by its best interests, with due regard for the superior rights of fit, proper, and suitable parents. *Caporale v. Hale* 751

8. In a divorce case it is generally the best policy to keep minor children within the jurisdiction of the court. *Caporale v. Hale* 751

9. The decree for child support in a divorce action is at all times subject to review and adjustment in the light of changing conditions regardless of the particular language of the decree. *Caporale v. Hale* 751

10. A parent may not be deprived of the custody of his child by the court until it is established that the parent is unfit to perform the duties of a parent or has forfeited the right to the custody of the child. *Baumann v. Baumann* 805

11. The natural and statutory rights of parents are of important consideration, and, in the absence of special circumstances, the child or children should be awarded to the parent or parents as against more distant relatives or third persons. *Baumann v. Baumann* 805

Drains.

1. The method of financing improvements and repairs of a drainage system and the plans for accomplishing the result are ordinarily within the discretion of the board of supervisors of the district, but it must act, and its acts must be commensurate with its legal duty. *Armbruster v. Stanton-Pilger Drainage Dist.* 594
2. While one who obstructs the flow of a drainage ditch in the furtherance of a public purpose is liable for damages thereby caused by the flooding of the lands of another, the burden of proof is on the person damaged by the flooding to prove the obstruction, that there was an overflow, that the overflow would not have occurred if it were not for the obstruction, and the extent of the damage attributable to it. *Baum v. County of Scotts Bluff* 816
3. One who builds a structure in a drainage ditch is charged with a duty to provide for the passage of all waters, ice, and debris which may reasonably be anticipated to flow or be carried through the ditch. *Baum v. County of Scotts Bluff* 816

Election of Remedies.

1. One who has voluntarily chosen and carried into effect an appropriate legal remedy, with knowledge of the facts and of his rights, will not generally be permitted to afterwards resort to an inconsistent remedy, involving a contradiction of the grounds upon which he previously proceeded. *State ex rel. Schaub v. City of Scottsbluff* 525
2. The rule under the doctrine of the election of remedies that one may pursue a second remedy after seeking a first remedy unsuccessfully applies only when both remedies are sought on a consistent state of facts. *State ex rel. Schaub v. City of Scottsbluff* 525

Electricity.

1. Statutory provision relating to powers of public power districts is subject to the limitations of the petition for the creation of public power districts and amendments thereto. *Schroll v. City of Beatrice* 162
2. Statute granting additional powers to a public power district relates to means by which a district may exercise the powers recited in the petition for

the creation of a public power district. *Schroll v. City of Beatrice* 162

Eminent Domain.

1. When land is taken outside the boundaries of the right-of-way condemned, it constitutes a second taking of private property for a public use and liability attaches therefor under Article I, section 21, of the Constitution. *Armbruster v. Stanton-Pilger Drainage Dist.* 594
2. The measure of damages for land taken for public use is the fair and reasonable market value of the land actually appropriated and the difference in the fair and reasonable market value of the remainder of the land before and after the taking. *Armbruster v. Stanton-Pilger Drainage Dist.* 594
3. Everything which affects the market value of land taken for public use is to be taken into consideration. The burden of additional fencing, and like matters, are to be included, not by being added together item by item, but to the extent that, taken as a whole, they detract from the market value of the property. *Armbruster v. Stanton-Pilger Drainage Dist.* 594
4. In a suit to recover damages under the constitutional provision for damages to property taken or damaged for public use, it is immaterial whether the petition states a cause of action ex delicto or ex contractu. If the fact is established that property has been damaged for public use, the owner is entitled to compensation. *Armbruster v. Stanton-Pilger Drainage Dist.* 594
5. In fixing the damages sustained by a landowner in consequence of the appropriation, or injury, of his property for a public use, every nonspeculative element of annoyance and disadvantage resulting from the improvement which would influence an intending purchaser's estimate of the market value of such property may be taken into account. *Armbruster v. Stanton-Pilger Drainage Dist.* 594

Equity.

1. A litigant must maintain his equitable action upon equitable grounds or fail, even though he may prove a good cause of action at law on the trial. *Jourdon v. Commonwealth Co.* 482
2. If an adequate remedy exists at law, a litigant may

not obtain relief in equity. The burden is on the party seeking relief to establish he has no adequate remedy at law before he can succeed in a court of equity. *Jourdon v. Commonwealth Co.* 482

3. If no ground for equitable relief is alleged or if no equitable relief is granted, a court of equity will generally decline jurisdiction to enter a money judgment on a legal cause of action. *Jourdon v. Commonwealth Co.* 482

4. If a cause of action for equitable relief and a cause of action at law are joined and equitable relief is not granted, the court is without authority to determine the issue of personal liability and render a judgment on the cause of action at law. *Jourdon v. Commonwealth Co.* 482

5. In such a situation the cause of action at law must be determined as any other law action and should be retained by the court for that purpose. *Jourdon v. Commonwealth Co.* 482

6. The question of whether laches exists in a particular case depends upon its own peculiar circumstances and is addressed to the sound discretion of the court. *Mazanec v. Lincoln Bonding & Ins. Co.* 629

7. In an equity suit a representative cause of action may not be properly joined with a personal cause of action. *Day v. City of Beatrice* 858

Estoppel.

1. A party may not properly base a claim of estoppel in his favor on his own wrongful act or dereliction of duty, or on acts or omissions induced by his own conduct, concealment, or representations. *Armbruster v. Stanton-Pilger Drainage Dist.* 594

2. There can be no waiver or estoppel unless the person against whom it is claimed had full knowledge of his rights and of facts which will enable him to take effectual action for their enforcement. No one can acquiesce in a wrong while ignorant that it has been committed. *Armbruster v. Stanton-Pilger Drainage Dist.* 594

Evidence.

1. Statements, admissions, and allegations in pleadings upon which the case is tried are always in evidence for all the purposes of the trial. They are before the court and may be used for any legitimate purpose. *Krueger v. Krueger* 82

2. A party may at any and all times invoke the language of his opponent's pleading on which a case is being tried as rendering certain facts indisputable. In doing this he is neither required nor allowed to offer such pleading in evidence in the ordinary manner. *Krueger v. Krueger* 82
3. In construing a will the whole thereof will be considered and from its four corners the court will determine the intent of the testator and give effect thereto. Extrinsic evidence is not admissible to determine the intent of the testator as expressed in his will unless there is a latent ambiguity. *Krueger v. Krueger* 82
4. Where the description of real property devised in a will is inaccurate or there is a latent ambiguity with respect thereto, extrinsic evidence is competent to resolve the ambiguity and identify the property designated. *Krueger v. Krueger* 82
5. Where there is no specific standard by which reasonable value of labor and materials furnished shall be proved, prima facie proof thereof is made where a reasonable inference of such value flows from the evidence adduced. *Bosle v. Luebs* 186
6. In a proceeding to recover for personal services rendered decedent, plaintiff is not required to show nonpayment therefor since payment is an affirmative defense to be established by the executor. *Bosle v. Luebs* 186
7. A plea of nolo contendere in a criminal action may not be used in evidence in a civil action against the party making the plea, but where a judgment has been entered on the plea, the record is competent evidence of the fact of conviction. *State ex rel. Nebraska State Bar Assn. v. Mathew* 194
8. A collateral fact or circumstance is admissible as corroborative evidence when it tends in any reasonable degree to establish a material issue in the case. *Smith v. State* 199
9. The evidence of other acts is admissible in a criminal prosecution if they evidence a conspiracy, knowledge, design, disposition, plan, or scheme, or other quality, bearing upon the particular act charged. *Smith v. State* 199
10. Admissions in the law of evidence are concessions or voluntary acknowledgments made by a party of the existence of certain facts *Anest v. Chester B. Brown Co.* 330

11. Admissions of a party against interest made in court or out of court, with reference to and pertinent to the issues being tried, are admissible in evidence against such party. *Anest v. Chester B. Brown Co.* 330
12. Where a plaintiff, without reasonable explanation, testifies to facts materially different concerning a vital issue than had previously been testified to by him under oath in another action, the change clearly being made to meet the exigencies of the pending action, the evidence is discredited as a matter of law and should be disregarded. *Kirchner v. Gast* 404
13. A plaintiff may not recite upon oath one statement of facts in one judicial proceeding and then, to meet the exigencies of the occasion in the trial of a different suit, recite under oath an entirely different story. *Kirchner v. Gast* 404
14. Extrajudicial statements of fact made by a party relating to matters material to the issues in a controversy are available to the adverse party in a trial thereof as admissions against interest or for impeachment. Such statements are, however, not conclusive but may be explained, rebutted, or contradicted. *Kirchner v. Gast* 404
15. A photograph proved to be a true representation of the person, place, or thing which it purports to represent is competent evidence of anything of which a verbal description by a witness is competent and relevant. *Fugate v. State* 420
16. It is within the discretion of the court to permit in rebuttal the introduction of evidence not strictly rebutting. *Fugate v. State* 420
17. The receiving, over objection, of evidence of an immaterial fact constitutes no ground for a reversal, unless it is shown that such evidence is prejudicial to the complaining party. *Fugate v. State* 420
18. The correctness of a trial court's ruling on the admission of evidence must be determined by the record before it at the time the ruling was made. Such ruling presents a question of law which cannot be presented to the trial court by motion for a new trial through the medium of affidavits. *Fugate v. State* 420
19. The granting or refusing of a new trial on the ground of newly discovered evidence rests in the sound discretion of the trial court, and its ruling

thereon will not be disturbed unless there has been a clear abuse of such discretion. *Fugate v. State* 434

20. Where it appears that a witness had no opportunity to formulate a basis for an opinion as to the speed of a motor vehicle, it is error to permit him to estimate such speed. *Malcom v. Dox* 539

21. The amount of damages awarded by a jury must be sustained by ascertained and established facts, or the verdict will be set aside. *Springer v. Henthorn* 578

22. Requirements for laying a foundation for admission of confession in evidence in a criminal case stated. *Olney v. State* 717

23. While a voluntary confession is insufficient, standing alone, to prove that a crime has been committed, it is, nevertheless, competent evidence of that fact, and may, together with sufficient corroborative circumstances, establish the corpus delicti as well as the defendant's guilty participation. *Olney v. State* 717

24. Evidence of prior transactions of one of the parties to the action with other persons, even though similar to the transaction involved in the case before the court, is generally not admissible. *Rickertsen v. Carskadon* 744

25. Evidence of prior transactions of a party to an action with a third person is not ordinarily admissible because there is no logical or necessary relation between the several transactions that anything done in connection with the one could be relied on to prove or disprove anything in issue in connection with the other. *Rickertsen v. Carskadon* 744

26. Where there is a conflict in the evidence relating to a material issue in the case, any collateral fact or circumstance tending in any reasonable degree to establish the probability or improbability of the fact in issue is relevant evidence and proper for the consideration of the jury. *Rickertsen v. Carskadon* 744

27. When the facts which form the basis of a conclusion cannot be adequately exhibited to a jury, the estimate of them made by a witness who observed them is ordinarily competent as evidence. It is only where such an estimate is based on pure speculation and conjecture that it is not admissible. *Rickertsen v. Carskadon* 744

False Imprisonment.

1. False imprisonment consists in the unlawful restraint against his will of an individual's personal liberty. *Herbrick v. Samardick & Co.* 833
2. Any intentional conduct chargeable to defendant, that results in placing of a person in a position where he cannot exercise his will in going where he may lawfully go, may constitute false imprisonment. *Herbrick v. Samardick & Co.* 833
3. Where there is a conflict of testimony in an action for false imprisonment, credibility of witnesses and weight of evidence are questions for the jury. *Herbrick v. Samardick & Co.* 833
4. The law does not prescribe a definite rule for the ascertainment of the exact amount recoverable for false imprisonment. *Herbrick v. Samardick & Co.* 833

Fraud.

1. To vitiate a contract for failure to disclose pertinent facts amounting to a fraud, the evidence must show that such facts were within the knowledge of the person charged, that a duty to speak existed, that such information was material, and that the suppression of the information tended to induce action which the other party would not otherwise have taken. *Richardson v. Waterite Co.* 263
2. To form the basis for an action in the nature of deceit, false representations must not consist merely of promises to be performed in the future, and generally not merely of expressions of opinion by a vendor as to the quality of goods, but they must be representations of known existing facts. *Wegner v. West* 546
3. Fraud must relate to present or preexisting facts, and cannot ordinarily be predicated on representations or statements which involve mere matters of futurity or things to be done or performed in the future. *Wegner v. West* 546
4. Right to rescind on the ground of fraud is barred by failure for an unreasonable time after knowledge of the facts to declare a rescission. *Mazanec v. Lincoln Bonding & Ins. Co.* 629

Frauds, Statute of.

1. An oral agreement purporting to establish an express trust in real estate is within the statute of frauds. *Halsted v. Halsted* 325

2. Where an oral contract within the statute of frauds has been established by evidence which is clear, convincing, and satisfactory, it will be enforced by a court of equity when it has been partly performed. *Halsted v. Halsted* 325
3. Where part performance is relied on to enforce an oral agreement otherwise barred by the statute of frauds, the acts alleged to constitute part performance must be referable solely to the contract sought to be enforced, and unequivocally indicate the existence of the contract alleged, and no other. *Halsted v. Halsted* 325
4. Acts which are alleged to constitute part performance of an oral agreement otherwise barred by the statute of frauds must be established by a preponderance of the evidence which is clear, convincing, and satisfactory. *Halsted v. Halsted* 325

Habeas Corpus.

1. Habeas corpus is available to review the action of the district court in fixing the amount of bail. *Kennedy v. Corrigan* 586
2. In a habeas corpus action the fixation of the amount of bail is a matter residing in the sound discretion of the court. *Kennedy v. Corrigan* 586
3. In a habeas corpus action, the petitioner and respondent may adduce evidence bearing on the question of whether or not the bail fixed is reasonable and not excessive. *Kennedy v. Corrigan* 586

Homesteads.

1. Any conveyance or encumbrance of the homestead of a married person is absolutely void and unenforceable unless voluntarily executed and acknowledged by both husband and wife. *Mazanec v. Lincoln Bonding & Ins. Co.* 629
2. Any conveyance or encumbrance of real estate, executed and delivered, is valid between the parties, though not lawfully acknowledged nor witnessed, and is sufficient to convey or encumber the land described therein, with the exception of the homestead of the grantor. *Mazanec v. Lincoln Bonding & Ins. Co.* 629
3. A homestead is the house and land where the family dwells. *Smith v. Wade* 710
4. Ordinarily, a homestead of a married person cannot be conveyed or encumbered unless the instru-

ment by which it is conveyed or encumbered is executed and acknowledged by both husband and wife. *Smith v. Wade* 710

Homicide.

1. Essential elements of crime of motor vehicle homicide stated. *Rimpley v. State* 171
2. A purpose to kill and malice are essential elements of murder in the second degree and in a prosecution therefor each must be established beyond a reasonable doubt. *Wright v. State* 497
3. If the circumstances attending a homicide are in evidence by a witness or witnesses thereto, there is no presumption of malice from the fact of the homicide. *Wright v. State* 497
4. Language alone, though excessively abusive and indecent, is no justification for the doing of violence to the person of another. *Wright v. State* 497
5. The unlawful operation of a motor vehicle is not necessarily an included offense in a prosecution for motor vehicle homicide. *Olney v. State* 717
6. In a prosecution for homicide, it is not proper to give an instruction submitting lesser offenses unless such an instruction is applicable and authorized by the evidence. *Olney v. State* 717

Husband and Wife.

1. A contract of a married woman can only be enforced against the separate estate which she possessed at the date of the contract. *Castle v. Richards* 339
2. Rule as to enforcement of judgment against the separate estate of married woman stated. *Castle v. Richards* 339
3. Ordinarily, a 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 husband and wife. *Smith v. Wade* 710

Indictments and Informations.

1. Where there is no showing of prejudice, a trial court may permit the names of witnesses to be endorsed upon an information before or during the trial. *Waite v. State* 113
2. An information in a felony case which lacks an allegation that the crime charged was committed

within the jurisdiction is vulnerable to a general demurrer. *Smith v. State* 199
3. Defects or omissions in an indictment or information which are of such fundamental character as to render the indictment or information wholly invalid are not subject to waiver by the accused. *Smith v. State* 199
4. A defendant by failure to move to quash or to demur does not waive the right to raise the question in the Supreme Court of whether or not the indictment or information is wholly invalid. *Smith v. State* 199
5. 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. *Smith v. State* 199
6. 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. *Smith v. State* 199

Infants.

1. Infants have a right to sue by a guardian or next friend to recover damages done to their person or property by the tortious acts of another. *Pullen v. Novak* 211
2. Duty of driver of an automobile to children stated. *Pullen v. Novak* 211
3. If a driver has reason to anticipate that a child might be near his automobile, it is his duty to see that the way is clear before starting the vehicle into motion. If he has no reason to anticipate the presence of children near his vehicle, negligence cannot be predicated on the mere fact that he started his vehicle and injured the child. *Pullen v. Novak* 211
4. Ordinarily a driver is not required to search for children on the far side of an automobile he is about to start, or for any that may be hidden underneath or in front of it, whom, by exercising reasonable care, he cannot see before starting. *Pullen v. Novak* 211
5. Infants, like adults, assume the ordinary risks of the service in which they engage. But an infant engaging in a hazardous employment is entitled to

warning of dangers which, on account of youth and inexperience, he does not fully comprehend. *Brackman v. Brackman* 650

6. Necessaries, within the meaning of the Uniform Sales Act, are goods suitable to the condition in life of an infant or other person, and to his actual requirements at the time of delivery. *Smith v. Wade* 710
7. The question of what are necessaries is a mixed one of law and fact which must be determined from the particular facts and circumstances of the case. *Smith v. Wade* 710
8. A minor may repudiate and rescind his contracts before he reaches his majority. *Smith v. Wade* 710

Injunctions.

1. If the nature of a threatened trespass on real estate is such that it will, if accomplished, prevent a substantial enjoyment of property or the possession thereof the remedy of injunction is appropriate to forestall the wrongful act. *Peterson v. Vak* 441
2. A party seeking an injunction must establish by competent evidence every controverted fact necessary to entitle it to relief. An injunction will not lie unless the right is clear, the damage is irreparable, and a remedy at law is inadequate to prevent a failure of justice. *Armbruster v. Stanton-Pilger Drainage Dist.* 594
3. Acts which destroy or result in a serious change of property either physically or in the character in which it has been held or enjoyed have been held to do an irreparable injury. *Armbruster v. Stanton-Pilger Drainage Dist.* 594
4. Ordinarily where an injury wrongfully committed is continuous or is being constantly repeated so that plaintiff's remedy at law requires the bringing of successive actions, that remedy is inadequate and the injury will be prevented by injunction. *Armbruster v. Stanton-Pilger Drainage Dist.* 594
5. Equity looks to the nature of the injury inflicted, together with the fact of its constant repetition or continuation, rather than to the magnitude of the damages inflicted, as the ground of affording relief. *Armbruster v. Stanton-Pilger Drainage Dist.* 594
6. A litigant may not complain of the refusal of the court to enjoin acts of his adversary when the litigant has, with knowledge of the facts, parti-

cipated and acquiesced in the performance of the acts he seeks to enjoin. *Day v. City of Beatrice* 858
7. As a general rule a party may lose his right to injunctive relief through his own acquiescence in a breach of duty by the other party. *Day v. City of Beatrice* 858

Insurance.
1. A loan by an insurance company to an insured, to be repaid only if the insured made a recovery from a third person, does not make the insurer the real party in interest in action against the third person. *Sun Ins. Co. v. Aetna Ins. Co.* 94
2. The "omnibus clause" of motor vehicle liability policies is for the purpose of giving additional insureds other than person named in liability policy as insured, with certain limitations, the benefit of the policy, and it extends protection to one permitted to use motor vehicle, although named insured may not be liable for accident. *Turpin v. Standard Reliance Ins. Co.* 233
3. Under omnibus and proration clauses of policies of motor vehicle liability insurance, policy of owner of automobile was liable for entire judgment within policy limits, and policy of driver of automobile was excess insurance. *Turpin v. Standard Reliance Ins. Co.* 233

Intoxicating Liquors.
The word operate, as used in motor vehicle statute, relates to the actual physical handling of the controls of an automobile by a person while under the influence of intoxicating liquor. *Waite v. State* 113

Joint Adventures.
1. Elements necessary to constitute a joint adventure stated. *Kleinknecht v. McNulty* 470
2. In order to constitute occupants of an automobile joint adventurers, there must be not only joint interest in the objects and purposes of the enterprise, but also an equal right, express or implied, to direct and control the conduct of each other in the operation of the automobile. *Kleinknecht v. McNulty* 470

Judgments.
1. Where the record in an action discloses that a judgment was entered against a county on a stipu-

lation of facts amounting to a confession of judgment under the issues, without a warrant of authority to the county attorney to do so, the judgment is void and subject to collateral attack. *State ex rel. Goodsell v. Tunnicliff* 128

2. A void judgment is not a defense to the issuance of a peremptory writ of mandamus otherwise required. *State ex rel. Goodsell v. Tunnicliff* 128
3. The prerequisites of granting a motion for 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. *Anderson v. Moser* 134
4. A formal entry on the record is not essential to the rendition of a judgment. A judgment is rendered when the court announces its decision upon the law and facts in controversy. *Lockard v. Lockard* 226
5. The proper function of a nunc pro tunc order is to correct a record which has been made so that it will truly record the action had, which through inadvertence or mistake has not been truly recorded. *Lockard v. Lockard* 226
6. A nunc pro tunc order is one the design and purpose of which is to make the record speak the truth. *Lockard v. Lockard* 226
7. The purpose of a nunc pro tunc order is not to correct, change, or modify affirmative action previously taken by the court. *Lockard v. Lockard* 226
8. Courts may consider and rely upon any satisfactory evidence to ascertain whether or not an order is properly a nunc pro tunc order. *Lockard v. Lockard* 226
9. A judgment is rendered when the court announces its decision upon the law and the facts in controversy as ascertained by the pleadings. *Pallas v. Dailey* 277
   Ricketts v. Continental Nat. Bank 809
10. A judgment lien on real estate attaches only to the actual interest of the judgment debtor therein and is subject to all the then existing equities thereto, whether of record or not. *Halsted v. Halsted* 325
11. A trial court has inherent power, during the term at which a judgment was entered, to correct errors and mistakes, even to the extent of granting a new trial, whether or not a motion for a new trial has been filed. *Harman v. Swanson* 452

12. The inherent power of a trial court to grant a new trial is limited to those situations where prejudicial error appears in the record and such power expires with the term of court at which the judgment was rendered. *Harman v. Swanson* 452
13. After the adjournment of the term at which a judgment was rendered the trial court has authority to grant a new trial where a motion therefor is filed within 10 days. *Harman v. Swanson* 452
14. A summary judgment is authorized only when the moving party is entitled to a judgment as a matter of law. If there is a genuine issue of fact to be determined, a summary judgment may not be properly entered. *Kleinknecht v. McNulty* 470
15. The pendency of a former suit by the same parties may be shown in abatement when a judgment in such suit would be a bar to a judgment in the second action. That one is an equitable action and the other a suit at law is immaterial if both suits are based upon substantially the same facts. *Jourdon v. Commonwealth Co.* 482
16. A case must be determined on the law as it stands when judgment is rendered therein. *Preisendorf Transp., Inc. v. Herman Bros., Inc.* 693
17. The district court may, on motion and satisfactory proof that a judgment had been fully paid or satisfied by the act of the parties thereto, order it discharged and canceled of record. *Hopwood v. Hopwood* 760
18. When a question of fact is once determined on its merits, that question is settled so far as the litigants and those in privity are concerned and it may not be relitigated between the same parties. *Gilcrist v. Wright* 799
19. A judgment is the final determination of the rights of the parties in an action. *Ricketts v. Continental Nat. Bank* 809
20. The entry of a judgment upon the records is not an integral part of the judicial act of rendering a judgment, although the entry thereof may be required before it can become available for certain purposes. *Ricketts v. Continental Nat. Bank* 809
21. The rendition of a judgment, the making of a final order, or the overruling of a motion for a new trial mean the announcement by the court of the action taken and does not necessarily require the notation thereof in any record or the entry thereof

in the journal of the court. *Ricketts v. Continental Nat. Bank* 809

22. The proper function of a nunc pro tunc order is not for the purpose of correcting some affirmative action of the court which ought to have been taken, but its true purpose is to correct the record which has been made to truly record the action really had. *Ricketts v. Continental Nat. Bank* 809

Juries.

1. As a general rule a verdict will not be set aside for reasons that would be sufficient to disqualify a juror in a challenge for cause, which existed before the juror was sworn, but which was unknown to the accused until after the verdict, unless it appears from the whole case that the substantial rights of the accused were materially affected by the fact that the juror served in the case. *Fugate v. State* 420

2. Where it appears that a juror made a one-dollar bet on the penalty that would be imposed on the defendant before he was sworn as a juror, which was unknown to the defendant until after the verdict, and his actions as a juror were wholly inconsistent with his interest in the result of the bet, it cannot be said that defendant was prejudiced by his serving on the jury. *Fugate v. State* 420

Landlord and Tenant.

1. Where land is leased and rent reserved in kind or share of the crops to be raised, the landlord and tenant are tenants or owners in common of the growing crops on such land during the life of the lease and until the crop is harvested and divided. *Anest v. Chester B. Brown Co.* 330

2. A tenant is entitled to the exclusive possession and use of the demised premises in the absence of reservations and restrictions in his lease and he may even maintain trespass against his landlord. *Peterson v. Vak* 441

Mandamus.

1. The only proper pleadings in a mandamus action, where an alternative writ is issued, are the alternative writ and the return or answer thereto. *State ex rel. Goodsell v. Tunnicliff* 128

2. No reply to the return or answer to an alternative

writ of mandamus is permitted, but the allegations thereof are deemed to be denied. *State ex rel. Goodsell v. Tunnicliff* 128
3. A void judgment is not a defense to the issuance of a peremptory writ of mandamus otherwise required. *State ex rel. Goodsell v. Tunnicliff* 128

Marriage.
1. The validity of a marriage is determined by the law of the place where it was contracted; if valid there it will be valid everywhere. *Ropken v. Ropken* 352
2. A common-law marriage is not recognized in this state unless entered into prior to 1923. *Ropken v. Ropken* 352
3. Common-law marriages are recognized in Iowa, and one asserting a valid marriage in that state must show that the requirements of its laws have been met. *Ropken v. Ropken* 352
4. Where cohabitation in its origin was meretricious the presumption is that it continues to be such. *Ropken v. Ropken* 352
5. Where cohabitation was in its beginning meretricious, affirmative proof of a subsequent present agreement to change such relation into a marital one is essential to the establishment of a common-law marriage. *Ropken v. Ropken* 352
6. Intention to become husband and wife cannot be inferred from cohabitation and reputation alone. The primary question is whether or not the minds of the parties have met in mutual consent to the marriage status and have subsequently cohabited with intent thereby to be husband and wife. *Ropken v. Ropken* 352
7. In a case wherein there is an issue as to the nullity of a marriage and a decree of nullity has been rendered, the court may decree what it shall deem proper concerning the care, custody, and maintenance of minor children of the parties. *Paltani v. Creel* 591

Master and Servant.
1. The law generally requires an employer to exercise ordinary care to provide reasonably safe tools and appliances for the use of his employee. *Anderson v. Moser* 134
2. If the employee possesses ordinary intelligence and knowledge and the tools and appliances furnished

are simple in character, in common use, easily understood, and in which defects can be readily observed by the employee, liability cannot be imposed on the employer for injury from use of such tools and appliances. *Anderson v. Moser* 134

3. In the instance of simple tools in common use an employer, as a matter of law, is relieved of the ordinary duty of furnishing safe tools to his employee, instructing the employee as to their use, and of inspecting the tools. *Anderson v. Moser* 134
4. The knowledge of an employee of simple tools in common use is, as a matter of law, presumed to be equal to that of an employer. *Anderson v. Moser* 134
5. For injuries caused by the negligent act of an employee not directed or ratified by the employer, the employee is liable because he committed the act which caused the injury, while the employer may be liable under the doctrine of respondeat superior if the requisite elements are present. *Pullen v. Novak* 211

Money Lenders.

The design of the Installment Loan Act is to license and control the business of making installment loans and to restrict the enforcement or collection of illegal loans once they have been made. *Robb v. Central Credit Corp.* 505

Motor Carriers.

1. In conformity with the Constitution, the Legislature has the right to prescribe how the railway commission may proceed and what authority it may exercise in granting certificates of public convenience and necessity for operation of motor vehicles for hire intrastate. *Preisendorf Transp., Inc. v. Herman Bros., Inc.* 693
   Strasheim v. Martin 787
2. The power of the railway commission to issue a certificate of public convenience and necessity is grounded on the filing of an application, the giving of notice to interested persons, and a hearing. *Preisendorf Transp., Inc. v. Herman Bros., Inc.* 693
3. A temporary certificate is subject to the same requirements under the statute as any other certificate of public convenience and necessity. The statute makes no distinction between classes or

types of certificates. *Preisendorf Transp., Inc. v. Herman Bros., Inc.* 693
4. Essential requirements for issuance of certificate of public convenience and necessity stated. *Preisendorf Transp., Inc. v. Herman Bros., Inc.* 693
5. Operation by motor carrier under void certificate of public convenience and necessity did not preclude granting of new certificate covering same operations. *Abler v. Wheeler Transp. Service, Inc.* 728
6. Railway commission is authorized to regulate common carriers by motor vehicle, subject to statutory requirements and subject to review of its orders by the Supreme Court. *Strasheim v. Martin* 787
7. By statute, orders of the railway commission are to be in force and effect from and after date fixed by the commission, and to so remain until adjudged unreasonable and unjust by a court of competent jurisdiction. *Strasheim v. Martin* 787
8. The railway commission, in order to revoke, change, or suspend a certificate of public convenience and necessity, must proceed in accordance with statute. *Strasheim v. Martin* 787
9. By statute, permits and certificates of public convenience and necessity issued to common carriers by motor vehicles remain in effect until terminated by the railway commission. *Ferguson Trucking Co., Inc. v. Nebraska State Railway Commission* 851
10. A permit or certificate of public convenience and necessity may be revoked, in the discretion of the railway commission, upon the application of a holder thereof. *Ferguson Trucking Co., Inc. v. Nebraska State Railway Commission* 851
11. On complaint or on the initiative of the railway commission, a permit or certificate of public convenience and necessity may be suspended, changed, or revoked in whole or in part, after notice and hearing, for willful failure to comply with any of the provisions of Motor Carrier Act, or with any lawful order, rule, or regulation of the commission promulgated thereunder, or with any term, condition, or limitation of such permit or certificate. *Ferguson Trucking Co., Inc. v. Nebraska State Railway Commission* 851
12. An order of revocation of a permit or certificate of public convenience and necessity by the railway commission without compliance with statute as to notice and hearing is not effective as a revocation.

Ferguson Trucking Co., Inc. v. Nebraska State Railway Commission 851

13. Under statute, the holder of a permit or certificate of public convenience and necessity may seek, by complaint or request, suspension of the permit or certificate or operation thereunder. The railway commission is required to give notice and grant a hearing thereon. *Ferguson Trucking Co., Inc. v. Nebraska State Railway Commission* 851

Municipal Corporations.

1. The purpose and effect of home rule charter provisions of the Constitution are to render cities, entitled to the benefit of the provisions, as nearly independent as possible of state legislation. *Mollner v. City of Omaha* 44
2. Home rule charter cities as to all matters of strictly local concern operate free and independent of state legislation. *Mollner v. City of Omaha*..... 44
3. The right of a city to provide for a particular form of government in a home rule charter does not depend upon whether the Legislature by statutory enactment has authorized such form, nor is it subject to statutory conditions and limitations upon which the Legislature may have authorized a city to adopt it. *Mollner v. City of Omaha* 44
4. A city may include in its home rule charter any provision for its government that does not conflict with the Constitution or any general law of the state. *Mollner v. City of Omaha* 44
5. The exercise of the legislative power of a municipality is not always exclusive in the city council thereof. The electors of the city may be authorized to participate therein. *Mollner v. City of Omaha* 44
6. In the adoption of a new home rule charter, it was proper to retain the provisions of prior home rule charter as ordinances until superseded by ordinances enacted under new charter. *Mollner v. City of Omaha* 44
7. Rule as to abandonment of a position with a municipality stated. *State ex rel. Schaub v. City of Scottsbluff* 525
8. The rule as to abandonment of a position applies not only where the refusal to perform is willful, but also where, though not intending to vacate the position, the employee in good faith but mistakenly

supposed he had no right to perform such duties. *State ex rel. Schaub v. City of Scottsbluff* 525

9. While abandonment of a position by an employee must be total and under such circumstances as to clearly indicate its absolute relinquishment, whether or not a position has been abandoned is dependent on his acts and conduct rather than his declared intention. *State ex rel. Schaub v. City of Scottsbluff* 525
10. The law will infer an abandonment where the acts and conduct of the employee indicate that he has completely relinquished the duties of his position. *State ex rel. Schaub v. City of Scottsbluff* 525
11. Where the power of a city to contract exists but was irregularly exercised, it may subsequently be adopted or ratified with the same resulting effect as though properly done in the first instance. *Day v. City of Beatrice* 858
12. The authority of a city to enter into a contract may properly be questioned only by the parties to the contract or by a taxpayer of the city. A person in the status of an unsuccessful bidder for the contract cannot properly raise such issue. *Day v. City of Beatrice* 858
13. Ordinarily a city council in the awarding of contracts possesses a discretionary power in considering the responsibility of bidders and in determining questions of public interest and welfare. *Day v. City of Beatrice* 858
14. It will be presumed that a city council, in awarding a contract, acted in good faith, with honest motives, and for the purpose of promoting the public good and protecting the public interest. *Day v. City of Beatrice* 858
15. Where there is no showing that a city council in the awarding of a contract acted arbitrarily, or from favoritism, ill will, fraud, collusion, or other such motives, a court will not ordinarily substitute its judgment for that of the council. *Day v. City of Beatrice* 858

Negligence.

1. The duty of the owner of the premises toward an invitee is to exercise ordinary care to maintain the premises within the scope of the invitation in a reasonably safe condition. *Anderson v. Moser* 134
2. The law generally requires an employer to exercise ordinary care to provide reasonably safe tools and

appliances for the use of his employee. *Anderson v. Moser* 134
3. If the employee possesses ordinary intelligence and knowledge and the tools and appliances furnished are simple in character, in common use, easily understood, and in which defects can be readily observed by the employee, liability cannot be imposed on the employer for injury from use of such tools and appliances. *Anderson v. Moser* 134
4. In the instance of simple tools in common use an employer, as a matter of law, is relieved of the ordinary duty of furnishing safe tools to his employee, instructing the employee as to their use, and of inspecting the tools. *Anderson v. Moser* 134
5. The knowledge of an employee of simple tools in common use is, as a matter of law, presumed to be equal to that of an employer. *Anderson v. Moser* 134
6. For injuries caused by the negligent act of an employee not directed or ratified by the employer, the employee is liable because he committed the act which caused the injury, while the employer may be liable under the doctrine of respondeat superior if the requisite elements are present. *Pullen v. Novak* 211
7. When there is no right of action in a son for personal injuries inflicted upon him by the negligent acts of his father, there can be no liability therefor on the part of the father and, since there is no liability of the father therefor, his employer can not be made to respond in damages to the son for the father's negligent acts. *Pullen v. Novak* 211
8. An unemancipated child cannot sue his father to recover damages for injuries to his person resulting from ordinary negligence on the part of the father and consequently he cannot sue his father's employer to recover such damages as he has suffered therefrom. *Pullen v. Novak* 211
9. In a personal injury suit, the burden is on plaintiff to show by the weight of the evidence the truth of one or more of the acts of negligence charged against the defendant, and that such negligence was the proximate cause of an injury and damage to plaintiff and the extent thereof. *Johnsen v. Taylor* 280
10. The element of time alone is not sufficient to establish causal connection between an accident and an alleged injury sustained thereby. *Johnsen v. Taylor* 280

11. Where the defendant pleads that the plaintiff was guilty of contributory negligence, the burden is on him to prove that defense by a preponderance of the evidence. *Harris v. Pullen* 298

12. If the evidence adduced by the plaintiff tends to prove the defense of contributory negligence, the defendant is entitled to receive the benefit thereof and it is the duty of the court to so instruct the jury. *Harris v. Pullen* 298

13. Where different minds may reasonably draw different conclusions from the evidence, or there is a conflict in the evidence as to whether or not negligence or contributory negligence has been established, the question is for the jury. *Harris v. Pullen* 298

14. It is the duty of the driver of a motor vehicle to have his vehicle under such reasonable control as will enable him to avoid a collision with other vehicles, assuming that the drivers thereof will exercise due care. *Harris v. Pullen* 298

15. The driver of a motor vehicle has the duty to keep a proper lookout and watch where he is driving even though he has the right-of-way or is driving on the side of the highway where he has a lawful right to be. *Harris v. Pullen* 298
Thomas v. Owens 369

16. The driver of a motor vehicle on a highway who would otherwise have the right-of-way forfeits that right-of-way if he operates the vehicle at an unlawful rate of speed. *Thomas v. Owens* 369

17. The failure of the driver of a motor vehicle upon approaching an intersection to look in the direction from which another vehicle 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 recovery. *Thomas v. Owens* 369

18. When one, being in a place of safety, sees or could have seen the approach of a motor vehicle in close proximity to him and suddenly moves from the place of safety into the path of such vehicle and is struck, his own conduct constitutes contributory negligence more than slight in degree, as a matter of law, and precludes recovery. *Thomas v. Owens* 369

19. The duty of the driver of a motor vehicle to look for vehicles approaching on the highway implies

the duty to see what is in plain sight. *Thomas v. Owens* 369
20. Want of ordinary care, and not knowledge of the danger, is the test of contributory negligence. *Thomas v. Owens* 369
21. If it appears that a defendant has been guilty of gross negligence and a plaintiff has been guilty of slight negligence by comparison with that of the defendant the plaintiff may recover. *Kirchner v. Gast* 404
22. If a defendant has been guilty of gross negligence and a plaintiff has been guilty of negligence more than slight by comparison with that of the defendant the plaintiff may not recover. *Kirchner v. Gast* 404
23. If a defendant has been guilty of negligence which is less than gross and the plaintiff has been guilty of negligence in any degree the plaintiff may not recover. *Kirchner v. Gast* 404
24. In an action based on negligence to which the comparative negligence rule has application wherein the evidence shows beyond reasonable dispute that the plaintiff's negligence was more than slight in comparison with that of the defendant the action should be dismissed or verdict directed. *Kirchner v. Gast* 404
25. The violation of any statutory or valid municipal regulation, established for the purpose of protecting persons or property from injury, is sufficient to prove such a breach of duty as will sustain a private action for negligence, if the other elements of actionable negligence occur. *Hersh v. Miller* 517
26. A violation of any statutory or municipal regulation is evidence of negligence which the jury is entitled to consider upon the question whether actionable negligence exists. *Hersh v. Miller* 517
27. Negligence consisting in whole or in part of the violation of statutes or ordinances, like other negligence, is without legal consequence unless it is a contributing cause of the injury for which recovery is sought. *Hersh v. Miller* 517
28. Proximate cause, as used in the law of negligence, is that cause which in a natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the accident could not have happened. *Hersh v. Miller* 517
29. Doctrine of efficient intervening cause in negligence case stated. *Hersh v. Miller* 517

30. An efficient, intervening cause is a new and independent force which breaks the causal connection between the original wrong and the injury. *Hersh v. Miller* 517
31. The causal connection is broken if between the defendant's negligent act and the plaintiff's injury there has intervened the negligence of a third person who had full control of the situation, and whose negligence was such as the defendant was not bound to anticipate and could not be said to have contemplated, which later negligence resulted directly in the injury to the plaintiff. *Hersh v. Miller* 517
32. Where a motorist approaches an intersection from the left, looks to his right and observes the imminence of danger of a collision, then swerves to the left and accelerates the speed of his vehicle to avoid a collision, he is guilty of contributory negligence which is more than slight as a matter of law. *Malcom v. Dox* 539
33. The doctrine of the last clear chance applies in those cases where there is negligence of the defendant subsequent to the negligence of the plaintiff, and the defendant's negligence is the proximate cause of the injury. *Malcom v. Dox* 539
34. Explanation is made of the comparative negligence statute and criterion is stated by which the degrees of negligence are to be measured. *Brackman v. Brackman* 650
35. The question of the existence of negligence or contributory negligence is for a jury where different minds may reasonably draw different conclusions from the evidence. *Brackman v. Brackman* 650
36. There is a clear distinction between the defense of assumption of risk and the defense of contributory negligence in that assumption of risk rests in contract or in the principle expressed by the ancient maxim, "volenti non fit injuria," whereas contributory negligence rests in tort. *Brackman v. Brackman* 650
37. Although the defense of assumption of risk is not incompatible with the defense of contributory negligence and both defenses may arise under the same set of facts, an instruction given by the trial court stating that both such defenses are identical is prejudicially erroneous. *Brackman v. Brackman* 650
38. Upon the issue of negligence or contributory negli-

gence, evidence of the ordinary practice or of the uniform custom, if any, of persons in the performance of acts under similar circumstances like those which are alleged to have been done negligently is generally competent evidence. *Brackman v. Brackman* 650

39. Custom need not be pleaded in negligence cases. *Brackman v. Brackman* 650

40. Negligence is not a necessary element to be proved in maintaining an action for damages resulting from a damaging of private property for public use under the Constitution. *Baum v. County of Scotts Bluff* 816

New Trial.

1. A motion for new trial on the ground of newly discovered evidence is addressed to the sound discretion of the trial court. Unless an abuse of discretion is shown, its determination will not be disturbed. *Smith v. State* 199

2. A motion for new trial must be made within 10 days after the verdict, report, or decision is rendered except where a party is unavoidably prevented from so doing, or for the cause of newly discovered evidence. *Lockard v. Lockard* 226

3. A motion for new trial not filed within time cannot form the basis for extension of the time within which an appeal can be taken. *Lockard v. Lockard* 226
Ricketts v. Continental Nat. Bank 809

4. A motion for new trial which is not filed within the time specified by statute is a nullity and of no force and effect. *Pallas v. Dailey* 277
Ricketts v. Continental Nat. Bank 809

5. Where a ground or grounds for a motion for a new trial present a question or questions of fact which are in dispute, the district court becomes the judge thereof. *Thomas v. Owens* 364

6. The district court is not authorized to invade the province of the jury and to set aside the verdict and grant a new trial because the court arrived at a different conclusion than the jury on the evidence. *Thomas v. Owens* 364

7. Under statute, a new trial may be granted in a criminal case for any of the reasons enumerated therein, including misconduct of the jury, which affect materially the substantial rights of the defendant. *Fugate v. State* 420

8. The granting or refusing of a new trial rests in the sound discretion of the trial court, and its ruling thereon will not be disturbed unless there has been a clear abuse of such discretion. *Fugate v. State* 420
9. Generally, however, if other and different issues of fact and of law relating thereto have been properly adduced and presented in a new trial, the law of the case is not controlling thereof in a subsequent trial. *Peterson v. Vak* 441
10. A trial court has inherent power, during the term at which a judgment was entered, to correct errors and mistakes, even to the extent of granting a new trial, whether or not a motion for a new trial has been filed. *Harman v. Swanson* 452
11. The inherent power of a trial court to grant a new trial is limited to those situations where prejudicial error appears in the record and such power expires with the term of court at which the judgment was rendered. *Harman v. Swanson* 452
12. After the adjournment of the term at which a judgment was rendered the trial court has authority to grant a new trial where a motion therefor is filed within 10 days. *Harman v. Swanson* 452
13. A motion for a new trial to be within the purview of statute authorizing same must be, in the alternative or otherwise, for a complete new trial. It must give the trial court, in terms, the opportunity to grant a complete new trial. *Harman v. Swanson* 452
14. A motion for an additur to the verdict or, in the alternative, for a new trial on one cause of action limited to the question of damages, is not a motion for a new trial within the meaning of statute, and does not authorize the trial court to grant a new trial at a subsequent term of court. *Harman v. Swanson* 452
15. Such a motion, fairly construed, means that if the trial court concluded that a complete new trial was required, no action by the trial court was desired. *Harman v. Swanson* 452
16. A trial court has no authority after the term at which the judgment was entered to make any order not requested in a motion for a new trial which was timely filed. *Harman v. Swanson* 452
17. The time for filing a motion for new trial begins to run from the time the decision was rendered, and not from the date it was filed or entered on

the journal of the court. *Ricketts v. Continental Nat. Bank* 809

Notice.

Where one is put upon inquiry, he is charged with notice of all of such facts as he would have learned by reasonable inquiry. *Mazanec v. Lincoln Bonding & Ins. Co.* 629

Officers.

1. Unless prohibited by statute, a county board may adopt such means to assist county officers to properly discharge the duties of their offices as in its judgment it shall deem necessary. *Collier v. County of Logan* 1
2. A county attorney has no authority to confess judgment or to stipulate to facts requiring an adverse judgment against the county without an appropriate warrant of attorney on behalf of the county. *State ex rel. Goodsell v. Tunnicliff* 128
3. Where a person is appointed by the proper authority as acting county judge and thereafter performs duties of the office and holds himself out to the public as such officer, but has failed to give the required statutory bond or take the required statutory oath of office, such person is a county judge de facto. *State v. Kidder* 181
4. The acts of a de facto officer are as valid and binding as though performed by an officer whose title to the office is beyond dispute. *State v. Kidder* 181

Parent and Child.

1. Rule as to liability in tort of a parent or one standing in loco parentis to a minor child stated. *Pullen v. Novak* 211
2. When there is no right of action in a son for personal injuries inflicted upon him by the negligent acts of his father, there can be no liability therefor on the part of the father and, since there is no liability of the father therefor, his employer can not be made to respond in damages to the son for the father's negligent acts. *Pullen v. Novak* 211
3. An unemancipated child cannot sue his father to recover damages for injuries to his person resulting from ordinary negligence on the part of the father and consequently he cannot sue his father's em-

ployer to recover such damages as he has suffered therefrom. *Pullen v. Novak* 211
4. Courts may not properly deprive a parent of the custody of a minor child unless it is shown that such parent is unfit to perform the duties imposed by the relation, or has forfeited that right. *Caporale v. Hale* 751
Baumann v. Baumann 805
5. The natural rights of a parent to the custody of his or her child are not absolute. They must yield to the best interests of the child where the preferential right has been forfeited. *Caporale v. Hale* 751
6. The natural and statutory rights of parents are of important consideration, and, in the absence of special circumstances, the child or children should be awarded to the parent or parents as against more distant relatives or third persons. *Baumann v. Baumann* 805

Parties.
1. A petition in intervention, to be filed as a matter of right, must be filed before the trial. *Kirchner v. Gast* 404
2. An intervener against whom a judgment has been rendered must be accorded the rights which, under like circumstances, belong to any other unsuccessful suitor. *Kirchner v. Gast* 404
3. Statute permitting intervention is applicable where a party has pleaded the required interest in the matter in litigation. *Kirchner v. Gast* 404
4. The interest in a matter in litigation which will authorize a person to intervene must be such a direct and immediate interest that the person or persons seeking to intervene will either lose or gain by the direct operation and legal effect of the judgment which may be rendered in the action. *Kirchner v. Gast* 404
5. Every person is entitled to access to courts of justice without interference from persons who have no interest in the matters in litigation. *Kirchner v. Gast* 404
6. To authorize a party to intervene the interest must be one arising from a claim to the subject matter of the action or some part thereof, or a lien upon the property or some part thereof. *Kirchner v. Gast* 404
7. The matter in litigation as used in intervention

statute is the subject matter of the action, the thing in controversy. *Kirchner v. Gast* 404

Partition.

1. Under statute, the district court should, in a partition case, in the exercise of its judicial discretion, apportion attorney's fees fairly and equitably among the attorneys who participated in the case. *Stoddard v. Montgomery* 252
2. If the district court does not make a fair and equitable division of attorneys' fees in a partition case and if the failure constitutes an abuse of discretion, the Supreme Court will, on an appeal therefrom, correct it. *Stoddard v. Montgomery* 252
3. A cross-petition for the partition of real estate owned in joint tenancy by the parties to a divorce action, in a suit in which the cross-petitioner alleged that the parties were never husband and wife, is not germane to the divorce action and cannot be properly joined therewith. *Ropken v. Ropken* 352

Pensions.

1. A vested right in or to a pension does not exist in the beneficiary until the event happens upon which the obligation to pay the pension depends. *Mollner v. City of Omaha* 44
2. A change in pension provisions prior to when the right thereto vests and becomes absolute does not impair any property right of the beneficiary of the pension and is not illegal. *Mollner v. City of Omaha* 44

Pleading.

1. Statements, admissions, and allegations in pleadings upon which the case is tried are always in evidence for all the purposes of the trial. They are before the court and may be used for any legitimate purpose. *Krueger v. Krueger* 82
2. A party may at any and all times invoke the language of his opponent's pleading on which a case is being tried as rendering certain facts indisputable. In doing this he is neither required nor allowed to offer such pleading in evidence in the ordinary manner. *Krueger v. Krueger* 82
   Kirchner v. Gast 404
3. In pleading a cause of action based on quantum meruit for the reasonable value of labor and materials

furnished, an allegation of a promise to pay impliedly exists in the pleading. *Bosle v. Luebs* 186
4. A motion for judgment on the pleadings will lie only when, from the face of the pleadings, the moving party is entitled to judgment as a matter of law. *State ex rel. Nebraska State Bar Assn. v. Mathew* 194
5. It is the duty of the court to render judgment in favor of a party, where, from the pleadings, such party is entitled thereto. *State ex rel. Nebraska State Bar Assn. v. Mathew* 194
6. Where a party has a meritorious defense, the trial court should, at any time before judgment, permit a party to answer upon such terms as to the payment of costs as the court may prescribe. *Anest v. Chester B. Brown Co.* 330
7. Statute permitting intervention is applicable where a party has pleaded the required interest in the matter in litigation. *Kirchner v. Gast* 404
8. Notwithstanding statute, a litigant will not be permitted to try his case in the district court as though a reply traversing the allegation in his answer were on file and insist in the Supreme Court that no reply was filed. *Kirchner v. Gast* 404
9. The rule as to invoking admissions in opponent's pleading applies only to statements in the pleadings upon which the case is tried. It has no application to statements contained in pleadings which have been superseded by amended pleadings. *Kirchner v. Gast* 404
10. The refusal to permit an amendment which is proposed at an opportune time, and which should be made in the furtherance of justice, is an abuse of discretion on the part of the trial court. *Kleinknecht v. McNulty* 470
11. The law of amendments should be liberally construed in order to prevent a failure of justice. Changes in judicial procedure have not altered the rule, nor indicated any reason for discontinuing its judicial application. *Kleinknecht v. McNulty* 470
12. A general demurrer admits all allegations of fact in the pleading to which it is addressed which are issuable, relevant, material, and well pleaded; but does not admit the pleader's conclusions of law or fact. *Hersh v. Miller* 517
Gerard v. Steinbock 828
13. A demurrer ore tenus is recognized by the Supreme

Court as permissible practice, and if the pleading to which it is addressed is totally defective it is error to admit any evidence under such pleading. *Gerard v. Steinbock* 828

14. The failure of a petition to state a cause of action may be challenged at any time during the pendency of the litigation. *Gerard v. Steinbock* 828

Principal and Surety.

Courts construe the contract of a surety for hire most strongly against the surety and in favor of the indemnity which the obligee has reasonable grounds to expect. *Sun Ins. Co. v. Aetna Ins. Co.* 94

Public Contracts.

1. The failure to make an alternative bid at the letting of a public contract is not material where the alternative on which bids were asked played no part in the contract awarded. *Day v. City of Beatrice* 858
2. An unsuccessful bidder for public work ordinarily acquires no legal right to protection, in law or equity, since the letting of contracts to the lowest responsible bidder is regarded as being for the benefit of the public and not for individual bidders. *Day v. City of Beatrice* 858

Public Service Commissions.

1. The railway commission has original jurisdiction and the sole power to grant, amend, deny, revoke, or transfer common carrier certificates of public convenience and necessity. Such proceedings are administrative and legislative in character. *Preisendorf Transp., Inc. v. Herman Bros., Inc.*..... 693
2. On an appeal to the Supreme Court from an order of the railway commission, administrative or legislative in character, the only questions to be determined are whether the commission acted within the scope of its authority and whether the order complained of is reasonable and not arbitrarily made. *Preisendorf Transp., Inc. v. Herman Bros., Inc.* 693
3. In conformity with the Constitution, the Legislature has the right to prescribe how the railway commission may proceed and what authority it may exercise in granting certificates of public convenience and necessity for operation of motor vehicles for

hire intrastate. *Preisendorf Transp., Inc. v. Herman Bros., Inc.* 693
Strasheim v. Martin 787

4. The power of the railway commission to issue a certificate of public convenience and necessity is grounded on the filing of an application, the giving of notice to interested persons, and a hearing. *Preisendorf Transp., Inc. v. Herman Bros., Inc.* 693
5. A temporary certificate is subject to the same requirements under the statute as any other certificate of public convenience and necessity. The statute makes no distinction between classes or types of certificates. *Preisendorf Transp., Inc. v. Herman Bros., Inc.* 693
6. Essential requirements for issuance of certificate of public convenience and necessity stated. *Preisendorf Transp., Inc. v. Herman Bros., Inc.* 693
7. Color of authority means an appearance or semblance of authority as distinguished from real; that is, an apparent right of authority. *Preisendorf Transp., Inc. v. Herman Bros., Inc.* 693
8. Rulings by the Interstate Commerce Commission in dealing with the subject of transportation by common carriers in interstate commerce may properly be considered by the railway commission, and by the Supreme Court on appeal therefrom, when dealing with comparable situations in intrastate commerce. *Preisendorf Transp., Inc. v. Herman Bros., Inc.* 693
9. Operation by motor carrier under void certificate of public convenience and necessity did not preclude granting of new certificate covering same operations. *Alber v. Wheeler Transp. Service, Inc.* 728
10. The Constitution of Nebraska provides that there shall be a railway commission with powers and duties to include the regulation of rates, service, and general control of common carriers as the Legislature may provide by law. *Strasheim v. Martin* 787
11. By statute, any dissatisfied common carrier may appeal to the Supreme Court of Nebraska from any ruling of the railway commission upon which there has been a hearing. *Strasheim v. Martin* 787
12. The procedure to obtain a reversal, modification, or vacation of any order or regulation made and adopted, upon which a hearing has been had before

the railway commission, is provided by statute. *Strasheim v. Martin* 787
13. Railway commission is authorized to regulate common carriers by motor vehicle, subject to statutory requirements and subject to review of its orders by the Supreme Court. *Strasheim v. Martin* 787
14. By statute, orders of the railway commission are to be in force and effect from and after date fixed by the commission, and to so remain until adjudged unreasonable and unjust by a court of competent jurisdiction. *Strasheim v. Martin* 787
15. The railway commission, in order to revoke, change, or suspend a certificate of public convenience and necessity, must proceed in accordance with statute. *Strasheim v. Martin* 787
16. The Legislature has provided that any order of the railway commission upon which there has been a hearing before the commission is reviewable for the purpose of securing its reversal, vacation, or modification. *Strasheim v. Martin* 787
17. By statute, permits and certificates of public convenience and necessity issued to common carriers by motor vehicles remain in effect until terminated by the railway commission. *Ferguson Trucking Co., Inc. v. Nebraska State Railway Commission* 851
18. A permit or certificate of public convenience and necessity may be revoked, in the discretion of the railway commission, upon the application of a holder thereof. *Ferguson Trucking Co., Inc. v. Nebraska State Railway Commission* 851
19. On complaint or on the initiative of the railway commission, a permit or certificate of public convenience and necessity may be suspended, changed, or revoked in whole or in part, after notice and hearing, for willful failure to comply with any of the provisions of Motor Carrier Act, or with any lawful order, rule, or regulation of the commission promulgated thereunder, or with any term, condition, or limitation of such permit or certificate. *Ferguson Trucking Co., Inc. v. Nebraska State Railway Commission* 851
20. An order of revocation of a permit or certificate of public convenience and necessity by the railway commission without compliance with statute as to notice and hearing is not effective as a revocation. *Ferguson Trucking Co., Inc. v. Nebraska State Railway Commission* 851

21. Under statute, the holder of a permit or certificate of public convenience and necessity may seek, by complaint or request, suspension of the permit or certificate or operation thereunder. The railway commission is required to give notice and grant a hearing thereon. *Ferguson Trucking Co., Inc. v. Nebraska State Railway Commission* 851

22. 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, R. I. & P. R. R. Co. v. Hebron Chamber of Commerce* 867

23. Duty of railway commission of control over railroads stated. *Chicago, R. I. & P. R. R. Co. v. Hebron Chamber of Commerce* 867

24. It is the duty of a carrier to seek, and of regulatory agencies to permit, the elimination of those services and facilities that are no longer needed or used by the public to any substantial extent. *Chicago, R. I. & P. R. R. Co. v. Hebron Chamber of Commerce* 867

25. When an application is made by a railroad to discontinue an existing service or facility the issue presented is primarily to be determined by the public need or lack of need therefor. In deciding such issue the cost of providing the service in comparison to the revenue derived therefrom is an important element to be considered although not necessarily controlling. *Chicago, R. I. & P. R. R. Co. v. Hebron Chamber of Commerce* 867

26. When the duty sought to be discontinued is one of convenience rather than necessity the questions of expense to the company, the volume of business done, service required in meeting community needs, revenue return therefrom, and relative benefit to the public served are factors which cannot be disregarded. *Chicago, R. I. & P. R. R. Co. v. Hebron Chamber of Commerce* 867

27. Unless public necessity requires, there should be no interference with the discretion of a railroad in establishing and maintaining its stations. *Chicago, R. I. & P. R. R. Co. v. Hebron Chamber of Commerce* 867

28. The matter of time necessary to be devoted to the performance of duties by an agent of a railroad is a matter of importance in determining whether

or not the railway commission acted arbitrarily and unreasonably in denying an application for the discontinuance of an agency. *Chicago, R. I. & P. R. R. Co. v. Hebron Chamber of Commerce* 867

29. The ruling of the railway commission or of the Supreme Court on the question of discontinuance of an agency at any given time does not amount to an adjudication for the future. It is only a judgment on the condition presented by the application and relates only to the time and conditions presented. *Chicago, R. I. & P. R. R. Co. v. Hebron Chamber of Commerce* 867

Public Utilities.

1. Statutory provision relating to powers of public power districts is subject to the limitations of the petition for the creation of public power districts and amendments thereto. *Schroll v. City of Beatrice* 162
2. Statute granting additional powers to a public power district relates to means by which a district may exercise the powers recited in the petition for the creation of a public power district. *Schroll v. City of Beatrice* 162

Quieting Title.

1. The original jurisdiction of the district court over an action to quiet the title to real estate is not affected by the fact that incident thereto there is involved the construction of a will. *Krueger v. Krueger* 82
2. A lessee of real estate may by virtue of statute maintain an action to quiet title to his leasehold. *Peterson v. Vak* 441

Railroads.

1. Duty of railway commission of control over railroads stated. *Chicago, R. I. & P. R. R. Co. v. Hebron Chamber of Commerce* 867
2. It is the duty of a carrier to seek, and of regulatory agencies to permit, the elimination of those services and facilities that are no longer needed or used by the public to any substantial extent. *Chicago, R. I. & P. R. R. Co. v. Hebron Chamber of Commerce* 867
3. When an application is made by a railroad to discontinue an existing service or facility the issue

presented is primarily to be determined by the public need or lack of need therefor. In deciding such issue the cost of providing the service in comparison to the revenue derived therefrom is an important element to be considered although not necessarily controlling. *Chicago, R. I. & P. R. R. Co. v. Hebron Chamber of Commerce* 867

4. When the duty sought to be discontinued is one of convenience rather than necessity the questions of expense to the company, the volume of business done, service required in meeting community needs, revenue return therefrom, and relative benefit to the public served are factors which cannot be disregarded. *Chicago, R. I. & P. R. R. Co. v. Hebron Chamber of Commerce* 867
5. Unless public necessity requires, there should be no interference with the discretion of a railroad in establishing and maintaining its stations. *Chicago, R. I. & P. R. R. Co. v. Hebron Chamber of Commerce* 867
6. Nature and extent of facilities and service required to be furnished by a railroad at its stations outlined. *Chicago, R. I. & P. R. R. Co. v. Hebron Chamber of Commerce* 867
7. A carrier is not required to make expenditure of earnings, from a particular community in the community where earned, in excess of the requirements of reasonable service. *Chicago, R. I. & P. R. R. Co. v. Hebron Chamber of Commerce* 867
8. The matter of time necessary to be devoted to the performance of duties by an agent of a railroad is a matter of importance in determining whether or not the railway commission acted arbitrarily and unreasonably in denying an application for the discontinuance of an agency. *Chicago, R. I. & P. R. R. Co. v. Hebron Chamber of Commerce* 867
9. The ruling of the railway commission or of the Supreme Court on the question of discontinuance of an agency at any given time does not amount to an adjudication for the future. It is only a judgment on the condition presented by the application and relates only to the time and conditions presented. *Chicago, R. I. & P. R. R. Co. v. Hebron Chamber of Commerce* 867

Rape.

1. A person may not be convicted of the crime of assault with intent to commit rape on the testimony

of the prosecutrix alone. Her testimony must be corroborated by other competent evidence. *Miller v. State* 737

2. Rule as to corroboration of testimony of prosecutrix for assault with intent to commit rape stated. *Miller v. State* 737
3. Admissions by the defendant showing that he planned and procured an opportunity to commit the act charged, with evidence of what was done, furnish sufficient corroboration of the prosecutrix's positive testimony to support a conviction of assault with intent to commit rape. *Miller v. State* 737
4. Testimony which discloses that the prosecutrix, as the result of an attack, had bruises and discolorations, and immediately thereafter was observed to be hysterical, is corroboration which will support a conviction of assault with intent to commit rape. *Miller v. State* 737

Release.

1. General words in a release are ordinarily sufficient to bar a claim which had accrued at the date of the execution of the release, or a claim known to exist by the party signing it. *Armbruster v. Stanton-Pilger Drainage Dist.* 594
2. When the amount received in settlement is grossly inadequate to compensate for the injuries sustained, that fact may be considered, with other evidence, as tending to show unfair practice, that the party has been overreached, and that the minds of the parties never met in consummation of a valid contract. *Armbruster v. Stanton-Pilger Drainage Dist.* 594
3. Circumstances stated under which release given in settlement of injuries can be set aside on ground of mutual mistake. *Armbruster v. Stanton-Pilger Drainage Dist.* 594

Rescission.

1. A rescission is not effective unless the parties to the contract are placed in status quo so far as the circumstances will permit. *Wegner v. West* 546
2. Ordinarily in rescission a formal tender of property is not required if it appears that it would have been futile. However, a tender may not be regarded as valid, even if it appears that at the time it was made it would have been futile, if there was

not a present ability to make the tender good. *Wegner v. West* 546
3. A party to a contract may not rescind on account of fraud or misrepresentation, or on account of breach by the other party, if for an unreasonable time after knowledge of the facts giving rise to the right he fails to declare a rescission and to disclaim the benefits of the contract. *Wegner v. West* 546
4. The question of whether or not there has been unreasonable delay in effecting a rescission is one which resides in the sound discretion of the court in the light of the particular facts and circumstances disclosed. *Wegner v. West* 546
5. Rescission by its nature implies the extinction of the contract which leaves the parties without a right of recovery on the contract itself. *Wegner v. West* 546
6. The rescission of a contract must be in toto and the parties must be placed in status quo as far as the circumstances will permit. *Wegner v. West* 546
7. The assertion of the rescission of a contract is nullified by the subsequent acceptance of benefits growing out of the contract. *Wegner v. West* 546
8. Right to rescind on the ground of fraud is barred by failure for an unreasonable time after knowledge of the facts to declare a rescission. *Mazanec v. Lincoln Bonding & Ins. Co.* 629

Sales.

1. Ordinarily where a purchaser has examined the subject of the purchase there is no implied warranty as regards defects which such examination ought to have disclosed. *Richardson v. Waterite Co.* 263
2. To form the basis for an action in the nature of deceit, false representations must not consist merely of promises to be performed in the future, and generally not merely of expressions of opinion by a vendor as to the quality of goods, but they must be representations of known existing facts. *Wegner v. West* 546
3. A seller is liable for cost of repair of goods in carrying out a warranty thereof. In making such repair, any time limitation on the warranty is waived. *Springer v. Henthorn* 578
4. Ordinarily, the measure of damages for breach of

warranty of quality or condition is the difference between the value of the property at time of sale and the value it would have had if as warranted. *Springer v. Henthorn* 578
5. Rule for determination of damages for breach of warranty stated. *Springer v. Henthorn* 578

Statutes.
1. Home rule charter cities as to all matters of strictly local concern operate free and independent of state legislation. *Mollner v. City of Omaha* 44
2. The right of a city to provide for a particular form of government in a home rule charter does not depend upon whether the Legislature by statutory enactment has authorized such form, nor is it subject to statutory conditions and limitations upon which the Legislature may have authorized a city to adopt it. *Mollner v. City of Omaha* 44
3. Under Motor Vehicle Dealer's License Act, a person is defined as "every natural person, firm, copartnership, association, or corporation." *Sun Ins. Co. v. Aetna Ins. Co.* 94
4. Under Motor Vehicle Dealer's License Act, a person desiring to act as a dealer must file under oath an application for a license. *Sun Ins. Co. v. Aetna Ins. Co.* 94
5. Under Motor Vehicle Dealer's License Act, a license may be revoked when licensee has been found guilty of willfully defrauding any person. *Sun Ins. Co. v. Aetna Ins. Co.* 94
6. Under Motor Vehicle Dealer's License Act, a dealer is required to furnish a corporate surety bond in the penal sum of $10,000. *Sun Ins. Co. v. Aetna Ins. Co.* 94
7. Statutes must be construed together and as part of a homogenous system. *Sun Ins. Co. v. Aetna Ins. Co.* 94
8. In enacting and construing a statute, the Legislature and courts must consider previous legislation upon the subject. *Sun Ins. Co. v. Aetna Ins. Co.* 94
9. The primary rule of construction of remedial statutes is to ascertain, declare, and give effect to the intention of the Legislature, as gathered from the language used. *Sun Ins. Co. v. Aetna Ins. Co.* 94
10. A remedial statute should be construed so as to afford all the relief within the power of the court which the language of the act indicates that the

Legislature intended to grant. *Sun Ins. Co. v. Aetna Ins. Co.* 94

11. A statutory bond will be construed in the light of the purpose for which it is required as expressed in the statute. *Sun Ins. Co. v. Aetna Ins. Co.* 94

12. The legal effect of a statutory bond is as much a part of the bond as if in terms incorporated therein. *Sun Ins. Co. v. Aetna Ins. Co.* 94

13. Recourse to legislative history of a statute is permitted when language of statute leaves application thereof in doubt. Where statute is clear and unambiguous, there is no need to resort to legislative history. *Sun Ins. Co. v. Aetna Ins. Co.* 94

14. A legislative act is limited in its scope and operation by its title, and a like rule is applicable to a law adopted by the initiative method. *Schroll v. City of Beatrice* 162

15. An express proviso that a corporation shall not do certain acts is no stronger than the failure to give authority, express or implied, to do them, for powers not granted either expressly or impliedly, are impliedly prohibited. *Schroll v. City of Beatrice* 162

16. Statutes in pari materia should be construed together, and, if possible, effect be given to all of their provisions. *Turpin v. Standard Reliance Ins. Co.* 233

17. The rule that adoption of the wording of a statute from another jurisdiction carries with it the previous judicial interpretations of the wording rests on a presumption of legislative intention which varies in strength with the similarity of the language, the established character of the decisions in the jurisdiction from which the language was adopted, and the presence or lack of other indicia of intention. *Todd v. County of Box Butte* 311

18. Where one state or sovereignty adopts a statute of another state or sovereignty, which has already received a known and definite construction in its courts, it is presumed to adopt the construction thus given. *Todd v. County of Box Butte* 311

19. The essential elements upon which the presumption is based is that it has already received a known and definite construction. The construction must have been fixed and uniform and must have been so long established as to have been known, or so that it reasonably might have been known, to the

Legislature adopting it. *Todd v. County of Box Butte* 311
20. The meaning of a statute cannot be considered as settled by judicial construction, so as to carry that construction with it to the jurisdiction where it is adopted, when it has not been so settled by the highest judicial authority which can pass upon the question. *Todd v. County of Box Butte* 311
21. The fundamental principle of statutory construction is to ascertain the intent of the Legislature, and to discover that intent from the language of the act itself. *Todd v. County of Box Butte* 311
22. It is not the court's duty nor within its province to read a meaning into a statute that is not warranted by legislative language. *Todd v. County of Box Butte* 311
23. Where words of a statute are plain, direct, and unambiguous, no interpretation is needed to ascertain their meaning. *Todd v. County of Box Butte* 311
24. The court cannot read a meaning into statutes that is not warranted by the legislative language. *Todd v. County of Box Butte* 311
25. It is not within the province of a court to read plain, direct, and unambiguous language out of a statute. *Todd v. County of Box Butte* 311
26. Statutes exempting property from taxation are to be strictly construed, and one contending that his property is exempt from such tax must show clearly that he is within the exceptions provided by statute. *Todd v. County of Box Butte* 311
27. The same rule applies to a statute exempting certain legacies from an inheritance tax. *Todd v. County of Box Butte* 311
28. To be exempt from an inheritance tax, a legacy must come within the strict letter of the statute. *Todd v. County of Box Butte* 311
29. Courts should give to statutory language its plain and ordinary meaning. *Todd v. County of Box Butte* 311
30. The Legislature during a session may do and undo, consider and reconsider, as often as it thinks proper, as only the final result will be regarded as the thing done. *Thompson v. Commercial Credit Equipment Corp.* 377
31. A legislative act which is amendatory of existing law is unconstitutional where such act does not contain the section or sections amended and does

not repeal said original sections. *Thompson v. Commercial Credit Equipment Corp.* 377

32. An independent legislative act covering the entire subject of legislation to which it relates may incidentally modify or change existing statutes without referring to them. *Thompson v. Commercial Credit Equipment Corp.* 377

33. An act not complete in itself, but which is clearly amendatory in its character and scope, must set forth the section or sections as amended, and repeal the original section or sections. *Thompson v. Commercial Credit Equipment Corp.* 377

34. Rule as to construction of general and special acts of the Legislature stated. *Thompson v. Commercial Credit Equipment Corp.* 377

35. Any provision in a legislative bill which is not clearly expressed in the title cannot be enacted into law. *Thompson v. Commercial Credit Equipment Corp.* 377

36. Where the title to an act is one for the amendment of an existing statute or section thereof, any legislation may be included in the amendatory act which is germane to the subject of the statute or section thereof sought to be amended. *Thompson v. Commercial Credit Equipment Corp.* 377

37. The Legislature may make the title to an act as restrictive as it pleases. If it does so the courts cannot enlarge the scope thereof and the Legislature, by so doing, limits itself accordingly. *Thompson v. Commercial Credit Equipment Corp.* 377

Taxation.

1. An appeal to the district court from action of the county board of equalization is heard as in equity. Upon appeal therefrom to the Supreme Court it is tried de novo. *Collier v. County of Logan* 1
Baum Realty Co. v. Board of Equalization 682

2. 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. *Collier v. County of Logan*.... 1

3. Ordinarily the valuation by the assessor is presumed to be correct. If the assessor does not make a personal inspection of the property, but accepts valuations thereof fixed by a professional

appraiser, the presumption does not obtain. In such case the burden is upon the protesting party to prove that the assessment is excessive. *Collier v. County of Logan* 1

4. The presumption obtains that a board of equalization has faithfully performed its official duties, and that in making an assessment it acted upon sufficient competent evidence to justify its action. *Collier v. County of Logan* 1

5. Presumption of validity of action of a board of equalization disappears when there is competent evidence to the contrary. Reasonableness of valuation then becomes one of fact based upon the evidence. *Collier v. County of Logan* 1

6. Elements required by statute to be considered in finding the assessed value of tangible property stated. *Collier v. County of Logan* 1

7. The burden of proof is upon a taxpayer to establish 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. *Collier v. County of Logan* 1

8. Where the evidence shows that the assessed value of tangible property has been determined by a formula in substantial compliance with 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. *Collier v. County of Logan* 1

9. 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. *Collier v. County of Logan* 1

10. Individual discrepancies and inequalities in the valuation of real property for tax purposes must be corrected and equalized by the county board of equalization. The duties of the State Board of Equalization and Assessment are unrelated thereto. However, the final orders of each must be given effect. *Collier v. County of Logan* 1

11. Appraisal committees merely make recommendations

to the county assessor and furnish evidence for use of county board of equalization. *Collier v. County of Logan* 1

12. Substantial compliance with the requirements of equalization and uniformity in taxation is all that is required. *Collier v. County of Logan* 1

13. While sale price may be taken into consideration, it is not conclusive of actual value of property. The true test in all cases is to arrive at actual value, meaning value in the market in the ordinary course of trade. *Collier v. County of Logan* 1

14. Generally, the valuation of property for tax purposes by the proper assessing officers should not be overthrown by the testimony of one or more interested witnesses that the values fixed by such officers were excessive or discriminatory when compared with values placed thereon by such witnesses. Otherwise, no assessment could ever be sustained. *Collier v. County of Logan* 1

15. Courts should not usurp the function of tribunals created by law for ascertaining the actual value of property for tax purposes or constitute themselves a taxing board or board of equalization. *Collier v. County of Logan* 1

16. There is a presumption that assessing officers acted fairly and impartially. The burden is on the property owner to establish that the assessment of property is improper or excessive. *Ace Constr. Co. v. Board of Equalization* 77

17. Where an actual situs has not been acquired elsewhere, the taxable situs of tangible personal property is the domicile of the owner. *Ace Constr. Co. v. Board of Equalization* 77

18. The state which is the domicile of the owner of tangibles is the situs of tangible personal property temporarily in another state but not permanently located there. *Ace Constr. Co. v. Board of Equalization* 77

19. Tangible personal property owned by a corporation is assessed in the taxing area of the principal place of business of the corporation unless otherwise provided by statute or unless it has acquired an actual situs elsewhere. *Ace Constr. Co. v. Board of Equalization* 77

20. Statutes exempting property from taxation are to be strictly construed, and one contending that his property is exempt from such tax must show clearly

that he is within the exceptions provided by statute. *Todd v. County of Box Butte* 311
21. The same rule applies to a statute exempting certain legacies from an inheritance tax. *Todd v. County of Box Butte* 311
22. To be exempt from an inheritance tax, a legacy must come within the strict letter of the statute. *Todd v. County of Box Butte* 311
23. The words in actual possession or occupancy, as contained in statute on taxation of real estate, mean such occupancy or possession by a person as would put an ordinarily prudent man on notice of that fact by observation of the premises involved. *Thomas v. Flynn* 458
24. A testator may shift the burden of death taxes from the person or fund which is ordinarily liable under the law to some other person or fund. *Stuckey v. Rosenberg* 557
25. No special formula of words is necessary to free a legacy or devise from a death tax if the intention to do so is shown. A few simple words may suffice to indicate the intention of the testator and to effectuate his purpose. *Stuckey v. Rosenberg* 557
26. It is permissible for a testator to make a gift which is not subject to diminution by reason of a death tax payment. The controlling consideration here, as elsewhere, is the expressed intention of the testator. *Stuckey v. Rosenberg* 557
27. A gift made by a will of an amount to be paid each month during the life of the beneficiary beginning with the date of the death of the testator manifests an intention that the gift or a part of it should be paid before death taxes are or can be estimated or ascertained and indicates an intention that the gift is exonerated from diminution under a tax apportionment act. *Stuckey v. Rosenberg* 557
28. Generally the valuation of property made by the county assessor for taxation purposes is presumed to be correct; but if he does not make a personal inspection of the property but accepts a valuation thereof fixed by another person, the presumption does not exist. *Baum Realty Co. v. Board of Equalization* 682
29. Where personal inspection by the county assessor has not been made, the value of property is a fact to be determined from evidence, unaided by pre-

sumption. The burden is upon the protesting party to establish that the assessment of the property is excessive. *Baum Realty Co. v. Board of Equalization* 682

30. In the assessment of property for taxation, the presumption of proper official action disappears where competent evidence is introduced on appeal to the contrary. Thereafter the question is one of fact to be determined from evidence, unaided by presumption. *Baum Realty Co. v. Board of Equalization* 682

31. If the evidence discloses that the value of real estate for assessment purposes was arbitrarily determined without explanation of the method used or elements considered, the value thus fixed is not supported by competent evidence and is legally erroneous. *Baum Realty Co. v. Board of Equalization* 682

32. On appeal from the action of a county board of equalization, where the county introduces no competent evidence of the value of the property involved, the evidence offered by the taxpayer will be accepted as established for the purpose of establishing a prima facie case. *Baum Realty Co. v. Board of Equalization* 682

Torts.

1. Infants have a right to sue by a guardian or next friend to recover damages done to their person or property by the tortious acts of another. *Pullen v. Novak* 211

2. Rule as to liability in tort of a parent or one standing in loco parentis to a minor child stated. *Pullen v. Novak* 211

3. A person to whom another has tortiously caused harm is entitled to compensatory damages therefor if he establishes by proof the extent of such harm and the amount of his damage with reasonable certainty. *Johnsen v. Taylor* 280

Trespass.

If the nature of a threatened trespass on real estate is such that it will, if accomplished, prevent a substantial enjoyment of property or the possession thereof the remedy of injunction is appropriate to forestall the wrongful act. *Peterson v. Vak* 441

Trial.

1. Amendment of pleadings rests within the discretion of the trial court, and error cannot be predicated on the action of the court in the absence of an abuse of discretion. *Anderson v. Moser* 134
2. The prerequisities of granting a motion for 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. *Anderson v. Moser* 134
3. Instruction in criminal case respecting the consideration to be given to the testimony of an accomplice was sufficient to adequately protect the rights of accused. *Smith v. State* 199
4. Where the trial court has instructed generally as to the issues of a criminal prosecution, error cannot be predicated on its failure to instruct as to a particular phase of the case, where no proper instruction has been requested. *Smith v. State* 199
5. In a personal injury suit, the burden is on plaintiff to show by the weight of the evidence the truth of one or more of the acts of negligence charged against the defendant, and that such negligence was the proximate cause of an injury and damage to plaintiff and the extent thereof. *Johnsen v. Taylor* 280
6. It is the duty of a district court to direct a verdict in a case if there is no conflict in the evidence or if the evidence, though conflicting, is so conclusive that it is insufficient to sustain a verdict. *Johnsen v. Taylor* 280
7. Where the defendant pleads that the plaintiff was guilty of contributory negligence, the burden is on him to prove that defense by a preponderance of the evidence. *Harris v. Pullen* 298
8. If the evidence adduced by the plaintiff tends to prove the defense of contributory negligence, the defendant is entitled to receive the benefit thereof and it is the duty of the court to so instruct the jury. *Harris v. Pullen* 298
9. Where different minds may reasonably draw different conclusions from the evidence, or there is a conflict in the evidence as to whether or not negligence or contributory negligence has been established, the question is for the jury. *Harris v. Pullen* 298
10. Rule for consideration of motion for directed verdict stated. *Harris v. Pullen* 298
Thomas v. Owens 369

Herbrick v. Samardick & Co. 833

11. A motion for judgment notwithstanding the verdict may not properly be sustained in the absence of a motion for a directed verdict which motion should have been sustained because of a want of evidence. *Harris v. Pullen* 298
12. The trial court should make a record of the proceedings at a pretrial conference, and the order entered thereon controls the subsequent course of the action unless modified. *Anest v. Chester B. Brown Co.* 330
13. Before the evidence in a case is submitted to a 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 upon whom the burden of proof is imposed. *Thomas v. Owens* 369
14. 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. *Thomas v. Owens* 369
15. Rule for consideration of sufficiency of evidence to support a verdict stated. *Buchanan v. Zorn* 396
16. It is the duty of trial courts to determine the issues upon which there is competent evidence and submit only those issues to the jury. *Buchanan v. Zorn* 396
17. One of the rules governing consideration of motion for judgment notwithstanding the verdict stated. *Buchanan v. Zorn* 396
18. Where a plaintiff, without reasonable explanation, testifies to facts materially different concerning a vital issue than had previously been testified to by him under oath in another action, the change clearly being made to meet the exigencies of the pending action, the evidence is discredited as a matter of law and should be disregarded. *Kirchner v. Gast* 404
19. A plaintiff may not recite upon oath one statement of facts in one judicial proceeding and then, to meet the exigencies of the occasion in the trial of a different suit, recite under oath an entirely different story. *Kirchner v. Gast* 404
20. An unexplained change in the evidence of a litigant not required by the exigencies pointed out in

a previous trial is a matter of impeachment, credibility, and weight for the jury to determine. *Kirchner v. Gast* 404

21. If it appears that a defendant has been guilty of gross negligence and a plaintiff has been guilty of slight negligence by comparison with that of the defendant the plaintiff may recover. *Kirchner v. Gast* 404

22. If a defendant has been guilty of gross negligence and a plaintiff has been guilty of negligence more than slight by comparison with that of the defendant the plaintiff may not recover. *Kirchner v. Gast* 404

23. If a defendant has been guilty of negligence which is less than gross and the plaintiff has been guilty of negligence in any degree the plaintiff may not recover. *Kirchner v. Gast* 404

24. In an action based on negligence to which the comparative negligence rule has application wherein the evidence shows beyond reasonable dispute that the plaintiff's negligence was more than slight in comparison with that of the defendant the action should be dismissed or verdict directed. *Kirchner v. Gast* 404

25. It is provided by statute that no judgment shall be set aside, or a new trial granted, in any criminal case, if the Supreme Court, after an examination of the entire cause, shall consider that no substantial miscarriage of justice has actually occurred. *Fugate v. State* 420

26. The Supreme Court may not in a criminal case resolve conflicts in or weigh the evidence or pass upon the credibility of witnesses. *Wright v. State* 497

27. It is implicit in a verdict of guilty that the jury decided all controverted questions of fact unfavorably to the accused and the Supreme Court will not disturb the verdict if based on evidence unless as a matter of law it is insufficient to support a finding of guilt beyond a reasonable doubt. *Wright v. State* 497

28. Instructions should be considered together in order that they may be properly understood; and if the entire charge properly submits the issues to the jury, the verdict will not be set aside. *Wright v. State* 497

29. It is error to refuse a request for a jury trial in an action at law, but where the one making the re-

quest has no substantial cause of action or defense, and the judgment of the trial court is the only one which could have been rendered in the case, such refusal is error without prejudice, for which the judgment will not be reversed. *Robb v. Central Credit Corp.* 505

30. The burden of proof upon an issue as to a boundary is upon the party having the affirmative of that issue. This burden must be established by a preponderance of the evidence. *Pallas v. Dailey* 533

31. A judgment of the trial court in sustaining a motion for a directed verdict should be affirmed when the plaintiff fails to prove a material allegation of his petition essential to the proof of his case. *Bushon v. Fallon* 544

32. Preliminary motion for a directed verdict is an absolute prerequisite to a motion for judgment notwithstanding the verdict. *Springer v. Henthorn* 578

33. The trial court should fully and fairly instruct the jury as to the various items of damages which it should take into consideration in arriving at its verdict. *Springer v. Henthorn* 578

34. The charge of the trial court to the jury should be confined to the issues presented by the pleadings and supported by the evidence. *Springer v. Henthorn* 578

35. It is error for the trial court to submit to the jury an issue pleaded by the defendant which, under the evidence adduced in the case, affords no basis for recovery. *Springer v. Henthorn* 578

36. A verdict cannot be based on mere speculation or conjecture. *Springer v. Henthorn* 578

37. The question of the existence of negligence or contributory negligence is for a jury where different minds may reasonably draw different conclusions from the evidence. *Brackman v. Brackman* 650

38. Although the defense of assumption of risk is not incompatible with the defense of contributory negligence and both defenses may arise under the same set of facts, an instruction given by the trial court stating that both such defenses are identical is prejudicially erroneous. *Brackman v. Brackman* 650

39. It is mandatory that the trial court, without request, correctly instruct the jury as to all issues in the case which are supported by evidence, and a failure to do so ordinarily constitutes prejudicial error. *Rickertsen v. Carskadon* 744

40. Where it appears from all the instructions given, and the clarity of the evidence adduced at the trial, that a claimed error in an instruction could not have misled the jury in determining the issues, such error will not constitute prejudicial error. *Baum v. County of Scotts Bluff* 816
41. Where a certain theory as to the measure of damages is relied upon by the parties to the trial as the proper one, it will be adhered to on appeal whether it is correct or not. *Baum v. County of Scotts Bluff* 816
42. An instruction which erroneously puts the burden of proof on the defendant on a material issue is prejudicial to the rights of such defendant and ordinarily requires a new trial. *Baum v. County of Scotts Bluff* 816
43. Where there is a conflict of testimony in an action for false imprisonment, credibility of witnesses and weight of evidence are questions for the jury. *Herbrick v. Samardick & Co.* 833
44. In an action where there is any evidence which will support a finding for a party having the burden of proof, the trial court cannot disregard it and direct a verdict against him. *Herbrick v. Samardick & Co.* 833
45. Excessive verdict should be set aside and new trial granted where it appears that the verdict was returned under the influence of passion and prejudice or where the jury misapplied the law. *Herbrick v. Samardick & Co.* 833
46. Where it is clear that a verdict is excessive but there is no method by which the court can rationally ascertain the extent of the excess, a remittitur cannot be properly required. *Herbrick v. Samardick & Co.* 833

Trusts.

A trust involves the creation of two separate and distinct interests in the trust property, the legal estate which is held by the trustee and the beneficial interest which is held by the beneficiaries of the trust. *Abbott v. Continental Nat. Bank* 147

Usury.

1. An implement dealer may, in good faith, sell farm machinery on time for a price in excess of the cash price without tainting the transaction with

usury, though the difference in prices may exceed lawful interest for a loan. *Thompson v. Commercial Credit Equipment Corp.* 377

2. In order to have the principle of a bona fide time sale apply, it must appear that the buyer actually was informed of and had the opportunity to choose between a time sale price and a cash sale price. *Thompson v. Commercial Credit Equipment Corp.* 377
Robb v. Central Credit Corp. 505
Commonwealth Co. v. Fauver 795

3. Every inhibitory provision contained in the Installment Loan Act applies alike to licensees and non-licensees. *Thompson v. Commercial Credit Equipment Corp.* 377

4. An automobile dealer may in good faith sell a car on time for a price in excess of the cash price without tainting the transaction with usury, though the difference in prices may exceed lawful interest for a loan. *Robb v. Central Credit Corp.* 505
Commonwealth Co. v. Fauver 795

5. A loan coming within the provisions of the Installment Loan Act, which was not secured by a bona fide duly recorded mortgage on real estate owned by the borrower and by the terms of which the payment of principal was extended beyond a period of 21 months from the making thereof, was a violation of the act. *Robb v. Central Credit Corp.* 505

6. The effect of violation of the Installment Loan Act is to make such contract void and uncollectible and a lender should have nothing in such a situation, and the lender, or those to whom any payments have been made thereunder, must return the payments received. *Robb v. Central Credit Corp.* 505

7. The design of the Installment Loan Act is to license and control the business of making installment loans and to restrict the enforcement or collection of illegal loans once they have been made. *Robb v. Central Credit Corp.* 505

Waters.

1. Where an irrigation district and a county jointly construct a structure across a drainage ditch which causes damage to private property, they are liable for such damage under self-executing provisions of the Constitution. *Baum v. County of Scotts Bluff* 816

2. While one who obstructs the flow of a drainage ditch in the furtherance of a public purpose is

liable for damages thereby caused by the flooding of the lands of another, the burden of proof is on the person damaged by the flooding to prove the obstruction, that there was an overflow, that the overflow would not have occurred if it were not for the obstruction, and the extent of the damage attributable to it. *Baum v. County of Scotts Bluff* 816

3. Negligence is not a necessary element to be proved in maintaining an action for damages resulting from a damaging of private property for public use under the Constitution. *Baum v. County of Scotts Bluff* 816

4. One who builds a structure in a drainage ditch is charged with a duty to provide for the passage of all waters, ice, and debris which may reasonably be anticipated to flow or be carried through the ditch. *Baum v. County of Scotts Bluff* 816

Wills.

1. In construing a will the whole thereof will be considered and from its four corners the court will determine the intent of the testator and give effect thereto. Extrinsic evidence is not admissible to determine the intent of the testator as expressed in his will unless there is a latent ambiguity. *Krueger v. Krueger* 82

2. The original jurisdiction of the district court over an action to quiet the title to real estate is not affected by the fact that incident thereto there is involved the construction of a will. *Krueger v. Krueger* 82

3. Where the description of real property devised in a will is inaccurate or there is a latent ambiguity with respect thereto, extrinsic evidence is competent to resolve the ambiguity and identify the property designated. *Krueger v. Krueger* 82

4. In searching for the intention of the testator the court must examine the entire will, consider each of its provisions, give words their generally accepted literal and grammatical meaning, and indulge the presumption that the testator understood the meaning of the words used. *Abbott v. Continental Nat. Bank* 147
Stuckey v. Rosenberg 557

5. It is a rule of construction that a devise or bequest to heirs, without more, designates not only

the persons who are to take but also the manner and proportions in which they will take. If there are no controlling words in the will, the law presumes the intention of the testator to be that they take by the law of the intestate succession. *Abbott v. Continental Nat. Bank* 147

6. The words "I order and direct my trustees to pay the income of such trust fund to my wife during her natural life and upon her death to pay the principal thereof to my legal heirs" held to exclude the wife as a devisee of the remainder and to designate the heirs of the testator who are such as of the date of the failure of the trust as the intended devisees. *Abbott v. Continental Nat. Bank* 147

7. A testator may dispose of his property as he pleases provided he is mentally competent and is not under undue influence. *Buchanan v. Zorn* 396

8. In a will contest burden is upon contestant to establish undue influence. Elements of undue influence stated. *Buchanan v. Zorn* 396

9. Undue influence cannot be inferred from motive or opportunity alone. There must be competent evidence, direct or circumstantial, to show that undue influence not only existed but that it was exercised at the very time the will was executed. *Buchanan v. Zorn* 396
Benge v. Sutton 769

10. In order to invalidate a will duly executed by a testator having testamentary capacity, undue influence must be of such character as to destroy the free agency of the testator and substitute another's will for his own. *Buchanan v. Zorn* 396
Benge v. Sutton 769

11. A testator may shift the burden of death taxes from the person or fund which is ordinarily liable under the law to some other person or fund. *Stuckey v. Rosenberg* 557

12. No special formula of words is necessary to free a legacy or devise from a death tax if the intention to do so is shown. A few simple words may suffice to indicate the intention of the testator and to effectuate his purpose. *Stuckey v. Rosenberg* 557

13. It is permissible for a testator to make a gift which is not subject to diminution by reason of a death tax payment. The controlling consideration here, as elsewhere, is the expressed intention of the testator. *Stuckey v. Rosenberg* 557

14. A gift made by a will of an amount to be paid each month during the life of the beneficiary beginning with the date of the death of the testator manifests an intention that the gift or a part of it should be paid before death taxes are or can be estimated or ascertained and indicates an intention that the gift is exonerated from diminution under a tax apportionment act. *Stuckey v. Rosenberg* 557
15. In a will contest, the contestant has the burden of proof. The four elements required to be established are stated. *Benge v. Sutton* 769
16. In a will contest on the ground of undue influence, if the evidence is insufficient to sustain a verdict upon such issue in favor of the contestant, it is the duty of the trial court to direct a verdict for the proponent. *Benge v. Sutton* 769
17. The natural affection, confidence, and gratitude of a parent to a child which inspires a preference in the disposition of his property by will, is a natural and lawful influence which, standing alone, does not constitute undue influence. *Benge v. Sutton* 769
18. It is only where natural affection, confidence, and gratitude have been improperly used by a person as a means of substituting his will for that of the testator that it may afford proof of undue influence. *Benge v. Sutton* 769

Witnesses.

1. A jury has the right to disregard the entire testimony of a witness if it believes that the witness has willfully testified falsely on any material matter. *Smith v. State* 199
2. A witness may be interrogated as to his previous conviction for a felony in a civil action. *Anest v. Chester B. Brown Co.* 330
3. A communication of a client to his attorney, to be accorded the privilege of confidence, must be one made in the course of professional employment with respect to the subject matter thereof and necessary and proper to enable the attorney to discharge the functions of his office. *Castle v. Richards* 339
4. The burden of establishing a confidential character of a communication made by a client to his attorney is on the party who objects to the disclosure of the communication. *Castle v. Richards* 339
5. The question of the qualification of a witness to state an opinion rests largely in the discretion of

the trial court, and its ruling will not be disturbed on appeal unless there is a clear showing of abuse of discretion. *School Dist. No. 162 v. Grosshans & Petersen, Inc.* 357

6. An unexplained change in the evidence of a litigant not required by the exigencies pointed out in a previous trial is a matter of impeachment, credibility, and weight for the jury to determine. *Kirchner v. Gast* 404
7. A new trial will not ordinarily be granted for newly discovered evidence which, when produced, will merely impeach or discredit a witness who testified at the trial. *Fugate v. State* 434
8. The credibility of witnesses and the weight of the evidence are for the jury to determine in a criminal case and the verdict of the jury may not be disturbed by the Supreme Court unless it is clearly wrong. *Wright v. State* 497
9. In the absence of any appearance of prejudice the violation of an order for the segregation or sequestration of witnesses on a trial does not furnish a basis for granting a new trial. *Miller v. State* 737
10. The value of the opinion of an expert witness is dependent on, and is no stronger than, the facts on which it is predicated. The opinion has no probative force unless the premises upon which it is based are shown to be true. *Gotfrey v. Sakurada* 879

Work and Labor.

1. An action based on quantum meruit for labor and materials furnished is grounded upon an implied promise to pay the reasonable value thereof. *Bosle v. Luebs* 186
2. In pleading a cause of action based on quantum meruit for the reasonable value of labor and materials furnished, an allegation of a promise to pay impliedly exists in the pleading. *Bosle v. Luebs* 186
3. Where there is no specific standard by which reasonable value of labor and materials furnished shall be proved, prima facie proof thereof is made where a reasonable inference of such value flows from the evidence adduced. *Bosle v. Luebs* 186
4. In a proceeding to recover for personal services rendered decedent, plaintiff is not required to show nonpayment therefor since payment is an affirmative defense to be established by the executor. *Bosle v. Luebs* 186

Workmen's Compensation.

1. Statutory definition of an accident within the meaning of the Workmen's Compensation Act quoted. *Tilghman v. Mills* 665
2. In an action under the Workmen's Compensation Act, the burden is on the claimant to establish by a preponderance of the evidence that he sustained a personal injury by an accident arising out of and in the course of his employment. *Tilghman v. Mills* 665
   Gotfrey v. Sakurada 879
3. In a workmen's compensation case, facts must be proved by the claimant by sufficient evidence leading to the direct conclusion, or by a legitimate legal inference therefrom, that an accidental injury occurred and caused the disability. There must be shown a causal connection between an accident suffered by the claimant and the cause of his disability. *Tilghman v. Mills* 665
4. Symptoms of pain and anguish such as weakness or expressions of pain clearly involuntary or any other symptoms indicating a deleterious change in bodily condition may constitute objective symptoms within the requirements of the Workmen's Compensation Act. *Tilghman v. Mills* 665
5. It is sufficient to show that the injury and pre-existing disease combined to produce disability, and it is not necessary to prove that the injury accelerated or aggravated the disease, in order to satisfy the requirement of the statute that the disability arose out of the employment. *Tilghman v. Mills* 665
6. The Workmen's Compensation Act is to be liberally construed to the end that its beneficent purposes may not be thwarted by technical refinement of interpretation. *Tilghman v. Mills* 665
7. In considering the sufficiency of the proof, the rule of liberal construction, as it relates to the Workmen's Compensation Act, applies to the law and not the evidence offered to support a claim by virtue of the law. *Tilghman v. Mills* 665
8. For workmen's compensation purposes, total disability does not mean a state of absolute helplessness, but means disablement of an employee to earn wages in the same kind of work, or work of a similar nature, that he was trained for, or accustomed to perform, or any other kind of work

which a person of his mentality and attainments could do. *Tilghman v. Mills* 665

9. An employee may be totally disabled for all practical purposes and yet be able to obtain trivial occasional employment under rare conditions at small remuneration. The claimant's status in such respect remains unaffected thereby. *Tilghman v. Mills* 665

10. A recovery by an employee against an employer by virtue of the Workmen's Compensation Act may include the reasonable expenses incident to and necessary for obtaining medical and hospital services. *Tilghman v. Mills* 665

11. Where an employee has appealed from the decision of the district court denying an award of compensation, an attorney's fee is not authorized on appeal even though a reversal of the judgment is obtained. *Tilghman v. Mills* 665

12. An appeal to the Supreme Court in a workmen's compensation case is considered and determined de novo upon the record. *Gotfrey v. Sakurada* 879

13. A compensable injury within the Workmen's Compensation Act is one caused by an accident arising out of and in the course of the employment. *Gotfrey v. Sakurada* 879

14. An accident within the Workmen's Compensation Act is an unexpected and unforeseen event happening suddenly and violently and producing at the time objective symptoms of injury. *Gotfrey v. Sakurada* 879

15. An award of compensation under the Workmen's Compensation Act may not be based on possibilities, probabilities, or speculative evidence. *Gotfrey v. Sakurada* 879

16. Rule of construction of Workmen's Compensation Act stated. *Gotfrey v. Sakurada* 879