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PHILLIPS PETROLEUM COMPANY, A CORPORATION, APPELLEE, v. CITY OF OMAHA, A MUNICIPAL CORPORATION, APPELLANT.

106 N. W. 2d 727

Filed December 16, 1960. No. 34831.

1. **Appeal and Error.** The purpose of assignments of error required by the rules of this court is to advise appellee and the court of the issues on appeal which are submitted for consideration and decision.
2. ———. The consideration of an appeal in this court is limited to errors assigned and discussed except the court may consider a plain error not assigned or discussed.
3. **Vendor and Purchaser.** An option to purchase real estate is a unilateral contract by which the owner of the property agrees with the optionee that he has the right to buy the property according to the terms and conditions of the option.
4. ———. Such an option does not constitute an estate or interest in land but it is a mere right of election to accept or reject a present offer within the time and upon the terms designated.
5. **Eminent Domain: Vendor and Purchaser.** A holder of a mere option to purchase land which is sought to be condemned is not entitled to any compensation to be paid therefor nor to any damages by reason of the severance of a part of the land from the remainder of it, the subject of the option.
6. **Landlord and Tenant: Vendor and Purchaser.** A provision in a lease of real estate giving to the lessee the right and election to purchase the land upon conditions therein stated is no part of the lessee's leasehold estate in the land and it creates in the lessee no estate in the land. It is only a contract right and is not an extension or amplification of the estate granted by the lease.
7. **Eminent Domain: Vendor and Purchaser.** A holder of an option to purchase land being condemned, whether contained in a lease in which the holder is lessee or evidenced by separate writing, has no interest in the land which entitles him to compensation.
8. **Trial: Damages.** It is the duty of the trial court to inform the jury as to each item or element of damage it should consider in reaching its verdict.
9. **Trial: Appeal and Error.** The proof on the trial of a jury case should be confined to legal evidence tending to prove or disprove an issue made by the pleadings, and an improper matter submitted to the jury for its consideration by the trial court is prejudicial error if it may have influenced the verdict.
10. ———: ———. If it does not appear from the record that an improper matter submitted to the jury for its consideration by

the trial court did not affect the result of the trial unfavorably to the party against whom it was admitted, its reception must be considered prejudicial error.

11. **Municipal Corporations.** The owner of property abutting on a street is not entitled as against the public to access to his land at all points on the boundary between it and a street although entire access cannot be denied him. The measure of the right of the property owner is reasonable ingress and egress under all the circumstances.
12. **Trial: Appeal and Error.** Whether or not there was error in a sentence or part of an instruction, it will be considered with the instruction of which it is a part and all the other instructions. The meaning of the instruction will not be determined from a single or separate phrase or paragraph but by considering the instructions as a whole.
13. **Eminent Domain.** Private property cannot be taken without compensation for public use under a police regulation relating strictly to the public health, the public morals, or the public safety any more than under a police regulation having no relation to such matters but only to the general welfare.
14. **Landlord and Tenant.** The volume of business done on any given leasehold has a direct relation to the value of the leasehold as volume is directly connected with the success of the business and diminution of business means decrease in volume.
15. **Eminent Domain.** A landowner must recover all his damages caused by the taking of land from him by condemnation and which may arise on account of the proper construction and the future operation of an improvement for which the land was taken in the condemnation proceeding.

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

Herbert M. Fitle, Bernard E. Vinardi, Irving B. Epstein, Frederick A. Brown, Benjamin M. Wall, Edward M. Stein, and *Steven J. Lustgarten,* for appellant.

Gaines, Spittler, Neely, Otis & Moore, for appellee.

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

BOSLAUGH, J.

Phillips Petroleum Company, appellee, appealed to the district court for Douglas County from the assess-

ment of damages made by the appraisers appointed in proceedings initiated in the county court of Douglas County by the City of Omaha, appellant, for the appropriation by the exercise of the power of eminent domain of specifically described real estate within the city for use by it in the improvement of streets. The contesting parties in this court are Phillips Petroleum Company and City of Omaha.

The substance of the amended petition of appellee in the district court was that it was a corporation authorized to do business in Nebraska; that appellant was a city of the metropolitan class of Nebraska; that appellee was at all the times important to the litigation the lessee of the real estate involved herein; that its lease of the premises provided that the lessee should have an option to purchase the leased premises free from any encumbrances at any time during the term or any extension or renewal of the term of the lease for an amount stated therein; that on November 4, 1954, appellant commenced condemnation proceedings to acquire the described premises; that the award of the appraisers appointed therein made to appellee was $6,325; that the real estate involved was a part of a tract used for many years and then used by appellee as a service station; that it had been by appellee improved by placing thereon buildings and concrete driveways, and installing equipment and other things usual and incidental to such a modern place of business; that the taking of the property described herein, the changing of the grades, and the constructing of improvements for which the land was taken have damaged the property of the service station tract not appropriated, and necessitated the alteration of the service station facilities and reconstruction of various improvements including removal of diesel and truck fuel tanks, removal of liquid propane gas tanks, removal and replacement of pump islands, removal and grading of concrete driveways and replacement of concrete surface thereon, replacement of signs, incidental wiring,

and installation of equipment; that by reason of the facts alleged appellee had been caused damage to the property not taken of $12,500 and damage by reduction in the market value of the premises remaining because of the loss of the part taken of $30,000; and that appellee refused the award made by the appraisers and has, as provided by law, prosecuted an appeal therefrom to the district court for Douglas County. Appellee asked from appellant the sum of $42,500.

The answer of appellant was in substance an admission of the appropriation by it of the real estate involved by the exercise of the power of eminent domain; an allegation that the award of the appraisers to appellee was fair and just for the damages sustained by it; and a denial of all other matters stated by appellee in its amended petition.

The result of the trial of the issues made by the pleadings had to a jury was a verdict for appellee of $13,168.80. A motion for new trial was denied. This appeal is from the judgment and the order denying a new trial.

The property leased by the appellee from the owner of it consisted of about 10,000 square feet located at the southeast of the intersection of Dodge and Seventy-second Streets in the city of Omaha. The former was north and the latter west of it. The property was irregular in shape and it was roughly somewhat like the shape of home plate of a baseball diamond with the base or longest property line thereof being to the north along the south boundary of Dodge Street. Appellee secured a lease of the ground, which was unimproved, July 1, 1935, and soon thereafter it modestly improved it as a motor vehicle service station, hereafter designated station, appropriate to the conditions then existing. Appellee constructed thereon a cottage-type building without any service bay in which to wash, polish, or service motor vehicles. Appellee put in three pumps in the front of the building which faced Dodge Street and two pumps to the west of the building on the Seventy-

second Street side. It installed lights, wiring, and signs.

The site of the station was in 1953 substantially cleared and an entire new modern one was erected including the construction of a new building consisting of an office, two bays in which to service motor vehicles, two new pump islands and four pumps on Dodge Street, and a pump island and two pumps thereon on the Seventy-second Street side. The station area and the driveways on the Dodge Street side were paved. On the Seventy-second Street side the graveled surface was continued because of the contemplated widening of that street. All facilities and modern incidentals were installed including those for supplying liquified petroleum gas to the public. There were then four 35-feet-wide drives for access of vehicles to and from the station, two on the Seventy-second Street side and two on the Dodge Street side. A part of the street right-of-way between the property line of the leased property and the curb line of the streets was improved by appellee as a part of the driveways as access to and from the station. The grade of the station site when it was improved in 1953 was established in harmony with the street grade or elevation at the south edge of the pavement on Dodge Street and at the east edge of the pavement on Seventy-second Street. This was the situation when the condemnation proceedings were commenced for the appropriation by the city of 523 square feet of the area leased by appellee at the northwest corner or part thereof for use of appellant in enlarging the rights-of-way of and improving each of the streets at the intersection and for a considerable distance from it.

The north property line of the land condemned by appellant was the south right-of-way line of Dodge Street. The west line of the property condemned extended substantially north and south from Dodge Street for about half of the distance of the line and then it ran somewhat in a northeasterly direction. The other boundary line of the area taken was a curved line extending from the

south end of the property line thereof on the west to the east end of the property line thereof on the north. The south point of the area taken was near the south boundary line of the south driveway from Seventy-second Street into the station and the east point of the area taken extended east about two-thirds of the width of the west driveway from Dodge Street into the station. This resulted in the station being deprived of each of these driveways as they existed before and at the time of the condemnation.

After the condemnation in 1955 Seventy-second Street was changed and improved from a point north of Dodge Street south to Pacific Street, and Dodge Street was changed and improved for about 1,300 feet east and west of Seventy-second Street. The intersection of Dodge and Seventy-second Streets was made a channelized intersection which means that traffic islands were installed therein to channel traffic in places where the highway authorities believed they belonged. Structures were placed in the intersection to control the traffic and all four legs of the intersection had channelizing islands in each quadrant of it to separate the right-turn vehicles from the through traffic. The purpose of this was to facilitate the improvement of right-turning traffic and separate it from through traffic so that the former could proceed without being interfered with by the traffic going through the intersection. This character of transformation of the intersection was thought to be justified because of the volume of the traffic using it. The result of the changes made and structures erected in the streets at and near this intersection eliminated the easy access to the station as it existed before the condemnation. There had been ingress and egress to the station from Dodge Street by the two driveways toward the east of the site of the station and this gave a good angle of approach. After the condemnation a sharp turn into it was required. The egress from the station to Seventy-second Street was

lost to the station. The free right turn from Seventy-second Street into Dodge Street gave traffic the right and freedom to make that turn without interference and this made it very difficult for Dodge Street traffic to turn and get in the station from Dodge Street. Traffic moving north on Seventy-second Street could not get into the station and be served at it and then return to that street and resume its travel to the north. The station had the benefit of traffic both ways, north and south, on Seventy-second Street before the condemnation but since then southbound traffic desiring to continue south must make a left turn on Dodge Street and enter the station. After it is served it must return to Dodge Street and go east on it because of the dividing center island on that street which extends about a block and a half to the east. All westbound traffic on Dodge Street is lost to the station because it cannot cross that street and enter the station. Likewise, traffic going north on Seventy-second Street which desires to turn west on Dodge Street cannot enter the station because it cannot leave it and go west on that street.

After the condemnation and the changes in the streets there was only one driveway into the station from Seventy-second Street and it was near the south part of the station site. There were two entrances to it from Dodge Street. Traffic northbound on Seventy-second Street had a free turn to the right into Dodge Street, that is, a means of turning to the right against the traffic-control lights and merging into the general traffic flow in the direction of the turn, and this had an adverse effect on entrance of vehicles into the station from Dodge Street because normal traffic on that street was constantly conflicting with the merging traffic in front of the station entrances. The things recited above were a damage to the remaining station site because the evidence is that it is necessary to a station operation to have ease of ingress and egress to accommodate traffic to and from it.

There was evidence that the grade or elevation on Dodge Street was changed from what it was before the condemnation. The changes shown at three stations on the north property line were 1.38 feet, 1.00 foot, and 1.05 feet, respectively. Appellee prepared plot plans of the station for use in remodeling it in 1953. The plans were submitted to appellant for approval when appellee applied for a building permit to do the work. The plans showed the grades proposed on the station site. The slope between the property line and the curb line of the paving before the condemnation was about one-fourth inch per foot. Appellant saw and approved these plans before the construction.

There was evidence that the best use of the property leased to appellee was a station; that repairs, replacement, and alterations were required to be made to the station site after the condemnation and the street improvements had been completed; and that the reasonable cost of such restoration was proven as a separate element of severance damage not included in the lost market value of the remainder of the property.

There was proof of all elements and items of damage alleged by appellee in its amended petition, the total of which was greatly in excess of the amount of the verdict. It is assumed, as it is required to be because of the character of the case and because the finding of the jury was for appellee, that all controverted matters were on the trial resolved in favor of it. Bolio v. Scholting, 152 Neb. 588, 41 N. W. 2d 913.

The assignment of appellant that the court erred in overruling its motion for a new trial is too general to require any consideration on this appeal. Wieck v. Blessin, 165 Neb. 282, 85 N. W. 2d 628. Likewise, the failure of appellant to discuss the assignment in its brief disregards the requirement of the rules of this court that an assignment to require the consideration of the court must be discussed by the party making it. Revised Rules of the Supreme Court, rule 8a 2(4). Hart-

man v. Hartmann, 150 Neb. 565, 35 N. W. 2d 482.

The trial court as a part of instruction No. 1 advised the jury that appellee alleged it was lessee of the real estate described in its amended petition and involved herein; that the lease contained in substance a provision that the lessee shall have an option to purchase the leased premises free of liens and encumbrances at any time during the extension or renewal term of the lease for the sum of $15,000; and that the lease had been extended and renewed for a period expiring August 2, 1961. The substance of a subsequent part of the charge to the jury said that it should return a verdict for appellee if it had established by the greater weight of the evidence that it had been damaged by reason of the condemnation proceeding in one or more of the respects charged by it in instruction No. 1, the nature and amount of the damage, and the amount which would be fair and just compensation to appellee for any loss to it. Appellant argues that the jury should not have been advised of the option provision of the lease because it was foreign to any issue in the case; that the instructions noticed above invited and permitted the jury to consider the option and to compensate appellee for any damage the jury found it sustained because of the condemnation of a part of the real estate in reference to which the option was granted; and that an option to purchase real estate which has not been exercised does not create an interest in the optionee entitling him to an award in condemnation proceedings appropriating a part or the whole of the real estate. This invites a consideration of the character and effect of an option.

In Keogh v. Peck, 316 Ill. 318, 147 N. E. 266, 38 A. L. R. 1151, the court said: "An option, originally, is neither a sale nor an agreement to sell. It is simply a contract by which the owner of property agrees with another person that he shall have the right to buy his property at a fixed price within a time certain. The

owner does not then sell his land or any interest in it. He does not then agree to sell it, but he does then sell the right or privilege to buy at the election or option of the other party. The second party gets, in praesenti, not lands or an interest therein, or an agreement that he shall have lands, but he does get something of value,—that is, the right to call for and receive lands if he elects."

Morgan v. Forbes, 236 Mass. 480, 128 N. E. 792, contains the following: "An option to purchase real estate is a unilateral contract by which the owner of the property agrees with the holder of the option that he has the right to buy the property according to the terms and conditions of the contract. By such an agreement the owner does not sell the land, nor does he at the time contract to sell. He does, however, agree that the person to whom the option is given shall have the right at his election or option to demand the conveyance in the manner specified. It is merely the right to an election which has been sold and the owner of this right is not bound to complete the sale." See, also, Annotation, 87 A. L. R. 566; 67 C. J. S., Option, p. 511.

It has been decided that an option for the purchase of real estate by the optionee may not before it is exercised be considered in the assessment of damages caused by condemnation of the real estate.

Cravero v. Florida State Turnpike Authority (Fla.), 91 So. 2d 312, states: "We agree with the trial judge that the Craveros had only an option to purchase and that an option to purchase which has not ripened into a mutually binding contract by having been exercised prior to the time of the entry of the award is not such an interest in the condemned property as to entitle the optionee to share in the award."

East Bay Municipal Utility Dist. v. Kieffer, 99 Cal. App. 240, 278 P. 476, states: "An option to purchase land does not constitute an interest in the land itself, but it is a mere right of election to accept or reject a

present offer within the time fixed, and the holder of a mere option to purchase lands sought to be condemned is not entitled to any part of the compensation to be paid therefor, nor to any damages by reason of the severance of such lands from other lands owned by him."

In Cornell-Andrews Smelting Co. v. Boston & P. R. R. Corp., 209 Mass. 298, 95 N. E. 887, it is said: "An option, giving to the lessee of real estate a right at his election to buy the fee at any time during the term of the lease, although it adds to the value of the lessee's rights under the lease, is no part of the lessee's estate in the land, but is merely a contract right." In the opinion it is said: "We understand that the learned counsel for the petitioner in effect concedes that ordinarily the only person who can bring a petition for compensation is the owner of an estate in the land. His argument is that the option added to the value of the lessee's leasehold interest, and if it did he has asked with great insistence why the petitioner should not have compensation for the diminution in the value of all his rights under the lease including the option. * * * But the real objection to this contention is that, although the insertion in a lease of an option giving to the lessee at his option a right to buy the fee adds to the value of the lessee's rights under the lease, it is no part of the lessee's estate in the land. It is a contract right and nothing more, although contained in the lease and although it is a contract right which passes to an assignee of the lease. It is not an extension or amplification of the lessee's estate. * * * The lessee's rights under such an option are rights which lie in contract and do not create in the lessee any estate in the land. Being rights which lie in contract, the lessee as the holder of such an option cannot bring a petition for damage done to the land, or intervene in one brought by the owner of an estate in the land. Neither can he in a petition brought by himself as lessee (to recover the compensation due for damage done to his estate in the land) have the value

of his estate in the land increased by the value of the option."

People v. Ocean Shore R. R. Co., 90 Cal. App. 2d 464, 203 P. 2d 579, adopted the following from a prior opinion: " 'The primary question here is the nature and extent of Middleton's interest in the property at the time of the taking by the state. If the agreements here constituted merely an option to purchase, then the exact date of the taking by the state becomes unimportant, as "The holder of an option to purchase land being condemned has no interest in the land which will entitle him to compensation * * *" (29 C. J. S. 1101; East Bay Mun. Utility Dist. v. Kieffer, 99 Cal. App. 240 [278 P. 476, 279 P. 178].)' "

Appellee argues that the doctrine of the foregoing cases is not applicable in this jurisdiction because the owner of an interest in property less or different than an estate in real estate is permitted to recover compensation in condemnation. Appellee presumes to sustain this hypothesis in this manner: The statute does not restrict compensation for loss caused by condemnation only to those possessed of an estate or interest in real estate. The statutory definition of property is any interest in real or personal property as the condemner is empowered by law to acquire for public use. § 76-701, R. R. S. 1943. The constitutional provision is that no property shall be taken or damaged for public use without just compensation. Art. I, § 21, Constitution of Nebraska. This case is a condemnation by appellant by virtue of its charter provision enabling it to exercise the power of eminent domain the substance of which is that the council may acquire, by the exercise of the power of eminent domain, private property or public property which is not devoted to public use, for municipal purposes, including street purposes. § 14-366, R. R. S. 1943. Therefore, this state does not limit the recovery of compensation to the owner of an interest or estate in real estate but it ex-

pressly provides for compensation for the appropriation of or damage to personal property by condemnation. Appellee says this court has recognized this doctrine. State v. Platte Valley Public Power & Irr. Dist., 147 Neb. 289, 23 N. W. 2d 300, 166 A. L. R. 1196.

The courts of New York discussed a similar contention. In In re Water Front in Tompkinsville, 219 App. Div. 387, 220 N. Y. S. 23, the appellate division decided that a lessee with an option to purchase real estate was entitled to be compensated for the value of the option in proceedings involving the real estate because that state permitted the owner of an interest less than an estate or interest in land to have compensation in condemnation. In that decision it is said: "But it is claimed by respondent that a lessee's option to purchase is not an estate for which he is entitled to recover compensation in addition to the value of his leasehold, citing 20 C. J. 742, § 194, and Cornell-Andrews Smelting Co. v. Boston & P. R. Corp., 209 Mass. 300, 95 N. E. 887. I do not think, however, that these authorities have any application to the case at bar, because, under the statute which governs the right to compensation for taking property in condemnation, in this proceeding, such right does not depend upon the possession by claimant of an estate, legal or equitable, in the land, as that term is usually understood in the law." It was also held therein that a provision in the lease which contains the option that if the premises involved were taken by eminent domain the lease should cease and come to an end, applied only to the lease and not to the option. That decision was disapproved by the Court of Appeals in In Re Application of City of New York, 246 N. Y. 1, 157 N. E. 911, in which it is said: "The tenant in this case had not exercised its option at the time title was taken by the city, October 11, 1919. In fact, it has never exercised its option. The option alone gave the lessee no interest in the real estate. He became a purchaser only upon the due exercise of the option. * * * The

reason for this is apparent. If the lessee had exercised his option prior to condemnation, he would be bound by his election as well as the owner. Therefore, if the premises should bring on condemnation less than the option price, the tenant nevertheless would be obliged to pay the difference, or the full option price to the owner. The reverse would also be true. The tenant would be entitled to receive the value of the award, although the option price were less. In other words, by the exercise of the option, the rights and obligations of the owner and the lessee became mutually binding. The New York Dock and Warehouse Company, Inc., claims that this option is one-sided, and only binding on the owner, and frankly states that if the award had been less than its option price, it would have been under no obligation to buy the property or take the award, and pay the owner the difference. It has the privilege, so it claims, of waiting until the award is made, and then, finding that the amount is in excess of the option price, claim an election and the right to the difference, which in this case is over $100,000. Such a thing cannot be * * *." The Court of Appeals also decided that the provision in the lease for its termination in the event the property involved was condemned rendered the option void.

The deficiency in the argument of appellee in this regard is that an option does not create an interest or estate in real estate or personal property. An unexercised option is essentially a unilateral contract which permits the optionee to make an election concerning the subject matter designated therein within a period prescribed. In 67 C. J. S., Option, p. 511, the following appears: "However, the very meaning of the word 'option' implies a right to act or not as the optionee may choose, and in this sense the word has been variously defined as meaning the right of choice; right of election to exercise a privilege; * * * the exercise of

the power of choice which may or may not be exercised." See, also, Annotation, 87 A. L. R. 566.

Appellee argues that an option is a right to acquire an interest in real estate and is, therefore, an equitable interest and that this court has decided an equitable owner of property is entitled to damages for injury thereto. City of Nebraska City v. Northcutt, 45 Neb. 456, 63 N. W. 807, is apparently the authority relied upon by appellee as supporting this argument. It falls far short of doing this, as the following language therein demonstrates: "Presumably, the improvements when made became a part of the realty and the property of its owner, and no right of action accrued to the plaintiff because he made them, unless he retained ownership or had some estate in the land; and in the latter case he could only recover for the injuries sustained by his particular estate. In so holding we must not be understood as deciding that one must be the owner of land in fee simple in order to recover damages for a change of grade. We simply hold that one must have some legal or equitable estate, and that his damages are confined to the injuries done that estate."

Los Angeles County Flood Control Dist. v. Andrews, 52 Cal. App. 788, 205 P. 1085, declares: "Appellant contends that at the time of the issuance of summons * * * it was an equitable owner of the land sought to be condemned. This claim is made because of the unusual manner in which Horsford indicated his execution of the option agreement. * * * Couched as the instrument was, his signing in the manner in which he did placed him in no different position than if he had merely appended his name after that of the secretary of the trust company. And his being a party to the paper was of no significance whatever. It was purely unilateral, for he made no promises above his signature, he covenanted to do nothing. In short, and without dissection of the instrument, it is plain to be seen that it was nothing but an option; and when an option is signed by

the optionee it is not because of that signature to be dignified by a higher name."

It was the duty of the trial court to instruct the jury as to each element or item shown by evidence which it should have considered in deciding the amount of the verdict appellee was entitled to have. The jury should not have been informed by the trial court of any matter which was not proper for it to have considered in arriving at a verdict in the case.

In Benedict v. Eppley Hotel Co., 159 Neb. 23, 65 N. W. 2d 224, it is said: "It is the duty of the trial court to instruct the jury fully and fairly as to items of damage it should consider in arriving at its verdict and as to the proper basis upon which damage should be assessed for each item." See, also, Wischmann v. Raikes, 168 Neb. 728, 97 N. W. 2d 551.

The jury was informed by the trial court of the option and it must be assumed that it considered the existence of it and the amount of any damage to the option of appellee because of the condemnation. There was evidence indicating that the option had a substantial value. The option price of the property, the subject of it, was $15,000. The property, by proof produced by appellant, was shown to have a value in excess of $42,000 and the evidence of the value thereof offered by appellee tended to show a value of $60,000. The expert appraiser who gave evidence at the instance of appellant referred to the value of the property in excess of the option price of $15,000 as the sum of $27,000 according to his opinion of value. He said this was "bonus value" which existed because of the option. It cannot be determined from the record that the submission of the option to the jury by the trial court did not materially influence the jury to the prejudice of appellant in the amount of the verdict in favor of appellee.

Borden v. General Insurance Co., 157 Neb. 98, 59 N. W. 2d 141, states: "The proof in a trial of a jury case must be confined to legal evidence tending to

prove or disprove an issue made by the pleadings and the admission of improper evidence is prejudicial error if it may have influenced the verdict. * * * If it does not appear from the record that evidence wrongfully admitted in the trial of a jury case did not affect the result of the trial unfavorably to the party against whom it was admitted its reception must be considered prejudicial error." See, also, Higgins v. Loup River Public Power Dist., 159 Neb. 549, 68 N. W. 2d 170; Barton v. Wilson, 168 Neb. 480, 96 N. W. 2d 270. The instructions given by the court advising the jury of the option for its consideration in deciding the amount of the recovery for appellee was prejudicial error.

Appellant complains of instruction No. 4 because it says the instruction conveys the impression that appellee was entitled to access between the property of which it was lessee and the street at all points necessary to the business of appellee. The language of the instruction in this respect was as follows: "The measure of the right of the property owner or lessees standing in the place of such owner is reasonable ingress and egress under all the circumstances, and he is not entitled to access to his land at all points in the boundary between it and the street but is limited solely to those points that are reasonably necessary in his business." A fair interpretation of that language of the court is that the measure of the right of appellee to access to the station property to and from the street was the ingress and egress which were reasonably necessary to the business there conducted and which was reasonable under all the circumstances. This did not conflict with the doctrine of this court on that subject. Hillerege v. City of Scottsbluff, 164 Neb. 560, 83 N. W. 2d 76, states: "The owner of property abutting on a street is not entitled, as against the public, to access to his land at all points in the boundary between it and a street, although entire access cannot be denied him. The measure of the right of the property owner is reasonable

ingress and egress under all the circumstances." In the immediately following paragraph of the instruction the court used the expression: "* * * and if from a preponderance of the evidence you find that such ingress and egress were reasonably necessary * * *" and because the court did not add to the words quoted the admonition "under all the circumstances," appellant says the instruction was prejudicially erroneous.

In Fielding v. Publix Cars, Inc., 133 Neb. 818, 277 N. W. 331, this court stated: "In instructions to the jury, fragments, though open to criticism when considered by themselves, are not necessarily prejudicial to the complaining party, if the charge as a whole correctly states the issues and the law applicable to the pleadings and the evidence."

An instruction will not be considered prejudicially erroneous because of a harmless imperfection which cannot reasonably be said to have confused or misled the jury in deciding the case. Whether or not there was error in a sentence or part of an instruction, it will be considered with the instruction of which it is a part and all the other instructions. The meaning of an instruction will not be determined from a single or separate phrase or paragraph but by considering all that is said on each subject or branch of the case. An admonition such as "under all the circumstances" used in one paragraph is not required to be repeated in each subsequent paragraph thereof which refers to the same subject. In re Estate of Kinsey, 152 Neb. 95, 40 N. W. 2d 526; Bolio v. Scholting, *supra;* Myers v. Willmeroth, 151 Neb. 712, 39 N. W. 2d 423.

Appellant complains that the final paragraph of instruction No. 4 permitted the jury to award any damage it found to have been occasioned appellee by the changing or widening of the streets. Instruction No. 5 told the jury that the ownership by appellant of land adjoining the old portion of the street and over which appellee had constructed its driveway did not affect

the right to recover damages suffered by appellee because of interference by appellant with the right of appellee to ingress and egress to and from its station. Instruction No. 7 said appellee could recover the reasonable cost of making changes in the location of its operating units and facilities and change in the surface if they were caused and made necessary by the condemnation of the part of the property taken.

Appellant says the damages mentioned in the last paragraph of instruction No. 4 were not restricted to those caused by the condemnation. The immediately preceding paragraph of the instruction concerning other items of damage that the jury was to consider commenced with the words: "If through the condemnation and improvement in the street plaintiff was affected * * *" and the last paragraph started with the words: "In addition, if you find from a preponderance of the evidence * * *." Thereby the subject of each of the paragraphs was limited to things resulting from the taking of a part of the property and the improvements made in the streets because of the taking.

Appellant substantially argues that the court in giving instructions Nos. 4, 5, and 7 failed to recognize the right of a municipality to exercise the police power delegated to it in reference to its streets. § 14-301, R. R. S. 1943. The essence of the contention in this respect is that damages resulting from the exercise of the police power by appellant are not compensable. The fact that appellant had under the police power the right to improve its streets and thereby control the traffic thereon does not mean that it had immunity from liability to respond in damages which resulted to private property abutting the improvement where a part of the property of appellee was taken by condemnation. The exercise of police power may or may not involve the taking of private property and it may or may not involve mere noncompensable inconvenience to the owner thereof. The distinction is not whether it is a valid exercise of

police power but whether or not the property itself is taken or damaged. In 18 Am. Jur., Eminent Domain, § 11, p. 639, the author says: "The real distinction, however (between eminent domain and the police power), lies in the fact that in eminent domain property or a right in property is taken from the owner and transferred to a public agency to be enjoyed by it as its own, whereas under the police power, although it may, and often does, take property in the constitutional sense so that it must be paid for, this is not accomplished by a transfer of ownership, but by destroying the property or impairing its value."

This is a condemnation proceeding originated by a petition of appellant which characterizes it as such. The petition asked the appointment of appraisers to determine the compensation appellant was required to pay in the manner and to the extent required by law, and of course there was not and could not have properly been any claim in the petition that the appellant was exempt from obligation to pay damages by reason that the municipality was exercizing the police power. Thereby appellant subjected itself to liability for all damages sustained by the taking which this court has repeatedly held includes all elements and inconveniences which affect the market value such as " 'The creation of noise and dust, the invasion of privacy, the deprivation of light and means of access, * * * and like matters * * *.' " Crawford v. Central Nebraska Public Power & Irr. Dist., 154 Neb. 832, 49 N. W. 2d 682.

In State ex rel. Westminster Presbyterian Church v. Edgecomb, 108 Neb. 859, 189 N. W. 617, 27 A. L. R. 437, this court quoted with approval from Chicago, B. & Q. Ry. Co. v. State of Illinois ex rel. Drainage Commissioners, 200 U. S. 561, 26 S. Ct. 341, 50 L. Ed. 596, the following: " 'Private property cannot be taken without compensation for public use under a police regulation relating strictly to the public health, the public morals or the public safety, any more than under a

police regulation having no relation to such matters, but only to the general welfare. The foundations upon which the power rests are in every case the same.' " See, also, City of Scottsbluff v. Winters Creek Canal Co., 155 Neb. 723, 53 N. W. 2d 543. The challenge of the instructions referred to above is not well founded and is not sustained.

Appellant contends that anticipated profits from a business cannot be considered in the assessment of condemnation damages and from that assumption appellant concludes that instruction No. 6 was wrong because it authorized the jury in finding the market value of the leasehold of appellee in the station property to consider the volume of business carried on there. There is no mention or evidence in the record of profits from the business conducted by the station on the site in question. The instruction strictly limited the consideration of the jury to the volume of business carried on by the station as it affected the value of the leasehold. This instruction has the approval of the decision in James Poultry Co. v. City of Nebraska City, 135 Neb. 787, 284 N. W. 273, in which it was said: "The volume of business done on any given leasehold has a direct relation to the value of the leasehold, as volume is directly connected with the success of the business, and diminution of business means decrease in volume." The expert appraiser produced by appellant recognized this. He testified he was acquainted with the volume of business of numerous stations, that he had appraised many of them, and that the volume of business was a feature to be considered in determining the value of such a location. The instruction complained of was not objectionable.

Appellant claims error in connection with the matters loosely referred to as changes in the grade and because instructions Nos. 7 and 8 permitted the jury to consider severance damages resulting from the construction of the streets at a different level or elevation rela-

tive to the property line of the station site. This is based on the hypothesis that as a matter of law appellee was not entitled to any consideration of this element of damages. Appellant was liable to appellee for damages to the remainder of the property which resulted from the construction of the improvement in the streets for which the condemnation power was exercised. The measure of damages was the difference between the before and after value of the tract and "* * * every element of annoyance and disadvantage resulting from the improvement which would influence an intending purchaser's estimate of the market value of such property" were proper to be considered. Chicago, R. I. & P. Ry. Co. v. O'Neill, 58 Neb. 239, 78 N. W. 521.

In the case of Rath v. Sanitary District No. One, 156 Neb. 444, 56 N. W. 2d 741, it was said, contrary to the argument of appellant: "Although conflicting, there is ample competent evidence in the record to sustain the verdict and judgment unless, as a matter of law, plaintiff was not entitled to recover consequential damages for depreciation in the value of his remaining land by severance and the construction of structures, embankment, and earthworks aforesaid, as argued by defendant. We conclude that such contention has no merit." See, also, Crawford v. Central Nebraska Public Power & Irr. Dist., *supra;* Quest v. East Omaha Drainage Dist., 155 Neb. 538, 52 N. W. 2d 417. This is necessarily the correct conclusion because a landowner must recover all his damages caused by the taking of land from him by condemnation and which may arise on account of the proper construction and the future operation of an improvement for which the land was taken in the condemnation proceeding. Churchill v. Beethe, 48 Neb. 87, 66 N. W. 992, 35 L. R. A. 442, stated: "It is now the settled law of the state that for all injuries which may arise on account of the proper construction or future operation of an improvement, an adjoining proprietor must be compensated in the orig-

inal condemnation proceedings." See, also, State v. County of Cheyenne, 157 Neb. 533, 60 N. W. 2d 593; Gruntorad v. Hughes Bros., 161 Neb. 358, 73 N. W. 2d 700; McGree v. Stanton-Pilger Drainage Dist., 164 Neb. 552, 82 N. W. 2d 798.

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

REVERSED AND REMANDED.

NORMAN B. MCDONALD, APPELLEE, V. RHEA RENTFROW, COUNTY SUPERINTENDENT OF SCHOOLS FOR SHERMAN COUNTY, NEBRASKA, ET AL., APPELLEES, IMPLEADED WITH HENRY THOMAS ET AL., APPELLANTS.

106 N. W. 2d 682

Filed December 16, 1960. No. 34833.

1. **Schools and School Districts.** The powers and duties imposed upon county superintendents of schools by section 79-420, R. S. Supp., 1955, are legislative in character.
2. ———. The exercise of the powers and duties delegated to county superintendents by section 79-420, R. S. Supp., 1955, are mandatory if the conditions exist which are described therein.
3. ———. Before the powers and duties prescribed in section 79-420, R. S. Supp., 1955, may be exercised, a county superintendent must give at least 15 days' notice to the legal residents of the district, which notice may be by mail or by publication in a newspaper of general circulation in the area.
4. **Schools and School Districts: Appeal and Error.** Secton 79-420, R. S. Supp., 1955, provides that an appeal may be taken from the action of the county superintendent to the district court but without providing a method.
5. **Appeal and Error.** Where no method of appeal is provided by statute the appropriate procedure is a proceeding in error.
6. ———. The district court was without jurisdiction to hear the appeal in this case except as a proceeding in error.
7. ———. The absence of jurisdiction of the district court may be taken advantage of at any stage of the proceedings.
8. **Schools and School Districts: Appeal and Error.** A proceeding in error from the action of a county superintendent must come to the district court on a petition in error and a transcript.

9. **Appeal and Error.** The petition shall contain the assignments of error, and the transcript shall contain the final judgment or order sought to be reversed.
10. ———. In a proceeding in error in the district court where a finding and judgment is the basis of the proceeding, the finding and judgment should be affirmed in the absence of a bill of exceptions containing the material and relevant evidence, and where the transcript fails to disclose any prejudicial error.
11. ———. The transcript on appeal imports absolute verity and is the exclusive evidence of the proceedings.
12. **Schools and School Districts: Appeal and Error.** In the case of a proceeding in error from the action of a county superintendent to the district court where no error is found, it is the duty of the district court to affirm the action of the county superintendent and of the clerk of the district court to certify the decision to the county superintendent.

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

Thomas W. Lanigan, Wellensiek & Weaver, and *Richard L. DeBacker,* for appellants.

Dier & Barton, for appellees.

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

YEAGER, J.

The inception of the action here was an order of Rhea Rentfrow, county superintendent of schools of Sherman County, Nebraska, dissolving school district No. 3 in that county; attaching the territory thereof to school district No. 8, a neighboring district also in Sherman County; and distributing the assets of district No. 3 to district No. 8. Norman B. McDonald, a resident and taxpayer of district No. 3, filed a supersedeas bond and thereupon filed in the district court for Sherman County, Nebraska, what he termed a petition on appeal and also a transcript of the proceedings before the county superintendent which led to the order which has been mentioned. Thereafter other pleadings were filed.

These pleadings will receive further attention later herein.

The petition of Norman B. McDonald designated him as plaintiff on appeal. He is appellee here. Rhea Rentfrow, county superintendent of schools of Sherman County, was designated a defendant. Henry Thomas, president of the board of education of school district No. 8, and Fred C. Teichmeier and Anton Weiss, as representatives of the legal voters of school district No. 3, were also made defendants. There are other defendants but none of them is in an active capacity before this court. Furthermore none of the other named defendants was declared by the petition to have in point of pleaded fact an interest within the meaning of any pertinent statute in the subject matter before the county superintendent.

The only irregularities charged in the petition are that the hearing was had without giving persons affected an opportunity to present evidence as to the educational welfare, needs, and necessity of the children of school age in school district No. 3, and without giving due consideration thereto; and that the educational welfare, needs, and necessity of the children of school age in school district No. 3 of Sherman County, Nebraska, require that at least a portion of said school district No. 3 be attached to and made a part of school district No. 30 of Howard County.

The defendants who have been named herein filed an answer. The only part which appears pertinent on the questions presented here is a denial of the allegations of the petition not admitted to be true.

An answer and cross-petition was filed by one Cleo Quest, one of the defendants named in the petition but who has not been previously named herein. His answer and cross-petition are as president and representative of the board of education and as representative of the legal voters of school district No. 30 of Howard

County, Nebraska. By these pleadings no claim is made to any interest in the subject matter of this action.

The case came on for hearing in the district court where it was heard de novo on the pleadings and on evidence adduced in that court. It was tried as an action on appeal.

At the conclusion of the trial the district court ordered and adjudged that school district No. 3 of Sherman County, Nebraska, be dissolved; that a part thereof be annexed to school district No. 8 of Sherman County, Nebraska; that a part be annexed to school district No. 30 of Howard County, Nebraska; and that the money and funds of school district No. 3 in the hands of the treasurer of the district be distributed in proportion to the assessed valuation of the real estate annexed to each of the districts.

The defendants Thomas, Teichmeier, and Weiss, who will be referred to hereinafter as appellants, have appealed from the judgment of the district court to this court. In this appeal Norman B. McDonald is appellee. The object and purpose of this appeal is to cause the judgment of the district court to be reversed and to cause the order of the county superintendent to be restored to the effect therein declared.

The brief of appellants herein contains numerous assigned grounds for reversal but it appears that before considering any of them specifically the history and the present status and quality of the statutory provisions involved should be pointed out and sufficiently analyzed.

The order and the proceedings throughout, as is disclosed by the order itself and the proceedings in relation thereto, flowed from section 79-420, R. S. Supp., 1955. This becomes clear and indisputable from the transcript which came from the county superintendent to the district court and thence to this court, and the pleadings of the parties with their declarations and admissions.

The powers and duties conferred by this section, in-

sofar as they are pertinent for present purposes, are that the county superintendent of a county shall dissolve a school district; shall attach the territory of the district to one or more neighboring school districts; and shall distribute the assets of the closed district to the other district or districts in proportion to the assessed valuation of the property attached to such district or districts. The exercise of these powers is mandatory and dependent upon a situation where there are less than three legal voters residing in the district; a failure to maintain a public elementary school within the district in which are enrolled and in regular attendance for at least 155 days one or more pupils of school age residing in the district; or the district does not contract for the tuition and transportation of pupils of such district with another district or districts and have pupils attending such other school or schools regularly for at least 155 days under such contracts.

Before exercising the powers and duties the county superintendent is required to give at least 15 days' notice to the legal residents of the district. Notice may be by mail or by publication in a newspaper of general circulation in the area. Appeals may be taken from the action to the district court of the county.

The question of whether or not there were three or more voters in district No. 3 is not involved. It is the other conditions which are of concern.

This section of the statutes is not by declaration therein or elsewhere made to depend, on the basis of substance or procedure, on any other phase of the school laws. It pertains to a subject which is not related to other provisions for organization, reorganization, or transfer of properties or school privileges. It is separate and distinct from all of these and has been so separate and distinct from its historical beginning down to the present time.

The subject matter was first introduced by Laws 1897, chapter 62, page 308. The powers and duties there

declared were not the same as those contained in the present section. The present ones however have come by specific amendment over the intervening period. That chapter, except the last section thereof which was merely an emergency clause, became sections 11522 to 11528, Cobbey's Annotated Statutes for 1907. There was an amendment to section 11523 in 1909 which amendment has no controlling significance here.

In 1949 there was a recodification of the school laws and it was then that the subject matter here became section 79-420, R. S. Supp., 1949. It embodied minor and unimportant variations by amendments which need not be mentioned here. There was however one significant change.

Up to that time the powers and duties of the county superintendent were burdened with certain conditions and certain discretion was allowed. However by this amendment, or in legislative terminology, enactment, the duty of the county superintendent to dissolve districts and distribute assets in the light of the conditions pointed out as being a part of the present section became absolute without notice and without right of appeal.

In 1953 the section was amended but in no particular requiring mention herein. Laws 1953, c. 291, § 2, p. 989. This amended section was amended early in the session of the Legislature of 1955, but as was true of the 1953 amendment it was in particulars not requiring mention herein. Laws 1955, c. 308, § 1, p. 952.

Later in the 1955 session it was again amended. Laws 1955, c. 315, § 5, p. 975. By this amendment it became for the first time since 1949 the duty of the county superintendent to give at least 15 days' notice to the legal residents of the district by mail or by publication in a newspaper of general circulation in the area before taking action. By this amendment the right of appeal from the action of the county superintendent to the district court was also provided.

There was an amendment in 1959, but this has no

bearing on the present proceeding since it did not become effective and controlling until after the county superintendent had acted with reference to the subject matter of the present action.

The powers and duties which were conferred by this provision of the statutes are and were legislative powers. The Legislature could exercise these powers itself or delegate them. This subject is covered fully in Nickel v. School Board of Axtell, 157 Neb. 813, 61 N. W. 2d 566, where citations of other cases of like effect are noted. The opinion does not state specifically that these legislative powers may be delegated to county superintendents but from the context no other reasonable conclusion may be reached. It is pointed out that the delegation of such power must carry certain restrictions. In Schutte v. Schmitt, 162 Neb. 162, 75 N. W. 2d 656, the power is specifically declared. The restrictive power will be referred to later herein.

It was pursuant to the power delegated to county superintendents by this statutory provision that Rhea Rentfrow, county superintendent of schools of Sherman County, Nebraska, according to the transcript before this court, on July 30, 1959, gave due notice of a public hearing to be had on August 21, 1959, at 2 p.m., at her office in Sherman County, Nebraska, for the purpose of dissolving school district No. 3 and attaching the district in whole or in part to a neighboring district or districts; that a hearing was had at the time designated; that at the conclusion of the hearing district No. 3 was dissolved and annexed to district No. 8 in Sherman County, an adjacent district; and also at that time the assets of district No. 3 were transferred to district No. 8.

To avoid confusion it is pointed out here that no question is raised as to the propriety of the dissolution of district No. 3. In fact the petition on appeal which has been referred to declares that "the County Superintendent of Schools of Sherman County, Nebraska, had a duty to dissolve said district and attach the same to

one or more neighboring school districts." The only basic question which is or has been before the courts is the propriety of the attachment of all of district No. 3 to district No. 8.

It is of course apparent that this court is called upon to make a determination upon the propriety of the order of the county superintendent, the appeal therefrom, and the consequent judgment of the district court. This requires first ascertainment of the true significance and force and effect of the appellate proceeding from the action of the county superintendent.

As has already been made clear the appellee instituted his action by what he denominated "petition on appeal." In essence however it amounted rather to a petition in error. In From v. Sutton, 156 Neb. 411, 56 N. W. 2d 441, in dealing with a matter in which a dissatisfied party was given a right of appeal, it was said: "It seems self-evident that the Legislature intended, by the statute it enacted, to extend to any parties coming within the scope thereof the right to an appeal which would entitle them to a retrial of the whole cause but failed to provide any procedural method for lodging jurisdiction thereof in the district court. This failure of the statute to so provide defeats the right for, as already stated, the right to appeal together with the mode and manner thereof are purely statutory." This declaration was approved in Jungman v. Coolidge, 157 Neb. 122, 58 N. W. 2d 828. Accordingly it must be said that the appellate proceeding from the action was not an appeal.

In From v. Sutton, *supra,* it is pointed out that a proceeding denominated an appeal may, if legal requirements are met, be treated as a proceeding in error. It appears that the essential requirements have been met in this case, and it is held that the pretended appeal from the action of the county superintendent was properly a proceeding in error. It is suggested in the brief of appellee, although not directly urged, that by the de-

cision in Roy v. Bladen School District No. R-31, 165 Neb. 170, 84 N. W. 2d 119, the rule does not obtain here. The answer to that is that in that case the statute being interpreted along with the declaration of the right of appeal also prescribed the procedure therefor. See § 79-403, R. R. S. 1943.

This question has been made the basis of an assignment of error by the appellants in this court. The appellee urges that it is not available for consideration for the reason that it was not presented by motion for new trial. This contention may not be sustained. This court said in Barney v. Platte Valley Public Power & Irr. Dist., 144 Neb. 230, 13 N. W. 2d 120: "Appellate jurisdiction of a case cannot be conferred upon a court by any action of the parties. The want of such jurisdiction may be taken advantage of at any stage of the proceedings. An appellate court cannot pass on the merits of a case falling within its appellate jurisdiction unless its jurisdiction is invoked in the manner prescribed by Constitution or statute." See, also, Roberts v. City of Mitchell, 131 Neb. 672, 269 N. W. 515; From v. Sutton, *supra;* Jungman v. Coolidge, *supra.*

A proceeding in error must come to the appellate court on petition in error and a transcript. §§ 25-1903 and 25-1905, R. R. S. 1943; From v. Sutton, *supra.*

It is required that the petition shall contain the assignments of errors complained of. § 25-1903, R. R. S. 1943. It is required that the transcript shall contain the final judgment or order sought to be reversed. § 25-1905, R. R. S. 1943.

In an error proceeding in the district court where a finding and judgment is the basis of the proceeding, the finding and judgment should be affirmed where there is an absence of a bill of exceptions containing the material and relevant evidence, and where the transcript fails to disclose any prejudicial error. Olsen v. Grosshans, 160 Neb. 543, 71 N. W. 2d 90.

No bill of exceptions was presented to the district

court, hence there was no evidence to examine for the purpose of determining whether or not the order of the superintendent was in point of fact erroneous. There was nothing therefore except the transcript to which reference was available to ascertain whether or not there was error.

It is also true that the record fails to disclose that any objections were filed or otherwise taken to the proceedings leading to the hearing by the county superintendent or at the hearing itself. Also there is no record of any exception taken thereafter and presented to the county superintendent. The first step taken was the filing of the "petition on appeal."

In the light of this the district court had only the transcript from which to ascertain whether or not the order of the county superintendent was erroneous. The rule is that the transcript on appeal imports absolute verity and is the exclusive evidence of the proceedings. In re Estate of Bednar, 151 Neb. 242, 37 N. W. 2d 195; Kennedy & Parsons Co. v. Schmidt, 152 Neb. 637, 42 N. W. 2d 191; Segebart v. Gregory, 160 Neb. 64, 69 N. W. 2d 315; Johns v. Carr, 167 Neb. 545, 93 N. W. 2d 831.

The opinion in Dovel v. School Dist. No. 23, 166 Neb. 548, 90 N. W. 2d 58, makes it clear that this rule is applicable in cases such as this one.

As has been pointed out the petition which was filed in the district court by the appellee charged two irregularities on the part of the county superintendent. They will be referred to here as assignments of error. The first is that the hearing was had without giving persons affected an opportunity to present evidence as to educational welfare, needs, and necessity of the children of school age in school district No. 3, and without giving due consideration thereto.

This contention is on the record without merit. There is no bill of exceptions and nothing in the nature of exceptions or otherwise in the transcript to support it. Instead of there having been no hearing the transcript

declares directly to the contrary, and, as pointed out, it is not shown that any effort was ever made before the county superintendent to lay a foundation for impeachment of what appears in the transcript. The transcript must be accepted as true.

The second assignment is that the educational welfare, needs, and necessity of the children of school age in school district No. 3 of Sherman County, Nebraska, require that at least a portion of school district No. 3 be attached to and made a part of school district No. 30 of Howard County.

There is nothing in the statutory provision under which the county superintendent acted, or its antecedent history which has been described, which required her to do less or more than was done by her. She did and performed according to the mandate of the statute. The exactions which the appellee would impose are not to be found in this statutory provision or in the area of its operation. It is of course true that such exactions are contemplated by other statutory provisions and procedures but they are foreign to this statute.

What was done here was in the exercise of legislative power properly delegated by the Legislature to the county superintendent. Nickel v. School Board of Axtell, *supra.* In pursuance of this delegated power the county superintendent could do what was done by the order in question without the consent and over the protests of residents or taxpayers in the district. See, Nickel v. School Board of Axtell, *supra;* Schutte v. Schmitt, *supra.*

This being true it was the duty of the district court to overrule the exceptions contained in the petition in error. It thereupon became the duty of the court to affirm the action of the county superintendent and the duty of the clerk of the district court to certify the decision to the county superintendent. See, Dovel v. School Dist. No. 23, *supra;* § 25-1909, R. R. S. 1943.

The judgment of the district court is therefore re-

versed and the cause remanded with directions to affirm the action of the county superintendent which affirmance shall be certified by the clerk of the district court to the county superintendent.

REVERSED AND REMANDED WITH DIRECTIONS.

SIMMONS, C. J., participating on briefs.

STANDARD RELIANCE INSURANCE COMPANY, A CORPORATION, APPELLANT, V. RUTH SCHOENTHAL ET AL., APPELLEES.

106 N. W. 2d 704

Filed December 16, 1960. No. 34834.

1. **Vendor and Purchaser.** The exercise of an option to purchase real estate, in order to be effectual, must be identical with the terms of the option agreement and unconditional.
2. ———. An option holder cannot enforce the option to purchase real estate until he elects to and binds himself to perform it, thereby giving mutuality to optionor's offer to sell by optionee's acceptance of it.
3. **Vendor and Purchaser: Equity.** Though an election to accept and exercise an option to purchase real estate is necessary to bind the optionee, the act of filing a bill in equity, within the time for exercising the option, declaring such acceptance and election is sufficient when accompanied by the payment into court of the purchase price fixed by the option agreement, since optionee thereby places himself under all the obligations of the option agreement.
4. **Vendor and Purchaser: Specific Performance.** Where in such an action the optionee prays for specific performance of the option agreement and makes an unconditional offer to exercise the option in accordance with its terms, and in all respects offers to do equity, the basis exists for the granting of such relief.
5. **Vendor and Purchaser.** A demand for a warranty deed contrary to the terms of the option agreement is not an acceptance or exercise of the option, but is a counteroffer.
6. **Pleading.** The prayer of a petition is not a part of the allegations of fact constituting the cause of action, and where the facts state a cause of action which are supported by the evidence the court will grant the proper relief, although it may not conform to the relief prayed for.
7. ———. The prayer of a petition is no part of the essential

pleading, it tenders no issue, and neither adds to nor takes from the evidence required of either party.

8. **Equity: Pleading.** A prayer for general relief in equity is as broad as the pleadings and the equitable powers of the court.

9. **Vendor and Purchaser: Equity.** The claim that the exercise of the option by optionee was ineffectual in that optionee failed to tender payment of installments on an assessment for a public improvement made after the execution of the option agreement and before the option could be exercised by its terms is without merit where the optionee, by pleading in an equity action properly brought, unqualifiedly exercises the option and unconditionally agrees to comply with its terms as determined by the court.

10. ———: ———. Where by a bill in equity an optionee exercises his option to purchase and prays for the specific performance of the option agreement, the doctrine of laches is not available as a defense where the suit is brought within the time fixed by the option agreement for its exercise and no delay chargeable to the optionee resulting in prejudice to the rights of optionor has occurred since the right to exercise the option arose.

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

Mason, Knudsen, Dickeson & Berkheimer, for appellant.

Field & Ricketts and *Cecil F. Parker,* for appellees.

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

CARTER, J.

This is a suit in equity to obtain the specific performance of an option contained in a contract and deed for the repurchase of real estate conveyed by the appellant, Standard Reliance Insurance Company referred to hereafter as the plaintiff, to C. E. Prevey and Medora A. Prevey, husband and wife, as joint tenants, both of whom were deceased at the commencement of this suit. The defendants are the personal representatives, heirs, devisees, and all other persons interested in the estates of the deceased grantees and optionors. The trial court held that the option had not been exercised in accord-

ance with its terms and dismissed plaintiff's petition. The plaintiff has appealed.

The evidence shows that on May 12, 1947, plaintiff entered into a contract with C. E. Prevey and Medora A. Prevey to sell and convey to them certain real estate described in plaintiff's petition. As a part of that contract it was also agreed as follows: "Vendees hereby grant to vendor the right and option within ninety days of the death of both of said vendees to purchase the property herein described for the sum of $9500.00 plus not to exceed $1,000.00 for major repairs, if any, made by vendees during the term of their possession of said property."

The record also shows that plaintiff, on April 30, 1948, executed and delivered a warranty deed to the Preveys in accordance with the provisions of the contract of sale. It is not questioned that the Preveys paid the purchase price agreed upon. The evidence also shows that the Preveys made improvements on the property in excess of $1,000 in value, that the option price was $10,500 thereafter, and that the plaintiff agreed in writing that this was the fact. The warranty deed executed and delivered to the Preveys on April 30, 1948, contained the following provision with reference to the option contained in the contract of sale: "This deed is subject to certain options to repurchase in favor of the grantor, extending for the period of 90 days from and after the death of the survivor of the within named grantees, the said option being conditioned upon the payment of the sum of $10,500. to the grantees, their heirs, personal representatives or assigns."

The evidence shows that C. E. Prevey died on February 13, 1957, leaving surviving his widow, Medora A. Prevey, a number of nieces and nephews, and other more distant relatives. He left a will which devised all of his property to his widow, which was not probated. The defendants Ruth Schoenthal and Joseph V. M. Dennison were contingent devisees of the real estate here

involved under this will. A determination of the inheritance tax due from the estate of C. E. Prevey was made by the county court on April 30, 1957. Plaintiff filed a petition in the county court on June 2, 1959, for the appointment of a special administrator. The defendant Ruth Schoenthal was appointed special administratrix on that date and letters testamentary were issued on June 4, 1959.

Medora A. Prevey died testate on March 17, 1959, and her will was admitted to probate on May 18, 1959. Letters testamentary were issued to Ruth Schoenthal as executrix on May 23, 1959. The time for appeal from the admission of the will of Medora A. Prevey to probate did not expire until after the 90-day period in which the option was required to be exercised. As the surviving joint tenant, Medora A. Prevey was, at the time of her death, the sole owner of the real estate subject to the option. By her will she devised this property to the defendants Ruth Schoenthal and Joseph V. M. Dennison. She also left surviving nieces and nephews who are named as parties defendant in the present suit.

It is evident that the 90 days in which the option was required to be exercised terminated on June 15, 1959. On March 24, 1959, the president of the plaintiff advised Ruth Schoenthal of plaintiff's intention to exercise the option, which letter admittedly was ineffective as an exercise of the option. On June 4, 1959, the president and vice president of the plaintiff, accompanied by one of its attorneys, met with the defendants Ruth Schoenthal and Joseph V. M. Dennison, and their attorney at the latter's office, and tendered the sum of $10,500 in cash as an exercise of the option, which was refused. It is evident from the record that the option was in all respects valid at the time of the death of Medora A. Prevey, the surviving joint tenant. The real issue is whether or not the plaintiff properly exercised its option in accordance with its terms.

The tender of the $10,500 to Ruth Schoenthal and

Joseph V. M. Dennison was properly made if the latter persons were the lawful devisees of the real estate to which the option related. It is the contention of the plaintiff that this question could not be determined with certainty because of the lack of finality in the probate of the estate of Medora A. Prevey. For this reason the tender of the $10,500 on June 4, 1959, was made in writing to Ruth Schoenthal and Joseph V. M. Dennison in the alternative in four different capacities. This was understood by all the parties present. The tender was declined in writing without any reason given therefor. In an affidavit filed in response to a request for an admission Ruth Schoenthal stated that the tender was refused because affiant and Joseph V. M. Dennison would not assume the responsibility and resultant liability in determining the beneficiaries of the tendered sum. In other words, the refusal of the tender was based on the same uncertainties which beset the plaintiff in attempting to exercise its option. The form of the tender was to the effect that plaintiff tendered $10,500 in exchange for the delivery of a good and sufficient deed to the property covered by the option. It will be observed that the tender contained no demands in excess of those required by the option.

On June 4, 1959, the day of the aforesaid tender, plaintiff commenced this suit in the district court for Lancaster County and paid to the clerk of that court the sum of $10,500 to abide the judgment of the court. The uncertainty of the plaintiff as to whom a tender should be made, and the unwillingness of Ruth Schoenthal and Joseph V. M. Dennison to accept the tender because of the uncertainty as to who was entitled to it, is also complicated by the fact that this court has never determined whether the purchase money goes to the heirs or the administrator where an option to purchase is exercised after the death of the one giving the option. An authoritative text sums up the existing situation with respect to this problem as follows: "It

is well settled that an option to purchase land, unless otherwise limited by its terms or by necessary implication therefrom, may be enforced against the heirs, devisees, and representatives of a deceased optionor. Although in case of a general offer to sell the death of the vendor ipso facto withdraws the offer, his death before the expiration of the time for exercising the option does not in any way affect the right of the other party thereafter to make his election and do the things necessary on his part to entitle him to a conveyance. According to the rule in some jurisdictions, the exercise of an option after the optionor's death relates back to the date of the contract giving the option, working an equitable conversion of the vendor's interest in the land into personalty, so that the right to the purchase money passes to the vendor's personal representative and not to his heirs. Other cases, however, take the view that the equitable conversion does not take effect until the option is exercised, and if this is not done until after the vendor's death, the land together with the right to the proceeds passes to the heirs." 55 Am. Jur., Vendor and Purchaser, § 35, p. 504. See, also, 19 Am. Jur., Equitable Conversion, § 16, p. 16. It is not necessary that we determine this question in this litigation. We cite it only to show that uncertainty existed, not only as to whether the heirs or the personal representative were entitled to the fund, but also as to the identity of the persons within the two groups as well. The situation is further complicated by the fact that the $10,500 might possibly be subject to the debts, if any, of Medora A. Prevey and to state and federal inheritance and estate taxes. We think the uncertain situation confronting the plaintiff afforded adequate reason for it to seek the aid of a court of equity as it did. The filing of such a suit for specific performance before expiration of the time limit for exercising the option, accompanied by a tender of the purchase money into court, constitutes an exercise of the option and gives the optionee a right to

specific performance of the option agreement. Asbury v. Cochran, 243 Ala. 281, 9 So. 2d 887; McIntosh v. Hopkins, 255 Mich. 493, 238 N. W. 198; Malone v. Kirkley, 118 Ind. App. 611, 82 N. E. 2d 530. In Asbury v. Cochran, *supra,* the court said: "But while an election to accept and exercise the option is necessary so as to bind the holder of it, and so as to make it mutually binding, the act of filing a bill declaring such acceptance and election is sufficient, since he thereby places himself under all the obligations of the contract." See, also, Smith v. Loewenstein, 50 Ohio St. 346, 34 N. E. 159; Levy v. Congregation Beth Sholom, 181 Misc. 877, 42 N. Y. S. 2d 891.

The petition of the plaintiff alleged the facts as heretofore recited, asserted that the plaintiff hereby does exercise the option to repurchase the real estate and is ready, willing, and able to pay the sum of $10,500 to the person or persons entitled thereto, and alleged that said amount was paid into court at the time of the filing of the petition. The plaintiff further alleged that an adjudication of the rights of the parties is necessary, with which adjudication it is willing to comply. This is clearly a proper exercise of the option in accordance with its terms. The unqualified exercise of the option in accordance with its terms to be determined by the court is a valid exercise of the option since the optionee thereby places himself under all the obligations of the option agreement.

The defendants assert that plaintiff's exercise of the option contained a demand in excess of the requirements of the option agreement and that the attempted exercise of the option was therefore insufficient and of no effect. This is based on the fact that in the prayer of the petition plaintiff prayed that a decree be entered enforcing specific performance of the option contract and directing the defendants, or some of them, to execute and deliver to plaintiff a good and sufficient warranty deed conveying title to the property in ques-

tion. This court has held that a demand for a warranty deed contrary to the terms of the option agreement is not an acceptance, but is a counter-proposition. Master Laboratories, Inc. v. Chesnut, 154 Neb. 749, 49 N. W. 2d 693; Anderson v. Stewart, 149 Neb. 660, 32 N. W. 2d 140, 3 A. L. R. 2d 250. It is fundamental in this state that the prayer of a petition is not a part of the allegations of fact constituting the cause of action, and where the facts state a cause of action and are established by the evidence the court will grant the proper relief, although it may not conform to the relief prayed for. Johnson v. Ruhl, 162 Neb. 330, 75 N. W. 2d 717; Central Nebraska Public Power & Irr. Dist. v. Walston, 140 Neb. 190, 299 N. W. 609; Rhoads v. Columbia Fire Underwriters Agency, 128 Neb. 710, 260 N. W. 174. This court has held that a petition containing a prayer for general relief, in addition to a prayer for specific relief as in the case before us, entitles the litigant to all the relief the proof shows that he is entitled to receive. Johnson v. Radio Station WOW, on rehearing, 144 Neb. 432, 14 N. W. 2d 666. In School Dist. No. 70 v. Wood, 144 Neb. 241, 13 N. W. 2d 153, we said: "A prayer for general relief in an equity action is as broad as the pleadings and the equitable powers of the court." The prayer for general relief is sufficient to authorize any judgment to which the party is entitled under the pleadings and evidence. Kelley v. Wehn, 63 Neb. 410, 88 N. W. 682. The prayer is no part of the pleading, tenders no issue, and neither adds to nor takes from the evidence required of either party. Jordan v. Jackson, 76 Neb. 15, 106 N. W. 999.

Under the foregoing authorities the prayer of the petition is no part of the stated cause of action. The fact that the pleader in an equity suit may have prayed for less or more than that to which he is entitled, when the prayer asks for general equitable relief, in no manner affects the stated cause of action. The controlling facts are those alleged in the petition as a cause of

action. The prayer is merely a request based on the alleged facts which the court in the consideration of the allegations and proof may or may not grant. It is a request directed to the court based on the facts alleged, not a demand upon the defendants in the sense that it could defeat the cause of action. We necessarily hold that the pleaded facts and not the prayer determine whether or not the plaintiff in the instant case properly exercised the option to repurchase the real estate in question.

The plaintiff made no demand for a warranty deed in the cause of action set out in the body of its petition. The petition therefore constituted an unqualified acceptance and exercise of the option agreement.

There is evidence in the case that, after the option agreement was entered into and prior to the time that the option was required to be exercised, the city of Lincoln levied special assessments for a public improvement against the real estate subject to the option, payable over a period of 10 years. It is shown that the installments due prior to the exercise of the option were paid and those falling due thereafter remained unpaid. It is the contention of the defendants that plaintiff's exercise of the option was insufficient in that it did not offer to pay nor assume the payment of these installments which were a lien on the property. There is no merit to this contention. The allegations of the petition that plaintiff hereby exercises the option and agrees to pay any amount found due the defendants under the terms of the option as determined by the court constitutes a complete exercise of the option and an unconditional tender of performance.

Defendants also contend that plaintiff is guilty of laches sufficient to bar a recovery in that it failed to bring the action for a period of 10 years after the option agreement was entered into. This contention is likewise without merit. It seems plain to us that plaintiff could not exercise its option by appealing to the equit-

able jurisdiction of a court of chancery until after the death of the surviving joint tenant. Plaintiff could have no standing in court on the issues presented in such a suit prior to that time. The rule is: Where by a bill in equity an optionee exercises his option to purchase and prays for the specific performance of the option agreement, the doctrine of laches is not available as a defense where the suit is brought within the time fixed by the option agreement for its exercise and no delay chargeable to the optionee resulting in prejudice to the rights of optionor has occurred since the right to exercise the option arose.

For the reasons stated the trial court was in error in dismissing plaintiff's petition. The judgment of the district court is reversed and the cause remanded with directions to determine the rights of the parties under the option agreement in accordance with our holding herein, to determine the amount owing by the plaintiff thereunder, and to direct the full amount thereof to be paid into court; that when so paid the decree of the court operate as a transfer of the real estate described in the option agreement to the plaintiff; and that the court thereafter determine the parties entitled to the fund paid into court and order distribution thereof in accordance with such determination. The costs of the appeal are taxed to the defendants Ruth Schoenthal and Joseph V. M. Dennison.

REVERSED AND REMANDED WITH DIRECTIONS.

HARRY GRAVES, APPELLEE, V. RICHARD J. BEDNAR, APPPELLANT.
107 N. W. 2d 12

Filed December 23, 1960. No. 34781.

1. **New Trial.** A new trial is to be granted for a legal cause and where it appears that a legal right has been invaded or denied.

A new trial is not to be granted for arbitrary, vague, or fanciful reasons.

2. ———. Errors sufficient to cause the granting of a new trial must be errors prejudicial to the rights of the unsuccessful party.

3. ———. Where a party has sustained the burden and expense of a trial and has succeeded in securing the judgment of a jury on the facts in issue, he has a right to keep the benefit of that verdict unless there is prejudicial error in the proceedings by which it was secured.

4. **Trial.** In a case where different minds may reasonably draw different conclusions or inferences from the adduced evidence, or if there is a conflict in the evidence as to whether or not the evidence establishes negligence or contributory negligence, and the degree thereof, when one is compared with the other, such issues must be submitted to a jury.

5. **Appeal and Error.** It is not the province of this court in reviewing the record in an action at law to resolve conflicts in or weigh the evidence.

6. ———. It is presumed in such an action that controverted facts were decided by the jury in favor of the successful party, and its findings based on conflicting evidence will not be disturbed unless clearly wrong.

7. **Trial: Appeal and Error.** In determining the sufficiency of evidence to sustain a verdict it must be considered most favorably to the successful party, any controverted fact resolved in his favor, and he must have the benefit of inferences reasonably deducible from it.

8. **Negligence.** Negligence is a question of fact and may be proved by circumstantial evidence. All the law requires is that the facts and circumstances proved, together with the inferences that may be legitimately drawn from them, shall indicate, with reasonable certainty, the negligent act complained of.

9. **Trial: Appeal and Error.** Instructions to a jury must be considered together, so that they may be properly understood, and, if as a whole they fairly state the law applicable to the evidence when so construed, error cannot be predicated on the giving thereof.

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

11. **Trial.** The reading by the official reporter of the testimony of a witness examined on the trial is within the spirit if not within the letter of section 25-1116, R. R. S. 1943, since the stenographic reporter's notes of the testimony are liable to be more

accurate than the judge's recollection of what was testified to.

12. ———. Proof of misconduct on the part of a jury to avoid a verdict must be of such a character that prejudice may be presumed. Evidence of misconduct which is to the advantage of the party complaining does not afford a basis for a new trial.

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

William P. Mueller and *Kennedy, Holland, DeLacy & Svoboda,* for appellant.

Theodore L. Kowalski and *Wear, Boland, Mullin & Walsh,* for appellee.

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

CHAPPELL, J.

Plaintiff, Harry Graves, brought this action against defendant, Richard J. Bednar, seeking recovery of damages for personal injuries, hospital and medical expenses, and damages to his motorcycle alleged to have been proximately caused by specified negligence of defendant when his car and plaintiff's motorcycle collided at what is shown by the evidence to be the intersection of Dodge Street, herein called Dodge, and Happy Hollow Boulevard, herein called the Boulevard, in Omaha.

Defendant's answer denied that he was guilty of any negligence, and alleged that any injuries or damages suffered by plaintiff were the direct and proximate result of plaintiff's own specified negligence which caused or contributed to the accident. Defendant's prayer was for dismissal of plaintiff's action. Plaintiff's reply was in the nature of a general denial.

Upon trial to a jury, the parties each adduced evidence, and defendant's motion for directed verdict, together with plaintiff's motions to not submit the issue of plaintiff's alleged contributory negligence to the jury and to instruct that defendant was guilty of negligence

as a matter of law, and submit only the issue of damages, were overruled. Thereupon, the issues of negligence and contributory negligence were submitted to the jury and it returned a verdict for defendant. A judgment was rendered accordingly for defendant, and thereafter the court sustained plaintiff's motion for new trial and granted a new trial. Thereafter, defendant appealed, assigning and arguing that the trial court erred in granting a new trial because no error prejudicial to plaintiff occurred in the trial, and the record showed no legal reason for granting a new trial. We sustain defendant's assignment.

On the other hand, plaintiff's brief contended that the trial court properly granted a new trial for reasons, to wit: (1) That instruction No. 8 given by the court was erroneous because it improperly and incompletely advised the jury with relation to the duty of a left-turning driver in a heavily traveled intersection protected by traffic lights; (2) that for want of sufficient evidence, the court erred in submitting the issue of plaintiff's alleged contributory negligence to the jury; (3) that the court erred in submitting the issue of defendant's alleged negligence to the jury because the evidence disclosed that he was guilty of negligence as a matter of law; and (4) that the jury misinterpreted its duties and engaged in conjecture, speculation, and misconduct in reaching its verdict which denied plaintiff a fair and impartial trial. We do not sustain plaintiff's contention.

There are well-established, applicable rules of law which are controlling in cases such as that at bar. In that connection, as recently as Bryant v. Greene, 166 Neb. 520, 89 N. W. 2d 579, we reaffirmed that: "A new trial is to be granted for a legal cause and where it appears that a legal right has been invaded or denied. A new trial is not to be granted for arbitrary, vague, or fanciful reasons.

"Errors sufficient to cause the granting of a new trial

must be errors prejudicial to the rights of the unsuccessful party.

"Where a party has sustained the burden and expense of a trial and has succeeded in securing the judgment of a jury on the facts in issue, he has a right to keep the benefit of that verdict unless there is prejudicial error in the proceedings by which it was secured."

In Owen v. Moore, 166 Neb. 239, 88 N. W. 2d 768, we held: "In a case where different minds may reasonably draw different conclusions or inferences from the adduced evidence, or if there is a conflict in the evidence as to whether or not the evidence establishes negligence or contributory negligence, and the degree thereof, when one is compared with the other, such issues must be submitted to a jury."

In Snyder v. Farmers Irr. Dist., 157 Neb. 771, 61 N. W. 2d 557, we held: "It is not the province of this court in reviewing the record in an action at law to resolve conflicts in or weigh the evidence.

"It is presumed in such an action that controverted facts were decided by the jury in favor of the successful party, and its finding based on conflicting evidence will not be disturbed unless clearly wrong."

In Granger v. Byrne, 160 Neb. 10, 69 N. W. 2d 293, we held: "In determining the sufficiency of evidence to sustain a verdict it must be considered most favorably to the successful party, any controverted fact resolved in his favor, and he must have the benefit of inferences reasonably deducible from it."

In Griess v. Borchers, 161 Neb. 217, 72 N. W. 2d 820, we held: "Negligence is a question of fact and may be proved by circumstantial evidence. All the law requires is that the facts and circumstances proved, together with the inferences that may be legitimately drawn from them, shall indicate, with reasonable certainty, the negligent act complained of.

"One having the right-of-way may not on that account proceed with disregard of the surrounding circum-

stances, nor is he thereby relieved from the duty of exercising ordinary care to avoid accidents."

In Styskal v. Brickey, 158 Neb. 208, 62 N. W. 2d 854, we held: "A 'go' signal at a street intersection confers no authority on the driver of an automobile who receives this signal to proceed across that intersection regardless of other persons or vehicles that may already be within it. It is not a command to go, but a qualified permission to proceed lawfully and carefully in the direction indicated.

"A motor vehicle having started to cross an intersecting street in accordance with the signal light is ordinarily entitled to complete the crossing notwithstanding a change in lights.

"A vehicle entering a street intersection with a traffic light in his favor is under obligation to use due care and to yield the right-of-way to vehicles in the intersection. His right-of-way is subject to the rights of those already in the intersection."

In Bell v. Crook, 168 Neb. 685, 97 N. W. 2d 352, we held: "All travelers are required to exercise due care in coming to and crossing an intersection of public highways."

In Coyle v. Stopak, 165 Neb. 594, 86 N. W. 2d 758, we held: "The lawfulness of the speed of a motor vehicle within the prima facie limits fixed is determined by the further test of whether the speed was greater than was reasonable and prudent under the conditions then existing.

"Instructions to a jury must be considered together, so that they may be properly understood, and, if as a whole they fairly state the law applicable to the evidence when so construed, error cannot be predicated on the giving thereof.

"Instructions must be considered and construed together, and if they are not sufficiently specific in some respects, it is the duty of counsel to offer requests for instructions that will supply the omission, and, unless

this is done, the judgment will not ordinarily be reversed for such defects."

As held in Bolio v. Scholting, 152 Neb. 588, 41 N. W. 2d 913: "The meaning of an instruction, not the phraseology, is the important consideration, and prejudice will not be found when the meaning thereof is reasonably clear.

"Instructions should be considered as a whole, and if they fairly submit the case the verdict of the jury will not be set aside."

In Shiman Bros. & Co. v. Nebraska Nat. Hotel Co., 146 Neb. 47, 18 N. W. 2d 551, we held: "Where instructions as a whole correctly state the law applicable to the controverted issues, the verdict of the jury, if supported by sufficient evidence, will not be set aside because particular instructions, considered separately, contain mere informalities or omissions which are not misleading or confusing."

In the light of such rules and others hereinafter cited, we have searched the record and examined the trial court's instructions. As far as important here, we summarize the relevant and material evidence as follows: Dodge is a brick-paved street, 42-feet wide, and has four marked lanes of travel, with two on the south for eastbound traffic and two on the north for westbound traffic. Dodge is intersected by the Boulevard in a channelized and oblongated east and west manner about four blocks west of Fifty-second Street, from which point there is a downgrade of about 3 or 4 percent to such intersection, and an upgrade therefrom toward the west. The Boulevard runs northeasterly from Dodge and has two separately-divided but merging 30-foot paved streets, with one on the east and one on the west, separated by a 92.2-foot triangular island extending east and west along the north curb on Dodge and on to the north point of merging in the Boulevard. At the time in question, such 30-foot streets were each respectively used for entry to and exit from the Boulevard. There were

four operating traffic lights at the intersection. One was located at the southwest corner of the island on the north side of Dodge and at the east side of the west 30-foot street; one was located directly west across such street and on the north side of Dodge; one was located a short distance west of midway across from the island on the south side of Dodge; and one was located some distance west thereof, on the south side of Dodge.

A few moments before 8 a. m. on October 6, 1953, plaintiff was riding his motorcycle west in the outer or north traffic lane on Dodge down the slope from Fifty-second Street to the intersection and to the point of accident in the intersection. He was due at work near Seventy-second Street at 8 a. m., but claims that he was traveling at only 20 to 25 miles an hour, although there is evidence that his speed was from 25 to 30 miles an hour. No vehicles were ahead of plaintiff in his lane of travel. Several cars traveling west on the inner lane of Dodge and to plaintiff's left were slowing down or stopping for red traffic lights, which cars somewhat obstructed plaintiff's view of the intersection, and he testified that as he passed said cars he looked but did not see defendant's car turning left in the intersection until about 15 to 18 feet before colliding with it. In the meantime, the head car traveling west on the inner lane of Dodge had stopped for red traffic lights. The driver of such vehicle, known as the Carter car, turned on his car blinker lights for a left turn south, and when green signal lights appeared, he moved up a few feet and stopped again to permit defendant and eastbound traffic on his left to clear the intersection. Plaintiff testified that he first saw defendant's car as it came across to the north in front of the Carter car without stopping or changing its direction, and plaintiff then applied his brakes and turned left, but was unable to avoid collision.

On the other hand, defendant was due to attend a law class at Creighton University, at 8 a. m., and he

testified that after driving his car east on the inner traffic lane of Dodge, he stopped for red traffic lights and turned on his car blinker lights for a left turn north. Thereafter, he looked east up the slope, and seeing no traffic in the north lane of Dodge, he followed the green traffic lights left at about 5 to 8 miles an hour, which speed is undisputed, across the intersection of Dodge and beyond the center thereof toward the east lane of the west 30-foot street entrance to the Boulevard. In doing so, he turned left a few feet west of the Carter car which had stopped and indicated its intention to turn left toward the south. Such car temporarily obstructed defendant's view to the east, and defendant claimed that he looked but did not see or hear plaintiff's motorcycle until just before the collision. There is evidence that the accident occurred in the east traffic lane extending northeast toward the Boulevard, and the north outer traffic lane of Dodge in the intersection where the front of plaintiff's motorcycle and the right rear fender and wheel of defendant's car collided, and the side of plaintiff's motorcycle slid around into the right side of defendant's car. Defendant testified that the front of his car was beyond the north traffic lane of Dodge when the accident occurred, and that in the afternoon, after the accident, he visited with plaintiff at the hospital where plaintiff said that he wasn't sure how the accident happened but that he saw defendant indicating that he was going to make a left turn, but plaintiff thought that without slowing down his motorcycle defendant would be out of the intersection before plaintiff's machine got there. Another witness for defendant testified that he was with defendant when plaintiff and defendant talked about the accident, but such witness could not recall just what the conversation was. In that connection, plaintiff testified that he had no recollection of defendant's visit at the hospital or the making of any such statements to defendant. Concededly, neither party sounded his horn before the accident.

Instruction No. 1, given by the trial court, summarized and paraphrased all of the material allegations of plaintiff's petition, and no complaint thereof as such is made by plaintiff. That instruction stated in substance plaintiff's allegations that on October 6, 1953, he was proceeding west on Dodge while operating a motorcycle, when defendant, driving a car east on Dodge, turned left across the intersection of Dodge with the Boulevard and directly in front of plaintiff's motorcycle, causing a collision. Plaintiff's theory of recovery and his claimed negligence of defendant, which was alleged to have proximately caused the accident and plaintiff's injuries and damages, was set forth fully and at length in seven separate enumerated paragraphs of the instruction. To recite them herein at length would serve no useful purpose.

Instruction No. 2, given by the trial court, summarized and paraphrased the material allegations of defendant's answer, and no complaint thereof as such is made by plaintiff. It stated in substance that defendant admitted plaintiff was operating a motorcycle and defendant was operating a car at such time and place; that Dodge runs east and west and is intersected by the Boulevard which crosses Dodge; and that such intersection was protected by operating traffic lights on the morning of the accident. Defendant alleged that he had come from the west on Dodge in the inner lane, next to the center, intending to turn north on the Boulevard; that as he came to the intersection, the traffic lights were red against him, and he stopped, headed east in the inner lane; that he then turned on his car blinker lights indicating his intention of turning left to the north; that on the east side of such intersection there were a number of cars headed west in the inner lane next to the center of Dodge, which were likewise stopped by the red traffic lights against them; that the westernmost car in such lane had its blinker lights on, indicating its intention to make a left turn to the south; that when the traffic

lights turned green, defendant moved ahead and turned left to go north; that the car opposite defendant from the east moved ahead, then paused to allow defendant to proceed north; and that having passed the inner lane of westbound traffic on Dodge and almost through the outer lane going north into the Boulevard, plaintiff ran into the side of defendant's car. Defendant then denied all allegations of plaintiff's petition not admitted, and denied that he was guilty of any negligence, but alleged that any injuries and damages suffered by plaintiff were the proximate result of plaintiff's own negligence which caused or contributed to the accident. In that connection, defendant's claimed negligence of plaintiff, which was alleged to have proximately caused the accident and plaintiff's injuries and damages, was set forth fully and at length in five separate enumerated paragraphs of the instruction. To recite them herein would serve no useful purpose.

The evidence adduced by the parties is too voluminous to set forth at length here in more detail than we have already done. We deem it sufficient to say that there was competent evidence respectively adduced by the parties sufficient to support the allegations of plaintiff's petition and defendant's answer heretofore mentioned, and that the evidence was either conflicting in material respects or was such that reasonable minds could draw different conclusions or inferences therefrom with regard to the respective allegations of negligence and contributory negligence which required the submission of such issues to the jury, as was properly done by the trial court. We therefore do not conclude, as a matter of law, that plaintiff was guilty of contributory negligence more than slight as argued by defendant, or that defendant was guilty of negligence as a matter of law, as argued by plaintiff.

With regard to instructions given, plaintiff simply contended that the trial court erred in giving instruction No. 8 for reasons heretofore recited, which allegedly

justified the granting of a new trial. We do not agree that such instruction was erroneous as claimed by plaintiff, who offered no requests for instructions, and in his brief admits that instruction No. 8 was "correct as far" as it went, but that it was "not complete." In that connection, instruction No. 8 simply advised the jury at length and properly with regard to the applicable provisions of ordinances of the city of Omaha received in evidence, and the applicable statutes of this state. Such instruction is too verbose to recite here at length. It is sufficient to say that it fully and fairly advised the jury with respect to the material applicable ordinances and statutory duties therein required of every motorist who operates a motor vehicle on the streets and highways of the city of Omaha and this state, and included in said instruction were all of the material and applicable limitations and qualifications contained in said ordinances and statutes. Of course, under the circumstances presented herein, such instruction did not include and was not required to include all the law of the case, because, as heretofore pointed out, all instructions given are required to be considered in determining whether instruction No. 8 was erroneous as claimed by plaintiff.

As heretofore pointed out, instruction No. 1 advised the jury at length the manner in which plaintiff claimed defendant was negligent, and instruction No. 2 advised the jury at length the manner in which defendant claimed plaintiff was negligent. Instruction No. 4 properly placed the burden of proof upon plaintiff with respect to defendant's alleged negligence, and instruction No. 5 properly placed the qualified burden of proof upon defendant with respect to plaintiff's alleged negligence. Instruction No. 7 advised the jury that both parties were required to see what was in plain sight, and that the fact that either one may not have seen the other if, in the exercise of ordinary care under the circumstances the other could have been seen, would

not excuse such driver from fault in not having seen the other. Instruction No. 9 informed the jury that a green light was not a command to go, but gave permission to proceed if, in the exercise of ordinary care, under all the particular circumstances and surroundings, an ordinarily prudent man exercising ordinary care would feel secure in doing so. Instruction No. 10 advised the jury that: "The statute giving to defendant the right-of-way after giving a lawful signal for a left turn and permitting defendant to proceed is subject to the condition that an ordinary prudent man exercising ordinary care would so proceed. To determine whether defendant under the conditions exercised ordinary care you should consider that after making the turn he was then facing a red light; what the plaintiff could reasonably expect in the way of intersecting travel on a highway of the character of Dodge Street at the place of the accident, and all other facts and circumstances in evidence." Instruction No. 11 advised the jury that: "In determining whether or not either driver exercised ordinary care under the circumstances there should be considered; the character of the road, the traffic thereon, the fact that it was a four-lane highway, that it was of an interstate character and heavily traveled, and what an ordinary prudent man exercising that degree of care would have done, and all other facts and circumstances in evidence."

No complaint is made here of any instructions as such except No. 8, and we conclude that the aforesaid instructions, including instruction No. 8, were in no manner prejudicially erroneous, but were in fact all-inclusive of the very theory upon which plaintiff sought recovery.

We turn finally to plaintiff's contention that a new trial was justified for misconduct of the jury in reaching a verdict by conjecture and speculation. We do not agree. That contention arose out of the fact that after

the jury had retired to deliberate, it submitted a written request to the court as follows: "To Judge Thomsen. Testimony of Graves. Did Graves see Bednars car before he entered the intersection and figure he had enough time without reducing his speed for Bednar to complete his turn."

In that connection, after receipt of such request, the official court reporter read to the court, and the court decided, what portions of Graves' testimony he believed to be in point. Thereafter, counsel for the parties, as requested by the court, returned to the courtroom where, in absence of the jury, counsel for defendant requested the court to include in the testimony to be read to the jury the portion of defendant's testimony relating to plaintiff's conversation with defendant at the hospital the afternoon following the accident, which we have heretofore pointed out and which could have affirmatively assisted the jury in answering its request. Upon objection thereto by plaintiff's counsel, defendant's request was denied, and the court said: "I will have the reporter read the testimony of Mr. Graves both on direct examination and cross examination on this point." Thereupon, the jury returned to the courtroom and, as directed by the court, the court reporter read the testimony of plaintiff given "both on direct examination and cross examination upon this question," which had theretofore been submitted by the jury. With regard thereto, the record discloses that plaintiff's counsel never objected to the proposed reading of plaintiff's testimony, or to the portions thereof which were read. As a matter of fact, after such testimony had been read, plaintiff's counsel suggested, in order to have no misunderstanding, that if defendant's counsel desired a reading to the jury of any other portions of plaintiff's testimony after checking the same with the court reporter, he, plaintiff's counsel, would have no objection to doing so, even "out of my presence if he feels he overlooked anything." Other portions of plaintiff's tes-

timony were not read, and the jury retired again for deliberation, as directed by the court.

In such respect, we conclude that the trial court complied with section 25-1116, R. R. S. 1943, in every material manner, and did so as requested by plaintiff's counsel, without any error prejudicial to plaintiff.

In Shiers v. Cowgill, 157 Neb. 265, 59 N. W. 2d 407, this court held: "The reading by the official reporter of the testimony of a witness examined on the trial is certainly within the spirit if not within the letter of section 25-1116, R. R. S. 1943, since the stenographic reporter's notes of the testimony are liable to be more accurate than the judge's recollection of what was testified to."

As held in Pope v. Tapelt, 155 Neb. 10, 50 N. W. 2d 352: "Proof of misconduct on the part of a jury to avoid a verdict must be of such a character that prejudice may be presumed. Evidence of misconduct which is to the advantage of the party complaining does not afford a basis for a new trial." We decide that plaintiff's contention with regard to claimed misconduct of the jury in arriving at its verdict has no merit.

We conclude that the trial court erred in sustaining plaintiff's motion for new trial and in the granting of a new trial, and that the order so doing should be and hereby is reversed and the cause is remanded with directions to reinstate the verdict of the jury and the judgment rendered thereon in favor of the defendant.

REVERSED AND REMANDED WITH DIRECTIONS.

SIMMONS, C. J., participating on briefs.

OSBORNE TURNELL ET AL., APPELLANTS, V. MABEL C. MAHLIN ET AL., APPELLEES.
106 N. W. 2d 693

Filed December 23, 1960. No. 34836.

1. **Appeal and Error.** The Revised Rules of the Supreme Court

provide that assignments of error relied upon for reversal and intended to be urged in the brief shall be separately numbered and paragraphed, bearing in mind that consideration of the cause will be limited to errors assigned and discussed. However, the court may, at its option, notice a plain error not assigned.

2. **Waters.** Surface water is that which is diffused over the surface of the ground, derived from falling rains or melting snows, and continues to be such until it reaches some well-defined channel in which it is accustomed to and does flow with other waters.
3. ———. Surface water is a common enemy and the proprietor may by embankment or dike or otherwise defend himself against its encroachments and will not be liable in damages which may result from the deflection and repulsion defended against, provided that the proprietor in making defense on his own land himself exercised ordinary care, and provided he so uses his own property as not to unnecessarily and negligently injure another.
4. ———. Where surface water flows in a well-defined course, whether the course be ditch, swale, or drain in its primitive condition, the flow cannot be arrested or interfered with to the injury of neighboring proprietors.
5. **Negligence.** Negligence is the omission to do something which a reasonable and prudent man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a reasonable, prudent man would not do; the want of that degree of care that an ordinarily prudent person would have exercised under the same circumstances.
6. **Injunction.** Injunction is the appropriate remedy for the protection of plaintiffs' rights herein.
7. **Damages.** The rule is that damages, to be recoverable, must be direct and certain. Contingent, remote, or speculative damages relating to the loss of crops and damage to land will not be allowed.

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

Blackledge & Sidner, for appellants.

Tye, Worlock & Knapp, for appellees.

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

MESSMORE, J.

This is an action in equity brought in the district

court for Buffalo County by Osborne Turnell, Ethel Turnell, Blanche Snider, and Bruno Miller, plaintiffs, against Mabel C. Mahlin, Milton Webb, and Wayne Webb, defendants. The purpose of the action was to restrain and permanently enjoin the defendants and each of them from diverting, interfering with, and obstructing the natural drainage of surface waters, and from causing the same to be diverted onto the lands of the plaintiffs; to require the defendants to refill the ditches and remove the dikes and dams so that the area here involved might be restored to its original state as provided by nature; and to recover from the defendants and each of them damages caused by the defendants' negligence in diverting surface waters onto the lands of the plaintiffs.

The defendants, by cross-petition, sought to restrain and permanently enjoin the plaintiffs and each of them from diverting, interfering with, and obstructing the natural drainage and surface waters along and across the defendants' lands; to require the plaintiffs to remove all filling, leveling, dikes, and dams constructed by the plaintiffs; to require the plaintiffs to open up and restore the natural drainage courses across their lands to their natural state; and to recover damages caused by the plaintiffs' negligence in diverting the natural drainage of surface waters so that the same ran onto the defendants' lands to the defendants' damage.

The trial court found generally for defendants and against the plaintiffs on the plaintiffs' petition; that the plaintiffs should be denied an injunction as prayed for in their petition, and denied damages; and that the defendants should be denied the relief prayed for in their cross-petition. Judgment was rendered in accordance with the findings.

The plaintiff filed a motion for new trial, or in the alternative to set aside the judgment rendered by the trial court. The trial court overruled the plaintiffs' motion mentioned above, and the plaintiffs perfected appeal to this court.

The plaintiffs assign as error that the trial court erred in dismissing the plaintiffs' petition, and erred in overruling the plaintiffs' motion for new trial, and alternative motion for a finding and decree in favor of the plaintiffs.

The trial court made a finding as follows: "This order shall not be construed as relieving parties herein from negligent or unlawful operation of their future drainage problems." The above finding does not appear in the trial court's journal entry, to which omission the plaintiffs objected, and in support of such objection offered into the record the docket notes of the trial court covering the trial and the decree, which were received in evidence.

The Revised Rules of the Supreme Court of this state, 1960, rule 8a2(4), provides: "Assignments of error relied upon for reversal and intended to be urged in the brief shall be separately numbered and paragraphed, bearing in mind that consideration of the cause will be limited to errors assigned and discussed. However, the court may, at its option, notice a plain error not assigned."

The plaintiffs failed to comply with the rule above set forth in their assignments of error relating to the sufficiency of the journal entry to fully describe the judgment rendered.

We find no merit to the plaintiffs' contention as above set forth.

Osborne Turnell and Ethel Turnell, husband and wife, are the owners of the northeast quarter of Section 32, Township 9 North, Range 17, in Buffalo County. Blanche Snider is the owner of the southwest quarter of Section 28, Township 9 North, Range 17, and Bruno Miller is the tenant farming the Snider land. Mabel C. Mahlin is the owner of the northwest quarter of Section 33, in Township 9 North, Range 17. It is alleged that Milton and Wayne Webb are the tenants in possession of the Mahlin land. The land of the Turnells is situated im-

mediately west of the land of Mabel C. Mahlin, divided by a section line, north and south graveled road. The Snider land is situated immediately to the north of the Mabel C. Mahlin land, separated by a graveled, maintained county road running east and west. Immediately north of the Turnell land is what is known as the Oldfather land. This land is west of the Snider land, divided by the north-south road heretofore mentioned. The lands of the plaintiffs and defendants are cultivated, irrigated, and productive.

There is no dispute by the parties in this case. What we are concerned with on this appeal are surface waters only.

For convenience we will refer to Osborne Turnell as Turnell, and to his land as the Turnell land or plaintiffs' land; to Mabel C. Mahlin as Mahlin, and to her land as the Mahlin land or defendants' land; to Bruno Miller as Miller; to Blanche Snider as Snider, and to her land as the Snider land; and to other witnesses either by their first or last names, or to the lands owned by them as occasion requires.

Before summarizing the evidence, we set forth some well-established rules relating to this appeal.

Actions in equity, on appeal to this court, are triable de novo.

"Surface water is that which is diffused over the surface of the ground, derived from falling rains or melting snows, and continues to be such until it reaches some well-defined channel in which it is accustomed to and does flow with other waters." Schomberg v. Kuther, 153 Neb. 413, 45 N. W. 2d 129. See, also, Walla v. Oak Creek Township, 167 Neb. 225, 92 N. W. 2d 542.

"Surface water is a common enemy and the proprietor may by embankment or dike or otherwise defend himself against its encroachments and will not be liable in damages which may result from the deflection and repulsion defended against, provided that the proprietor in making defense on his own land himself exercised

ordinary care, and provided he so uses his own property as not to unnecessarily and negligently injure another." County of Scotts Bluff v. Hartwig, 160 Neb. 823, 71 N. W. 2d 507.

"Where surface water flows in a well-defined course, whether the course be ditch, swale, or drain in its primitive condition, the flow cannot be arrested or interfered with to the injury of neighboring proprietors." Bussell v. McClellan, 155 Neb. 875, 54 N. W. 2d 81.

Negligence is the omission to do something which a reasonable and prudent man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a reasonable, prudent man would not do; the want of that degree of care that an ordinarily prudent person would have exercised under the same circumstances.

Many cases, too numerous to cite, declare that injunction is the appropriate remedy for the protection of the plaintiffs' rights in a case such as the case at bar.

Miller testified that he was a tenant farming the Snider land; that he lived right north of the Snider land; that he was 50 years of age and had lived in the area here involved all his life; and that he farmed the Mahlin land from 1929 to 1934. He further testified that the general direction of the drainage in that area is south and east; that the waters run into the Kearney Canal at the south end of the Turnell land and continue 8 or 10 miles into the Kearney Lake; that there is a high spot on the Snider land extending into the Mahlin land running generally from north to south and close to the west side of both the Snider and Mahlin lands; that this ridge is elevated above the surface of the surrounding land; that the natural flow of the surface waters across the Snider land is from the northwest to the southeast, and east of the high spot or ridge on the Snider and Mahlin lands; that the surface waters proceed across the east-west road from the Snider land onto the Mahlin land through a 16-inch culvert under the road, which

is the only culvert in that area; that the surface waters then proceed south onto the Mahlin land and into a duck pond or lagoon of approximately 15 acres in the northeast corner of the Mahlin land; that this was the course of the surface water in its primitive state; that the waters would not flow west because of the ridge running north and south on the Snider and Mahlin lands, but would run east; that this ridge is 565 feet from the northwest corner of the Mahlin land; and that there never has been any drainage by nature from the east to the west across this ridge because water will not run up hill and it would have to do that in order to get over the ridge. This witness further testified that there has been some construction work along the north side of the Mahlin land consisting of a dirt dike, the dirt being taken out of the road ditch to build up the dike and the road ditch north of the Mahlin land deepened on the east-west road, and the dirt was piled up on the bank on the Mahlin land; and that most of the dike is across the east half of the north line of the Mahlin land. He further testified that the road ditch extends clear across the north portion of the Mahlin land and has been deepened the entire distance; that, figuring from the bottom of the deepened road ditch to the top of the dike, it is higher in the low spot about 488 or 500 feet from the east side of the north line of the Mahlin land; that the dike is not as high going to the west; and that in the particular area just described, the dike is about 4 feet high, considering the depth of the road ditch, and is at its greatest height at the low part of the land. This witness further testified that he talked to Wayne Webb, the tenant on the Mahlin land, with reference to the construction, and informed him that it would back up the water on the Snider land after every rain; that before the dike was built the water would back up onto the Snider land perhaps an acre or so; and that now it would back up to the extent of 10 acres, or as far as 60 rods north and probably 10 rods or more wide, and would

be a foot or more deep. The effect of the backing up of this water onto the Snider land would be to ruin the crops and the land. He further testified that since the road ditch was deepened and the dike built on the Mahlin land, the water that would ordinarily proceed south onto the Mahlin land is turned to the west onto the Turnell land; that in all the years that this witness had known the land and watched the drainage, there had never been times, before the dike was built and the ditch deepened, that he had seen water running across the north-south road, but ever since the dike was built and the ditch deepened, he believed he had seen water running across the road onto the Turnell land about every year; and that there is a large quantity of water that reaches the Turnell land and floods it.

On cross-examination this witness testified that there is a culvert across the north-south road between the Mahlin and Turnell lands south of the intersection which water flowed through from the east to the west prior to and subsequent to the construction made on the Mahlin land; that this culvert is 973 feet south of the northwest corner of the Mahlin land; that before the road was leveled, some of the water, after it crossed the road, ran a little bit to the west and then south; that some of the water that ran across the Mahlin land on the east side of the ridge would turn to the southwest at the south end of the ridge and run southwest into the Kearney Canal; that the water taken out of the lateral or dike is used for irrigation purposes on the Mahlin land; that across the Turnell land there is very definite drainage over about halfway east and west, running south across the Turnell quarter section of land; and that Turnell has done some leveling and improving of his land along the north and east sides of it.

J. M. Halliwell testified that he lives immediately east of the Snider land and cornering the Mahlin land, has lived in that area for over 70 years, and had farmed the Mahlin land in 1915; that he has lived on the land

he now occupies for 32 years and is familiar with the course of rainwaters as they flow across his place; that the drainage across the Snider land is from the northwest to the southeast, and across the east-west road between the Snider and Mahlin lands and south to the Kearney Canal; that before the dike was built and the road ditch deepened along the north side of the Mahlin land, none of these waters would back up across the Snider land or proceed west to the Turnell land for the reason that the waters could not get over the raise on the Mahlin land; that because of the dike constructed on the Mahlin land some of the waters backed up on the Snider land and stood there for 60 hours; and that the amount of water standing on the Snider land would result in damage to the crops growing thereon and would have some effect on the soil.

On cross-examination this witness testified that at all times, on the land in that area, there were some low spots, and the drainage was not too good on such lands; that nearly every farm below the hills has been improved by irrigation which has changed a lot of things insofar as the water flowing on such land is concerned; and that there is an opening into the Kearney Canal at the south end of the Turnell land. He described the natural flow of surface water in its primitive condition on the Mahlin land as the previous witness described it.

Ernie Asay testified that he was a former highway commissioner for Buffalo County, had occupied such position for 17 years, and had been employed by the highway department of that county for 38 years. He further testified that he was familiar with the lands here involved and the location of the Kearney Canal immediately south of these lands; that he was familiar with the Mahlin land before there was any leveling of such land and before the dike was built thereon; that on the Mahlin quarter section there was a lagoon in the northeast 40 acres of such quarter section and to the west of this lagoon was reasonably high ground; that

over the years, by his observation, relating to the flow and drainage of rainwater generally in its primitive condition on the Mahlin land, the lagoon would hold a considerable amount of water but in heavy rains water would overflow to the south and into the Kearney Canal; that in 1957, immediately after a heavy rain, this witness was in the vicinity of these lands on the north-south road that goes along the east side of the Turnell land, and also along the east-west road that runs on the north side of the Mahlin land; that at that time he saw considerable water crossing the highway east to west onto the Turnell land; and that this water was coming from the south ditch of the east-west road along the north side of the Mahlin land. This witness further testified that during the many times he had seen the land prior to the construction made on the Mahlin land, he had never seen water run from the east to the west on the north side of the Mahlin land because the water could not get over the ridge on the Mahlin land; and that before the deepening of the ditch and building of the dike on the Mahlin land, to his knowledge, there had been no impounding of water north of the east-west road.

Allen A. Wright testified that he had lived in Buffalo County for 65 years and had been familiar with the lands of the various parties involved in this litigation from 1904 until 1920; that he lived on the Turnell land for 12 years and farmed it following that time for 4 years; and that he had many opportunities to observe the course of rainwaters as they drained across these lands. He substantially corroborated the testimony of the foregoing witnesses with reference to the natural drainage of waters on these lands, and also located a lagoon on the Mahlin land, as did the previous witnesses. He testified that the size of this lagoon was probably 9 or 10 acres; and that at no time, since he has known these lands, did water cross the north-south road and flood the Turnell land.

Ethel Turnell, the wife of Osborne Turnell, testified

substantially to the drainage of the surface waters in that area, with which she was familiar and acquainted all of her life, as did the previous witnesses. She further testified that since the deepening of the ditch and the building of the dike on the north side of the Mahlin land, the rainwater now floods across the north-south road from the east; and that prior to the construction work done on the Mahlin land these waters never flooded in that direction.

Osborne Turnell testified that he was 62 years of age and had known the land in that area all of his life and under all kinds of weather conditions; that he observed the pattern and flow of the rainwaters and floodwaters across these lands; that the general course of such waters across the Snider land was to the southeast, leaving that land close to the southeast corner of such land and across the east-west road into the lagoon in the northeast quarter of the Mahlin land; that the water would flow south and southeast toward the opening in the Kearney Canal; that before the road ditch was deepened on the south side of the east-west road and before the dike was built none of the rain or floodwaters would flow to the west because the land was higher, indicating, of course, the ridge on the Mahlin land; and that water would not run up hill. This witness further testified to the source of his problem, that is, as to where he received the water about which he complains, by the construction of the dike and the deepening of the ditch on the north side of the Mahlin land; that the water is concentrated on the northeast corner of his land for a distance of 688 feet south from a point 643 feet south of the extreme northeast corner of his land; that the water causing the trouble comes from the east on the north side of the Mahlin land to the northwest corner of the Turnell land and then turns south; that such waters are released from the deepened road ditch at the northwest corner of the Mahlin land and then back across the north-south road into his field for

a distance of 688 feet; that at that point the waters really pour across into his land; and that before the ditch was deepened and the dike built on the Mahlin land he never received any water from the east running across the road in a westerly direction to the area of his trouble spot.

On cross-examination this witness testified that the construction of the dike on the Mahlin land has not changed the picture in the northwest portion of the Mahlin land; that the level of the road on the east half of the Mahlin land is lower than the dike on the Mahlin land and east of the culvert the dike is higher than the road; and that the level of the dike is higher than the culvert. This witness further testified that in October 1951, he leveled the area on the east side of the natural watercourse on his land, that is, east of the private road on his land.

Harry Neal testified in behalf of the defendants. He testified that he had lived 4 miles north of Elm Creek, and in Buffalo County for 61 years; and that he is familiar with the lands involved in this litigation. He described the pattern of the flowage of rainwater as follows: That the water came off the Oldfather land at the northwest corner of the Snider land, and south to the north half of the Mahlin land and from there into a lagoon on the Mahlin land; and when the lagoon was filled with water it would flow in a southwesterly direction, making a horseshoe turn on the Turnell land and back toward the road. He was not sure where this water crossed the road, but it did flow on the west side of the road into the Kearney Canal. He further testified that there was a lagoon on the north side of the east-west road, constituting an acre or an acre and a half.

Milton Webb testified that he was not the tenant on the Mahlin land and had no agreement, either oral or written, with reference to such land; and that he exchanged work back and forth with his son Wayne who was the tenant on the Mahlin land. He further testified

that he was familiar in some degree with the pattern and flow of the surface and rainwater on and across the lands involved in this litigation; that the drainage from the northwest of the Mahlin land runs down the north-south road between the Mahlin and Turnell lands to the Kearney Canal; that when the water crosses the Oldfather land onto the Snider land, some of the water would run onto the west side of the north-south road to the Kearney Canal; that Turnell has constructed a small dike on the west side of the north-south road on his land which turns a large amount of water across the road which, it is claimed, had the effect of preventing water running through the culvert from the Mahlin land onto the Turnell land; that he farmed the Turnell land in 1941; and that at the four corners of the intersection of the Oldfather, Snider, Turnell, and Mahlin lands the water that ran down the north-south road would flood at the intersection frequently before any work was done on the Mahlin land. He further testified that the construction of the dike and the deepening of the ditch on the Mahlin land started in 1946 and was finished in 1948; that the dike is a dirt dike used as a lateral; that the height of the dike in comparison with the height of the road separating the Snider and Mahlin lands is level with the road on the east third of the Mahlin land, and west to the irrigation pump on the Mahlin land it is three-tenths of a foot higher than the road; that if the debris was kept out of the ditch on the south side of the Snider land there would be no difficulty in water backing up onto the Snider land; that if a hole was made in the dike on the Mahlin land this would cause the water to run south onto the Knobel land which is immediately south of the Mahlin land, where the water never ran before; that there was no change in the course of the water prior to and subsequent to the construction built on the Mahlin land; that the ditch running north and south on the north-south road causes the water on the south side of the

Mahlin land to run south where it connects with other water and such water then proceeds west across the Turnell land from the Mahlin land; that the Turnell land flooded from the north and northwest before the construction was made on the Mahlin land; and that he has never seen the ditches overflow since the construction was made on the Mahlin land.

On cross-examination this witness testified that he knew about the work that was to be done on the Mahlin land from Mr. Mahlin, but he was not farming the Mahlin land; and that he presumed that his son Wayne would know about it. He further testified that when you get to the west end of the Mahlin land toward the ridge, a dike is not needed because of the natural elevation, but that the ditch was deepened at that point for the purpose of causing the water to flow westward, and this had to be done to get the water over the raise; that the low spot on the Mahlin land is next to the pump house and at that point the dike is practically level with the road; that the dike was elevated some at that point; that the purpose of the dike was to stop the drainage of waters across the road onto the Mahlin land and also, by extending the ditch westward, would cause the waters to flow to the west where they had not heretofore naturally flowed; that the dike was elevated somewhat above the road; that by extending the ditch westerly and deepening it, the waters that would have gone south onto the Mahlin land went west by virtue of the ditch and the dike, and that was the object for which the dike was built and the ditch deepened; and that the result is that the waters in their original or primitive state that came south across the road onto the Mahlin land and in a southwesterly direction, instead of that those waters are now taken westerly into the road ditch on the south side of the east-west road then south along the east side of the north-south road.

Milo Faser testified that he was 73 years old, had lived in Buffalo County 58 years, and was familiar with

the land involved in this case. He further testified that before the construction on the Mahlin land he had seen the Turnell land flooded in the southeast corner thereof; that he also knew of the work that was done on the Turnell property where the water crosses the road from the Mahlin land; that there was a pretty deep swale there which Turnell filled up and leveled off so that his land could be irrigated, otherwise the water would drain off the Mahlin land to the southwest onto the Turnell land; that the low spot on the Snider land is the same as it has been since 1904; that there has always been a swale there consisting of 3 or 4 acres; and that the ditch or borrow pit on the north side of the east-west road between the Mahlin and Snider lands is filled up. This witness also testified that prior to the time work was done on the Mahlin property he had seen water flooding the southeast corner of the Turnell land.

Wayne Webb testified that he has rented the Mahlin land since 1942; that his father had not rented this land; that he is now the tenant occupying such land; that the drainage of the surface waters over the lands in that area is from the northwest part of the Oldfather land in a southeasterly direction, crossing the north-south road to the east on the Snider land and south across the east-west road; that the road ditches on both sides of the north-south road between the Turnell and Mahlin lands are small and will not carry water; and that none of the water that entered the Mahlin land from the north flowed straight south, but would drain in a southwesterly direction off of the Mahlin land and cross the north-south road onto the Turnell land. This witness further testified that the drainage on the west side of the Snider land drained into the road ditch and then through the culvert at the intersection of the north-south road and then south on such road; that the improvement work was done with the permission of the township board to use the east-west road ditch on the

north side of the Mahlin land to run the water along the road in the event it would not damage the road; that he kept the ditch on that side of the east-west road cleaned out; that the ditch on the north side of the east-west road has continued to be filled with silt after heavy rains; and that the last time he knew of any work being done in that ditch was in 1947. He further testified that the ditch on the west side of the north-south road had not been cleaned out or deepened during the past 6 or 8 years; that Turnell mowed the weeds on the west side of the north-south road along his land; that the surface waters that come down from the north follow the north-south road, which divides the Oldfather and Snider lands, and go down the road following the road ditches to the south; and that he has not seen this water over the entire roadway at the intersection where the Oldfather, Snider, Turnell, and Mahlin lands come together. This witness further testified, however, that he had seen this water approximately 100 feet south of such intersection, carried by the road ditches, flood the entire road at that point; that the water carried along the north and west sides of the Mahlin land has not poured over the ditch or flooded; that he has not had to do any work in this ditch after its construction; that the condition of the road ditch and culvert on the west side of the north-south road north of the Turnell driveway, when he observed it 2 days before the trial, was plugged up at the west side, and was about the same as it had been for some time; that Turnell did some leveling in 1951, and there had been no change since that time; that there has always been a ridge on the west side of the north-south road at or near the Turnell driveway as long as he can remember; and that during the years 1955, 1957, 1958, and 1959, the years for which the plaintiffs claim damage to their lands, he never saw any flooding of the crops in this area, nor any evidence of flooding. This witness further testified that the ditch constructed on the north side

of the Mahlin land would be approximately 20 feet wide at the top; that the ditch was oval shaped; that from the level of the land it would vary in depth in places from 2 to 3 feet; and that this ditch was considerably larger than the ditch on the north side of the east-west road.

On cross-examination this witness testified that the purpose of the ditch on the north side of the Mahlin land would be to put the Mahlin land in a higher state of productivity so that it could be more effectively irrigated, and to accomplish this it was first necessary to stop the flow of the floodwaters that came from the north onto the Mahlin land; and that the reason the dike was built and the ditch deepened along the north side of the Mahlin land was so that the floodwaters, which had normally and previously crossed onto the Mahlin land, would be carried along the north side of the Mahlin land and turned west.

Fred G. Webb testified that he was 75 years of age and had been a member of the township board for 12 to 15 years; that he had seen where the water washed the gravel off the north part of the intersection on the north-south road before the construction work was done on the Mahlin land; and that the water comes off the Mahlin land exactly as it did before the construction work was done on the Mahlin land, and spills in the same place it did before such construction was begun.

The plaintiff Osborne Turnell testified in rebuttal that his land had never been flooded by waters from the north.

We have examined the evidence of all the witnesses, but deem it unnecessary to set forth any further testimony given in the instant case for the reason that the same is covered by a summary of the testimony heretofore set forth.

From an analysis of the record, it appears that the witnesses are in general agreement that surface waters entered upon the Mahlin land from the north and pro-

ceeded south into the lagoon. The dispute in the evidence is with reference to the pattern and direction of these waters after they leave the lagoon on the Mahlin land. The plaintiffs' witnesses testified that the waters, when they left the lagoon on the Mahlin land, proceeded in a southerly direction into the Kearney Canal due south of the lagoon, while the defendants' witnesses testified that the general course of the waters from the lagoon was in a southwesterly direction to the approximate southwest corner of the Mahlin land just opposite the southeast corner of the Turnell land. There is no complaint made by Turnells as to any of the waters received by them at this point.

The evidence also shows that the Turnell land is burdened by natural drainage from the northwest to the southeast across such land by means of a ditch which terminates in the southeast corner of the Turnell land. This is a burden that the Turnells are obligated to accept.

The evidence also shows that the Turnells present problem is caused by the concentration of water in the northeast corner of the Turnell land for a distance of 688 feet south from a point 643 feet south of the extreme northeast corner of the Turnell land, and that the waters causing this difficulty come from the east along the north side of the Mahlin land, and these waters are turned south and released from the deepened road ditch at the northwest corner of the Mahlin land where they flow across the north-south road onto the Turnell field; that before the road ditch was deepened and the dike constructed, Turnells' land did not receive waters from the east; that these waters flood not only the 43 acres of Turnell land, but also flood on west across the drainage ditch on such land, covering 65 or 70 acres and, as testified to by Osborne Turnell, at shoulder depth; and that the condition that now prevails by virtue of the construction on the Mahlin land did not occur prior to such construction on the north line of the Mahlin land. There is also evidence to the effect that work has been

done on this dike and road ditch each year since 1948.

In Bussell v. McClellan, *supra,* this court said: "It may however be said with certainty that there was a collection and discharge of water in volume on the property of plaintiffs. The acts involved were committed in disregard of the rights of plaintiffs and the duty which the defendants owed to them. The acts must be regarded as negligence within the proper definition of that term."

In Town of Everett v. Teigeler, 162 Neb. 769, 77 N. W. 2d 467, which cited Bussell v. McClellan, *supra,* and Schomberg v. Kuther, *supra,* with approval, this court said: "It is not a reasonable use of one's property to construct a dike across a natural drain upon farm lands for the sole purpose of preventing the flow of unpolluted water from a neighbor's land in the natural course of drainage, where such flow had theretofore at all times been uninterrupted." See, also, Pospisil v. Jessen, 153 Neb. 346, 44 N. W. 2d 600; Schomberg v. Kuther, *supra.*

We conclude that the defendants collected surface water into the man-made ditch and by the construction of the dike in such a manner as to discharge, through the ditch, surface waters onto the lands of the Turnells and, by the defendants' acts of negligence, diverted the surface waters so that they would flow in a different direction than the natural flow.

From an examination of the evidence relating to damages alleged to have been suffered by the plaintiffs due to the negligent acts of the defendants, the general rule is that damages, to be recoverable, must be direct and certain. Contingent, remote, or speculative damages, such as the loss of speculative profits, will not be allowed. See Gledhill v. State, 123 Neb. 726, 243 N. W. 909. This rule would also relate to the loss of crops and damage to the land.

We conclude that the plaintiffs have failed in this action to prove damages that may have resulted to the crops growing on the Turnell land.

While it is true that the construction made on the Mahlin land as heretofore set forth was done by parties other than Wayne Webb, the tenant on such land, the evidence discloses that this work was done with the knowledge of Wayne Webb and for the purpose of making the Mahlin land more productive, and it is apparent that Wayne Webb and Mrs. Mahlin talked about the improvements to be made for the purpose as before stated. With reference to Milton Webb, it is apparent that he did not farm this land, nor did he have very much, if anything, to do with the construction thereon and insofar as this defendant is concerned, he should be dismissed from this case.

Insofar as the Snider land is concerned, the effect of the injunction will take care of the waters backing up on this land due to the construction on the Mahlin land.

We conclude that the prayer of the plaintiffs' petition should be granted, with the exception that no damages be allowed. We reverse the judgment of the trial court insofar as it dismissed the plaintiffs' petition, and remand the cause with directions to render judgment in conformity with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

SIMMONS, C. J., participating on briefs.

BERNARD GOEDEKER, DOING BUSINESS AS NEBRASKA CUSTOM KITCHENS CO., APPELLEE, V. PETER KIEWIT SONS' CO., A CORPORATION, APPELLANT.

106 N. W. 2d 679

Filed December 23, 1960. No. 34851.

1. **Sales.** Generally, in the absence of any contrary intention or agreement, the risk of loss follows the title.
2. ———. In order to have a passing of title there must be a delivery and acceptance thereof within the intent and meaning of the parties' agreement.

3. **Contracts: Sales.** Where, pursuant to the terms of an executory contract, materials are to be furnished and labor is to be performed in placing the same in usable condition the contract is not divisible as between the material and labor so as to pass title to the materials before the required labor is performed, unless, by the terms of the contract, it is evident the parties intended otherwise.

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

Story, Pilcher, Howard & Hickman, for appellant.

Cassem, Tierney, Adams & Henatsch, for appellee.

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

WENKE, J.

Bernard Goedeker, doing business as Nebraska Custom Kitchens Company, brought this action, which is in the nature of a declaratory judgment suit, in the district court for Douglas County against Peter Kiewit Sons' Company, a corporation. The purpose of the action is to have the court determine the ownership of certain personal property on January 12, 1959, when it was totally destroyed by a fire of undetermined origin, in order to fix the responsibility for the loss, both parties allegedly having insurance to cover it. The value of the personal property destroyed is claimed to be $7,995.04. A trial was had. The trial court found and decreed that the defendant was the owner of the merchandise destroyed by the fire of January 12, 1959, and that the reasonable and agreed value thereof was in the sum of $7,995.04. Defendant thereafter filed a motion for new trial and this appeal was taken from the overruling thereof.

For convenience we shall herein refer to plaintiff-appellee Bernard Goedeker, doing business as Nebraska Custom Kitchens Company, as Goedeker, and to defendant-appellant Peter Kiewit Sons' Company, as the Kiewit Company.

Peter Kiewit owned a residence property in Omaha located at 9702 North Thirtieth Street. Sometime in 1958, he apparently entered into a contract with the Kiewit Company for a complete remodeling thereof, for, in October 1958, Kiewit Company commenced doing so, the work being done under the supervision of Nels Lillethorup as foreman.

Goedeker was, at all times herein material, a distributor in Omaha for St. Charles Manufacturing Company's custom-built kitchens, having been in that business in Omaha for about 15 years. Sometime prior to November 13, 1958, he negotiated with a representative of Kiewit Company to completely install a kitchen of this type in the home it was remodeling for Peter Kiewit. These custom-built kitchens are manufactured at St. Charles, Illinois, according to designs submitted by the distributor (here Goedeker) as approved by the customer (here Kiewit Company). Basically, such custom-built equipment consists of cabinets designed and built to fit the architect's plans for the particular room in which they are to be installed. The appliances used in connection therewith usually consist of standard equipment that is available and can be purchased on the open market. It is customary to ship the custom-built equipment disassembled in crates for assembling on the job.

As a result of the negotiations hereinbefore referred to an agreement was entered into by Goedeker with Kiewit Company whereby the former was to furnish and install for the latter a custom-built kitchen in the home it was remodeling for Peter Kiewit. The provisions thereof, insofar as here material, provide:

"You may consider this letter as your authority to proceed with the fabrication and furnishing as well as delivery and complete installation of all kitchen equipment as indicated on your drawing No. 3767-2 dated October 27, 1958 and revised November 10, 1958, for the sum of $8,700.00. * * * It is further understood that all

items of equipment mentioned above will be on hand and ready for installation during the last two weeks of December, 1958. * * * It is further understood that all appliances will be completely installed * * *."

Generally, in the absence of any contrary intention or agreement, the risk of loss follows the title. See, 46 Am. Jur., Sales, § 279, p. 463; Storz Brewing Co. v. Brown, 154 Neb. 204, 47 N. W. 2d 407; § 69-422, R. R. S. 1943. In order to have a passing of title there must be a delivery and acceptance thereof within the intent and meaning of the parties' agreement. See, Joyce Wholesale Co. v. Northside L. & M., Inc., 160 Neb. 703, 71 N. W. 2d 186; § 69-418, R. R. S. 1943; 77 C. J. S., Sales, § 154, p. 880; Kopald Electric Co. v. Mandan Creamery & Produce Co., 76 N. D. 503, 37 N. W. 2d 253; Western Silo Co. v. Gogerty, 187 Iowa 1, 171 N. W. 176; Stratton v. Andrew C. Sisman Co., 255 Mich. 451, 238 N. W. 171.

Goedecker ordered the custom-built part of the kitchen from the St. Charles Manufacturing Company of St. Charles, Illinois, with directions that it be delivered during the last 2 weeks in December of 1958. It was loaded by the manufacturer in St. Charles, Illinois, on December 26, 1958, in a furniture van and was then transported to Omaha by a motor common carrier. Due to delays in transit it did not reach Omaha until Saturday, January 3, 1959. Although consigned to Goedeker at his address in Omaha the cardboard crates, containing the custom-built fixtures for the kitchen, were taken directly to the Peter Kiewit residence that was being remodeled and stored therein. Thereafter, on January 12, 1959, the Peter Kiewit residence was destroyed by a fire of undetermined origin as well as the contents thereof, which included the unopened cardboard crates and their contents.

The contract did not consist of a separate sale of the personal property, consisting of the custom-built cabinets and appliances, and the cost of the labor for

the installation thereof. Rather it was a contract for the fabrication, furnishing, delivery, and complete installation of these kitchen fixtures in the kitchen of the Peter Kiewit residence for an agreed price. It was not divisible. Consequently the delivery of a major part of the equipment to be installed in the kitchen to the Peter Kiewit residence, where it was stored with the knowledge and consent of Kiewit Company's foreman, did not constitute a delivery and acceptance thereof by the buyer. See Kopald Electric Co. v. Mandan Creamery & Produce Co., *supra.* As therein held: "Where pursuant to the terms of an executory contract materials are to be furnished and labor is to be performed in placing the same in usable condition, the contract is not divisible as between the material and labor so as to pass title to the materials before the required labor is performed, unless so specifically provided in the contract." See, also, § 69-419, Rule 2, R. R. S. 1943; 46 Am. Jur., Sales, § 420, p. 589; Morel v. Solomon, 203 Miss. 356, 35 So. 2d 314. However, the title may pass under such a situation if such is the intention of the parties even though something remains to be done by the seller to put the property in its final condition. See, § 69-419, R. R. S. 1943; International Harvester Co. v. Brownlee Brothers (Ark.), 329 S. W. 2d 177; 46 Am. Jur., Sales, § 420, p. 590. But that is not the situation here.

During the negotiations leading up to the contract it was the idea of the representative of Kiewit Company that the equipment should be on the Peter Kiewit property in late December of 1958, because he thought the remodeling of the residence would then be far enough advanced to permit the kitchen equipment to be installed. Consequently he wanted the assurance from Goedeker that he could have the equipment there at that time in order to avoid any delay in completing the remodeling. Goedeker assured him that he could. In view thereof the provision, which has been hereinbefore set out to that effect, was included in the parties'

agreement. Appellant aptly described what the parties intended the contract to mean when it states in its brief: "The contract called for the presence of the equipment on the premises during the last two weeks in December of 1958."

The custom-built kitchen equipment did not arrive from St. Charles, Illinois, until January 3, 1959, due to delay in transit. It was then taken to the Peter Kiewit residence and stored therein. However, the kitchen was not ready for its installation so it was left crated. At no time, prior to the fire on January 12, 1959, was the kitchen ready for the equipment to be installed, although Goedeker had his men check it constantly for that purpose. In fact, the parties agreed that the kitchen would not be ready for that purpose until the week of January 19, 1959.

Section 69-422, R. R. S. 1943, provides, insofar as here material, as follows: "Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer the goods are at the buyer's risk whether delivery has been made or not, except that * * * (2) Where delivery has been delayed through the fault of either buyer or seller, the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault."

Here the evidence shows that Kiewit Company wanted the custom-built kitchen equipment on the property in order to avoid any delay in its being installed whenever it had remodeled the kitchen so that could be done; that Goedeker delivered the equipment on the property on January 3, 1959, and would have immediately installed it if the kitchen had been ready for that purpose; that Goedeker continued to keep informed as to the extent of Kiewit Company's remodeling in order to install the kitchen equipment whenever Kiewit Company had the kitchen ready for him to do so; and that at

no time prior to January 12, 1959, when the fire occurred, was the kitchen in such condition that that could be done. Under this situation we think subsection (2) of section 69-422, R. R. S. 1943, is controlling.

The value of the personal property stored in the Peter Kiewit residence by Goedeker was fixed by the trial court at $7,995.04. From an examination of the record we come to the same conclusion.

In view of what we have said herein we think the trial court arrived at the correct conclusion and therefore affirm the judgment rendered by it.

AFFIRMED.

MARGARET L. BASS, APPELLANT, V. COUNTY OF SALINE, APPELLEE.

106 N. W. 2d 860

Filed December 23, 1960. No. 34854.

1. **Statutes: Officers.** A provision in a statute that a county officer shall have necessary clerks and assistants at such salaries as he may determine, with the approval of the county board, invests the county officer with the duty of fixing the salaries of clerks and employees in his office.
2. **Officers.** In discharging the duty of fixing salaries of clerks and employees in his office the county officer must not act arbitrarily, capriciously, or unreasonably.
3. ———. The expression, "with the approval of the county board," authorizes the county board to approve or disapprove the salary fixed by the officer, but such county board must not act arbitrarily, capriciously, or unreasonably in so doing.
4. ———. Where a county officer has fixed the salary of a clerk or employee, and the evidence is undisputed that the salary so fixed is fair and reasonable for the service rendered, a disallowance or reduction of the salary claim by the county board is arbitrary and unreasonable.

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

Steinacher & Vosoba, for appellant.

Ach & Ach, for appellee.

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

CARTER, J.

This is an appeal from an order of the district court for Saline County dismissing plaintiff's petition on appeal from the partial disallowance of her salary claim by the board of county commissioners of Saline County.

There is no dispute in the evidence. Plaintiff is the clerk of the county court of Saline County. The evidence shows that on September 15, 1959, the county judge of Saline County informed the county board that he had fixed the salary of plaintiff beginning in October 1959, at $225 per month. In October 1959, plaintiff filed her claim for salary in the amount of $225. The county board allowed the claim in the amount of $190 in accordance with a salary schedule established by it on July 1, 1959. The evidence is not disputed that plaintiff was competent and efficient, and that her services as clerk of the county court were reasonably of the value of $225 per month. The sole question is whether or not the county board, under such circumstances, is required to pay the salary of $225 per month as fixed by the county judge.

It is the contention of the plaintiff that the effect of section 23-1111, R. R. S. 1943, authorizes the county judge to fix the salary of the clerk of the county court, provided that such salary is reasonable and not the arbitrary act of the county judge. It is the contention of the county that the county board is authorized to disapprove the action of the county judge in fixing the salary, even though it is reasonable and fair.

Since 1943 section 23-1111, R. R. S. 1943, has provided: "The county officers in all counties shall have the necessary clerks and assistants for such periods and at such salaries as they may determine with the approval of the county board, whose salaries shall be

paid out of the general fund of the county." In 1953 section 23-1114, R. R. S. 1943, was enacted, reading as follows so far as here applicable: "The salaries of all officers, deputies, and employees of the county, excepting the members of the county board and the county judge, shall be fixed by the county board at least sixty days prior to the closing of filings of certificates of nomination to place names on primary ballot for the respective offices; * * *." It is clear from the reading of these two sections of the statutes that they were in conflict in regard to the fixing of salaries of employees in county offices.

In 1955 the Legislature resolved that conflict by amending section 23-1114, R. R. S. 1943, to read as follows: "The salaries of all elected officers of the county, excepting the members of the county board and the county judge, shall be fixed by the county board at least sixty days prior to the closing of filings of certificates of nomination to place names on the primary ballot for the respective offices; * * *." It will be observed that the word "employees" was omitted from section 23-1114, R. R. S. 1943, as it was amended in 1955. A subsequent amendment of this section in 1959 did not change the act so far as pertinent here. It is fundamental that there can be no such office as a deputy county judge, such an office being unknown to the law, and consequently the provisions of statute relating to deputies have no application to the case at bar. 30A Am. Jur., Judges, § 29, p. 18. For the purposes of section 23-1111, R. R. S. 1943, a county judge is a county officer.

The following rules of statutory construction are applicable here. Statutes pertaining to the same subject matter should be construed together. Such statutes, being pari materia, must be construed as if they were one law and effect given to every provision. Mueller v. Keeley, 163 Neb. 613, 80 N. W. 2d 707; Sun Ins. Co. v. Aetna Ins. Co., 169 Neb. 94, 98 N. W. 2d 692. In

enacting a statute the Legislature must be presumed to have knowledge of all previous legislation upon the subject. Sun Ins. Co. v. Aetna Ins. Co., *supra*. The intent of the Legislature is expressed by omission as well as by inclusion. Ledwith v. Bankers Life Ins. Co., 156 Neb. 107, 54 N. W. 2d 409; Johnson Fruit Co. v. Story, *ante* p. 310, 106 N. W. 2d 182. Where general and special provisions of statutes are in conflict, the general law yields to the special, without regard to priority of dates in enacting the same, and a special law will not be repealed by general provisions unless by express words or necessary implication. State ex rel. Strom v. Marsh, 162 Neb. 593, 77 N. W. 2d 163. County commissioners possess no powers except such as are expressly granted or are incidentally necessary to carry such powers into effect. Ahern v. Richardson County, 127 Neb. 659, 256 N. W. 515.

Applying the foregoing rules of statutory construction, it is clear that the fixing of salaries of employees in county offices is the duty of the various county officers. It was therefore the duty of the county judge of Saline County, under section 23-1111, R. R. S. 1943, to fix the salary of the clerk of the county court.

The Legislature saw fit, however, to limit the authority of the county judge by the use of the words "with the approval of the county board." The primary issue here is the meaning to be given to this limitation. The limitation clearly does not mean that the county board could whimsically or arbitrarily ignore the fixing of the salary of the clerk of the county court by the county judge. To so hold would have the effect of investing the county board with full power to fix salaries of employees in county offices contrary to the expressed intent of the Legislature, and render nugatory the provision of section 23-1111, R. R. S. 1943, granting such authority to county officers.

The word approval generally means to ratify or sanction, but its meaning in a statute may vary in accord-

ance with the sense in which it was intended to be used. See State ex rel. Johnson v. Tilley, 137 Neb. 173, 288 N. W. 521. Its meaning as used in section 23-1111, R. R. S. 1943, has not heretofore been before this court. Similar provisions have been before this court and provisions almost identical have been before the courts of other jurisdictions. We shall examine the reasoning of these cases to determine the meaning intended by the statute before us.

In State ex rel. Johnson v. Tilley, *supra,* the court had before it the meaning of an appropriation bill providing a highway cash fund for the Department of Roads and Irrigation, containing a provision that "not more than the sum of $9,200, to be expended under the direction of the attorney general and subject to the approval of the state engineer, for salaries and office maintenance in the office of the attorney general." The Attorney General filed a claim for the month of July 1939, which the State Engineer refused to approve. In sustaining the claim of the Attorney General this court said: "The amount of work involved in rendering the services and the proportionate charge that should be made therefor is a matter peculiarly within the knowledge and the discretion of the attorney general. In the absence of a showing that such charges are unreasonable or unconscionable, his decision as to the allocation of expenditures must be controlling." See, also, Speer v. Kratzenstein, on rehearing, 143 Neb. 310, 12 N. W. 2d 360; Roberts v. Thompson, 82 Neb. 458, 118 N. W. 106.

In Powers v. Isley, 66 Ariz. 94, 183 P. 2d 880, the court had before it statutory language almost identical with that in section 23-1111, R. R. S. 1943. The statute there involved provided: "The salary of the court reporter shall be fixed by the judge of the court, with the approval of the board of supervisors of the county, and paid by the county; * * *." In holding that the board of supervisors exceeded its authority in reducing the salaries of court reporters below that fixed by the

judge, the court said: "The province of the Board of Supervisors in connection with the approval of the salary fixed by the judge * * * is interpreted to be that the Board of Supervisors have the power to approve or disapprove the salary fixed by the judge for the court reporter. That in performing this duty the Board of Supervisors must exercise discretion, but they must act in a reasonable manner and not arbitrarily or capriciously in disapproving such salary. Neither must the judge in fixing the salary act arbitrarily or capriciously or unreasonably. In this particular case plaintiffs allege in their complaint that five judges * * * determined that the proper salary for each of the court reporters * * * should be the sum of $3600, and by proper order so fixed the salary. The same was submitted to the Board of Supervisors. They neither approved or disapproved the salary as fixed by the judges, but arbitrarily proceeded upon their own initiative to reduce the salary fixed by the judges in the sum of $3300. It appears from the allegations of the complaint that the Board of Supervisors exceeded their authority in this particular case." See, also, State ex rel. Kuhlemeier v. Rhein, 149 Iowa 76, 127 N. W. 1079.

We conclude from the foregoing authorities that the statute authorizes the county judge to fix the salary of the clerk of the county court. In so doing he must not act arbitrarily, capriciously, or unreasonably. The limitation placed upon the authority of the judge in fixing the salary of the clerk of the county court to the effect that it should be done "with the approval of the county board" authorizes the county board to approve or disapprove the act of the county judge, but in so acting the county board may not act arbitrarily, capriciously, or unreasonably. In the absence of evidence that the salary fixed by the county judge is unreasonable, capricious, or arbitrary, the county board is without authority to disapprove it.

Since the evidence establishes without dispute that

the reasonable value of the service of the plaintiff as clerk of the county court is $225 per month, the failure of the county board to approve such salary is arbitrary and unreasonable. Under the record before us the plaintiff is entitled to a judgment for the unpaid amount of the salary fixed by the county judge.

The trial court was in error in overruling plaintiff's motion for a new trial. The judgment of the district court is reversed and the cause remanded for further proceedings in accordance with this opinion.

REVERSED AND REMANDED.

JULIUS YOUNG ET AL., APPELLANTS, V. CITY OF SCRIBNER, A MUNICIPAL CORPORATION, APPELLEE.
106 N. W. 2d 864

Filed December 30, 1960. No. 34849.

1. **Municipal Corporations: Waters.** When a city makes provision by sewers or drains for carrying off the surface water, it may not discontinue or abandon the same, when it leaves the lot owner in a worse condition than he would have been if the city had not constructed such drains.
2. ———: ———. While the grant of power to a city of the second class to construct sewers or drains does not require it to do so, yet if it does exercise the power conferred, it is bound to use ordinary care or exercise due diligence to keep such sewers or drains as it constructs in proper condition and repair and free from obstruction, and will be held liable for damages to property resulting from its failure to do so.
3. ———: ———. When such a city has constructed in its streets a system of gutters or drains to carry off surface water, it is charged with the duty of ordinary care to maintain them in a proper manner; and where one of its agents negligently and carelessly obstructs a gutter or drain in such a manner as to dam the flow and raise the water in the street to such a height that it overflows and damages private property, the city itself will be liable for such injury.
4. ———: ———. It is a well-settled principle of law that neither the owner of land nor a municipal corporation has any right to collect waters and discharge them upon the lands of another

in a greater quantity than what would have reached the property by natural drainage.

5. **Municipal Corporations: Nuisances. Like an individual, a municipality may, in a proper case, be enjoined from creating or maintaining a nuisance, or be required to abate one already created by it.**

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

Sidner, Lee, Gunderson & Svoboda, for appellants.

Spear, Lamme & Simmons, for appellee.

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

CHAPPELL, J.

Plaintiffs, Julius Young and Ruby Young, as owners of a dwelling house property known as Lot 10, Block 39, in Scribner, a city of the second class, brought this action in equity against defendant city seeking to require it to remove certain obstructions theretofore placed by defendant in its drainage ditches in the city street to the south and east of plaintiffs' property; to enjoin defendant from thereby casting surface waters on plaintiffs' premises; and to recover damages to their property caused by such obstructions and inadequate drainage which flooded plaintiffs' property. The primary relief sought by plaintiffs, as the issues were joined by the parties, was to obtain mandatory injunctive relief requiring defendant to enlarge its inadequate culvert and drainage facilities in the intersection of State and Grant Streets west and south of plaintiffs' property in order to adequately drain the water therefrom west and south, or in the alternative to require defendant to remove certain obstructions placed by defendant in the north roadside ditch on Grant Street at a church driveway on Lot 11 east of plaintiffs' property in order to drain the water therefrom to the east.

In that connection, defendant's answer denied generally, then admitted its municipal status and plaintiffs' ownership of the property. However, defendant also denied that plaintiffs ever had any drainage to the east and alleged that plaintiffs' drainage had always been west and south and that defendant's culvert and facilities constructed by it in the intersection to the west and south were adequate.

The cause was tried and submitted to the trial court on April 9, 1959. Thereafter, on January 6, 1960, a judgment was rendered which found and adjudged the issues generally in favor of defendant and dismissed plaintiffs' petition, with costs taxed to plaintiffs. Subsequently, plaintiffs' motion for new trial was overruled and they appealed, assigning and arguing in substance that the trial court erred in dismissing plaintiffs' petition and in not requiring defendant to remove obstructions in at least one or the other of its roadside drains serving plaintiffs' property. We sustain plaintiffs' contentions, pointing out, however, that plaintiffs' evidence was insufficient to enable the trial court or this court to determine with any degree of accuracy the dollar amount of plaintiffs' damages. It is sufficient in that connection to say that plaintiffs did establish by competent evidence that they sustained continuing damages by flooding during 1957 and 1958. In that connection, it is elementary that in such a situation injunction is a proper remedy because equity looks to the nature of the continuing damages inflicted rather than to the magnitude thereof as a ground of affording relief.

Actions in equity, such as that at bar, are triable de novo by this court upon appeal, in conformity with the rule of this court, reaffirmed as recently as Peters v. Woodmen Accident & Life Co., 170 Neb. 861, 104 N. W. 2d 490.

As far as important here, section 17-508, R. R. S. 1943, gives second-class cities the power to provide for the

grading and repair of streets and the construction of culverts and sewers.

In Cattin v. City of Omaha, 149 Neb. 434, 31 N. W. 2d 300, this court said: "The following authorities are likewise pertinent to this appeal.

" 'When a city makes provision by sewers or drains for carrying off the surface water, it may not discontinue or abandon the same, when it leaves the lot owner in a worse condition than he would have been if the city had not constructed such drains.' McAdams v. City of McCook, 71 Neb. 789, 99 N. W. 656. This case recognized the rule that the city is under no obligation to construct a system of drainage for protection from the surface water, but having constructed a system of drainage, the city is not entirely absolved from liability for injury caused to the private property by its failure to keep the ditches in proper control after they have been constructed.

"As stated in 4 McQuillin, Municipal Corporations (2d ed. rev.), § 1568, p. 432: 'While as stated a grant of power to a municipal corporation to construct sewers and drains does not require it to do so, yet if it does exercise the power conferred, it is bound to use ordinary care or exercise due diligence to keep such sewers and drains as it constructs in proper condition and repair and free from obstructions, and will be held liable for damages to property resulting from its failure to do so.'

"In Randall v. City of Chadron, 112 Neb. 120, 198 N. W. 1020, this court held: 'Where a city has constructed in its streets a system of gutters or drains to carry off surface water, it is charged with the duty of ordinary care to maintain them in a proper manner; and where one of its agents negligently and carelessly obstructs a gutter or drain in such a manner as to dam the flow and raise the water in the street to such a height that it overflows the curb and runs into the basement of plaintiffs' store, injuring a part of a stock of goods, the

city itself will be liable for such injury.' See, also, McAdams v. City of McCook, supra; 6 McQuillin, Municipal Corporations (2d ed. rev.), § 2869, p. 1227; Pevear v. City of Lynn, 249 Mass. 486, 144 N. E. 379.

"In the last cited case it is said: 'The law governing actions of this nature is settled. A municipality is not responsible for damages which accrue to individuals through any defect or inadequacy in the plan of its system of sewers, because that is established by public officers acting, not as its agents, but in a quasi judicial capacity for the benefit of the general public. A municipality is responsible for damages which accrue to individuals through negligence in the construction, maintenance or operation of its system of sewers, because that system when constructed becomes the property of the municipality, no one else can interfere with it and its care and continuance devolve wholly upon the municipality through such agents as it may select." See, also, 38 Am. Jur., Municipal Corporations, § 629, p. 330, § 636, p. 340, § 639, p. 344, § 645, p. 351.

In Naysmith v. City of Auburn, 95 Neb. 582, 146 N. W. 971, this court said: "We take it that it is a well-settled principle of law that neither the owner of land nor a municipal corporation has any right to collect waters and discharge them upon the lands of another in a greater quantity than what would have reached the property by natural drainage. Elliott v. Oil City, 129 Pa. St. 570; Byrnes v. City of Cohoes, 67 N. Y. 204; 30 Am. & Eng. Ency. Law (2d ed.) 339; Lincoln & B. H. R. Co. v. Sutherland, 44 Neb. 526. In 10 Am. & Eng. Ency. Law (2d ed.) 243, it is said: 'It is well settled according to all the authorities that, were (sic) the effect of the sewer, whatever its plan, is to cause a direct invasion of private property by collecting and throwing upon it in new channels or in increased quantities water that would not otherwise have found its way there, the corporation is liable.' We can conceive

no reason why the same rule should not be applied to surface drainage or surface sewers."

In City of Kearney v. Themanson, 48 Neb. 74, 66 N. W. 996, involving facts comparable in some material respects with those at bar, this court said: "The mere right of a proprietor to defend himself against surface water without being responsible for the consequences has never been denied by this court. But there may be a difference between the possession of a right and the manner of its exercise. In the case at bar it may be conceded that the city had a right to grade the street in question,—to build the embankment therein. This right we do not call in question. It is only the manner of the exercise of that right that is involved in this litigation."

Also, in Goodrich v. University Place, 80 Neb. 774, 115 N. W. 538, this court held: "By accepting the special privileges and powers of taxation, supervision and local government, cities of the second class and villages assume the duties, responsibilities and liabilities flowing therefrom and incident thereto in the same manner and to the same extent as any other municipality; and such special privileges and powers constitute a sufficient consideration for the obligations and liabilities thus assumed."

As stated in 63 C. J. S., Municipal Corporations, § 770, p. 69, citing numerous authorities: "Like an individual, a municipality may, in a proper case, be enjoined from creating or maintaining a nuisance, or be required to abate one already created by it." See, also, 63 C. J. S., Municipal Corporations, § 879, p. 265, § 880, p. 268, § 893, p. 294; 38 Am. Jur., Municipal Corporations, § 643, p. 348.

In the light of such authorities, we have examined the record. It discloses that some of the evidence is undisputed and that some of it is conflicting; but we bear in mind that some material conflicting testimony given by the city officials and agents in defendant's behalf

was either equivocal or incredible when considered in the light of two undisputed surveys made by the county surveyor, and photographs reflecting the flooded condition of plaintiffs' property in 1958, which were offered and received in evidence.

Plaintiffs purchased the property in 1944 and moved into it in 1945 when their son, who was a tenant thereon, had moved out. It is undisputed that from 1944 to 1957 plaintiffs' property had never been flooded. The property is 256.2 feet long, running east and west, and is 85 feet wide, running north and south. It is bordered on the west by State Street and on the south by Grant Street, which streets intersect at the southwest corner of plaintiffs' property. The two surveys made by the county surveyor show the topography and pertinent elevations of plaintiffs' property and of State and Grant Streets bordering plaintiffs' property up to and beyond the intersection thereof, and show an admittedly inadequate 18-inch culvert therein which had been installed by defendant to drain water to the south beyond the intersection. In that connection, said culvert was one-tenth of a foot higher at the south end than it was at the north end. One such survey was made at request of plaintiffs, wherein the elevations were taken at the flow line of a ditch running south on the east side of State Street, and the other was made at request of defendant wherein comparable elevations were taken at the flow line of defendants' culvert at the intersection.

By such survey and other evidence it was established that from a point about one and one-half blocks north of plaintiffs' property, State Street slopes south down to and along the west end of plaintiffs' property, thence south across the intersection and on south beyond it. A ditch on the east side of State Street drains the water south into the culvert in the intersection, thence on to the south. The southwest corner of plaintiffs' property, which is the northeast corner of the intersection, is

lower than either end of the city's culvert, and is lower than the west side of the intersection and the northwest corner of Grant Street therein.

From 1943 to 1956, there was a ditch in the street on the north side of Grant Street which extended from the southwest corner of plaintiffs' property, thence east along the south side of plaintiffs' property, thence east along and beyond adjacent Lot 11 where a Catholic church was constructed upon higher ground about 1956. One witness who lived on plaintiffs' property in 1943 and 1944, one witness who lived on said property in 1944 and 1945, plaintiff Julius Young who lived thereon from 1945 to date, and his daughter, a nurse, who lived there with plaintiffs from 1952 to date, testified that there was such a ditch. Before construction of the church, there was a slight rise about midway in plaintiffs' land where they had a garage and a driveway leading thereto from Grant Street. There is evidence that to the east of plaintiffs' driveway the water then drained east, and to the west thereof it drained west and south. Some witnesses for defendant testified contrary thereto, but subsequent events and other evidence, together with pertinent elevations of the ditch and adjacent property, reasonably indicate otherwise.

In that connection, the surveys demonstrate, and the evidence discloses, that the church was constructed on Lot 11 about 1956, and that about midway thereof there is a rise on the north side of Grant Street where the roadside ditch had been filled without any culvert, and had been subesquently graveled over by the city for a driveway to the church. Some 4 feet under said driveway, in order to protect the water from freezing, the city had theretofore constructed and buried its extended sewer and water pipes needed for the church. How deep the ditch was before filling without any culvert thereunder is not definitely shown, but, in any event, it appears from the surveys and evidence that there is a roadside ditch which distinctly slopes to the

west from such church driveway and along the east end of plaintiffs' property to the rise in plaintiffs' driveway and beyond to the intersection, and that there is a roadside ditch which distinctly slopes from such church driveway to the east along the east end of its property, thence east along adjoining Lot 12 to a point where the drainage is south. Also, about the same time, the city placed asphalt on Grant Street to a point beyond the church property, which increased the flow of water to the west and south. As a result, surface water flowed down the north ditch in Grant Street from the church property and driveway and over the east end of plaintiffs' property. It also flowed over asphalted Grant Street and down the ditch on the east side of State Street to the inadequate culvert in the intersection, where accumulations of water backed up and flooded plaintiffs' property.

Upon complaint thereof to city officials by plaintiff Julius Young in 1957, the city admittedly put a culvert in the north ditch under plaintiffs' garage driveway and constructed a dike on the north side of the ditch in Grant Street along the south side of plaintiffs' property. The city refused to place an enlarged culvert in the intersection to drain such waters south unless plaintiffs would furnish the culvert and because in any event there would be too much opposition thereto by residents living south thereof who had driveway drains that might be too small to carry the water. The city also refused to remove the obstruction at the church driveway or put a culvert thereunder so the water would drain east from plaintiffs' driveway, because of danger to the city's water and sewer connections to the church. As a result of the foregoing situation, water came down over and inside the dike, admitted to have been wrongfully constructed by the city, and accumulated on the east end of plaintiffs' land, which water, together with water accumulated in the intersection, flooded plaintiffs' property and seriously damaged or

destroyed plaintiffs' garden, strawberry and raspberry crops, and other property. As a matter of fact, plaintiffs' property was so flooded three different times in 1957 and twice in 1958. The extent and manner thereof in 1958 is demonstrated by photographs offered and received in evidence.

In that situation, plaintiffs brought this action contending that defendant should be required to remove the obstructions placed by the city in the north roadside ditch east of plaintiffs' property and thus carry drainage to the east, which would admittedly be more expensive, or in the alternative to provide an adequate culvert and facilities in the intersection for city drainage to be carried away to the west and south of plaintiffs' property.

On the other hand, defendant contends that there never was any ditch which carried drainage from plaintiffs' property to the east, although defendant admits that it had installed water and sewer connections for the church under the filled-up ditch without a culvert, and had leveled same with gravel for the church driveway from Grant Street, as heretofore mentioned; that it put a culvert under plaintiffs' driveway and wrongfully constructed the dike in and along Grant Street north of the ditch along the south side of plaintiffs' property; and it is undisputed that defendant's culvert in the intersection of State and Grant Streets was inadequate to carry the drainage south. As a matter of fact, defendant's officers and agents who testified, claimed that but little if any water had ever flooded plaintiffs' land when they viewed it, which is refuted by direct evidence and the photographs received in evidence; that in any event defendant's facilities were adequate and the flood of plaintiffs' land came from and was caused solely by heavy rains more than would be normally anticipated, which the record does not sustain; and that plaintiffs were not entitled to relief because some other people in Scribner had similar trouble, which is not a legitimate defense. Defendant also argued that, under the

circumstances, defendant was not liable as a matter of law. We do not agree.

In that connection, authorities relied upon by defendant are entirely distinguishable upon the facts. To discuss them at length herein would serve no useful purpose. Suffice it to say that this is not a case wherein plaintiffs simply sought to require defendant to provide surface water drainage for their property in a situation where such drainage had been obstructed by third parties. Rather, it is a case wherein defendant's officials and agents, by their own wrongful and negligent acts of omission and commission, caused the obstructions and flooding and thereby created a nuisance upon plaintiffs' property.

We decide, upon trial de novo, that plaintiffs were entitled to the mandatory injunctive relief sought by them. Therefore, we conclude that the judgment of the trial court should be and hereby is reversed and the cause is remanded with directions to render a judgment finding and adjudging the issues in favor of plaintiffs and against defendant, and granting plaintiffs the mandatory injunctive relief sought by plaintiffs. All costs are taxed to defendant.

REVERSED AND REMANDED WITH DIRECTIONS.

IN RE GUARDIANSHIP OF ROBERT LEE WORKMAN ET AL. DOLORES LUCILLE WORKMAN, INDIVIDUALLY AND AS GUARDIAN OF ROBERT LEE WORKMAN ET AL., APPELLEES, V. FRANK M. WORKMAN ET AL., APPELLANTS.

106 N. W. 2d 722

Filed December 30, 1960. No. 34863.

1. **Guardian and Ward: Appeal and Error.** Appeals to this court in the matter of the appointment of guardians are heard and determined de novo.

2. **Guardian and Ward.** A proceeding for the appointment of a guardian is a probate matter.
3. ———. Under the provisions of section 38-104, R. R. S. 1943, a minor over the age of 14 years has a right to nominate his own guardian and ordinarily the county court should approve the person so nominated unless, in the exercise of its discretion, it comes to the conclusion that the person nominated is disqualified to act as such.
4. **Guardian and Ward: Appeal and Error.** Subject to the rights of parents as natural guardians of their minor children and the statutory rights of minors over 14 years of age to nominate their own guardians, the selection and appointment of guardians is a matter within the discretion of the county court making such selection and appointment and ordinarily this court will not interfere therewith unless an abuse of discretion is shown.
5. **Guardian and Ward.** If one having a legal right to the appointment of guardian, such as a parent, is a fit and proper person to act in that capacity, he should not ordinarily be denied such right.
6. ———. Where a minor has, for a number of years, been in the custody and care of a certain person who is competent and otherwise a suitable person to perform the duties of a guardian, the appointment of such person as guardian would be in the best interest of the minor.

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

Max Kier, for appellants.

Crosby, Pansing & Guenzel and *Perry, Perry & Nuernberger,* for appellees.

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

WENKE, J.

This litigation originated in the county court of Lancaster County. It involves the appointment by the county court of Lancaster County of a successor guardian in each of three separate guardianship proceedings pending therein. In the district court for Lancaster County, on appeal thereto from the county court, the three cases were, by stipulation, consolidated for the purpose of trial. Trial was had and each of the three

appeals was dismissed. The parties objecting to the appointment of the successor guardian thereupon filed one or more motions for new trial in each case, which were overruled. The cases were then, by stipulation, consolidated for the purpose of appeal to this court and an appeal was thereupon taken from the orders overruling the motions for new trial. This opinion will dispose of all three cases.

Appeals to this court in the matter of the appointment of guardians are heard and determined de novo. Cass v. Pense, 155 Neb. 792, 54 N. W. 2d 68.

Appellant Frank M. Workman, to whom we shall herein refer as the father, and appellee Dolores Lucille Workman, to whom we shall herein refer as the mother, are the parents of four living children. They are Dellouise Workman Carroll, a married daughter, born December 19, 1937; appellant Joseph M. Workman, a son, born June 8, 1942; Robert Lee Workman, a son, born June 17, 1943; and Francine L. Workman, a daughter, born March 20, 1947.

On March 15, 1950, the county court of Lancaster County, with the consent of the mother, appointed the father guardian of each of the three youngest of these children, namely, Joseph M., Robert Lee, and Francine L. On May 7, 1955, the county court of Lancaster County, on the petition of the mother, removed the father as guardian of each of said minors and appointed Joseph Ginsburg to succeed him. In so doing the county court found: "* * * the best interests of said minors can be served by the appointment of an independent guardian to protect the vested property rights of said minors in said trust." The father's removal as guardian in each of these guardianships was ultimately affirmed by this court. See Workman v. Workman, 168 Neb. 408, 95 N W. 2d 704.

Ginsburg continued to act as guardian for each of these minors until August 7, 1957, when, at the suggestion of the mother, he filed his resignation with the county

court in each of the guardianships. Thereafter, on either August 8, 1957, or August 15, 1957, the mother filed a petition in each of the guardianships asking that she be appointed guardian, therein stating that any conflicts between the interests of each of said minors and herself as to property matters had been eliminated. The father filed objections to the mother's request in each of the guardianship proceedings as did the son, appellant Joseph M., in his own guardianship proceeding. On August 30, 1957, the county court, in each of the guardianship proceedings, accepted the resignation of Joseph Ginsburg and appointed the mother to become the successor guardian, therein finding: "* * * the court further finds and adjudges that Dolores Lucille Workman has been awarded the legal custody of each of said minors by the Supreme Court of Nebraska and the District Court of Lancaster County, Nebraska, that no conflict in interest between said mother and said minors exists and that it is to the best interests of said minors and their estate that she be appointed guardian with full authority to act for the protection of their interests and that probable cause of the necessity of action by the guardian on behalf of the interest of said minor wards and each of them has been shown." The mother qualified as guardian in each case and letters of guardianship were issued to her by the county court on September 4, 1957. The father, in each case, as well as the son Joseph M., in his own guardianship proceeding, appealed to the district court, giving bond for that purpose.

Transcripts containing the necessary records of the county court in each guardianship proceeding were filed in the district court for Lancaster County on September 19, 1957. Pleadings were thereupon filed in the district court in each case. The cases were then jointly tried, upon the issues raised, and were disposed of by the district court in the manner hereinbefore set forth.

This appeal does not involve the custody of these

minor children, which has already been determined by this court as being in the mother. See Workman v. Workman, 164 Neb. 642, 83 N. W. 2d 368. Any desired change therein, because of changed conditions arising subsequent thereto, must be brought in that action in the district court.

A proceeding for the appointment of a guardian is a probate matter. See Cass v. Pense, *supra*. In each appeal, both to the district court and to this court, appellants gave proper bonds, all of which were approved. See § 30-1603, R. R. S. 1943. In view of the fact that during the time these appeals were pending the mother, as guardian, with the approval of the county court, brought several actions against Capitol Investment Company, amended her pleadings in another case, and entered into a contingent fee contract with her attorneys, appellants suggest we determine her status as guardian, contending her authority to act as guardian was superseded by the appeals and that any actions she has taken as guardian are void. The only questions presented by this appeal are, did the county court exceed its authority in appointing the mother as successor guardian and, if not, did it abuse its discretion in appointing her? Whether or not the guardian had, with the county court's approval, authority to bring and maintain the actions referred to and whether or not she had authority, with the county court's approval, to enter into the contingent fee contract with her attorneys during the pendency of these appeals, can be raised and determined in those actions and, as to the contract involving attorneys' fees, when it is sought to be enforced. However, in regard to the mother's right to bring and maintain such actions in behalf of these minor children as their next friend, see Workman v. Workman, 167 Neb. 857, 95 N. W. 2d 186.

Section 38-104, R. R. S. 1943, provides as follows: "If the minor is under the age of fourteen years, the court of probate may appoint his guardian, and if he

is above the age of fourteen years he may nominate his own guardian, who, if approved by the court, shall be appointed accordingly."

The son, appellant Joseph M. Workman, being over the age of 14 years, objected to the appointment of his mother as his guardian, suggesting that he would rather have his father be his guardian but, if he couldn't have his father as his guardian, that he preferred to have an outsider. The record leaves no doubt of the fact that the father is disqualified to act as such because of the position he has taken in regard to the rights of his children in an irrevocable trust created by the father and mother on February 20, 1950, for the benefit of their then four minor children. See Workman v. Workman, 167 Neb. 857, 95 N. W. 2d 186.

Section 38-105, R. R. S. 1943, provides: "If the guardian nominated by such minor shall not be approved by the court, or if the minor shall reside out of the state, or if, after being cited by the court, he shall neglect to nominate a suitable person, the court may appoint the guardian in the same manner as if the minor were under the age of fourteen years."

Under these statutory provisions a minor over the age of 14 years has a right to nominate his own guardian and ordinarily the county court should approve the person so nominated unless, in the exercise of its discretion, it comes to the conclusion that the person nominated is disqualified to act as such. See 39 C. J. S., Guardian and Ward, § 14, p. 26. Here the father was disqualified and the minor made no other specific nomination except the general statement that he preferred an outsider over his mother.

Subject to the rights of parents as natural guardians of their minor children and the statutory rights of minors over 14 years of age to nominate their own guardians, the selection and appointment of guardians is a matter within the discretion of the county court making such selection and appointment and ordinarily

this court will not interfere therewith unless an abuse of discretion is shown in connection therewith. See, 39 C. J. S., Guardian and Ward, § 18, p. 32, § 28 a, p. 48; In re Guardianship of Lancey, 232 Iowa 191, 2 N. W. 2d 787; In re Guardianship of McCoy, 46 Cal. App. 2d 494, 116 P. 2d 103; §§ 38-104, 38-105, 38-107, R. R. S. 1943; Tiffany v. Wright, 79 Neb. 10, 112 N. W. 311.

After the father had been appointed and qualified as guardian of each of these minors the parents became involved in marital difficulties which resulted in an action for divorce being filed in the district court for Lancaster County by the mother in November 1954. Thereafter, in 1955, the county court removed the father as guardian and appointed Joseph Ginsburg to succeed him, basing its action in doing so on the finding hereinbefore set forth. The "trust" referred to therein is the irrevocable trust hereinbefore referred to which was created by the mother and father for the benefit of their children. At the time Ginsburg was appointed to succeed the father as guardian neither the custody of the minor children nor the marital property rights of the parents had been determined and the appointment of an independent guardian to protect the property rights of the minors in the trust was entirely proper. The divorce action ultimately was determined by this court in our opinion reported as Workman v. Workman, 164 Neb. 642, 83 N. W. 2d 368, which placed the custody of the minor children in the mother and definitely fixed the rights of the mother insofar as her right to alimony is concerned. Subsequent to our mandate therein, which was issued July 3, 1957, the parents, on December 20, 1957, made what is referred to as a "Partial Settlement." It is referred to in Workman v. Workman, 167 Neb. 857, 95 N. W. 2d 186.

After our mandate in the divorce action was issued the mother made application in each of the three guardianship proceedings to be appointed guardian therein, Joseph Ginsburg having previously resigned at her re-

quest. Prior to our opinion in Workman v. Workman, 164 Neb. 642, 83 N. W. 2d 368, the mother's position as to the irrevocable trust, which she and the father had created for the benefit of the children, was contrary to the best interests of the children. However, subsequent thereto she changed her position in regard thereto and sought to have it fully enforced. She was then no longer disqualified to act as guardian because of her position in regard thereto. This fact is fully evidenced by what we said and held in Workman v. Workman, 167 Neb. 857, 95 N. W. 2d 186, about this litigation. In this respect the previous finding by the county court in 1955 to the effect that "the best interests of said minors can be served by the appointment of an independent guardian" was no longer true, in view of these changed conditions, and therefore not binding on that court.

If one having a legal right to the appointment of guardian, such as a parent, is a fit and proper person to act in that capacity, he should not ordinarily be denied such right. And, where a minor has been for a number of years in the custody and care of a certain person, here parent, who is competent and otherwise a suitable person to perform the duties of a guardian, the appointment of such person as guardian would, it seems to us, be in the best interest of the minor. See, 25 Am. Jur., Guardian and Ward, § 29, p. 25; 39 C. J. S., Guardian and Ward, § 17 a, p. 28.

We think the best interests of the three minors will be best served, both as to custody and as to their property rights, by the appointment of their mother as guardian. In view thereof we affirm the district court's action in dismissing all three appeals taken to it from the county court.

AFFIRMED.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1961

ALBERT F. ROOS ET AL., APPELLEES, V. CONSUMERS PUBLIC POWER DISTRICT, APPELLANT, CONSOLIDATED WITH DONALD H. SALLENBACH, APPELLEE, V. CONSUMERS PUBLIC POWER DISTRICT, APPELLANT.

106 N. W. 2d 871

Filed January 6, 1961. No. 34861.

1. **Negligence: Trial.** In an action for negligence based on specified acts of negligence the plaintiff, in order to recover, must establish the specific negligence alleged and the doctrine of res ipsa loquitur cannot be applied.
2. **Electricity: Negligence.** An electric company maintaining wires carrying electricity is required to exercise the care that a person of ordinary prudence would exercise under the circumstances. It is not an insurer against injury.
3. ———: ———. Among the circumstances to be considered in such a case is the well-known dangerous character of electricity and the inherent risk of injury to persons or property when it is uncontrolled. Therefore, the care used must be commensurate with and proportionate to that danger.
4. ———: ———. The duty of due care with which an electric company is charged consists not only in the installation of the dangerous instrumentality but in the maintenance thereof in a safe condition at all times and places and under the changing circumstances of the particular case.
5. ———: ———. One dealing with electricity of high voltage must, because of its highly dangerous character, exercise the utmost degree of care and skill known in the operation of its business to prevent injury to persons or property at any place where they may reasonably be expected to be.
6. ———: ———. The mere fact that an electric line breaks, unless the facts bring it within the rule of res ipsa loquitur,

does not establish negligence so as to render an electric company liable for damages to property coming in contact with a fallen wire.

7. ———: ———. If an electric company is shown, without conflict in the evidence, to have used the utmost degree of care and skill, meaning the highest degree of care and skill which is used or may be used by others engaged in the same or similar business under the same or similar circumstances, notwithstanding that injury has resulted from contact with a fallen wire, the electric company, as a matter of law, has not failed in the performance of its duty.

8. ———: ———. The festooning of the insulation on electric wires or an abnormal sagging of such wires is not evidence of negligence to support a recovery where such conditions in no way contributed to the injury for which recovery is sought.

9. ———: ———. In the performance of its duty to exercise due care and skill under the circumstances, an electric company must anticipate and guard against events which may reasonably be expected to occur, and a failure in this respect is negligence.

10. ———: ———. On the other hand, it is not negligence to fail to anticipate and guard against happenings which would not have arisen except under exceptional or unusual circumstances. To impose such a liability upon electric companies would constitute them insurers against injury.

11. ———: ———. In the performance of its duty to exercise the utmost care and skill in maintaining its electric wires, an electric company is required to make reasonable inspections to detect defects.

12. ———: ———. An electric company must make reasonable and proper inspections of its appliances with such frequency as appears reasonably necessary and use due diligence to discover and remedy defects to the end that injury may not result therefrom.

13. ———: ———. When an electric company conducts its business with due care and diligence it ordinarily is not liable for a defective condition of its appliances of which it has no notice.

14. ———: ———. In the absence of evidence of a practical and customary means of discovering an inherent defect in a power line or a defect which is imperceptible to the human eye, and of which the electric company has no notice, liability ordinarily does not attach.

15. ———: ———. The evidence in this case does not show that the electric company had or ought to have had the means of detecting by inspection the fatigue fracture that caused the

break in the line, which fatigue fracture was found to be the cause of the break only upon examination under a high-powered microscope. Liability for improper inspection does not attach under such circumstances.

16. **———: ———. An electric company is liable only for its own negligence and where the proof does not establish a pleaded act of negligence, either of omission or commission, the basis for a recovery does not exist.**

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

Blackledge & Sidner, for appellant.

Oscar A. Drake, John E. Dougherty, and *James R. Ganz,* for appellees.

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

CARTER, J.

The plaintiffs brought separate actions for property damages sustained because of the negligence of the defendant in not properly maintaining its electric lines and in failing to properly inspect such lines and discover the defects therein which resulted in the plaintiffs' injuries. A verdict was returned by the jury for each of the plaintiffs. The defendant has appealed. The two cases were consolidated for trial in the district court and for the purpose of appeal to this court.

The plaintiffs Roos are the owners of a two-story hotel building and a one-story office building in Gibbon, Nebraska. The plaintiff Sallenbach was a tenant of the south office in the office building, which he was using as his office for the practice of medicine. The other office in the office building was immediately north of the doctor's office. It adjoined the hotel building to the north, and was rented to Max Wilkie, a livestock dealer. On February 27, 1958, the office building was destroyed and the hotel building damaged by an explosion. The actions presently before the court are for the damages resulting from this explosion.

The evidence shows that during the evening of February 26, 1958, a storm struck the area in and around Gibbon, which extended into the next day. The evidence is that the storm brought rain, sleet, and snow, accompanied by high, gusty winds and freezing temperatures. The storm was described as a blizzard of unusual severity. At about 3 a.m., on February 27, 1958, a primary conductor wire broke and the live ends came in contact with the ground. The broken wire came in contact with telephone service wires passing under the distribution lines of the electric company. There is evidence also that one of the broken primary wires came in contact and fused with a natural gas regulator, and caused high-voltage electrical current to energize the gas main of the gas company that services the area.

The area involved is a distance of 2 blocks in an east and west alley between LaBarre Avenue and Niles Street. The alley was immediately south of the doctor's office hereinbefore described. The telephone wires which came in contact with the broken primary wire entered an underground telephone cable running north and south on LaBarre Avenue, which cable had been installed prior to the paving of LaBarre Avenue. Subsequent to the paving of LaBarre Avenue the gas company laid a gas main in the alley which crossed LaBarre Avenue at its intersection with the alley. The gas main had been forced through under the pavement and, unknown to anyone until after the explosion, it passed immediately under and in contact with the above-mentioned telephone cable. Due to the energizing of the telephone wires or of the gas main, or both, arc burns occurred at the point where the telephone cable and gas main were in contact in the intersection of the alley with LaBarre Avenue. As a result a hole was burned in the cable and in the gas main, the latter permitting a large amount of natural gas to escape. The escaping gas followed the sand-and-gravel fill around service lines leading into

the offices of Dr. Sallenbach where, after an accumulation of gas, it came in contact with the pilot lights of an automatic gas furnace and a water heater, and the explosion resulted. It is not disputed that the breaking of the power line precipitated the chain of events which brought about the explosion. The defendant does contend that the installation of the gas main across LaBarre Avenue in such a way as to be left in contact with the telephone cable was an intervening factor which would relieve it from liability. The complete answer to this contention is that the contact of the gas main and the telephone cable was a condition and not an intervening cause as that term is used in the law of negligence.

The causes of action of the plaintiffs are based on a charge of negligence by the defendant in the following respects: (1) Defendant negligently and carelessly maintained the high-voltage electric line after it became weakened by stress from long use which made it unfit for use on February 27, 1958; and (2) that defendant negligently failed to properly inspect the electric line when such an inspection would have revealed its dangerous condition. We point out that plaintiffs, by pleading acts of negligence as their causes of action, may not rely upon the doctrine of res ipsa loquitur. Miratsky v. Beseda, 139 Neb. 229, 297 N. W. 94; Security Ins. Co. v. Omaha Coca-Cola Bottling Co., 157 Neb. 923, 62 N. W. 2d 127; Benedict v. Eppley Hotel Co., 161 Neb. 280, 73 N. W. 2d 228; Weston v. Gold & Co., 167 Neb. 692, 94 N. W. 2d 380. The burden of proving the acts of negligence alleged is upon the plaintiffs. Defendant contends that plaintiffs have not met this burden and that its motions for directed verdicts should have been sustained.

The defendant's power line was located on the north side of the alley. The break in the line occurred in the next block east of the block in which the Roos property was located. It was 21 feet from the west edge of this block to the first pole in the power line in this

block. It is designated in the record as pole 1. From pole 1 to the next pole to the east it was 96 feet. The latter pole is designated as pole 2. From pole 2 to the next pole to the east it was 107 feet. This latter pole is designated as pole 3. The break in the line is alleged to have occurred between poles 2 and 3, although there is evidence that it may have occurred at pole 2. The primary line consisted of three wires on cross-arms at the top of the poles. The primary line was a 2,400-volt line. Below the primary line on similar cross-arms was a distribution line which provided the electrical energy for electric light users in the area. Below the second series of cross-arms was a three-wire power line serving users of power in the area, which was attached to the poles with vertical brackets. The telephone service wires passed under the electric company's wires between pole 1 and pole 2. The wire that broke was the middle primary wire on the top series of arms. The voltage on the two lower lines was 240 volts.

There is evidence that the wire broke between poles 2 and 3. The evidence is not clear as to the exact place where the wire broke. The broken wire became detached from pole 2, making it necessary for the repairman to cut down the broken live wires at poles 1 and 3. It appears to be the theory of the plaintiffs that the wire broke close to the insulator on pole 2, since a part of the tie-wire which was also broken was on the conductor wire at the point of the break. It is evident on plaintiffs' theory that the west part of the broken wire contacted the gas regulator about 24 inches from the end and melted the wire at that point, leaving the 24-inch end of the wire near the regulator where it was found. This 24-inch section of the conductor wire is in evidence and designated as exhibit 1.

The plaintiffs called the witness W. F. Weiland, who qualified as an expert on the physical and mechanical behavior of metals as affected by stresses, fires, electrical currents, heat, and explosions under all circum-

stances and conditions. Professor Weiland determined the cause of the break to be a fatigue fracture which he described as follows: A fatigue fracture may start as a minute scratch on the wire, a scratch almost imperceptible to the human eye, and as it is bent back and forth a little bit over a period of years, a crack begins to form, and, eventually the crack travels into the wire to such an extent that the wire breaks. . He stated that this may be a little crack or a little nick that has developed because of a slight line of corrosion on the wire, or a sharp corner, or it may develop because of impurities within the wire, and in each case it may continue to develop until it breaks because of what is technically called a fatigue fracture. Exposure to the elements, including fumes, gases, and moisture in the air, tends to accelerate the eating into the metal. As to whether or not an inspection could be made that would disclose such a defect, which he was able to discover only with a high-powered microscope, he stated that a visual inspection of areas of suspicion should be made, areas where tie-wires are used, or the twisting of the conductor wire is evident, as well as where sharp corners exist.

Professor Weiland also testified that the dangling of insulation from the wire, referred to in the record as festooning, was some indication of the age of the wire. He stated also that the sag in the wire, estimated by the employee who repaired the break to be 4 feet, was indicative of a fatigued wire.

The defendant called W. A. Richardson, who qualified as an expert in the field of municipal engineering which includes waterworks, sewerage, paving, electrical distribution systems, transmission lines, natural gas systems, power plants, and the like. He testified that the festooning of the insulation on the primary wires had no relation to the efficiency or safety of the power lines as it related to a break in the wire; and that it was common practice to construct high-tension power lines

with noninsulated wire. He testified that the ordinary life of copper wire such as was here used was approximately 50 years. He testified that the normal sag in such a line between poles 107 feet apart is 2 feet, that a sag of 4 feet does not affect the efficiency or safety of such a line, and that the additional sag would tend to reduce rather than increase the tension on the line. This evidence is not disputed.

There is no evidence in the record that the festooning of the insulation on the conductor wire or the sagging of the line in any manner contributed to the breaking of the wire. There is no evidence that adequate tolerance was not provided to protect against unusual weather and the accumulations of ice on the primary line. The local representative of the defendant testified that he observed the condition of these lines at frequent intervals by inspection by ground patrol. There is no evidence that any other type of inspection was required or was more practical. This is, we think, a fair statement of the facts upon which we must determine if the defendant was negligent in not properly maintaining the line, and whether or not it was negligent in not properly inspecting the line and discovering the fatigue fracture before the break occurred.

A power company engaged in the transmission of electricity is required to exercise reasonable care in the construction and maintenance of its lines. The degree of care varies with the circumstances, but it must be commensurate with the dangers involved, and where wires are designed to carry electricity of high voltage, the law imposes upon the company the duty of exercising the utmost care and prudence consistent with the practical operation of its business to avoid injury to persons and property. Scott v. Claiborne Electric Cooperative (La), 13 So. 2d 524; Gellert v. Missouri Service Co. (Mo.), 221 S. W. 2d 177; Rice v. City of Lumberton, 235 N. C. 227, 69 S. E. 2d 543. Electric companies

are not insurers of the safety of the public and hence are not liable for injuries unless guilty of some wrongful act or omission. New Omaha Thompson-Houston Electric Light Co. v. Anderson, 73 Neb. 84, 102 N. W. 89. Such companies, being engaged in the transmission of a dangerous commodity, must anticipate and guard against events which may reasonably be expected to occur, and a failure to do so is negligence. A failure to anticipate and guard against a happening which would not have arisen except under exceptional or unusual circumstances is not negligence. Frerichs v. Eastern Nebraska Public Power Dist., 154 Neb. 777, 49 N. W. 2d 619. "The law does not require impossibilities of such companies in avoiding accidents and resulting injuries. In the erection and maintenance of their poles, wires, and other appliances, they are bound to anticipate only such combinations of circumstances and accidents and injuries therefrom as they may reasonably forecast as likely to happen, taking into account their own past experience and the experience and practice of others in similar situations, together with what is inherently probable from the condition of their appliances as they relate to the conduct of their business." 18 Am. Jur., Electricity, § 53, p. 448.

There is no evidence of faulty construction of the power line involved in this case. We accept the theory of the plaintiffs that the property damage sued for was the result of the break in the primary wire caused by the fatigue fracture, as described by the witness Weiland. It is not disputed that the line was constructed with a No. 4 triple-braided, weatherproof, copper wire, which was the proper kind to be used in this type of construction. There is no evidence in this record as to when the line was constructed, or of the age of the wire at the time of the break. There is no evidence of previous breaks in the wire, or of any other indication that the wire was defective. There is no evidence of any circumstances which would require the use of insulated

wire and, consequently, the festooning of the insulation is not evidence of negligence under the facts of this case. Beresford v. Pacific Gas & Electric Co., 45 Cal. 2d 738, 290 P. 2d 498, 54 A. L. R. 2d 910; Hardware Mutual Casualty Co. v. Tampa Electric Co. (Fla.), 60 So. 2d 179, 40 A. L. R. 2d 1293. There is no evidence that the abnormal sag of the wire in any manner contributed to the breaking of the wire. Interstate Power Co. v. Thomas, 51 F. 2d 964. The festooning of the insulation on the wire and the sag in the wire testified to, not being shown to have contributed to the breaking of the wire, are not a proximate or efficient cause thereof, and can afford no basis for recovery. Heidt v. Southern Telephone & Telegraph Co., 122 Ga. 474, 50 S. E. 361.

We point out also that there is no evidence that the defendant had any reasonable or practical means of locating the defective place in the line prior to its break, or that it had any knowledge of the defect. It is not shown that any special equipment existed that is of general use in the trade, which would have revealed the defect, the nonuse of which would amount to a failure to properly maintain the line in the exercise of due care.

There is evidence that the line, due to the unusual condition of the weather, had accumulated as much as 1 inch of ice, although the amount of the ice on the wire was in dispute. The ice on the wire and the weather conditions which produced it were undoubtedly contributing factors. The severity of the storm and its resulting effects are not alleged to be a proximate cause of the break in the wire, although they were admittedly a contributing factor.

We have come to the conclusion that a fatigue fracture such as described by the witness Weiland, which plaintiffs assert as the cause of the break, does not constitute proof of negligence. To so hold would make

the defendant an insurer against accident, which it is not.

It is contended that defendant was negligent in not properly inspecting the line in order to guard against defects. The local representative of defendant testified that he frequently patrolled these particular lines and that he observed nothing to indicate any defect in them. It is not urged that defendant was required to inspect otherwise than by visual observation on ground patrol. Plaintiffs' expert indicated that ground observation should reveal suspicious areas requiring close inspection. He did not testify that there was a suspicious area near the point of the break which a reasonable inspection should have detected. He only suggested it as a possibility which does not sustain a basis of recovery. There is no evidence that the place of the break was in an area that the witness considered suspicious. It seems to us that it would be unreasonable to require an inspection that would reveal a fatigue fracture which the witness was able to detect only with a high-powered microscope. To impose such a duty of inspection upon electric companies would be the equivadent of making them insurers against injury.

It is well established that when one relies upon pleaded acts of negligence as a basis of recovery, such acts must be proved, or be reasonably inferable from established facts. Under such circumstances negligence will not be presumed. We fail to find evidence of any act of the defendant the doing of which was negligence; nor do we find evidence of the failure to do some act which amounted to negligence.

Misfortunes do occur which result from inevitable accident. A wire may have some defect which the most astute care will not discern. A wire originally good may come to be defective and break, when no human skill could reasonably be expected to detect it. Such accidents, unaccompanied by any negligence on the part of an electric company, can afford no basis for a re-

covery. Only insurers against injury are liable for injuries resulting from such accidents. The only exception to this rule, if it may be called an exception, is where the facts are such as to result in an inference of negligence under the rule of res ipsa loquitur.

We necessarily conclude that negligence on the part of the defendant was not established in the respects charged and that the trial court erred in not sustaining defendant's motions for directed verdicts at the close of all the evidence. The judgments of the district court are reversed and the causes remanded with directions to sustain defendant's motions for judgments notwithstanding the verdicts of the jury.

REVERSED AND REMANDED.

JOSEPH BARKER, JR., EXECUTOR OF THE ESTATE OF ELIZABETH A. BARKER, DECEASED, APPELLANT, V. THE WARDENS AND VESTRYMEN OF ST. BARNABAS CHURCH, APPELLEE.

106 N. W. 2d 858

Filed January 6, 1961. No. 34866.

1. **Appeal and Error.** Where the trial court gives no reason for an order determining a cause and it cannot be determined from the record, on appeal here the successful party in the trial court has the duty to point out here the reason or reasons which he contends justifies the decision of the trial court.
2. **Assumpsit, Action of.** Wherever one person has money to which in equity and good conscience another is entitled, the law creates a promise by the former to pay it to the latter and the obligation may be enforced by assumpsit.
3. **Money Received.** An action for money had and received is an action at law.

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

Kennedy, Holland, DeLacy & Svoboda and *J. A. C. Kennedy, Jr.*, for appellant.

Gross, Welch, Vinardi, Kauffman & Schatz, for appellee.

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

SIMMONS, C. J.

This is an action which began in the municipal court of the city of Omaha. It resulted in a judgment for the plaintiff. Defendant appealed to the district court. Plaintiff filed his petition in the district court. Defendant moved to dismiss "for the reason that the court has no jurisdiction of the subject matter of this cause." The trial court sustained the motion and dismissed the cause without prejudice. Plaintiff appeals.

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

The trial court gave no reason for its ruling and none appears in the transcript.

In Greenberg v. Fireman's Fund Ins. Co., 150 Neb. 695, 35 N. W. 2d 772, we held: "If the trial court gave no reasons for its decision, then the appellant meets the duty placed upon him when he brings the record here with his assignments of error and submits the record to critical examination with the contention that there was no prejudicial error. The duty then rests upon the appellee to point out the prejudicial error that he contends exists in the record and which he contends justifies the decision of the trial court. The appellant then in reply has the right, if he desires, of meeting those contentions."

This has been repeatedly followed as late as Bryant v. Greene, 166 Neb. 520, 89 N. W. 2d 579. The reasoning of that rule is that where the trial court gives no reason for an order determining a cause and it cannot be determined from the record, on appeal here the successful party in the trial court has the duty to point out here the reason or reasons which he contends justifies the decision of the trial court.

Defendant as appellee undertakes to do that here.

Plaintiff, in his petition in the district court on appeal, alleged that he was the executor of the estate of Elizabeth A. Barker, deceased; that defendant is a legal entity formed under Chapter 21, article 8, R. R. S. 1943; that in 1950 and 1951 a "St. Barnabas Church New Building Fund" drive was conducted for the purpose of acquiring another site and erecting a new church building; that substantial contributions were made to the fund, among others a $1,000 gift by Elizabeth A. Barker; that a site was purchased with part of the fund so raised; that in 1957 it was decided that the new site be sold; that it was done at a profit of $24,000; that on request the contributors would be reimbursed their contributions; and that the funds remaining should be spent for repairs and improvements of the "present church building" and for establishing and maintaining a parochial mission. Plaintiff further alleged that he had made request for the return of the $1,000 and that the request had been refused. He prayed for judgment for $1,000 and costs of this action.

So far as the transcript shows this petition and the motion above recited set out the only issues presented to the trial court.

Defendant as appellee here contends that the trial court's appellate jurisdiction is limited to that of the municipal court of Omaha; and that the present action is equitable in nature, being an effort to establish a resulting trust to which the cy pres doctrine applies.

When this action began, section 26-117, R. R. S. 1943, provided that: "The municipal court shall have jurisdiction in all civil cases where the sum in question does not exceed one thousand dollars * * *" except in certain cases not involved here.

Defendant's contention then rests basically on the contention that the action in the municipal court was one in equity; that the municipal court does not have equitable powers and hence was without jurisdiction

of the subject matter; and that the district court on appeal had no jurisdiction.

The transcript does not set out the pleadings in the municipal court. So far as it does refer to the issues tried and decided in the municipal court, the record is exactly to the contrary of appellee's contention.

The transcript from the municipal court shows: "December 16, 1958 Filed Petition. Petition prays for judgment in the sum of $1,000.00, and costs. Due for money had and received." It shows also: "January 29, 1959 Filed Answer." It then recites: October 22, 1959 At 2 P.M. this case as (sic) tried August 6, 1959 and thereafter briefs submitted. On consideration of the pleadings evidence and agruments (sic) the court finds in favor of the plaintiff and against the defendants, and that there is due the plaintiff from the defendants the sum of $1000.00 and costs.

"It is therefore considered, ordered and adjudged by the court that the plaintiff have and recover of and from the defendants the sum of $1000.00, with interest at 6% from date hereof and also their costs herein expended taxed at $3.45."

From that judgment the appeal was taken to the district court.

There is no contention that the amount of the judgment was in excess of the jurisdictional amount of a municipal court judgment. The transcript then shows that the action in the municipal court was one for money had and received.

In School District No. 34 v. Thompson, 51 Neb. 857, 71 N. W. 728, we held with reference to an action for money had and received: "While this form of proceeding has been abolished by the Code, the substantive legal principle on which the action was based still exists, and by that principle the action lies in any case where the defendant has obtained possession of money which ex aequo et bono he ought to refund."

This was followed in McCormick Harvesting Machine Co. v. Stires, 68 Neb. 432, 94 N. W. 629.

In Estate of Devries v. Hawkins, 70 Neb. 656, 97 N. W. 792, we held: Wherever one person has money to which in equity and good conscience another is entitled, the law creates a promise by the former to pay it to the latter and the obligation may be enforced by assumpsit. The rule is again stated in Washington v. Beselin, 141 Neb. 638, 4 N. W. 2d 753. The rule was again stated in Boman v. Olson, 158 Neb. 636, 64 N. W. 2d 310, where we also said: "The action, though falling under the common-law class of assumpsit, is really in the nature of a bill in equity and lies wherever the party should by equity and natural principles of justice refund the money."

An action for money had and received is an action at law. 58 C. J. S., Money Received, § 1, p. 906; 4 Am. Jur., Assumpsit, § 20, p. 508. It follows that the trial court was in error in dismissing the cause.

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

REVERSED AND REMANDED.

WILLIAM D. P. CAREY ET AL., APPELLANTS, V. FRANK E. HUMPHRIES ET AL., APPELLEES.

107 N. W. 2d 20

Filed January 13, 1961. No. 34789.

1. **Appeal and Error.** A consideration by this court of a cause on appeal is limited to errors assigned and discussed, except the court may at its option note a plain error not assigned.
2. **Partnership: Joint Adventures.** To constitute a partnership or joint adventure, in a legal sense, there must be an agreement to share the profits and losses, and an absence of mutual interest in the profits or benefits is conclusive that a partnership or joint adventure does not exist.
3. **Joint Adventures.** A joint adventure is in the nature of a partnership and exists when two or more persons contribute cash,

labor, or property to a common fund with the intention of entering into some business or transaction for the purpose of making a profit to be shared in proportion to the respective contributions.

4. ———. To constitute a 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.

5. ———. The existence of a joint adventure is a question of fact and the burden of establishing it is on the litigant who asserts its existence, and more evidence is required to prove the existence of a joint adventure if alleged joint adventure parties are the only litigants than where the controversy is between a third party and the joint adventurers.

6. **Brokers.** A broker is one who is engaged for others on a commission to negotiate contracts relative to property with the custody of which he has no concern.

7. **Joint Adventures.** The generally recognized equitable principle is that persons engaged in a common enterprise by way of a joint adventure or other similar association of persons stand, within the scope of the enterprise with respect to the property related to or employed in the enterprise or to matters pertaining to the enterprise, in a fiduciary relation each to the other and are bound by strict standards of good conduct and fair dealing the one to the other.

8. ———. However, it is generally recognized that if a joint adventure or a like association of persons is formed for the acquisition, ownership, or development of certain defined property, the equitable rule above referred to will not be extended so as to forbid the acquisition, ownership, or development by one of the parties for his own benefit of property not owned by or concerned in the enterprise and which is outside of its scope.

9. **Trusts.** The burden of proof is on one seeking to establish the existence of a constructive trust to do so by evidence that is clear, satisfactory, and convincing.

10. ———. A constructive trust is a relationship with respect to property subjecting the person by whom the title is held to an equitable duty to convey it to another on the ground that an acquisition or retention of the property is wrongful and that he would be unjustly enriched if he were permitted to retain the property.

11. ———. The law is that each case in which it is sought to es-

tablish a constructive trust must be determined from its facts and circumstances.

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

Halcomb, O'Brien & Everson, for appellants.

Van Steenberg, Myers & Burke and *Baker & Smart*, for appellees.

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

BOSLAUGH, J.

Magnolia Petroleum Company, hereafter called Magnolia, was the owner of oil and gas leases covering the west half of the northwest quarter, the west half of the northeast quarter, and the south 58.13 acres of the east half of the southwest quarter of Section 17, and Lot 3 in Section 20, Township 12 North, Range 56 West of the 6th P. M., Kimball County, Nebraska, together with other lands not involved in this litigation. Magnolia proposed in writing to Dan Reinfried, designated herein Reinfried, that if he would commence on or before a stated date the drilling of an oil well to be located at a described location on Lot 3; would prosecute the drilling of the well with due diligence to a depth sufficient to test to the satisfaction of Magnolia the Skull Creek shale at an estimated depth of 6,700 feet unless oil or gas was produced in paying quantities at a lesser distance; would fully comply with all other provisions of the writing; and would complete the well within a reasonable time not later than 60 days from the date of the commencement of it, Magnolia would assign to Reinfried the described oil and gas leases to the extent and insofar as they covered the above specifically described land of about 240 acres more or less. The writing containing the offer of Magnolia to Reinfried stated it was not binding upon Magnolia until it was accepted by Reinfried as it was submitted to him as evidenced by

his signature subscribed thereon and its return to Magnolia within 15 days from the date of the writing; and upon Reinfried's signing and returning it and three copies thereof within that time, the writing would constitute a valid and binding contract between Reinfried and Magnolia. Reinfried signed the writing under the words endorsed thereon: "ACCEPTED in all its terms and conditions, this 28 day of January, 1958." The offer made by Magnolia to Reinfried as stated above was subject to other definitely stated conditions and obligations not necessary to be recited herein because none of them are involved in this litigation.

Later Sinclair Oil & Gas Company, designated hereafter as Sinclair, offered Reinfried by an instrument designated "Acreage Contribution Agreement. Our Lease No. 132 Kimball County, Nebraska" that if he commenced operations for the drilling of a well for oil and gas on or before a date stated upon a described location identical with the one designated by Magnolia and drilled it with due diligence to a depth sufficient to test the top of the Skull Creek formation anticipated in this vicinity at approximately 6,650 feet, then, upon being furnished by Reinfried with evidence satisfactory to Sinclair that such test well had been so commenced, drilled, and finally completed either as a producing well or plugged and abandoned as a dry hole on or before May 15, 1958, Sinclair would assign to Reinfried all its right, title, and interest in and to the east half of the southeast quarter of Section 17, Township 12 North, Range 56 West of the 6th P. M., in Kimball County, Nebraska. The offer of Sinclair to Reinfried as above recited was made subject to compliance by the latter with definitely stated conditions not necessary to be set forth herein because none of them are involved in this litigation. The instrument containing the offer of Sinclair to Reinfried provided it should not be binding on Sinclair unless its acceptance by Reinfried was noted on the instrument and it was returned to Sinclair within

15 days from its date. It was accepted and agreed to in writing, endorsed thereon, and signed by Reinfried on the fourth day after its date.

Shell Oil Company, identified herein as Shell, on the date Reinfried accepted the offer of Sinclair above referred to, offered in a writing designated "Dry Hole Contribution" to contribute $6,500 toward the cost of drilling a test well by payment thereof directly to Braden provided the drilling of the well was completed as a dry hole, the test to be commenced not later than a date specified at a described location on Lot 3 and thereafter drilled with due diligence to a depth of 75 feet below the top of the Dakota "J" sandstone or to a depth of 6,760 feet, whichever was first reached. Shell specified its offer was subject to other stated conditions but they are not repeated herein because none of them are involved in this litigation. The writing evidencing the offer of Shell was accepted and acted upon.

The Braden Drilling Company was a partnership. Robert G. Braden, hereafter referred to as Braden, was one of the two members of it. He was an active member of the Kansas Bar; resided and had his office in Wichita, Kansas; and he performed legal services for and participated in the activities of the partnership which maintained an office in Denver, Colorado, in charge of Jerry Slater, hereafter called Slater. Any acreage in the Denver-Julesburg Basin in which the partnership was concerned was held in the name of Braden for its convenience.

A letter was signed and transmitted by Braden to Reinfried in which recitals were made concerning the commitment of Magnolia and Sinclair to assign oil and gas leases to Reinfried and the commitment of Shell to contribute dry-hole money as above stated. The letter of Braden stated that it was to confirm the verbal agreement between him and Reinfried relative to the real estate described in the leases and was in substance as follows: Reinfried agreed to assign the acreage cov-

ered by the leases to Braden and they understood that Reinfried was to receive an overriding royalty equal to 4 percent of seven-eighths working interest in each of the tracts and a cash consideration of $500; that Braden was to receive a full seven-eighths working interest therein burdened only by the overriding royalty of Reinfried; that Braden was to have all the benefits of the dry-hole obligation of Shell as above recited herein, subject to the conditions recited in the agreement concerning it; and that the oil and gas well was to be commenced not later than March 9, 1958. Reinfried was asked by the letter, if it expressed his oral agreement with Braden, to sign and return one copy of the letter and retain the other copy of it. Reinfried attached his signature thereto under the words written on the original of the letter when he received it: "ACCEPTED this 4th day of February, 1958."

The time of the commencement of the oil and gas well was by agreement of the interested parties extended. The drilling equipment was moved to the location of the well not later than April 1, 1958. The drilling of it was finished and it was established as a producing oil well on about April 28, 1958.

There is no claim made in this case that any agreement or obligation of Magnolia, Sinclair, Braden, or Reinfried as hereinbefore recited was not wholly and timely performed and satisfied. Magnolia assigned the oil and gas leases described in its agreement with Reinfried to him as it was obligated thereby to do; likewise Sinclair assigned the oil and gas lease described in its agreement with Reinfried to him as it was obligated thereby to do. Braden paid Reinfried the $500 cash consideration and drilled the well which proved to be an oil-producing one, as his contract with Reinfried obligated Braden to do. Reinfried assigned the oil and gas leases he secured from Magnolia and Sinclair, respectively, to Braden subject to the 4 percent of the seven-eighths overriding royalty retained by Reinfried

as he was obligated to do by the agreement between him and Braden.

The agreement and obligation of Shell concerning the contribution of dry-hole money was wholly annulled and disposed of by the fact that the well drilled by Braden was a producing oil well and was not a dry hole.

Reinfried obtained information in the latter part of June 1958, by happenings hereafter stated, that there was no oil and gas lease covering Lots 1 and 2 of Section 20, Township 12 North, Range 56 West of the 6th P. M., Kimball County, Nebraska. He secured an oil and gas lease covering the land last described from the owner and her husband under date of July 7, 1958. Reinfried was named as the lessee therein and the lease was soon thereafter filed for record and recorded in the office of the register of deeds of Kimball County, Nebraska. The lease covering the last above-described real estate and an amendment and extension of it were filed on July 23, 1958, and were assigned by the lessee to Frank E. Humphries, B. B. Bradish, and Dan Reinfried, subject to an undivided 4 percent of seven-eighths overriding royalty of all oil and gas produced, saved, and marketed from the acreage described in the lease which was reserved and retained by Reinfried. The assignees named in the assignment of the lease were the members of a partnership organized April 1, 1958.

There were about a score of persons and one partnership named as plaintiffs in this case in the trial court. The record is substantially silent concerning all of them except Robert G. Braden mentioned above and Ray O. Braden, the only members of the Braden Drilling Company, a partnership. Any interest of the individual plaintiffs except Robert G. Braden in the subject of this litigation was derived through Robert G. Braden and is identical in character with his interest. The above-described individuals or any of them did not participate in any way in the negotiations or agreements concerning or the performance of the agreements which

resulted in the drilling of the oil well on Lot 3 above described except Ray O. Braden who was the other member of the Braden Drilling Company. There were several defendants named in this case when it was commenced. All of them except Frank E. Humphries, B. B. Bradish, and Dan Reinfried as individuals and as the only members of the partnership Humphries-Bradish-Reinfried were dismissed from the case and it was dismissed with prejudice as to them before the trial of the case was had. Frank E. Humphries, B. B. Bradish, and Dan Reinfried will be designated as appellees except when they are referred by the surname of the one or ones mentioned. The partnership of Humphries-Bradish-Reinfried will be designated by the word partnership. The plaintiffs in the trial court will be designated appellants.

The amended petition of appellants is long and involved. The substance of the parts of it necessary to be stated to show the basis of the claims of appellants for the relief they seek is as follows: That Braden and Reinfried before January 25, 1958, made an agreement for testing an area surrounding Lot 3, Section 20, Township 12 North, Range 56 West of the 6th P. M., Kimball County, Nebraska, afterwards referred to as Lot 3, for oil and gas for their mutual benefit and gain which was reduced to writing on January 25, 1958; that appellants, by their representative Slater, requested Reinfried to ascertain by checking the records of Kimball County, Nebraska, and Weld County, Colorado, or by other means, if there was any acreage available to be leased for oil and gas exploration and development within a 1-mile radius of Lot 3; that Reinfried agreed to take suitable steps before the commencement of the proposed test well to ascertain the facts in that regard; that if any acreage was found to be available for leasing, an effort would be made to secure a lease or leases covering it; that if secured appellants and appellees would share in the oil and gas leasehold estates secured on

the same terms as was provided in that respect in the oil and gas leasehold estates referred to in the agreement made by Reinfried and Braden in relation to drilling a well on Lot 3 as hereinbefore stated; that appellants before the commencement of the test well by Braden inquired on occasions of appellees or some of them if they had ascertained if there was any open acreage or oil and gas leases that could be obtained in the area where the well was to be drilled, and appellees or some of them reported to appellants that the checking had not been completed, but assurances were given that it would be accomplished promptly; that appellees advised appellants before the drilling of the test well on Lot 3 was commenced, the exact date of which appellants cannot state, that there was no acreage not leased for oil and gas within a radius of 1 mile of the location where the drilling was proposed and intended to be done; that appellants relied on what they were told or otherwise they would have made a suitable check for open acreage before the drilling of the well was commenced; that a general custom existed in the oil and gas exploration and development industry whereby any person intending to drill a test well for oil and gas refrained from doing so on land adjoining a tract not leased for oil and gas exploration; that appellants knew and appellees knew or should have known of the custom at the times herein concerned; that appellants would not have commenced the drilling of the test well but for the assurances given them by appellees as aforesaid; that Lots 1 and 2 of Section 20 which were immediately east of Lot 3 of that section were in fact not covered by an oil and gas lease at any time before July 7, 1958, which appellees knew before the undertaking was entered upon in reference to the test well on Lot 3 or during the time that undertaking was being carried out, but they or any of them did not report such fact to appellants or any of them; that Reinfried secured an oil and gas lease on Lots 1 and 2 on or about July

7, 1958, which was recorded in the public records of Kimball County, Nebraska, without the knowledge or acquiescence of or any notice to appellants; that appellees violated their duties and obligations to appellants in the following respects: (1) Appellees failed to inform appellants of facts important to the object of their mutual undertaking of which appellees had knowledge before the commencement thereof or during its prosecution; (2) appellees did not properly investigate and ascertain if there was open, unleased acreage for oil and gas exploration and development within a 1-mile radius of Lot 3 before commencement of the test well or if they did they failed to correctly report the true facts to appellants or any of them; (3) appellees did not advise appellants of the fact that Reinfried had acquired an oil and gas lease on Lots 1 and 2; and (4) appellees have assigned the leasehold estate in Lots 1 and 2 created by the oil and gas lease secured thereon by Reinfried to the extent that it is not available to convey to appellants the interest therein they are entitled to have and enjoy.

The amended petition also states that the great cost of drilling a test well for oil and gas on Lot 3 by appellants resulted in an enhancement of the value of an oil and gas leasehold estate as to Lots 1 and 2 and it would be unjust and inequitable if appellants were denied probable and proximate results of their endeavors; that if appellees were permitted to secure a greater portion of the benefits resulting from the undertaking of appellants and appellees than was originally contemplated, an unjust enrichment of appellees would result therefrom; that justice, fairness, and equity require an adjudication that appellees hold all the title and interest in and to the aforementioned oil and gas leasehold estate in Lots 1 and 2 for the use and benefit of appellants; and that substantial quantities of oil have been removed from Lots 1 and 2 and it constitutes a portion of the leasehold estate involved in this litigation.

Appellants ask the court to declare that appellees and each of them hold the right, title, and interest standing in their respective names with reference to the oil and gas leasehold estate created by the lease of July 7, 1958, and the amendment and extension thereof recorded respectively in book 39, pages 621 to 623, and book 39, pages 624 and 625; and in the oil and gas leasehold estate created by the leases described in the written agreement hereinbefore described made by Magnolia and Reinfried recorded in book 1, page 191, and in book 1, page 193, of the public records of Kimball County, Nebraska, so far as the leases cover the west half of the northwest quarter, the west half of the northeast quarter, and the south 58.13 acres of the east half of the southwest quarter, Section 17, Township 12 North, Range 56 West of the 6th P. M., Kimball County, Nebraska, and Lot 3 in Section 20, Township 12 North, Range 56 West of the 6th P. M., in Kimball County, Nebraska; and in the oil and gas leasehold estate evidenced by the lease recorded in book 10, pages 213 and 214, of the public records of Kimball County, Nebraska, insofar as it covers the east half of the southeast quarter of said Section 17, in trust for appellants in the proportions set forth in the amended petition, and for such other and further relief as may be just and equitable.

The separate answer of Reinfried, the separate answer of Frank E. Humphries and B. B. Bradish, and the separate answer of the partnership each admitted the agreement entered into by Reinfried and Braden in reference to the drilling of a well on Lot 3 as hereinbefore recited; that the members of the partnership on or about April 1, 1958, entered into an agreement providing that they would thereafter conduct an oil and gas business for the benefit of the three of them in the proportion of one-third to each; that Magnolia and Reinfried, and Sinclair and Reinfried, entered into agreements as hereinbefore stated; that Lots 1 and 2 of Section 20

above described were not covered by any oil and gas lease before July 7, 1958; that Reinfried secured in his name an oil and gas lease covering Lots 1 and 2 on or about July 7, 1958; that an amendment and extension of that oil and gas lease were secured by Reinfried on or about July 21, 1958; and that the oil and gas lease and the amendment and extension thereof were assigned by Reinfried to Frank E. Humphries, B. B. Bradish, and Dan Reinfried. Each of the answers denied all of the statements of the amended petition not admitted. The separate answer of Frank E. Humphries and B. B. Bradish and the separate answer of the partnership contained additional allegations as follows: That on or about April 1, 1958, appellees entered into an agreement by the terms of which they agreed to exchange among each other certain interests in oil and gas leases and thereafter to conduct an oil and gas lease business for the benefit of all of them in a proportion of one-third to each; that assignments of interest in oil and gas leases were made in accordance with the agreement and since that date appellees have each equally shared in the oil and gas business conducted by them; that because of the agreement Reinfried assigned to Frank E. Humphries and B. B. Bradish each a one-fourth of 1 percent of seven-eighths overriding royalty in the oil and gas leases covering the west half of the northwest quarter, the west half of the northeast quarter, and the south 58.13 acres of the east half of the southwest quarter of Section 17, and Lot 3 in Section 20, Township 12 North, Range 56 West of the 6th P. M., in Kimball County, Nebraska; and that prior to the acquisition of the oil and gas lease on Lots 1 and 2 and for some time thereafter appellees or any of them did not know nor did they have reason to know that Braden or his agents claimed to have made an alleged agreement with appellees or any of them employing appellees or any of them to check the records of Kimball County, Nebraska, or Weld County, Colorado, to ascertain if there were any oil and

gas leases available and to ascertain if there was acreage not covered by oil and gas leases within a 1-mile radius of Lot 3. The separate answer of Frank E. Humphries and B. B. Bradish alleged that they were each bona fide purchasers for value of all interest in the oil and gas leases transferred to them by Reinfried and that they and each of them were without notice of any claims of any kind of Braden or his assigns at the time of the acquisition of such interests in the oil and gas leases by B. B. Bradish and Frank E. Humphries.

The reply of appellants to the answers of appellees was a denial of the statements therein inconsistent with the amended petition and an assertion that any interest Reinfried had on or about April 1, 1958, in the west half of the northwest quarter, the west half of the northeast quarter, and the south 58.13 acres of the east half of the southwest quarter of Section 17 was acquired by his participation in the joint venture referred to in the amended petition.

The district court found at the conclusion of the trial of this case generally for appellees and against appellants; that the agreement made by Reinfried and Braden concerning the drilling of a well on Lot 3, appearing in evidence as exhibit No. 1, did not create the relation of principal and broker, principal and agent, or joint adventurers; that there was not at any time any confidential relationship between Reinfried and the plaintiffs (appellants) or any of them or between the other defendants (appellees) and plaintiffs or any of them; that the evidence is insufficient to show any custom creating duties and obligations between Reinfried and plaintiffs or any of them or between the other defendants and the plaintiffs or any of them known to said parties; and that no constructive trust should be imposed upon the defendants' interests in the oil and gas leasehold estates described in the prayer of the plaintiffs' amended petition. A judgment of dismissal of the action was rendered. A motion for a new trial was

denied and this appeal is from that order.

Appellants say that the relationship of Reinfried and appellants in carrying out the project poses the major question. This is equivalent of saying the relationship of Reinfried and Braden in entering into a contract for the drilling of the well on Lot 3, completing it as a producing well, and fully consummating the contract is decisive of this case because none of the other appellants had any negotiations or contract with Reinfried concerning that contract or anything done or accomplished because of it. Any interest or right of those appellants in the subject matter of this case resulted wholly by virtue of what took place between them and Braden to which Reinfried was a total stranger. Appellants characterize the relationship as fiduciary because, as they assert, Reinfried and Braden were thereby engaged in a joint adventure. Braden had no conversation or negotiation with Reinfried concerning the drilling of a well on Lot 3. The negotiations with reference to that were carried on between Reinfried and Slater, an employee of the drilling company who had charge of its Denver office. The first contact of Braden with that transaction was when the letter which later was made the contract between him and Reinfried was submitted to Braden for his examination at Wichita, Kansas. The letter was addressed to Reinfried, was signed by Braden, and he asked Reinfried to accept it by subscribing his signature on the letter if he found it evidenced the true agreement between them in reference to the drilling of the well. It was known and acted upon by both of them that Braden was acting for the Braden Drilling Company and that company did the actual drilling of the well on Lot 3 in performance of the contract of Reinfried and Braden. Much of the property of the Braden Drilling Company was carried in the name of Braden and much of its business was done in the name of Braden for convenience.

Reinfried thought of attempting to put the drilling deal

together which resulted in the oil well on Lot 3 as early as November 1957. He explained the manner of proceeding to put together that kind of a deal by saying that he looked for an area around which wells had been drilled that looked like it might be productive. He then searched for three or more leasehold interests where the acreage was contiguous so that he could acquire a farm out on one leasehold, support from another in the way of acreage contribution or dry-hole money, and the same from other adjacent leaseholders. He secured the information from the Pomco map which he characterized as the working tool of putting together drilling deals. It was 2 months or more after the first contact of Reinfried with a major oil company before he was able to get the farm out from Magnolia, the acreage contribution from Sinclair, and the dry-hole support from Shell of the project concerned in this case. A letter from Magnolia dated January 7, 1958, rejecting the support requested in a proposal made to it by Reinfried and containing a counterproposal by Magnolia of the acreage described in the farm-out letter which became the agreement made by it and Reinfried in reference to a test well on Lot 3 was the first commitment he secured. He then obtained agreements with Sinclair and Shell. Reinfried then had to find someone with whom he could contract to drill the test well on Lot 3.

Slater, who represented the Braden Drilling Company, inquired of Reinfried in January of 1958 if he had any drilling deals. He said he had one and he would be glad to submit it for consideration. He did, included in which was a plat of the farm out and the support acreage which exhibited the acreage in orange on a white background and located it in Township 12 North, Range 56 West, in Kimball County, Nebraska. Later Slater said they were interested in getting the drilling deal but the terms would have to be negotiated. Reinfried asked more than the final agreement which is shown by the contract between Braden and Reinfried

for the drilling of a test well on Lot 3 as hereinbefore stated. Reinfried had his drilling deal formulated and informal commitments of a farm-out acreage from Magnolia, a farm-out contribution, and dry-hole support before he was contacted by Slater. He testified as to what Reinfried offered him: "He had to offer me three 80-acre tracts from Magnolia, one from Sinclair, and some dry hole money from Shell Oil Company, a drilling deal." Slater was asked: "What commitments had to be fulfilled before this acreage could be earned?" He answered: "We were to drill a well in Lot 3, in the approximate center of what would have been a 40-acre tract, section 20." The offer of Reinfried to Slater was expressed in these words by him: "Well, he offered it to me to drill for an override and some cash to him." The written contract between Reinfried and Braden confirms in writing just exactly what Slater says Reinfried had to sell him and the terms under which he bought it from Reinfried.

The status of Reinfried when he was approached by Slater was that Reinfried had by his sole effort formulated a drilling deal. His undertaking was to sell or dispose of it for a monetary consideration and for an overriding royalty. He accomplished this by selling the drilling deal to Braden by a contract which obligated him to pay Reinfried $500 and he was permitted to retain an overriding royalty of 4 percent of seven-eighths of the production of the acreage covered by the leases. The undertaking of Reinfried was also to see that Braden complied with the contract which provided for the drilling of the well the performance of which would be the carrying out by Reinfried of his agreements with Magnolia and Sinclair and thus he would be insured the assignment of the leases from those companies and his overriding royalty. His final undertaking was to secure and receive the assignment of the leases from Magnolia and Sinclair and the making of assignments of them to Braden by Reinfried, reserving

and retaining to him the agreed overriding royalty. Braden had no interest in the drilling deal Reinfried developed until after it had been completely formulated. Braden did not know of the existence of it before that time. He first heard of it after Reinfried had presented it to Slater. The first act of Braden in reference to the drilling deal was when he secured it from Reinfried by contract made by him and Braden upon the terms and conditions evidenced by the contract as previously recited herein. The next act of Braden's undertaking in reference to the proposed well was to pay for the drilling deal which he did by seeking and securing financial assistance from his investors. His next act in the undertaking was to pay Reinfried the $500 as provided in the contract and drill the test well on Lot 3 as required by the contract with Reinfried. His succeeding act concerning the undertaking was to secure the assignment of oil and gas leases from Reinfried to which he was entitled by the contract for the drilling of the well. The final act of Braden was to operate the properties for the benefit of himself and the investors.

It follows that the undertaking and sole concern of Reinfried was to dispose of the drilling deal he had formulated for cash and an overriding royalty. It was the undertaking of Braden to acquire and pay for the drilling deal and to drill a test well on the designated location. The undertaking of each of the parties was different than that of the other. There was no community of interest and common purpose. The interest and purpose of Reinfried was to dispose of the drilling deal he had worked up and to receive cash and override for it. The interest of Braden was to acquire the drilling deal, sell interests to investors to assist in paying for it, pay the monetary consideration for the deal, drill the well, and thereby for himself earn the entire leasehold interest in the properties other than those which he had sold and assigned to investors. It

is clear that the interest and purpose of each were not identical but entirely different. There was not an equal voice in the performance or equal control of or over the agencies of performance. It was entirely in the hands of Braden to drill the test well and Reinfried could do nothing about it but to require Braden to comply with the terms of the contract which provided for the drilling of the well. There was no obligation for the sharing of losses resulting from the drilling of the well by Braden and Reinfried. This is made conclusively clear by the statement in the brief of appellants: "Plaintiffs were to pay actual expenses for test which proved to be $29,395.43 and if test be dry they would receive $6,500.00 which mean (means) an assumed net outlay of $22,895.43 in event of failure of enterprise." In the circumstances of this case there was a failure to establish either a joint undertaking, a community of interest, a common purpose, an equal voice in performance, an equal control of agencies of performance, or a sharing of profits or losses.

In Bank of Cedar Bluffs v. LeGrand, 127 Neb. 183, 254 N. W. 892, this court said: "To constitute a partnership or joint adventure, in a legal sense, there must be an agreement to share the profits and losses." In the opinion it is stated: "A joint adventure is in the nature of a partnership and exists when two or more persons contribute cash, labor or property to a common fund with the intention of entering into some business or transaction for the purpose of making a profit to be shared in proportion to the respective contributions. There is no evidence in this case of any agreement that the profits of the farming and stock-raising business should be divided between the husband and the wife * * * (and) the question of losses was not brought up * * *."

Alexander v. Turner, 139 Neb. 364, 297 N. W. 589, states: "A joint adventure has been defined as an

undertaking by two or more persons to carry out a single business enterprise for profit."

Soulek v. City of Omaha, 140 Neb. 151, 299 N. W. 368, declares: "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." In the opinion it is said: "And the absence of mutual interest in the profits or benefits is conclusive that a partnership or joint adventure does not exist."

In Rossbach v. Bilby, 155 Neb. 575, 52 N. W. 2d 747, the following is stated in the opinion: "The existence of a joint adventure is a question of fact under the evidence, and further, more convincing evidence is required to prove existence of a joint adventure where alleged joint adventure parties are the only litigants than where the controversy is between a third party and the joint adventurers. The burden of establishing the joint adventure is on the plaintiff." See, also, Kleinknecht v. McNulty, 169 Neb. 470, 100 N. W. 2d 77; Lyhane v. Durtschi, 144 Neb. 256, 13 N. W. 2d 130.

The argument that the relationship of Reinfried and Braden in reference to the enterprise of drilling a well on Lot 3 was a joint adventure is not sustained by the evidence and cannot be accepted.

Appellants argue that the status of Reinfried during his acts relating to obtaining the drilling of the test well on Lot 3 was that of a broker. This argument of appellants is based on a statement in a letter that he wrote to a representative of Sinclair in which Reinfried referred to himself as broker and on the basis that Slater in his testimony spoke of Reinfried as a broker. The letter mentioned above was not on the subject of the test well on Lot 3 but concerned another proposed

enterprise and was contained in only an incidental remark. The terminology by which a layman describes the activities of another is not always accurate and may not be indicative of the truth. In 8 Am. Jur., Brokers, § 2, p. 989, the author defines a broker in this manner: "As generally defined, a broker is an agent who, for a commission or brokerage fee, bargains or carries on negotiations in behalf of his principal as an intermediary between the latter and third persons in transacting business relative to the acquisition of contractual rights, or to the sale or purchase of any form of property, real or personal, the custody of which is not intrusted to him for the purpose of discharging his agency. Brokers have also been defined as those who are engaged for others in the negotiation of contracts relative to property with the custody of which they have no concern. They act as negotiators in bringing other persons together to bargain * * *."

In 12 C. J. S., Brokers, § 1, p. 5, it is stated: "A broker is one who is engaged for others, on a commission, in negotiating contracts relative to property with the custody of which he has no concern * * *."

In Gile v. Tsutakawa, 109 Wash. 366, 187 P. 323, it is said: "A broker is one who is engaged for others on a commission to negotiate contracts relative to property with the custody of which he has no concern." See, also, Rodman v. Manning, 53 Ore. 336, 99 P. 657, 20 L. R. A. N. S. 1158; French v. City of Toledo, 81 Ohio St. 160, 90 N. E. 160, 25 L. R. A. N. S. 748; Turner v. Crumpton & Crumpton, 21 N. D. 294, 130 N. W. 937, Ann. Cas. 1913C 1015.

The facts in this case which exhibit in detail the acts of Reinfried and the written agreements which fully express the facts of his entire conduct in reference to the exploration for oil on Lot 3 condemn the argument of appellants that he acted as a broker for anyone in reference to that enterprise. Reinfried acted as a principal concerning it. He was not an agent or

representative of anyone in disposing of the drilling deal to Braden. Reinfried acted only for himself in securing the leases and the dry-hole money and after he had assembled the drilling deal he disposed of it to Braden while acting independently and entirely for himself. Reinfried continued to act only for himself until his contract with Braden was fully completed. This contention of appellants is entirely without foundation.

The record does not support the assignment of error that the district court erred in holding that appellants pursued the wrong remedy in this case or the assignment of error that the trial court erred in refusing to "require correction as to interest assigned in leasehold, particularly as to East Half of Southeast Quarter of Section 17." There is no showing exhibited by the record that the trial court did hold that appellants pursued the wrong remedy. It is impossible to determine to what the second assignment noted above referred. The pleadings of appellants contain no basis for such correction or reformation. The prayer of the amended petition seeks no such relief. The briefs of appellants contain no discussion of the alleged error. Neither of these assignments presents anything this court can consider. Schaffer v. Strauss Bros., 164 Neb. 773, 83 N. W. 2d 543.

Appellants allege in their amended petition that there was a general custom in the oil and gas exploration and development industry whereby any person intending to drill a test well for oil and gas refrained from doing so on a location adjoining a tract of land not leased for oil and gas exploration. Appellants attempted to prove the existence of the alleged custom and that appellees knew or should have known of it before the well was commenced on Lot 3. The district court made a specific finding against appellants as to that claim. There is no assignment of error by appellants that the finding in that regard was incorrect, neither is the matter dis-

cussed in the brief on this appeal. There is, therefore, nothing this court may consider in regard to the alleged custom. Schaffer v. Strauss Bros., *supra.*

The proof offered by appellants in reference to their claim that Reinfried, or Reinfried and Humphries, were engaged by Slater, acting for Braden, to check the area around Lot 3 before the test well was commenced to ascertain if there was any acreage that was not covered by an oil and gas lease was only the testimony of Slater as follows: Sometime in between the time that the well was drilled he asked Reinfried and Humphries to check the acreage around the thing within 1 mile of that location. He could not give the dates but he said he instructed them several times before the rig was moved on the location. He later testified he asked Reinfried to check the records for the witness to see if there was any area unleased and that was at the time the agreement between Reinfried and Braden for the drilling of the well on Lot 3 was actually being reduced to writing and that Reinfried then said he would do that. Slater said that happened when the negotiations (for drilling the well) were being completed and that was the first time he had instructed it (checking the records by Reinfried). Witness was specifically asked: "* * * the first time was the time that you and Mr. Reinfried were formally reducing your agreement to writing?" The witness answered the question in the affirmative. The witness during the negotiations he had with Reinfried concerning the drilling of the well was acting on behalf of the Braden Drilling Company. Subsequently in his testimony he stated that he contacted Humphries and Reinfried not personally but by telephone, but he did not know when the first instance was that he told them to check those (records) and they agreed to do it but around the time the rig was moved on location on Lot 3 they told witness they had done it. Witness then changed "they" to "Reinfried" and said he told the witness that he,

Reinfried, had checked the records and there was no open acreage. Thereafter during the examination of the witness he said he hired Reinfried and Humphries to do day work after Braden agreed to drill it just as he hired all these brokers to check this acreage for him but there was nothing mentioned about compensation. He said the usual compensation for checking records in that area was from $25 to $50 per day and that generally when he had such work to do he employed a person who was experienced in checking records. The witness finally said there was no agreement to pay Reinfried or Humphries any monetary compensation for checking the records as the witness allegedly requested but they were to get their pay for that work from 4 percent of seven-eighths overriding royalty realized from any new lease they secured on land they found was subject to lease while they were checking the record under the arrangement made with them by Slater.

The assertion that Reinfried, or Reinfried and Humphries, were solicited or employed to make an investigation as to unleased acreage around the drill site of the test well on Lot 3 was unqualifiedly denied by them. Reinfried testified that from the time he first mentioned the drilling deal concerning the proposed test well on Lot 3 until after the well was drilled and completed, Slater made no request to Reinfried to check any acreage for Slater, and Reinfried first learned that Slater claimed that he requested Reinfried to check the area around Lot 3 in August 1958. Humphries while a witness said that he had no conversation with Slater concerning anything connected with the well which was drilled on Lot 3 until sometime in the month of August 1958, after he had heard that Slater was claiming that he had instructed Humphries to check the records for unleased acreage around Lot 3. The witness first knew this claim was in fact made when it was asserted by Slater in August 1958, when Hum-

phries was in the office of Slater. Humphries denied that he was at any time asked or instructed by Slater to check any records for open or unleased acreage around the site where the test well was drilled.

The testimony of Slater concerning the subject that he asked Reinfried to check the records for Slater to ascertain if there was any area unleased around where the test well was proposed to be drilled was that he did that at the time the agreement between Reinfried and Braden for the drilling of the well was actually being reduced to writing and that Reinfried said he would make such a check. Slater said the request was made by him and accepted by Reinfried when the negotiations for the agreement were being completed and that was the first time the subject was discussed. Slater conducted all the negotiations between his employer, the Braden Drilling Company, and Reinfried in reference to the drilling contract between them which was reduced to writing and executed by Braden for his company and Reinfried for himself. The writing which became the evidence of the drilling contract was made in the Denver office of the Braden Drilling Company which was managed by Slater. It bears date of January 25, 1958. After it was prepared it was sent to Braden at Wichita, Kansas, for his attention. He signed and transmitted it to Reinfried who executed it 1 week later. The writing became a complete contract. It specified in detail the obligations of each of the parties to it. It was delivered, became effective, and was fully performed according to its terms. It contained no provision obligating Reinfried to do any checking or investigating concerning any land. The real estate covered by the oil and gas leases involved in the transaction were precisely described in the written agreement, and Lots 1 and 2 of Section 20 were not mentioned. Those lots were entirely excluded and were wholly unconcerned in the transaction. Braden sought, obtained, retained, and acted upon writings from Rein-

fried, which were composed and written by Slater, concerning modifications of the well-drilling contract in respect to the time of the commencement date of the well. These writings expressly affirmed all other terms and provisions of the drilling contract and stated they should remain as they were originally written. The last of these writings was more than a month after the drilling agreement was prepared but no effort was made to add to it a provision concerning checking for unleased areas around the drilling site. These facts detract from the quality of the testimony of Slater.

In another part of his testimony Slater said he asked Reinfried and Humphries to check the acreage around the location of the well and to purchase any lease they could obtain on any unleased land they found; that Braden would buy the lease; and that Reinfried and Humphries would receive their override the same as they did in the original deal. Slater did not tell them how much they could pay for a lease on any new acreage. The witness stated he instructed them in this regard several times. He could not state the dates this was done but did say it was before the rig was on location.

Humphries was not interested in any manner in the drilling deal concerning a test well on Lot 3. He did not claim nor was he entitled to any override involved in that enterprise. Humphries had no business transaction with Reinfried concerning any oil business such as is involved in this case at or prior to the time designated by Slater as before the rig was moved on location. In fact Humphries had no business transaction with Reinfried except they each paid one-half of the expense of the office space they respectively occupied but each had and conducted his own separate business and neither had any interest in the business of the other before April 1, 1958, at which time the partnership of Humphries-Bradish-Reinfried was organized. Humphries had no specific information about the drilling

deal of Reinfried described herein at the time last above designated by Slater. It was not at all probable that Humphries would have obligated himself to check the acreage within a given radius of a specified location when he had no interest in and only slight information of the transaction involved and could not profit therefrom. Humphries did not claim any skill for or experience in that kind of investigation work. Slater said it had been the previous practice of Braden Drilling Company when it had checking of public records to be done to employ an experienced person in that field to do it, generally on the basis of day work at an expense of from $25 to $50 per day.

Slater further testified he contacted Reinfried and Humphries concerning checking the area around Lot 3 when the deal was consummated in February. Soon after making that statement Slater said that Reinfried was employed by Braden to check the acreage around the location of the test well; that he was to be compensated for his employment by day work; and that he, Slater, would not have been surprised if Reinfried did not ever send him, Slater, a bill for it. When Slater was asked the exact terms of the hiring by him of Reinfried and Humphries he said they were hired just like all those brokers. He asked them if they would check this acreage for him and they said they would. There was nothing mentioned about the compensation that would be paid. Slater was asked if Reinfried was to do the checking for nothing and he said: "I don't know, there wasn't anything talked about it, but they could have sent me a bill, they could not have sent me a bill. I've done things for people at times that I've turned deals to as a favor without ever billing them for it." The testimony of Slater on the subject discussed above was equivocal, uncertain, unsatisfactory, and in some respects contradictory. It was not of the quality required to even tend to show, much less to establish,

justification for a finding of or a decree for the imposition of a constructive trust.

It is and has been the consistent doctrine of this court that the burden of proof is on one seeking to establish the existence of a constructive trust to do so by evidence that is clear, satisfactory, and convincing. Wiskocil v. Kliment, 155 Neb. 103, 50 N. W. 2d 786; Bailey v. Karnopp, 170 Neb. 836, 104 N. W. 2d 417.

There is a fact in the record which indicates that Braden or Slater did not think that checking for unleased land near Lot 3 was of such tremendous importance when the drilling contract was being negotiated and consummated as they have attempted to make it appear in this litigation. The fact is that Braden had and examined abstracts of title to the land actually involved in the drilling deal concerning Lot 3 and the abstracts he was furnished covered the title to Lots 1 and 2 adjoining Lot 3. Braden was asked this question: "Then, you are prepared to make the flat statement that some of the abstracts did cover Lots 1 and 2?" The answer of Braden was an unqualified "Yes." Braden did not say he examined the abstract to Lots 1 and 2 but he had an opportunity to do so. It may be that Slater and Braden relied on the Pomco map which showed that Magnolia had a lease on Lots 1 and 2 when the drilling contract was negotiated and consummated just as Reinfried did. It could be that the idea that Reinfried would do the checking for unleased land was an afterthought when it was learned that he had secured a lease on Lots 1 and 2 and Slater was proclaiming by telephone and otherwise that there was sure to be a lawsuit involving that lease.

Appellants contend that all contacts in carrying out the terms of the contracts with Magnolia and Sinclair on the one hand and Braden on the other hand were handled through Reinfried and because of this he stood in a fiduciary relationship. The record does not sustain this. The fact as established by the record is the

very antithesis of this contention. All the instruments and writings between Reinfried and Magnolia and Sinclair are in evidence and there is nothing in them showing any communications from Reinfried to either of the oil companies in reference to any of the matters required by the contracts with them and there was no offer of proof of any communication other than what is contained in the contracts concerning what the companies should do. The record shows that each of the participants in arranging for and accomplishing the drilling of a test well knew exactly what the facts were, what each was obligated to do, and what each was to receive if the enterprise was successful in producing an oil well or if the result proved to be a dry hole. Each of the participants acted independently and at arm's length with each other. Each was bound by a definite, complete, and clear written agreement and the provisions of each of the contracts were fully performed. The agreement between Reinfried and Magnolia was dictated and written by the latter and the farm out was definitely described therein. It did not include Lots 1 and 2 and there is no claim that anyone interested in the exploration for oil understood that it did. That agreement was the measure of the rights and obligations of the parties to it. The acreage contribution agreement between Sinclair and Reinfried was prepared by Sinclair and it definitely described the land covered by the lease. It was contributing to support the farm out made by Magnolia as assistance in having a test well drilled on Lot 3. That agreement was the measure of the rights and obligations of the parties to it. Shell, at the solicitation of Reinfried, made a dry-hole commitment to assist in having a test made on Lot 3 but Shell insisted that the amount thereof be paid, if and when the conditions of the commitment were complied with, directly to Braden. Hence the contract concerning it was made by Shell and Braden and it fixed the rights and obligations of the parties in

reference to that contribution. The contract between Reinfried and Braden for the drilling of the well on Lot 3 was complete, definite, and unambiguous in providing for the rights and obligations of the parties to it. It described by legal description the land covered by the leases contributed by Magnolia and Sinclair and it described the dry-hole contribution of Shell. There was no requirement, place, or function for an intermediary between the parties or any of them who were participating in this enterprise. The rights and obligations of each were contractual and no one of them acted for or represented any of the others except to perform the contract or contracts by which he was bound.

Reinfried depended upon the correctness of the representations of the Pomco map to the effect that the land around Lot 3 was covered by oil and gas leases. This, according to the record, is the practice generally among persons engaged in the exploration and development of the oil industry unless there is something which appears to challenge the correctness of the map. An inquiry by a representative of Sinclair to Reinfried late in June or early in July 1958, after the oil well on Lot 3 had been completed, resulted in the latter telling the former that the map showed that Magnolia had a lease on Lots 1 and 2. Later the representative told Reinfried that Magnolia reported it did not have such a lease. Reinfried then inquired of Shell if it had a lease on the lots and he was advised that Shell did not. Reinfried then investigated at Kimball and satisfied himself that Lots 1 and 2 were not leased for oil and gas exploration. He secured such a lease thereon which was dated July 7, 1958. He took the lease in his name and recorded it in the public records of Kimball County. It is not important how he became advised that Lots 1 and 2 were not covered by an oil and gas lease. What is important and decisive is that there was no relationship between any of the

appellants and any of the appellees which required the latter to share the lease on Lots 1 and 2 with appellants. The object of this litigation is in effect to have Lots 1 and 2 added to the description of the real estate described in the drilling contract made by Braden and Reinfried under the terms of which the oil well on Lot 3 was drilled.

If there had been a fiduciary relationship between Reinfried and the appellants or any of them, this fact would not, under the circumstances of this case, necessarily entitle appellants to an adjudication of a constructive trust.

In Warner v. Winn, 145 Tex. 302, 197 S. W. 2d 338, the court said: "A contract which provided for the development of certain specified and carefully described areas, held under named and well defined leases for the production and sale of gas from those tracts, constituted the full agreement between the parties, and the equitable rule that persons engaged in a common enterprise by way of joint adventure stand, within the scope of the enterprise, in a fiduciary relation each to the other, will not be extended so as to forbid the acquisition, ownership or development by one of the parties for his own benefit of property not embraced in the enterprise and outside of the scope of the contract. * * * To invoke the equitable rule that persons engaged in a joint enterprise stand in a fiduciary relation to each other and be bound by the strict standards of good conduct and fair dealing with each other, there must be some act showing the intention of one or the other of the parties to acquire, for his own benefit, property belonging to the joint enterprise, to use the funds of such enterprise for his own gain."

In British American Oil Producing Co. v. Midway Oil Co., 183 Okl. 475, 82 P. 2d 1049, it is stated: "The plaintiff discusses at length the rules applicable to a fiduciary relationship, the duties of a trustee to his cestui que trust, and the requirements of loyalty to a coadventurer.

Those principles apply here, but only as applied to the property involved and the existing property rights. Here each party owed a high degree of loyalty to the other, as applied, however, to the assembling of leases and the drilling and developing of the specified area involved, and the further duty of faithfully accounting for the income. As to those matters, the parties did not deal at arm's length, but trusted and relied upon each other. British American owed to Midway a high degree of loyalty, diligence, and fidelity, and that will not consciously be lowered by any judgment of this court. But when every such duty has been discharged in full, no court has the right to enlarge the duty of British American and create new rights in Midway by decreeing to Midway a share of profits made by British American from a private risk in a separate enterprise. This cannot be fairly done even in the name of a fiduciary relationship, or a trust relationship, however sacred in the law are those relationships, and the duties and rights arising therefrom when properly analyzed, applied, and enforced."

The relief appellants seek in this litigation is that the court impose a constructive trust upon the interest of appellees in the property described in the prayer of the amended petition of appellants.

In Jenkins v. Jenkins, 151 Neb. 113, 36 N. W. 2d 637, this court said: "A constructive trust is a relationship with respect to property subjecting the person by whom the title is held to an equitable duty to convey it to another on the ground that his acquisition or retention of the property is wrongful and that he would be unjustly enriched if he were permitted to retain the property. * * * The law is well established that each case is to be determined from the facts, circumstances, and conditions, as presented therein." See, also, Wiskocil v. Kliment, *supra;* Vielehr v. Malone, 158 Neb. 436, 63 N. W. 2d 497.

This is an equity case and the trial in this court is

de novo. Wiskocil v. Kliment, *supra;* Bailey v. Karnopp, *supra.* The evidence is not of the quality required to establish a case justifying the imposition of a constructive trust in favor of appellants in respect to the property involved. The judgment should be and it is affirmed.

AFFIRMED.

Note: This opinion was adopted by the court on January 3, 1961.

METROPOLITAN UTILITIES DISTRICT, A MUNICIPAL CORPORATION, APPELLEE, V. CITY OF OMAHA, A MUNICIPAL CORPORATION, APPELLANT.
107 N. W. 2d 397

Filed January 27, 1961. No. 34913.

1. **Municipal Corporations.** A public sewer system is a public utility; a municipality may, by ordinance, fix and collect reasonable service charges for the use thereof upon a proper basis; and doing so relates to a matter of state-wide concern.
2. **Judgments.** Where there is an actual controversy between the parties and justiciable issues are presented by all the interested parties, who are parties in the proceedings, the Uniform Declaratory Judgments Act is applicable.
3. **Constitutional Law.** Before a law can be determined unconstitutional, the express provision of our Constitution which the law contravenes must be pointed out.
4. **Constitutional Law: Statutes.** Ordinances and statutes are presumed to be constitutional; unconstitutionality must be clearly established; and courts will not pass on a question of constitutionality unless it becomes necessary to do so.
5. **Statutes: Municipal Corporations.** Validity of statutes and ordinances is favored and when susceptible of two constructions the one holding such statute or ordinance valid will ordinarily be followed.
6. **Municipal Corporations.** Municipal corporations are purely entities of legislative creation. They do not exist independent of some action of the legislative department of government bringing them into being. All the powers which they can possess are derived from the creator. Unlike natural persons they can exercise no power except such as has been expressly delegated

to them, or such as may be inferred from some express delegated power essential to give effect to that power.

7. **Statutes.** In case of doubt as to the meaning of a statute resort may be had to the title of the act as an aid to discover the legislative intent but by no means to enlarge the scope of the statute so as to include a subject not fairly expressed in the body of the act.
8. ———. If words of a statute are of doubtful meaning they will be interpreted in a manner which will best effect the purposes of the enactment in preference to one which will defeat it. The intention of the Legislature, when ascertained, will prevail over the literal sense of the words used and this is especially true when the strict letter of the law would lead to injustice or absurdity. In interpreting a statute the legislative intent may be found from the reason of the enactment.
9. **Public Utilities: Municipal Corporations.** A public sewer system is a public utility the same as a water system and the Legislature would have the right to delegate to a municipal corporation the authority to manage and operate the same, or any phase thereof.
10. **Statutes.** The power of classification rests with the Legislature and this power cannot be interfered with by the courts unless it is clearly apparent that the Legislature has, by an artificial and baseless classification, attempted to avoid and violate the provisions of the Constitution prohibiting local and special legislation.
11. **Municipal Corporations.** A regulation promulgated by municipal ordinance which provides that the water supply be shut off to residents delinquent in the payment of sewer charges is valid and not an unreasonable or arbitrary regulation.

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

Herbert M. Fitle, Bernard E. Vinardi, Irving B. Epstein, Frederick A. Brown, Benjamin M. Wall, Edward M. Stein, and *Steven J. Lustgarten,* for appellant.

George C. Pardee, G. H. Seig, and *Harry H. Foulks, Jr.,* for appellee.

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

WENKE, J.

This action was instituted in the district court for

Douglas County by the Metropolitan Utilities District, a municipal corporation to which we shall hereinafter refer as the district, against the City of Omaha, a municipal corporation to which we shall hereinafter refer as the city. The action is in the nature of a declaratory judgment suit and was brought for the purpose of determining the validity of a contract entered into between the district and the city whereby the district agreed to collect for and remit to the city the sewer service charges which the city, by ordinance, had imposed upon those using its sewer system and, if valid, to determine the rights, powers, duties, and obligations of the parties thereunder. The trial court held the legislative act, under and pursuant to which the parties had entered into the contract herein involved, unconstitutional in certain respects and, because other statutory requirements imposed upon the district had not been properly complied with, that the contract was inoperative and without force and effect. The city thereupon filed a motion for new trial and this appeal was taken from the overruling thereof.

The district has exclusive management and control of the water and gas systems serving the city and surrounding territory. The city is of the metropolitan class governed by a home rule charter adopted by its electorate on November 6, 1956. It has the exclusive management and control of the sewer system of the city. After the 1959 Legislature had adopted L. B. 295 on June 9, 1959, with an emergency clause, the district and city did, on March 2, 1960, enter into the agreement hereinbefore referred to. By its ordinance No. 21141, passed on December 29, 1959, the city fixed the rates which the users of its sewer system were to pay and which, under its contract with the city, which ordinance No. 21141 authorized, the district agreed to collect. The parties to the contract are unable to agree as to their respective rights, powers, duties, and liabilities thereunder and under the statutes of the state

and ordinances of the city applicable thereto. In view of that fact they seek, as the contract provides they shall, to have the validity and enforcibility thereof judicially determined before they put the contract into effect by operating thereunder.

The action involves a question as to the constitutionality of a statute. Consequently, since declaratory relief is sought, copies of the proceedings were served on the Attorney General of the state. See § 25-21,159, R. R. S. 1943. However, no appearance was made in the action by the Attorney General either in the court below or in this court.

A public sewer system is a public utility; a municipality may, by ordinance, fix and collect reasonable service charges for the use thereof upon a proper basis; and doing so relates to a matter of state-wide concern. Michelson v. City of Grand Island, 154 Neb. 654, 48 N. W. 2d 769, 26 A. L. R. 2d 1346.

Where, as here, there is an actual controversy between the parties and justiciable issues are presented by all the interested parties, who are parties in the proceedings, the Uniform Declaratory Judgments Act is applicable. See, Lynn v. Kearney County, 121 Neb. 122, 236 N. W. 192; Nebraska Mid-State Reclamation Dist. v. Hall County, 152 Neb. 410, 41 N. W. 2d 397. The action being equitable in its nature we shall consider the cause de novo. State Farm Mutual Automobile Ins. Co. v. Kersey, *ante* p. 212, 106 N. W. 2d 31.

The questions raised involve the constitutionality of certain statutes; the construction thereof as well as of ordinance No. 21141 passed by the city under and pursuant thereto; the authority of the district and city thereunder; and the construction of such authority. In view thereof we shall set forth certain principles relating thereto before discussing separately the questions raised. Before doing so we will dispose of the city's contention that the question of constitutionality was not properly or sufficiently pleaded as an issue in view

of our holding to the effect that: "* * * before a law can be determined unconstitutional, the express provision of our constitution which the law contravenes must be pointed out." State ex rel. Miller v. Bryant, 94 Neb. 754, 144 N. W. 804. It is apparent that the constitutional provision relied upon by the district must have been pointed out to the court below, for it passed thereon, and it has been fully and sufficiently called to the attention of this court. We find no merit to this contention made by the city. The burden, in this respect, is upon the party so contending. Wagner v. City of Omaha, 156 Neb. 163, 55 N. W. 2d 490.

Ordinances and statutes are presumed to be constitutional; unconstitutionality must be clearly established; and courts will not pass on a question of constitutionality unless it becomes necessary to do so. United Community Services v. The Omaha Nat. Bank, 162 Neb. 786, 77 N. W. 2d 576; Wilson v. Marsh, 162 Neb. 237, 75 N. W. 2d 723; Wagner v. City of Omaha, *supra;* Dorrance v. County of Douglas, 149 Neb. 685, 32 N. W. 2d 202; State ex rel. Garton v. Fulton, 118 Neb. 400, 225 N. W. 28; Nebraska District of Evangelical Lutheran Synod v. McKelvie, 104 Neb. 93, 175 N. W. 531, 7 A. L. R. 1688; Davis v. State, 51 Neb. 301, 70 N. W. 984.

Validity of statutes and ordinances is favored and when susceptible of two constructions the one holding such statute or ordinance valid will ordinarily be followed. Starman v. Shirley, 162 Neb. 613, 76 N. W. 2d 749. As therein held: "When an ordinance or statute is susceptible of two constructions, under one of which it is clearly valid, while under the other its validity may be doubtful, that construction which makes sure its validity will ordinarily be given."

"A district organized under the provisions of articles 10 and 11, ch. 14, Comp. St. 1929 (now Chapter 14, articles 10 and 11, R. R. S. 1943), is a public corporation empowered to perform functions usually performed by

cities of the metropolitan class and is, in its broader sense, a municipal corporation." Nelson-Johnston & Doudna v. Metropolitan Utilities Dist., 137 Neb. 871, 291 N. W. 558.

"Municipal corporations are purely entities of legislative creation. They do not exist independent of some action of the legislative department of government bringing them into being. All the powers which they can possess are derived from the creator. Unlike natural persons they can exercise no power except such as has been expressly delegated to them, or such as may be inferred from some express delegated power essential to give effect to that power." Garver v. City of Humboldt, 120 Neb. 132, 231 N. W. 699. See, also, United Community Services v. The Omaha Nat. Bank, *supra.*

"A municipal corporation may exercise only such powers as are expressly granted, those necessarily or fairly implied in or incidental to powers expressly granted and those essential to the declared objects and purposes of a municipality." Nelson-Johnston & Doudna v. Metropolitan Utilities Dist., *supra.* See, also, United Community Services v. The Omaha Nat. Bank, *supra.*

"* * * legislative charters wherein cities are empowered to perform certain acts or functions are construed with a greater degree of strictness than ordinary civil statutes, and the rule in Nebraska is that they shall be strictly construed. Their authority to perform municipal acts will not be extended beyond the plain import of the language of the charter." Garver v. City of Humboldt, *supra.* See, also, Nelson-Johnston & Doudna v. Metropolitan Utilities Dist., *supra.*

"The authority given a public corporation to engage in the operation of a business enterprise carries with it the power to conduct it in the same manner in which a private corporation would deal with its property under similar circumstances." United Community Services v. The Omaha Nat. Bank, *supra.*

The first question raised is, does L. B. 295, as passed

by the 1959 Legislature, authorize and empower the district and city to enter into the contract herein involved? That they followed the necessary legal procedure to do so is evidenced by the record. The trial court held that the act did so authorize and empower. We shall set out so much of the act as is material to this issue, including the title.

"AN ACT * * * relating to sewer rental or use fees in cities of the metropolitan class; to empower and provide that a city of the metropolitan class may enter into a contract with the metropolitan water or metropolitan utilities district serving such city for the purpose of aiding in the collection of any sewer rental or use fee established by such city and to pay the charge therefor; to provide that such a metropolitan water or metropolitan utilities district may by contract provide such services to such city upon payment of the cost thereof, and to terminate water services for nonpayment of such sewer use fee; to provide that such fees shall be charged to the owner of the property served or the person, firm, or corporation using the service; * * *."

"Section 1. In addition to any and all powers granted to metropolitan cities and metropolitan water or metropolitan utilities districts within and serving such cities, a metropolitan city may enter into a contract with the metropolitan water or metropolitan utilities district within its area in order to obtain the use of facilities and services of the water utility of such a district in order to collect all or any part of a sewer use or rental fee which such city may lawfully be entitled to charge and collect.

"Sec. 2. To accomplish the purposes of section 1 of this act, a metropolitan city is empowered to pay such metropolitan water or metropolitan utilities district the charges for such services as set forth in said contract, and such district may discontinue water service to its customers, for failure to pay such sewer rental or use fee.

"Sec. 3. The powers granted in sections 1 and 2 of this act to metropolitan cities, metropolitan water districts and metropolitan utilities districts, are cumulative and not in derogation or amendment of the existing powers of each." Laws 1959, c. 32, p. 186; §§ 1, 2, and 3, now §§ 14-1108, 14-1109, and 14-1110, R. S. Supp., 1959.

We think the language of sections 1, 2, and 3 of the act grants this authority to the district and city. But if there is any question in this regard we think, in view of the record before us, that the following principles, applied thereto, would make that fact abundantly clear.

"In case of doubt as to the meaning of a statute, resort may be had to the title as an aid to discover the legislative intent, but by no means to enlarge the scope of the statute so as to include a subject not fairly expressed in the body of the act." Omaha Nat. Bank v. Jensen, 157 Neb. 22, 58 N. W. 2d 582. See, also, McConnell v. McCook Nat. Bank, 142 Neb. 451, 6 N. W. 2d 599; Nebraska Central Bldg. & Loan Assn. v. Yellowstone, Inc., 141 Neb. 679, 4 N. W. 2d 762; Hansen v. Dakota County, 135 Neb. 582, 283 N. W. 217; State ex rel. Marrow v. City of Lincoln, 101 Neb. 57, 162 N. W. 138. As stated in Hansen v. Dakota County, *supra:* "Assuming, for the sake of argument, that the language used in section 7, when considered with other language in the act, results in ambiguity and uncertainty and casts doubt as to what the legislature intended, we may then resort to an examination of the title to the act as an aid to construction."

"If words of a statute are of doubtful meaning, they will be interpreted in a manner which will best effect the purposes of the enactment in preference to one which will defeat it. The intention of the Legislature when ascertained will prevail over the literal sense of the words used and this is especially true when the strict letter of the law would lead to injustice or absurdity. In interpreting a statute the legislative intent may be found from the reason of the enactment." Hal-

stead v. Rozmiarek, 167 Neb. 652, 94 N. W. 2d 37. See, also, Roy v. Bladen School Dist. No. R-31, 165 Neb. 170, 84 N. W. 2d 119; Starman v. Shirley, *supra;* Howell v. Fletcher, 157 Neb. 196, 59 N. W. 2d 359; McConnell v. McCook Nat. Bank, *supra;* Federal Farm Mtg. Corp. v. Adams, 142 Neb. 202, 5 N. W. 2d 384.

A public sewer system is a public utility the same as a water system, and the Legislature would have the right to delegate to a municipal corporation, here the city and the district, the authority to manage and operate the same or any phase thereof. See, Michelson v. City of Grand Island, *supra;* Laverents v. City of Cheyenne, 67 Wyo. 187, 217 P. 2d 877. But in this respect L. B. 295 is not an original and independent piece of legislation, complete in itself so far as it applies to the subject matter properly embraced within its title. See, Stewart v. Barton, 91 Neb. 96, 135 N. W. 381; Beisner v. Cochran, 138 Neb. 445, 293 N. W. 289. It is legislation which either adds to or takes from the district or the city the right already delegated to it by the Legislature to manage and operate, respectively, the water and sewer systems of Omaha and the surrounding area.

We think the trial court was correct when it held: "Metropolitan Utilities District has been empowered by Chapter 32, Nebraska Session Laws of 1959, approved June 9, 1959, with emergency clause, referred to herein as L. B. 295, to contract with the (city) of Omaha for the collection of sewer use fees which such city may lawfully be entitled to charge and collect." In other words, it gives the district the authority to enter into a contract with the city to use the facilities and services of the water utility, which it (the district) manages and operates, to collect all or any part of a service use or rental fee which the city may lawfully be entitled to charge and collect. Such authority is, however, not mandatory.

The next question to arise is, did the 1959 Legislature, by using the language that it did in amending sections

14-365.03 and 14-365.10, R. R. S. 1943, create a class of sewer users in metropolitan cities, other than those in cities and villages generally, without a proper base therefor such that it creates special class legislation which is prohibited by Article III, section 18, of the Constitution of Nebraska? The trial court held that it did. Its holding in this effect is apparently based on the thought that under sections 18-503, R. R. S. 1943, and 18-509, R. S. Supp., 1959, sewer users who do not own the premises served and who have not requested the service being used are not liable for the use thereof, whereas, sections 14-365.03 and 14-365.10, R. S. Supp., 1959, would subject all sewer users in metropolitan cities to such liability.

The operation of a sewer system, which includes the collection of a fee or service charge for the use thereof, is a matter of state-wide concern and, since the Legislature has entered the field, any attempt of a city to deal therewith contrary to the statutes covering the subject would be without force and effect. See, Michelson v. City of Grand Island, *supra;* Omaha Parking Authority v. City of Omaha, 163 Neb. 97, 77 N. W. 2d 862; Nagle v. City of Grand Island, 144 Neb. 67, 12 N. W. 2d 540; Axberg v. City of Lincoln, 141 Neb. 55, 2 N. W. 2d 613, 141 A. L. R. 894.

However the Legislature can, in dealing with a matter of state-wide concern, make classification of those subject thereto if a proper basis exists for so doing. See, Omaha Parking Authority v. City of Omaha, *supra;* United Community Services v. The Omaha Nat. Bank, *supra;* Dorrance v. County of Douglas, *supra;* Axberg v. City of Lincoln, *supra;* Galloway v. Wolfe, 117 Neb. 824, 223 N. W. 1, 62 A. L. R. 637; State ex rel. Douglas County v. Frank, 61 Neb. 679, 85 N. W. 956; State ex rel. Wheeler v. Stuht, 52 Neb. 209, 71 N. W. 941; State ex rel. Jones v. Graham, 16 Neb. 74, 19 N. W. 470. As we held in Cunningham v. Douglas County, 104 Neb. 405, 177 N. W. 742, by quoting from Allan v. Kennard,

81 Neb. 289, 116 N. W. 63: " 'The power of classification rests with the legislature, and this power cannot be interfered with by the courts, unless it is clearly apparent that the legislature has by an artificial and baseless classification attempted to avoid and violate the provisions of the Constitution prohibiting local and special legislation.' "

The question then arises, did the Legislature classify the users of the sewer system in a metropolitan city on a different basis than those in other cities and villages in the state? If it did not classify them differently then there is no necessity for our determining whether or not a proper basis exists for its doing so.

Originally the Legislature dealt with this subject in 1933 when it passed S. F. No. 384. See Laws 1933, c. 146, p. 561, which is now Chapter 18, article 5, R. R. S. 1943. Section 18-503, R. R. S. 1943, thereof provides: "The governing body of such municipality may make all necessary rules and regulations governing the use, operation, and control thereof. The governing body may establish just and equitable rates or charges to be paid to it for the use of such disposal plant and sewerage system by each person, firm or corporation whose premises are served thereby. If the service charge so established is not paid when due, such sum may be recovered by the municipality in an action of assumpsit, or it may be certified to the tax assessor and assessed against the premises served, and collected or returned in the same manner as other municipal taxes are certified, assessed, collected and returned."

Section 18-509 was enacted by the 1951 and amended by the 1957 session of the Legislature and is now reported as section 18-509, R. S. Supp., 1959. It provides, insofar as here material, as follows: "The mayor and city council of any city or the board of trustees of any village, in addition to other sources of revenue available to the city or village, may by ordinance set up a rental or use charge, to be collected from users

of any system of sewerage, and provide methods for collection thereof. The charges shall be charged to each property served by the sewerage system, shall be a lien upon the property served, and may be collected either from the owner or the person, firm, or corporation requesting the service."

Insofar as cities of the metropolitan class are concerned the Legislature passed a law in 1953 relating thereto. See Laws 1953, c. 24, p. 98. It has become a part of article 3 of Chapter 14, R. R. S. 1943. The 1959 Legislature amended sections 14-365.03 and 14-365.10 thereof. See Laws 1959, c. 32, p. 186. These sections, as amended, are now sections 14-365.03 and 14-365.10, R. S. Supp., 1959.

Section 14-365.03, as amended by the 1959 Legislature, now reads as follows: "The governing body of such municipality may make all necessary rules and regulations governing the use, operation, and control thereof. The governing body may establish just and equitable rates or charges to be paid to it for the use of such disposal plant and sewerage system, including any storm sewer system, by the owner of the property served or by the person, firm, or corporation using the services. If the service charge so established is not paid when due, such sum may be recovered by the municipality in an action of assumpsit, or it may be certified to the tax assessor and assessed against the premises served, and collected or returned in the same manner as other municipal taxes are certified, assessed, collected, and returned."

Section 14-365.10, as amended by the 1959 Legislature, now reads, insofar as here material, as follows: "The mayor and city council of any metropolitan city, in addition to other sources of revenue available to the city, may by ordinance set up a rental or use charge to be collected from users of any system of sewerage, including any storm sewer system, and provide methods of collection thereof. The charges shall be charged to

each property served by the sewerage system, including any storm sewer system, shall be a lien upon the property served, and may be collected either from the owner or the person, firm, or corporation using the service."

Section 18-503, R. R. S. 1943, and section 18-509, R. S. Supp., 1959, permit the governing body of any city or village in the state to establish just and equitable rates or charges, also referred to as rental or use charges, to be paid for the use of any sewer system which it is lawfully operating and that such rental or use charges are to be charged to the premises served thereby but may be collected from either the owner of the premises served or from the person, firm, or corporation "requesting the service."

Sections 14-365.03 and 14-365.10, R. S. Supp., 1959, permit the governing body of any metropolitan city in the state to establish just and equitable rates or charges, also referred to as rental or use charges, to be paid to it for the use of its sewer system and that such rental or use charges are to be charged to each property served but may be collected from either the owner thereof or from the person, firm, or corporation "using the service."

The primary purpose of these statutes is to authorize the governing body of any city or village in the state to make and collect a reasonable rental fee or service charge for the use of any sewer system which it is operating. In each case the statute provides such rental fee or service charge may be charged to the premises served but collected from either the owner or the person, firm, or corporation "requesting the service" or "using the service." We do not think the use of the two words "requesting" and "using" created two distinct classes from whom collection for the use of the sewer may be made. We think "using the service" implies a request was made for that purpose, whereas "requesting the service" implies that it is done for the

purpose of making use thereof. We find that for all practical purposes the two phrases "requesting the service" and "using the service" mean the same thing and should be so construed. In view thereof we find the trial court was in error.

A further question arises, did the Legislature have the right to delegate to the district the authority to cut off the water service of its patrons who fail to pay the sewer service fee or use charge imposed upon them by the city if the district enters into an agreement with the city under and pursuant to ordinance No. 21141. Ordinance No. 21141 was passed by the city under and pursuant to L. B. 295. Section 2 of L. B. 295, hereinbefore set forth, provides in part: "* * * and such district may discontinue water service to its customers, for failure to pay such sewer rental or use fee." In Michelson v. City of Grand Island, *supra,* we held: "The provision of a city ordinance for shutting off water furnished by the city to the premises of the consumer failing to pay sewer service charges is not unconstitutional as depriving persons of property without due process of law, as where water and sewer services are so interlocked neither can be effective without the other.

"A regulation promulgated by municipal ordinance which provides that the water supply be shut off to residents delinquent in the payment of sewer charges is valid and not an unreasonable or arbitrary regulation, * * *."

We see no good reason why the Legislature, under its plenary powers to regulate and control municipal corporations, could not grant the same authority to municipal corporations that have been given the authority to manage and operate such utilities. We think it can. This case is clearly distinguishable from Garner v. City of Aurora, 149 Neb. 295, 30 N. W. 2d 917, which involved the collection and disposal of garbage, under the principle therein announced as follows: "A public service corporation cannot refuse to furnish its public service

because the patron is in arrears with it on account of some collateral or independent transaction, not strictly connected with the particular physical service."

Having come to the conclusion that L. B. 295 is constitutional, that ordinance No. 21141, passed by the city under and pursuant thereto, is valid, and that the district and city could lawfully enter into a contract whereby the district could agree to use the facilities and services of its water department to collect and remit the sewer service fee or rental use lawfully imposed by the city, the question arises, was it entered into on a proper basis?

Section 2 of L. B. 295, provides the city is empowered to pay the district "the charges for such services as set forth in said contract" which is referred to in the title of the act as "the cost thereof." However, section 14-1041, R. R. S. 1943, insofar as here material, provides: "A metropolitan water or metropolitan utilities district shall keep all funds, accounts and obligations relating to any one utility under its management separate and independent from the funds and accounts of each other utility under its management. The cost of any consolidated operation shall be allocated to the various utilities upon some reasonable basis determined by its board of directors."

Section 14-1041, R. R. S. 1943, does not provide any particular formula which the district must use for the purpose of allocating the costs. "Reasonable basis," as therein used, means a basis that is appropriate to the purpose for which it is being used, that is, that the customers of one utility do not unreasonably bear the costs which should properly be chargeable to the customers of another. It would appear there are several formulas, under approved accounting methods, by which the board of directors of the district could determine the cost of such consolidated operation upon a reasonable basis, that is, to determine the cost to the district for the use of the facilities and services of its water utility to

collect the sewer use or rental fee lawfully imposed by the city upon the users of its sewer system. However, it should be remembered it is not for the city or the courts to determine what that formula is to be, but it is a matter for the board of directors of the district to decide subject, however, to the courts' right to review such decision to determine if it was made upon some reasonable basis.

It had been costing the city about $101,500 per annum to collect its sewer use or rental fee. The method used by the board of directors of the district, in order to determine what they were going to charge for this service, was to take a figure of $40,500 as the actual or "out-of-pocket" cost of performing the service and then adding thereto half of what it thought that figure would save the city, thus dividing what are referred to as "net savings" to the city from the operation equally between the district and the city. By doing so a figure of $70,500, or 8⅓ cents per customer per month, was arrived at. That is the contract basis upon which the district agreed to perform the service, for the contract provides the "City will reimburse District at the rate of 8⅓ cents per sewer use fee bill rendered." With few exceptions, all billings are to be on a monthly basis. We cannot see where such a basis for determining the cost of the operation is a reasonable one for the amount which the city would save by reason of the district performing these services has nothing to do with the cost thereof to the district. We do not think the district had authority to enter into a contract with the city to perform the services on that basis. We think the trial court was correct when it held the contract between the district and the city was not made in conformity with the provisions of section 14-1041, R. R. S. 1943, applicable thereto and, in view thereof, to be inoperative and without force and effect for it was not made within the scope of the district's authority. In order to be operative a contract entered into under and

pursuant to the authority granted the district and the city by L. B. 295, the requirements of section 14-1041, R. R. S. 1943, that the cost of such operation must be allocated by the board of directors of the district upon some reasonable basis, must be complied with.

The trial court directed that each of the parties to the action should pay its own costs in that court. Under section 25-1933, R. R. S. 1943, this court is authorized to direct each party to pay his own costs or apportion the costs among the parties. Considering the history of the negotiations between the district and city leading up to the contract, including the history leading up to the enactment of L. B. 295, and the purpose for which this suit was brought, we think the same order, with one exception, should be entered by this court. We, therefore, direct that each of the parties to the action shall pay its own costs in this court except that the cost of the bill of exceptions shall be taxed equally between them.

We remand this cause to the district court to render a judgment in accordance with our holdings herein.

AFFIRMED AS MODIFIED.

ELLWOOD B. CHAPPELL and PAUL E. BOSLAUGH, JJ., not participating.

SERENA WALDBAUM, APPELLEE, V. SIDNEY WALDBAUM, APPELLANT.

107 N. W. 2d 407

Filed February 3, 1961. No. 34803.

1. **Divorce: Appeal and Error.** In an appeal to this court in a divorce action the cause is tried de novo.
2. **Appeal and Error.** When the evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite.

3. **Divorce.** Any unjustifiable conduct on the part of either the husband or wife, which so grievously wounds the mental feelings of the other, or so utterly destroys the peace of mind of the other, as to seriously impair the bodily health and endanger the life of the other, or such as utterly destroys the legitimate ends and objects of matrimony, constitutes extreme cruelty.
4. ———. Extreme cruelty may consist of personal injury or physical violence, or it may be acts or omissions of such character as to destroy the peace of mind or impair the bodily or mental health of the one upon whom they are inflicted or toward whom they are directed, or be such as to destroy the objects of matrimony.
5. ———. It is impossible to lay down any general rule as to the degree of corroboration required in a divorce action, as each case must be decided on its own facts and circumstances.
6. ———. Condonation is forgiveness for the past upon condition that the wrongs shall not be repeated. It is dependent upon future good conduct, and a repetition of the offense revives the wrong condoned.
7. **Divorce: Parent and Child.** In awarding custody of a child, the primary concern of the court in its sound discretion is the best interest and welfare of the child, having due regard for the rights of fit, proper, and suitable parents.
8. ———: ———. In a case where the fixing of the custody of a minor child is concerned, the wishes of the child are not controlling, but if the child has reached sufficient age and has the ability to express an intelligent preference, such an expression is entitled to consideration.
9. **Parent and Child.** A father's legal duty to support his child ceases when the child becomes of age, especially when the record is void of any reason for such support.
10. **Divorce.** The division of property and allowance of alimony in divorce actions are always to be determined by the facts in each case.
11. ———. In determining the question of alimony or division of property as between the parties the court will consider the respective ages of the parties to the marriage; their earning ability; the duration of the marriage; the conduct of each party during the marriage; their station in life, including the social standing, comforts, and luxuries of life which the wife would probably have enjoyed; the circumstances and necessities of each; their health and physical condition; and their financial circumstances as shown by the property they owned at the time of divorce, its value at that time, its income-producing capacity, if any, whether accumulated or acquired before or after the marriage, the manner in which it was acquired,

and the contributions each has made thereto. From these elements and all other relevant facts and circumstances, the court will determine the rights of the parties and make an award that is equitable and just.

APPEAL from the district court for Douglas County: LAWRENCE C. KRELL, JUDGE. *Affirmed in part, and in part reversed and remanded with directions.*

Gross, Welch, Vinardi, Kauffman & Schatz, for appellant.

Marks, Clare, Hopkins & Rauth, for appellee.

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

MESSMORE, J.

This is an action for divorce brought by Serena Waldbaum as plaintiff in the district court for Douglas County, against Sidney Waldbaum, defendant. The defendant filed an answer and cross-petition wherein he prayed for a divorce. The trial court granted the plaintiff an absolute divorce from the defendant, and dismissed the defendant's cross-petition. The defendant filed a motion for new trial. The trial court overruled the defendant's motion for new trial, and the defendant perfected his appeal to this court.

The plaintiff's petition charged the defendant with extreme cruelty. She asked for custody of the minor children, child support, alimony, and division of the property acquired by the parties during the marriage.

The defendant filed a cross-petition in which he charged the plaintiff with extreme cruelty, and asked for the custody of the two younger sons of the parties and a return of certain property taken by the plaintiff from their home when she separated from the defendant.

The plaintiff's reply denied the allegations of the defendant's answer not admitted. The plaintiff, by answer to the defendant's cross-petition, denied the allegations therein contained not admitted, and alleged

other facts relating to extreme cruelty on the part of the defendant. The prayer was for a judgment in accordance with her petition.

In an appeal to this court in a divorce action the cause is tried de novo. Messer v. Messer, 157 Neb. 312, 59 N. W. 2d 395; Workman v. Workman, 164 Neb. 642, 83 N. W. 2d 368.

When the evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite. Stohlmann v. Stohlmann, 168 Neb. 401, 96 N. W. 2d 40; Dier v. Dier, 141 Neb. 685, 4 N. W. 2d 731.

We deem the following to be applicable to this appeal.

Any unjustifiable conduct on the part of either the husband or wife, which so grievously wounds the mental feelings of the other, or so utterly destroys the peace of mind of the other, as to seriously impair the bodily health and endanger the life of the other, or such as utterly destroys the legitimate ends and objects of matrimony, constitutes "extreme cruelty." See, § 42-302, R. R. S. 1943; Smith v. Smith, 160 Neb. 120, 69 N. W. 2d 321; Egbert v. Egbert, 149 Neb. 227, 30 N. W. 2d 669; Workman v. Workman, *supra.*

Extreme cruelty may consist of personal injury or physical violence, or it may be acts or omissions of such character as to destroy the peace of mind or impair the bodily or mental health of the one upon whom they are inflicted or toward whom they are directed, or be such as to destroy the objects of matrimony. See, Messer v. Messer, *supra;* Workman v. Workman, *supra.*

It is impossible to lay down any general rule as to the degree of corroboration required in a divorce action, as each case must be decided on its own facts and circumstances. See, Schlueter v. Schlueter, 158 Neb. 233,

62 N. W. 2d 871; Hines v. Hines, 157 Neb. 20, 58 N. W. 2d 505; Workman v. Workman, *supra*.

The bill of exceptions in this case is voluminous. It would serve no useful purpose to detail the evidence of the respective witnesses.

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

The record discloses that the parties were married in New York City, New York, on June 21, 1936. At the time of their marriage the plaintiff was 20 years of age, and the defendant was 22 years of age, and neither party had any substantial assets. At the time of trial the plaintiff was nearly 45 years of age and the defendant nearly 48 years of age. Four children were born as a result of this marriage: David Robert, born March 22, 1937; Caryl Lynne, born August 1, 1940; Howard Miles, born June 19, 1949; and Douglas Ralph, born January 19, 1953. The plaintiff finished high school, studied commercial art at the Pratt Institute, and studied 2 years in the New York School of Fine and Applied Arts. The defendant completed high school, attended college for 3 years, and then spent 6 or 7 months touring Europe. For a few years after the marriage the defendant was employed by S & W Waldbaum, Inc., a New York corporation engaged in the wholesale butter and egg business. The stock in the above corporation was originally owned by the defendant's father and later acquired by his two maternal uncles. After the outbreak of World War II, it was decided that S & W Waldbaum, Inc., should expand its operations and engage in business in the midwest. Thereafter the Twin Rivers Company, Inc., was formed under Nebraska law, with its headquarters at Grand Island, Nebraska, and the New York corporation as the sole stockholder. In the late spring or early summer of 1942, the parties and their family moved to Grand Island where the defendant managed the business of the Twin Rivers Company, Inc. Shortly after the formation of the Twin Rivers Company, Inc.,

the New York corporation sold its entire stock interest in Twin Rivers Company, Inc., one-third each to the defendant and his two maternal uncles, Abe and Jack Inkeles. Subsequently the defendant acquired some stock of the S & W Waldbaum corporation, and the plaintiff acquired some additional stock of such corporation by gift from one of the defendant's uncles, so that the combined interests of the plaintiff and defendant came to represent one-third of the stock issued and outstanding of the New York corporation. By gift from the defendant, the interests of the plaintiff and defendant in the New York corporation were ultimately held in the plaintiff's name. In 1954, following negotiations with his uncles by the defendant, it was arranged for the Twin Rivers Company, Inc., to purchase the outstanding stock of the defendant's uncles in the amount of $116,500, and for the plaintiff to give the defendant's uncles the one-third interest in the New York corporation which then stood in her name and was valued at $30,000, which would show the value of the Twin Rivers Company, Inc., as of that time in the amount of $219,750. The result of this transaction was to make the defendant the sole stockholder in the Twin Rivers Company, Inc., and to sever his connections with the New York corporation.

After moving to Grand Island, the plaintiff and defendant purchased a home at 1508 West First Street in that city. The plaintiff was unfortunate in having miscarriages in January and August 1954, and then began a course of psychiatric treatments, commencing with Dr. E. James Brady of Colorado Springs, Colorado, in the latter part of October 1954. Thereafter the plaintiff was treated by Dr. Frank R. Barta of Omaha, for a period from late October 1954 through the middle part of December 1955. As a part of this treatment the plaintiff was hospitalized from January 24 to February 19, 1955, for psychiatric treatment. In May 1956, the plaintiff began to see Dr. Phillip H. Starr, of Omaha,

a psychiatrist. He treated her until February or March 1959. During this time, the defendant was also treated by both Dr. Barta and Dr. Brady, and also was treated by Dr. Floyd Ring, a psychiatrist in Omaha who shared offices with Dr. Starr.

The course of treatment and the recommendations relating to the mental health of both the plaintiff and defendant are fully explained in the record. The record has been examined and considered in this respect, and the conclusions of the doctors need not be set out.

The testimony of the plaintiff is to the effect that the defendant started a course of conduct which constituted extreme cruelty towards her in either 1947 or 1948. The parties were raised in the Jewish faith, and the plaintiff was taught to believe in and observe the holidays of such faith. The plaintiff desired to raise the children in a belief in the Jewish faith. The defendant refused to observe the holidays of such faith, and apparently had no particular interest in religion. The actions of the defendant in this respect made the plaintiff unhappy and upset her because of his lack of cooperation with her relative to their religion.

It also appears from the record that the defendant refused, at the request of the plaintiff and their son David and others of the children, to attend certain ceremonies conducted by the Boy Scouts and the De Molay, a Masonic organization of which David was a member and at which he was to be honored. The defendant gave a very vague excuse for not attending such ceremonies and disclosed a lack of interest in the welfare of his eldest son at that time.

In 1952 or 1953, there was an argument between the plaintiff and defendant with reference to the defendant purchasing, from catalogs, jewelry, trinkets, household gadgets, and toys for the children which the plaintiff believed to be unnecessary and too extensive. The plaintiff desired to prove to the defendant that such orders of items were unnecessary, and she took from the de-

fendant the receipts and purchase sheets of articles and ran upstairs with them, with the defendant in pursuit of her. She ran into David's room and requested him to hold the receipts. The defendant came in and started to beat David with his fists. The plaintiff tried to pull the defendant off of David and the defendant struck the plaintiff with his hand and fist. At that time the defendant weighed close to 300 pounds, the plaintiff weighed approximately 130-odd pounds, and David weighed 160 pounds. The plaintiff then ran out of the room and called the police while the defendant kept beating David. However, David refused to give the defendant the invoices.

David testified that during the time he was residing with his parents and growing up, he heard arguments between the plaintiff and defendant on numerous occasions, through the night from midnight until 2 or 3 in the morning; and that such arguments were about business, people working in the defendant's plant, and matters relating to family life.

The plaintiff testified that on one occasion in 1956, when the defendant was standing in the kitchen door in the home in Grand Island, he started to quarrel with the plaintiff who was working and who ignored him. She became angered at the defendant and threw a piece of frozen meat at him. The defendant picked up this piece of meat and beat the plaintiff with it on the head, face, and shoulders. The plaintiff testified that she was quite stunned, and that she ran out of the house and went to the police. They suggested that she go to the hospital and call her doctor, which she did. The doctor gave her a sedative and recommended that she remain in the hospital overnight and get a good rest.

The plaintiff testified that on another occasion, after she had filed this action for divorce on July 28, 1958, the defendant switched cars with her while she was attending a function at the Town House in Omaha. She had separated from the defendant and resided in

Omaha at that time. When she came out to get the car it was gone and another car was in its place. She contacted her lawyer with reference to this matter and he informed her to wait until her husband came back to the house and then for her to take the car. At a later date the defendant returned to the plaintiff's home in Omaha and went into the house. The plaintiff endeavored to take possession of the car that the defendant had driven to her home. The defendant came out of the house, pulled the plaintiff out of the car, struck her, and she fell to the ground. This occurred in the presence of the plaintiff's children and her attorney.

The plaintiff further testified that during the past several years the defendant had made threats to commit suicide, and that this usually occurred when the defendant failed to have his own way. On at least two occasions the defendant left suicide notes in his own handwriting, one to the plaintiff and one to his mother. The one to his mother was not mailed, and was dated March 21, 1956. On this occasion the defendant talked about suicide, telling the plaintiff that he was going to take his own life for the reason that he was discouraged and had nothing to live for. The plaintiff endeavored to prevail upon him not to act in such a manner. On another occasion in the summer of 1956 or 1957, the defendant came home from his office at noon, put the car in the garage, which he usually did not do, and closed the garage door. He told the plaintiff he was unhappy, he didn't want to live, that he was a burden and no good to her or the children, and that he was going to take his own life. The plaintiff tried to persuade him not to do so. There was then some argument with reference to money which upset the plaintiff. The defendant went to the garage, but later left the garage unknown to the plaintiff. The plaintiff called the police, and they inspected the garage and later found the defendant sitting in the livingroom of his home in Grand Island. The defendant told the

police that his wife had made him miserable, and the police reprimanded the defendant. This apparently was done for the purpose of upsetting the plaintiff.

The record shows that in the early 1950's the defendant became obsessed with sex to an abnormal extent and insisted that the plaintiff indulge in unnatural forms of marital relations. Dr. Starr, a psychiatrist who treated both parties, described in detail the effect of this type of conduct on the part of the defendant toward the plaintiff which need not be repeated in this opinion, and testified that the defendant's conduct in this regard caused the plaintiff to become emotionally upset. Dr. Starr's testimony corroborated the plaintiff's testimony that the sexual appetites of the defendant revolted and disturbed her, and was the basic reason for her seeking psychiatric help. The doctor further testified that the defendant was in need of psychiatric help, and both the plaintiff and defendant did receive such help for some time. The record also shows that the defendant purchased books on sex relations of the erotic type, and also had a collection of nude photographs.

The record further shows that the defendant's conduct was that of a selfish, inconsiderate, self-indulgent, and egotistical individual. He testified concerning a passage in one of the sex books he purchased to the effect that there are many types of neurotic husbands; that there is the type who is egotistical, self-centered, and demanding; and that the wife of such a husband is expected to conform to his plans. The defendant felt that the words "egotistical, self-centered, and demanding" applied to him.

The record details many other acts such as arguments and controversies relating to the habits of each of the parties, and their conduct and actions toward each other which thoroughly indicate that these parties are unable to live in peace and harmony with each other and, as stated by their psychiatrists, should be separated at least temporarily.

From the record it is manifest that the acts of the defendant toward the plaintiff were sufficient to constitute extreme cruelty within the purview of the authorities heretofore cited, and we conclude that the trial court did not err in granting the plaintiff an absolute divorce.

The record shows that the defendant filed an action for divorce against the plaintiff on September 9, 1957. This was evidently for the purpose of inducing the plaintiff to return to him. She had previously separated from him, had lived in Omaha, and had taken an extended vacation in the east. The plaintiff did return to the defendant, and the defendant dismissed his action for divorce. This reunion lasted but a short time. Thereafter the present action was commenced by the plaintiff. The defendant contends that the plaintiff condoned his conduct of which she now complains as constituting extreme cruelty.

Condonation is forgiveness for the past upon condition that the wrongs shall not be repeated. It is dependent upon future good conduct, and a repetition of the offense revives the wrong condoned. See, Kidder v. Kidder, 159 Neb. 666, 68 N. W. 2d 279; Workman v. Workman, *supra.*

The defendant's contention with reference to condonation on the part of the plaintiff under the facts is without merit for the reason that there was a repetition of the offenses constituting extreme cruelty toward the plaintiff which would revive any wrong allegedly condoned.

The trial court by its decree granted the plaintiff the control and custody of Douglas, the youngest child of the parties, and granted the defendant the control and custody of Howard who was 10 years of age at the time of this trial.

The record shows that both the plaintiff and defendant have great affection for their children and are de-

sirous of making adequate provision for their care and support.

The statutory rule is: "Upon pronouncing a sentence or decree of nullity of a marriage and also upon decreeing a divorce, whether from the bonds of matrimony or from bed and board, 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, and may determine with which of the parents the children or any of them shall remain. * * *." § 42-311, R. R. S. 1943. See, also, Smallcomb v. Smallcomb, 165 Neb. 191, 84 N. W. 2d 217.

In Stohlmann v. Stohlmann, *supra,* this court said: "In a case where the fixing of the custody of a minor child is concerned, the wishes of the child are not controlling, but if the child has reached sufficient age and has the ability to express an intelligent preference, such an expression is entitled to consideration." State ex rel. Bize v. Young, 121 Neb. 619, 237 N. W. 677, is cited.

Howard told the trial judge that he preferred to live with his father in Grand Island because he has an asthmatic condition which is an emotional problem, and when he is in Grand Island with his father he does not have such a condition; that there is a lady who stays at the home in Grand Island and cooks the meals and has care and supervision of him, and in addition there is a lady who comes at times during the week to clean the house and do the laundry; that he attends a school which is close to his home; that he does good work in school; that his father is generally home with him in the evenings and at other times; that he has no objection to visiting his mother from time to time under proper circumstances; and that he has friends and his interests in Grand Island and prefers to reside there with his father which would be the best thing to do under the present circumstances.

We conclude that Howard has shown a high degree of intelligence and manifested his desires in such a man-

ner as to warrant being placed in the custody, care, and control of his father, and the trial court did not err in placing the custody of Howard in the defendant, the trial court finding both parents to be suitable persons to have the care, control, and custody of the children.

It also appears from the record that at the time of the trial the plaintiff was employed at a mercantile store. Caryl, when she was not otherwise engaged, would be at home with Douglas. Also, the plaintiff has made provisions for the care of Douglas while she is employed.

Insofar as David is concerned, he is a graduate of Massachusetts Institute of Technology and was 22 years of age at the time of trial.

The decree of the trial court shows that beginning November 1, 1959, and continuing for 3 years, or until further order of the court, the defendant should pay $200 each month for the support of Caryl while she is residing with the plaintiff and attending college or university.

The trial court's decree required the defendant to cash United States Government E bonds of the face value of $4,100, and place the proceeds in an irrevocable trust whose corpus and income may be used only for the college education of Howard and Douglas, and must be distributed to them when they reach the age of 23 years.

Section 38-101, R. R. S. 1943, provides: "All persons under twenty-one years of age are declared to be minors; but in case a female marries under the age of twenty-one years her minority ends."

The general rules of the law of parent and child, being based on the child's incapacity, both natural and legal, and its consequent need of protection and care, apply only while the child is under the age of majority, and the father's legal duty to support his child ceases when the child comes of age. See, Annotation, 42 A. L. R. 150; 39 Am. Jur., Parent and Child, §§ 68, 69, pp.

708, 710; Breuer v. Dowden, 207 Ky. 12, 268 S. W. 541, 42 A. L. R. 146.

There are no circumstances shown in the instant case that would require the defendant to support his children upon their obtaining adulthood. Caryl will be 21 years of age on August 1, 1961. Consequently, any allowance for child support for her shown in the decree beyond that period of time should not be allowed, and we so hold.

Insofar as the irrevocable trust created by the trial court in favor of Howard and Douglas is concerned, this part of the decree should be vacated and set aside for the same reason as shown by the above authorities. It can be adduced from the record that the parties would not fail to provide adequate education for their children.

Insofar as the decree relating to the right of visitation of the parents to the children is concerned, we believe this is proper and that it should not be disturbed. The decree provides that the defendant is to have the right to have Douglas visit him one weekend, Friday evening through Sunday afternoon, each month, and the plaintiff is entitled to have Howard visit her under the same type of arrangement. It is also ordered that the boys should spend not less than 30 days of each summer vacation together, all of which is subject to further order of the court.

The trial court provided that the defendant should pay the sum of $125 each month for the support of Douglas, and that this amount be increased to $150 each month upon the termination of payments of support for Caryl. We believe that the sum of $125 a month would be sufficient for the support and maintenance of Douglas until there is an adequate and proper showing made, as provided for by law, that such amount should be increased.

By the decree the trial court required the defendant to maintain, keep in force, and pay the premiums on adequate hospitalization and medical insurance for the minor children, and to pay all extraordinary medical

and hospital expense incurred by or on behalf of the minor children, with the exception of fees of psychiatrists or plastic surgeons which would be allowed only upon order of the court. We believe that this part of the court's decree should be held for naught.

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

The division of property and allowance of alimony in divorce actions are always to be determined by the facts in each case. See, Francil v. Francil, 153 Neb. 243, 44 N. W. 2d 315; Workman v. Workman, *supra.*

"In determining the question of alimony or division of property as between the parties the court will consider the respective ages of the parties to the marriage; their earning ability; the duration of the marriage; the conduct of each party during the marriage; their station in life, including the social standing, comforts, and luxuries of life which the wife would probably have enjoyed; the circumstances and necessities of each; their health and physical condition; and their financial circumstances as shown by the property they owned at the time of divorce, its value at that time, its income-producing capacity, if any, whether accumulated or acquired before or after the marriage, the manner in which it was acquired, and the contributions each has made thereto. From these elements and all other relevant facts and circumstances, the court will determine the rights of the parties and make an award that is equitable and just." Spencer v. Spencer, 158 Neb. 629, 64 N. W. 2d 348.

This marriage lasted for a period of 23 years. There is no question but that the defendant supported the plaintiff and his children in a comfortable, generous,

and even lavish style. The family acquired a good social status and had many of the finer things of life.

The trial court's decree provided for a division of the property by awarding to the plaintiff the home purchased by her at 9424 Capitol Avenue, in Omaha, subject to taxes, liens, and encumbrances thereon, including a mortgage to an insurance company. The court found the equity in such home to be in the amount of $7,500. This home was purchased with the consent of the defendant. The court further awarded the plaintiff the household goods and furnishings contained in such home, except certain items which apparently were claimed by the defendant. The plaintiff was also awarded a 1959 Chevrolet Impala sedan valued at $2,000; the balance in a checking account carried in the name of the plaintiff in the amount of $2,500; and certain clothing and other articles belonging to the plaintiff, Caryl, and Douglas. The defendant was given credit for the sum of $8,000, representing the differential in bonds, home furnishings, cash in Caryl's possession or bank account, and unwarranted expense on the part of the plaintiff.

The court allowed permanent alimony to the plaintiff in the amount of $55,000, $5,000 payable within 10 days from the date of the decree and the balance of $50,000 to be paid at the rate of $400 each month commencing 1 month from the date of the decree and a like amount to be paid on the first day of each and every month thereafter until the sum of $55,000 is paid in full. The decree ordered that said payments of alimony totaling $55,000 should be deductible for income tax purposes by the defendant in accordance with pertinent regulations and provisions of the Internal Revenue Code.

The trial court awarded the defendant, as his sole and separate property, the home in Grand Island; the furniture, fixtures, and household goods contained therein; a stamp and coin collection, except that David's stamp collection should be delivered to him; 6 shares of stock

of the First National City Bank of New York City; 72 shares of stock in Manufacturer's Trust Company of New York City; all shares of stock, and all right, title, and interest in and to Twin Rivers Company, Inc., a Nebraska corporation; the total of $22,000 face value of United States Government bonds; all clothing and personal effects of the defendant and Howard located at either home or in storage at Grand Island; all articles and personal property in storage at Grand Island with the exception of those that belonged to Caryl and Douglas; the balance in the personal checking account of the defendant; and a 1953 Packard automobile now titled in the name of the plaintiff, and the court ordered the plaintiff to execute the title certificate to the defendant. The defendant was ordered to pay all family bills owing as of September 1, 1959, in the total amount of $2,360.96. The decree further ordered that the defendant should in the future have the right to take as exemptions under his personal income tax return Caryl, Douglas, and Howard, as long as he continues to pay the child support as provided under the decree; and that the defendant pay the costs of the action, including attorneys' fees in the amount of $5,000, to be payable forthwith to the clerk of the district court. The trial court divided the $5,000 fee as $2,500 payable for services rendered in obtaining the divorce, and $2,500 for services rendered in connection with the property litigation. The decree was rendered accordingly.

While the trial court states in the decree that the plaintiff shall be awarded as permanent alimony and division of property the total sum of $75,000, being items of real and personal property, cash, and stock, and then made a provision awarding the plaintiff $55,000 as permanent alimony as heretofore mentioned, it should be stated that the items constituting the equity in the home in Omaha, the Chevrolet Impala sedan, the checking account, and the $55,000 alimony payable as provided for by the decree, constitute a total of $67,000.

The difference between the $75,000 and $67,000, or $8,000, was the credit given to the defendant on differential in bonds, home furnishings, cash in Caryl's possession or bank account, and unwarranted expense on the part of the plaintiff.

We have heretofore set out that part of the trial court's decree relating to child support and the creation of an irrevocable trust, and have determined the same.

The record discloses a sharp conflict in the evidence as it relates to the value of the personal and real property owned by the plaintiff and defendant. This is especially true with reference to the value of the stock of the Twin Rivers Company, Inc., owned exclusively by the defendant, and the value of the business conducted by such corporation which is an egg processing business. True, it is a business that fluctuates, in other words, in some years it returns a substantial profit while in others it sustains a loss. However, generally speaking the returns from such business have shown it to be a substantial business, and its present and future status is not as discouraging as the defendant testified. Neither the plaintiff or defendant, for the most part, gave a fair, complete, or accurate valuation of the property owned by each which is involved in this case. There is no question but that the trial court gave careful consideration to the record upon this phase of the case, as did this court. We conclude, from a review of the evidence on this phase of the case, that it fully sustains the trial court's judgment with reference to a division of the property between the parties here involved, and the allowance for permanent alimony.

We conclude that the decree of the trial court should be modified with reference to child support, as heretofore set forth; that the irrevocable trust created by the trial court for the benefit of Howard and Douglas should be held for naught; that the defendant should be required to pay the plaintiff $5,000 in cash as an alimony payment within 30 days after the issuance of the man-

date in this case and attorneys' fees as allowed by the trial court in the amount of $5,000 within the same period of time; and that the part of the trial court's decree requiring the defendant to maintain, keep in force, and pay the premiums on adequate hospitalization and medical insurance for the minor children and to pay all extraordinary medical and hospital expenses incurred by or on behalf of the minor children with the exception of fees of psychiatrists or plastic surgeons which would be allowed only on order of the court, should be held for naught for the reason hereinbefore stated. We award as costs to the plaintiff attorneys' fees in the amount of $2,500 for services rendered by plaintiff's attorneys in this court. In all other respects we find the decree and judgment of the trial court to be correct.

For the reasons given herein we affirm in part and in part reverse the judgment and remand the cause to the district court with directions to enter judgment in conformity with this opinion.

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

ELLWOOD B. CHAPPELL and PAUL E. BOSLAUGH, JJ., not participating.

MORGAN D. WELTON, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.
107 N. W. 2d 394

Filed February 3, 1961. No. 34810.

1. **Criminal Law: Evidence.** It is permissible for a party to ask his own witness whether he made prior statements inconsistent with his testimony and such an inquiry is not objectionable, although the incidental effect of it is to impeach the witness. Such an examination is a proper one for the purpose of showing that the testimony of the witness operated as a surprise, or to test his recollection, refresh his memory, induce him to change his testimony, draw out an explanation of his apparent inconsistency, or show the circumstances which induced the party to

call him, and that such party had been placed at a disadvantage by unexpected evidence.

2. **Criminal Law: Trial.** 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 by the party complaining.

ERROR to the district court for Garfield County: ERNEST G. KROGER, JUDGE. *Affirmed.*

Tedd C. Huston, for plaintiff in error.

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

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

BOSLAUGH, J.

The plaintiff in error, who will be referred to herein as the defendant, was charged with contributing to the delinquency of Marjorie Davenport, a child under 18 years of age, in violation of section 28-477, R. R. S. 1943. The complaint was originally filed in the county court of Garfield County, Nebraska. Upon a plea of guilty, the defendant was sentenced to imprisonment in the county jail and to pay a fine and costs.

The defendant appealed to the district court for Garfield County, Nebraska, he pleaded not guilty, and upon trial to a jury was found guilty. His motion for new trial was overruled and he was sentenced to imprisonment in the county jail for 45 days and fined $200 and costs. The defendant then filed his petition in error in this court.

The girl named in the complaint will be referred to herein as the complaining witness.

Of the errors assigned, only those which have been discussed will be considered. Revised Rules of the Supreme Court, rule 8a2(4); Linder v. State, 156 Neb. 504, 56 N. W. 2d 734.

The defendant has not challenged the sufficiency of

the evidence to support his conviction. Therefore, it will not be necessary to include a detailed review of the evidence in this opinion.

The defendant complains that he was prejudiced because the county attorney questioned the complaining witness in reference to a conversation she had with a state safety patrolman after the offense had been committed, and that the trial court erred in permitting the county attorney to read from a statement made to the patrolman by the complaining witness.

No statement was introduced in evidence and none appears in the record. The record shows that the following occurred on direct examination of the complaining witness by the county attorney: "Q. Did Mr. Welton get on top of you at all while in the back seat of the car? A. I don't remember. Q. Do you know what the genital organs are, Miss Davenport? A. Yes. Q. Did Mr. Welton place his hands or otherwise touch any of your genital organs? A. I don't know. Q. Refreshing your memory, do you recall talking to a trooper, Donald Grieb, about this matter shortly after it happened? A. Yes. Q. Is it true you gave him a statement to the effect while you were in the car at this time Mr. Welton—

"MR. HUSTON: Your Honor, I will have to object to the questioning from this document. The witness has already testified that she didn't remember.

"THE COURT: I think he has a right to refresh her memory from previous statements.

"Q. Miss Davenport, do you recall talking to Trooper Grieb about this matter? A. Yes. Q. Is it true at that time you told him Mr. Welton did touch your genital organs? A. I guess so.

"MR. HUSTON: I further object on the basis it's impeaching his own witness.

"THE COURT: Overruled."

The defendant relies upon Masourides v. State, 86 Neb. 105, 125 N. W. 132, and Erdman v. State, 90 Neb. 642, 134 N. W. 258, Ann. Cas. 1913B 577.

In Penhansky v. Drake Realty Constr. Co., 109 Neb. 120, 190 N. W. 265, the court set aside the rule as to contradiction of witnesses stated in Masourides v. State, *supra*. In Penhansky v. Drake Realty Constr. Co., *supra*, the plaintiff called the driver of the defendant's truck as her own witness. The truck driver testified in contradiction to statements which he had made to the plaintiff's counsel before the trial. The court held that the plaintiff was entitled to show the prior contradictory statements of the witness and set aside the rule as to contradiction of witnesses stated in Masourides v. State, *supra*.

The following rule is applicable here: It is always permissible for a party to ask his own witness whether he had made prior statements inconsistent with his testimony and such an inquiry is not objectionable, although the incidental effect of it is to impeach the witness. Such an examination is a proper one for the purpose of showing that the testimony of the witness operated as a surprise, or to test his recollection, refresh his memory, induce him to change his testimony, draw out an explanation of his apparent inconsistency, or show the circumstances which induced the party to call him, and that such party had been placed at a disadvantage by unexpected evidence. Svehla v. State, 168 Neb. 553, 96 N. W. 2d 649; Moore v. State, 147 Neb. 390, 23 N. W. 2d 552.

In this case the county attorney did not attempt to introduce a written statement as such or read at length to the witness from such a statement. Under the circumstances in this case it was proper for the county attorney to examine the complaining witness concerning her previous conversation with the patrolman for the purpose of refreshing her memory.

The defendant also complains that the trial court erred in failing to instruct the jury as to the defendant's theory of the case, as to the weight to be given to the testimony of a witness who has been impeached, and

that evidence which is admitted for the purpose of impeachment is not substantive evidence. The defendant has cited no authority in support of his contentions in this regard.

The defendant's plea was not guilty. His testimony amounted to a denial that the offense occurred. He presented no evidence of an affirmative or other special defense. The assignment of error in reference to a failure of the trial court to instruct the jury as to the defendant's theory of the case is without merit.

There is no testimony or other evidence in the record which was admitted for the purpose of impeachment. It is true that the county attorney was permitted to examine the complaining witness in reference to a previous conversation which she had with the patrolman. That evidence was admitted for the purpose of refreshing the recollection of the witness and any effect which it may have had of tending to impeach the witness was incidental. Thus, there was no occasion for the trial court to instruct the jury as to the weight to be given to the testimony of a witness who has been impeached or that evidence admitted for the purpose of impeachment is not substantive evidence.

The trial court instructed the jury generally as to the issues in the case. The defendant has not challenged any of the instructions which were given and did not request any instructions in addition to those which were given. In this situation the following rule is applicable: "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, when no proper instruction has been requested by the party complaining." Smith v. State, 169 Neb. 199, 99 N. W. 2d 8. See, also, Frades v. State, 131 Neb. 811, 270 N. W. 314.

The judgment is affirmed.

AFFIRMED.

JOSEPH A. GRASSO, APPELLEE, V. ADOLPH DEAN ET AL., APPELLANTS, IMPLEADED WITH STATE FINANCE COMPANY, A CORPORATION, ET AL., APPELLEES.

107 N. W. 2d 421

Filed February 3, 1961. No. 34848.

1. **Contracts: Duress.** A disguised threat of criminal punishment may be as effective for the purpose of inciting fear as a direct statement, and if it produces the desired condition of the mind, may amount to duress.
2. ———: ———. Any wrongful influence designedly exerted by an interested party and producing a condition of mind that deprives the other party of the exercise of his free will may amount to duress and invalidate a contract signed while the influence prevails.
3. **Parent and Child: Duress.** Where a parent is induced to execute an instrument by threats and fear of criminal punishment of a child, the instrument is the result of duress and the contract may be voided.
4. **Bills and Notes: Mortgages.** If the consideration for a note and mortgage is the suppression of a criminal prosecution, the transaction is illegal and void and no recovery can be had thereon.

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

Philip M. Kneifl and *Abrahams, Kaslow & Cassman,* for appellants.

Joseph T. Votava, for appellee Grasso.

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

SPENCER, J.

This is an action by appellee Grasso, hereinafter referred to as plaintiff, against appellants Adolph, Gladys, and Joan Dean, hereinafter referred to as defendants, and defendant corporations, State Finance Company, Postal Finance Company, and First Loan Company. It seeks to foreclose a mortgage on the home owned by defendants Adolph and Gladys Dean, in which the three

defendant corporations are alleged to claim some interest. The mortgage was given to secure an installment promissory note signed by the three defendants Dean.

The defense raised by defendants Adolph and Gladys Dean, hereinafter referred to as Adolph and Gladys, is that the promissory note and mortgage were without consideration and were obtained by the use of duress and threats. Defendant Joan Dean, hereinafter referred to as Joan, pleaded duress and the disaffirmance of the contract because of infancy.

The trial court in its judgment found that defendant corporations, State Finance Company and First Loan Company, had failed to plead or answer; and entered their default. It found defendant corporation, Postal Finance Company, to have a first lien on the property involved herein. It found plaintiff to have a second lien in the amount of $7,432.56 as of February 18, 1960. The trial court then entered a judgment of foreclosure and ordered that if the proceeds of the sale were insufficient plaintiff on motion would be entitled to a deficiency judgment against defendant Joan.

The essential facts are: Defendant Joan entered the employ of plaintiff, a dentist, in 1954 as an office clerk, receptionist, and technician. Plaintiff had been in practice but a few months. Joan was 16 years of age but represented herself to be 18. During the years 1956 and 1957, Joan embezzled funds belonging to plaintiff. According to plaintiff's testimony, Joan admitted "about the fourth or sixth month * * * of 1957," that she had been taking money, but could not give the amount. Audits were made by plaintiff's accountant. On October 24, 1957, Joan, in the office of plaintiff's accountant and in his presence, and in the presence of plaintiff, signed an "affidavit of admission," but no amount was stated. During December 1957, Joan made two payments on the obligation. Subsequent to these payments, plaintiff insisted that Joan bring her father to his office. About 2 weeks previous to February 18, 1958, Joan brought

Adolph to plaintiff's office. Previous to this time, Joan had not wanted her folks informed. At this visit, plaintiff discussed Joan's difficulty with her father, who, according to plaintiff's testimony, said, "he would help her in any way he could, and he was appreciating what I was doing." On February 18, 1958, Joan and Adolph met plaintiff at the home of plaintiff's accountant, and signed a note for $7,974, and Adolph executed a mortgage on the Dean home. The Deans had never furnished plaintiff with a description of the property nor had there ever been a specific reference to a mortgage on their home. The papers were prepared by plaintiff's attorney, who never appeared in the transaction. The note and mortgage were signed. Then Adolph, Joan, plaintiff, and the notary public went to the Dean home where the instruments were signed by Gladys who had not previously been informed about Joan's difficulty.

The evidence on the amount of the defalcation is in dispute. Joan contends it could not have exceeded $1,500. The testimony of plaintiff's witness sets the amount at $8,200.38. The note was for $7,974. Payments have been made in the amount of $1,283.45. All of these payments were made by Joan. The testimony of the parties as to the alleged facts constituting duress is in conflict, and no purpose will be served by detailing the respective contentions of the parties. Suffice it to say that the testimony, in the light of the circumstances apparent from the record, leaves little doubt as to the way the issue should be resolved.

The evidence in this case is undisputed that Joan did embezzle funds of plaintiff. However, in considering the defense of duress herein, the question of her guilt or innocence is immaterial. The question is whether the facts and circumstances, as disclosed by the record involved, constitute duress. In Nebraska the law is well established that where a parent or other relative is induced to execute an instrument by threats and fear of criminal punishment of a child or relative, the instru-

ment is the result of duress and the contract may be voided. Beindorff v. Kaufman, 41 Neb. 824, 60 N. W. 101; Hoellworth v. McCarthy, 93 Neb. 246, 140 N. W. 141, 43 L. R. A. N. S. 1005.

We said in Farmers State Bank v. Dowler, 112 Neb. 262, 199 N. W. 528: "Any wrongful influence designedly exerted by an interested party and producing a condition of mind that deprives the other party of the exercise of his free will may amount to duress and invalidate a contract signed while the influence prevails."

Plaintiff testifed: "* * * we have never told them that we were going to prosecute, all we told them was *that we weren't interested in having any trouble, we weren't interested in hurting them or harming them in any way,* but we just wanted to help them. * * * I had never mentioned any threat of any kind, but I had told him that *I knew that it was a bad situation and that I would like to help them as much as possible.* * * * Q. But let's try and get one point clear. Up to the time he walked into this room and saw a note and a mortgage that was on the table, you had never had any real discussion with him about the fact that you were asking him to be bound by a promissory note to pay you back in full on the amount you claimed and also to put up his house as security? A. As I recall, I had told him that I had discussed this with my attorney on a meeting previous to the time we met in Mr. Watts' office, that I had told him that we should do it in a legal manner and he knew that that was the reason he was to come there, to sign these legal notes and documents. * * * Q. All right, let's go back. The first meeting with Mr. Dean at your office did you tell him that you expected him to sign a promissory note in the sum of approximately $8,000 and to execute a mortgage on his home directly to you to pay for Joan's defalcations? MR. GARROTTO: I object to that as already answered. THE COURT: He has already answered that; he said no." (Italics supplied.)

The testimony of Wesley Fox, the notary public who took the acknowledgment and who was called by plaintiff, is as follows: "I believe that some mention was made concerning the papers, and now, whether the word 'mortgage' was mentioned, I do not recall, but as I recall the conversation, he indicated that if the Deans would sign this mortgage, that no charges would be pressed, and that the doctor did not want to press any charges, he merely wanted to work it out with them. But I don't believe Mr. Watts used the word 'prison' at all, I believe the actual words were something about preferring charges or something of that nature." It is true that the witness was referring to his conversation with plaintiff's accountant Watts and not to any conversation with plaintiff. It is inserted here because of the light it tends to shed on statements made by plaintiff's accountant who was an active participant in securing the instruments.

Plaintiff's accountant Watts testified: "Q. Now then, was anything else said there with reference to the amount due at that time? A. I said that it being a large amount, and there wasn't an exact amount specified other than it was large, that we'd all have to work it out together. Mr. Dean thanked us very much for cooperating the way that we had, and I said to Mr. Dean, 'There is no reason why this thing can't be worked out.' * * * Q. Now, Mr. Dean was already there when you arrived? A. That's correct. Q. Did you observe the way he appeared when you arrived? Was he broken up at that time? A. At first he was, yes. Q. He had been crying? A. Well, there was tears in his eyes. I would assume. Q. And then you joined in the conversation? A. Correct. Q. And do you remember what your words were as you began the conversation, or what you said? A. Well, to the effect that the money that Joan had taken, *we didn't want a lot of publicity about it, we wanted to try and help them work things out,* that all we were interested in is Doctor getting his money

back. Q. Did you say something about the fact that she was in a serious position? A. That's correct. * * * Q. Just tell us what you said, just what you said in regard to paper. A. *That we wanted to try to rehabilitate her, we didn't want to persecute her, we wanted to do everything to help her. In other words, just because she is down we didn't want to trample her, we wanted to help her.*" (Italics supplied.)

The word "persecute" as used by the witness would ordinarily have an entirely different meaning, but as used here could logically be calculated to induce fear of prosecution. Joan had confessed to taking money several months before. She had given a written admission on October 24, 1957. She had also made payments on the obligation. What was to be "worked out"? What was plaintiff doing that Joan's father appreciated? Why wasn't it necessary for plaintiff to discuss the amount with the father? Why was plaintiff so certain the Deans would give a mortgage on their home that he had one prepared without even discussing it with them before the night it was executed? When we consider the substance of the testimony adduced by plaintiff, we can readily conclude the obvious answer must be the correct one. There was a threat of prosecution under plaintiff's evidence, and while not stated in so many words, it evidently produced the desired condition of mind.

The testimony of defendants is to the effect that they signed because otherwise Joan "would just have to go over the road."

In this case, which we try de novo, we resolve the fact question in the affirmative and hold that a disguised threat may fairly be inferred from the testimony adduced on behalf of plaintiff, and that such threat was as effective for the purpose of inciting fear as a direct statement. Hoellworth v. McCarthy, *supra*. We believe the consideration for the giving of the note and mortgage was the suppression of a criminal prosecution, and find

the transaction illegal and void and that no recovery can be had thereon. Smith Premier Typewriter Co. v. Mayhew, 65 Neb. 65, 90 N. W. 939.

There is a wide variance between Joan and plaintiff as to the amount of the defalcation. While it is generally true that an embezzler little realizes how fast his abstractions move into large figures, it does test credulity to believe that a dentist in practice only 3 years and operating alone would not notice the withdrawal from January 1, 1956, to "the fourth or sixth month * * * of 1957," of over $8,000. This is an average in excess of $400 per month. The evidence is that plaintiff personally made all of the bank deposits. He could not help but have some awareness of his volume of business. A minor should be held liable for defalcations. If, however, there has been a misrepresentation of the amount involved, or if the minor has been overreached, certainly relief should be granted, and she should have her day in court.

We find the note and mortgage void, and as to defendants Adolph and Gladys Dean we reverse the judgment of the trial court and dismiss the action. As to defendant Joan Dean we reverse the judgment of the trial court and remand the cause for further proceedings, with costs in this action taxed to plaintiff.

REVERSED AND REMANDED WITH DIRECTIONS.

RUTH ERICKSON ET AL., EXECUTORS OF THE ESTATE OF A. HORACE ERICKSON, DECEASED, APPELLEES, V. METROPOLITAN UTILITIES DISTRICT, A CORPORATION, ET AL., APPELLANTS, HAROLD M. DIERS ET AL., INTERVENERS-APPELLEES.

107 N. W. 2d 324

Filed February 3, 1961. No. 34862.

1. **Municipal Corporations.** A metropolitan water district organized pursuant to section 14-1002, R. R. S. 1943, is a body corporate and possesses all of the usual powers of a corporation for public purposes.

2. ———. A metropolitan water district is empowered to exercise any and all powers that are possessed by or which may be granted to cities and villages by the general statutes of this state for the construction and extension of waterworks.
3. ———. A metropolitan water district in the conduct of its affairs functions in the nature of a private enterprise for the convenience, advantage, and benefit of the area of functioning, the inhabitants thereof, and the property owners therein.
4. ———. The board of directors of a metropolitan water district has power and authority to determine and fix all water rates; to determine what shall be a reasonable rate for any particular service; to prescribe the conditions and methods of water service; to collect all charges for water service or the sale of water; and to make rules and regulations as it deems proper for the operation of its water plant.
5. ———. Where a water district furnishes water to the public at large it may classify users and charge different rates to the different classes provided that the charges are reasonable and not discriminatory.
6. ———. Those engaged in serving water to the public generally may not make unreasonable and unjust discrimination either in service or rates among their patrons.
7. ———. A metropolitan water district having power to adopt rules and regulations is required to exact reasonable requirements, the reasonableness of which may be inquired into in a full hearing de novo in the courts.
8. **Municipal Corporations: Courts.** The question of whether or not a metropolitan water district has acted unreasonably and arbitrarily in the performance of its functions in the matter of service rendered and rates charged is one of those which is properly subject to judicial review and examination.
9. **Municipal Corporations: Injunction.** The injunctive process is available to a user of water against a water district furnishing water to the public generally to prevent the enforcement of a rate which is discriminatory.

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

George C. Pardee, G. H. Seig, and *Harry H. Foulks, Jr.,* for appellants.

J. A. C. Kennedy, Yale C. Holland, George L. DeLacy, Ralph E. Svoboda, and *Clarence E. Heaney, Jr.,* for appellees.

Eugene D. O'Sullivan, for intervener-appellee O'Sullivan.

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

YEAGER, J.

This action was originally instituted in the district court for Douglas County, Nebraska, by A. Horace Erickson, plaintiff, against the Metropolitan Utilities District, a public utility corporation created pursuant to statutes of the State of Nebraska, which will be referred to as the district, the individual members of the board of directors of the district, and the general manager thereof, defendants. It is not deemed necessary to name herein the members of the board of directors or the general manager. The plaintiff died during the pendency of the action and in consequence Ruth Erickson and the Omaha National Bank, as executors, were substituted as parties plaintiff. Before the case was tried three separate groups of parties, one corporation, and one individual filed pleadings and became interveners in the case. Their relation to the subject matter of the action was in substance the same as that of the plaintiff.

The action, briefly stated, was by plaintiff to enjoin the district and its officers and directors from imposing and collecting a water surcharge; from imposing penalties and taking punitive action for refusal to pay a water surcharge; and from exacting a rate for seasonal use of water not applicable to all seasonal users on the basis of the amount of water used. The relief sought by the interveners was in substance the same as that sought by the plaintiff.

The action was tried to the court and a judgment was rendered in favor of plaintiffs and interveners and against the defendants. Motion for new trial was filed. From the final judgment and the order overruling the motion for new trial the defendants have appealed.

For the further purposes of this opinion the plaintiffs and the interveners will be referred to as appellees, unless other reference is required, and the defendants will be referred to as appellants, except when separate reference is made to the Metropolitan Utilities District. At such times it will, as has already been indicated, be referred to as the district.

By the pleadings of the appellees it is substantially alleged that the district is a public utility corporation organized and carrying on its business under and by virtue of the laws of the State of Nebraska, and as such it operates the water system which serves the inhabitants of the city of Omaha and surrounding territory within the limits of the district; that the district adopted a rate schedule or surcharge for all nonconserved air-conditioning equipment; that the schedule was denominated " 'Rate Schedule W-S. Surcharge Rates for Non-conserved air-conditioning' "; that the surcharge rate exaction was $36 per ton of capacity of nonconserved water-cooled air-conditioning units; and that this surcharge is for reasons enumerated arbitrary, unreasonable, unjust, oppressive, and discriminatory. Of the enumerated reasons those necessary to a determination of this case will be adverted to later herein. The date this surcharge was adopted is not declared in the pleadings but the record discloses it was January 4, 1956, effective as of January 1, 1956. It exempted all units installed up to and including April 30, 1956, for the years 1956 and 1957.

By answers containing detailed contentions in that area the appellants deny the charge that the surcharge is arbitrary, unreasonable, unjust, oppressive, and discriminatory.

The ultimate determination in this action properly depends upon which of these two opposing contentions must be sustained under the facts and applicable legal principles. Subordinate and preliminary to an ultimate determination the proper approach, in the light of

the peculiar capacity and powers of the district, must be ascertained.

The general powers of the district are found in section 14-1002, R. R. S. 1943. To the extent necessary to state them here, they are the following: "A metropolitan water district shall be a body corporate and possess all the usual powers of a corporation for public purposes, * * *. It may exercise any and all the powers that are now or may be granted to cities and villages by the general statutes of this state for the construction or extension of waterworks."

Specific regulatory powers which are of concern in this case are found in section 14-1015, R. R. S. 1943, as follows: "The board of directors of the metropolitan water district shall have power and authority to determine and fix all water rates, and to determine what shall be a reasonable water rate for any particular service, the conditions and methods of water service, the collection of all charges for water service or the sale of water; * * *. The board of directors shall also have authority to make such rules and regulations for the conduct of the water plant controlled and operated by the metropolitan water district, and the use and measurement of water supplied therefrom as it may deem proper, including the authority to cut off any water service for nonpayment, or for nonmaintenance of the pipes and plumbing connected with the supply main, or noncompliance on the part of any water user with the rules and regulations adopted by the board for the conduct of its business and affairs."

While it is a matter of no real importance in the determination of the issues involved here the present name of the district flows from section 14-1101, R. R. S. 1943, and not from the original legislation empowering the creation of metropolitan water districts.

The capacity in which the district as such performs its functions does not appear to have been clearly defined in the statutes, the decisions of this court, or in the briefs

of the parties to this action, although the inference to be drawn from all of these is that there is an accord that it does not perform a governmental function but one in the nature of a private enterprise for the convenience, advantage, and benefit of the area of functioning, the inhabitants thereof, and the property owners therein. This conclusion flows from the pronouncement contained in Metropolitan Utilities Dist. v. City of Omaha, 112 Neb. 93, 198 N. W. 858. This is the logic which flows from the language in the opinion in that case which declares that when a city is performing like functions the exercise thereof is not governmental but in the nature of a private enterprise. This is supported by the language of United Community Services v. The Omaha Nat. Bank, 162 Neb. 786, 77 N. W. 2d 576, wherein the functions of other public corporations are described and analyzed.

In the performance of the functions under the power granted by the statute the district in the matter of service rendered and rates to be charged therefor, the question of whether or not the district has acted unreasonably and arbitrarily has been recognized as a matter proper for judicial examination and review. The case of Keystone Investment Co. v. Metropolitan Utilities Dist., 113 Neb. 132, 202 N. W. 416, 37 A. L. R. 1507, is one wherein there was such a review. No case has been cited or found to the opposite effect.

The parties however, while apparently agreeing that there may be a review, do not agree as to the character and extent of that right. The position taken by the district is lacking in clarity. The interpretation placed upon that position appears to be about as follows: If on the hearing in the district court there was competent and relevant evidence to sustain the action of the district and on which evidence it could not be said the action was arbitrary and unreasonable, and if such action was within the scope of the powers of the district, the court could not of right declare it invalid.

It relies for this position on Nebraska Limestone Producers Assn. v. All Nebraska Railroads, 168 Neb. 786, 97 N. W. 2d 331, and cases cited from other jurisdictions. Neither this case nor any of the others is authority for this position. The cited case is one which came to this court for review of action taken after full hearing and determination of the Nebraska State Railway Commission which is a constitutional department of state government clothed with power, among others, to hold hearings and establish rates for common carriers in intrastate commerce. Art. IV, § 20, Constitution of Nebraska. The powers of hearing and decision conferred upon the Nebraska State Railway Commission are not conferred on the district either by Constitution or statute. That case therefore does not amount to authority for the contention made. Furthermore this position is inimical to the status of the district as indicated by what was said in Metropolitan Utilities Dist. v. City of Omaha, *supra,* and Keystone Investment Co. v. Metropolitan Utilities Dist., *supra.*

In practice, if not by specific declaration, it has been the rule that public service corporations having power to adopt rules and regulations are required to exact reasonable requirements, the reasonableness of which may be inquired into in a full hearing in the courts. See, Western Union Telegraph Co. v. Call Publishing Co., 44 Neb. 326, 62 N. W. 506, 48 Am. S. R. 729, 27 L. R. A. 622, 58 Neb. 192, 78 N. W. 519, affirmed 181 U. S. 92, 21 S. Ct. 561, 45 L. Ed. 765; American Water-Works Co. v. State ex rel. Walker, 46 Neb. 194, 64 N. W. 711, 50 Am. S. R. 610, 30 L. R. A. 447; Albert v. Davis, 49 Neb. 579, 68 N. W. 945; Hoover v. Deffenbaugh, 83 Neb. 476, 119 N. W. 1130. This represents substantially the theory on which the appellees have proceeded.

The conclusion reached is that the question of the validity of the exactions made by the district which are here for review was the proper subject of a full hearing de novo by the district court. It is added that the ap-

pellees do not contend that the burden was not on them to establish invalidity in order to prevail.

The surcharge, the penalty and punitive action, and the seasonal rate which the appellees sought to enjoin by their action and which were enjoined by the judgment of the district court appear in Rate Schedule W-S adopted by the board of directors of the district on January 4, 1956, and declared effective as of January 1, 1956, with a reservation that it would not apply through 1956 and 1957 to nonconserved air-conditioning equipment which had been actually connected to the district's water system on or before April 30, 1956. All equipment installed after April 1956 was subjected to the rate.

The schedule to the extent necessary to state it here provides that, in addition to the regular charges at the applicable rates, a surcharge shall be made of $36 a ton of capacity for water-cooled air-conditioning where the unit does not have water-conserving equipment. The surcharge is allocated one-third each to the months of June, July, and August of each year. No surcharge shall be made if nonconserved air-conditioning equipment is installed but has been physically disconnected from the plumbing system. If there is a reconnection at any time before September 1 of any year the annual charge for the year will be made. If new installations are made prior to June 30 of any year the full surcharge shall be applicable; if made between July 1 and August 1 the surcharge shall be two-thirds of the total; and if made between August 1 and September 1 the surcharge shall be one-third of the total.

It is this that the appellees contend is arbitrary, unreasonable, unjust, oppressive, and discriminatory. They contend this on substantially the following grounds: (1) The surcharge is not based upon units of service rendered but upon the kind and character of equipment used; (2) it relates to but one type and not to all seasonal uses; (3) it amounts to a tax on equipment in

favor of the district and permits rates not based on the amount of necessary return; (4) it is prejudicial and discriminatory as to persons who installed nonconserving units prior to the adoption of the rate; (5) it imposes an illegal arbitrary charge without regard to quantity of water used; (6) it ignores the fact that the district has sufficient capacity to meet all peak demands; and (7) it discriminates against users of nonconserved equipment by excluding from the application of the surcharge industries and commercial firms whose water consumption remains steady regardless of season. This is a consolidated abstract of the stated grounds in the petition of the original plaintiff in this case.

Preliminary to a consideration of whether or not any or all of the contentions have been sustained it is here pointed out that there had been before and has been since the establishment of this surcharge a uniform graduated rate for furnishing water which depended upon the amount regularly metered and furnished to the user. All users, including each and all of the appellees, were required to pay the same rate. Also prior to and since this surcharge was established there was no other classification upon which was imposed a surcharge upon any amount or particular use of water. It is true that there were special situations under which the district furnished water for which service it received payment, but these had no relation to the questions involved herein.

To justify the surcharge, or more accurately stated, to defend against the contentions of the appellees, the district urges substantially that the use of water in nonconserving air-conditioners sets the users apart as a class of such a kind and character as to permit the exaction of a reasonable surcharge for the water used for that purpose, and that the surcharge made and the rate established were reasonable.

A large part of the record and of the briefs in this case deals with motives and motivations. It should be

said however that motives may not be allowed to control or influence unless they coincide with sound principle.

In this area it becomes clear, and about this there is no real dispute, that the district was, in the establishment of the surcharge, in a large measure motivated by a purpose to prevent the installation of additional nonconserving water air-conditioning and to encourage the installing of water-conserving equipment on existing nonconserving equipment, the contemplated design of which was to reduce prospective future necessity for enlargement of water production capacity of the facilities of the district in order to meet the demands for water during peak periods of water use. It follows therefore that the conclusion to be reached must rest upon what the record discloses or fails to disclose as to reasonable necessity rather than only motive.

The surcharge here is based, as has been indicated, on a classification of the appellees into a class separate and distinct from all other users of water of the district with the rate charged higher than the rate charged to any of the others. There is no legal bar to classification provided that a valuable service was given other and different from that furnished to the public at large, and that the charge is reasonable and is not discriminatory. See, Keystone Investment Co. v. Metropolitan Utilities Dist., *supra;* Nebraska Limestone Producers Assn. v. All Nebraska Railroads, *supra.*

The evidence on the question of whether or not this surcharge was for a valuable service other and different from that furnished to the public at large, and the further question of whether or not the surcharge is reasonable and not discriminatory is of such length that it may not be summarized herein, but from it pertinent observations, which are deemed controlling, will be made as accurately as the record will permit.

At this point it will be said that the alleged ground of invalidity in (2) herein, which embraces b, e, and i

in the plaintiff's petition, requires no consideration other than to say that the evidence is insufficient upon which to base a finding of invalidity with particular regard to the matter of whether or not what was done was reasonable. This is not to say that what is presented by this specification, if supported by competent and material evidence, could not be the basis of the kind and character of relief sought herein. In this case there is evidence as to the demands and requirements of nonconserving air-conditioners but none which furnishes a basis for a comparison of this with other customer uses, hence clearly there is no basis for anything more than speculation as to whether or not there is unreasonableness and discrimination in this respect.

Our (4), plaintiff's d, in the terms in which it is stated stands without support. If there is discrimination it is in favor of the person who installed a nonconserving unit before the adoption of the rate regulation since he is relieved from the surcharge through 1957.

As to our (1), plaintiff's a, the meaning is not clear. The surcharge is based on evidence of probable maximum daily excess use of water by a nonconserving air-conditioner over one of like capacity having conserving equipment. Whether or not this has a material bearing on the validity of the surcharge must depend upon matters which will necessarily be considered under other specifications.

As to our (7), plaintiff's j, this requires no special consideration herein. This is true for the reason that although the factual statement contained therein is quite probably true the record is insufficient upon which to base a finding that this represents true discrimination rather than proper classification.

If therefore this surcharge is found to be arbitrary, unreasonable, unjust, oppressive, or discriminatory the findings must depend upon what the record discloses as to our (3), (5), and (6), plaintiff's c, f, g, and h.

At the outset of the consideration of this phase of the

case it is pointed out that in point of fact at no time after the establishment of this surcharge was it necessary to increase the pumping capacity of the district to meet the need for nonconserved air-conditioning or for any other purpose. In 1955 there was one day on which there was a use of 120,000,000 gallons. That was the highest amount ever required before or since. The capacity was increased, which increase was completed in 1957, to 140,000,000 gallons. This was before the surcharge became effective as to those having nonconserved air-conditioning before 1956. No further increase was projected after that which was completed in 1957. It is true that engineering surveys were made, the reports of which indicate a prospective later need for expansion but these were in nowise implemented. There is nothing authentically in the record to indicate that it was the purpose of the district to apply any portion of the surcharge in payment of the capital investment involved in the increase of capacity to 140,000,000 gallons which was completed in 1957. This according to the evidence of the district amounted to somewhat more than $14,000,000.

It is made clear by the evidence that so long as the plant and facilities for distribution were sufficient no extra burden or cost over that involved in the ordinary furnishing of water to users was cast upon the district by the furnishing of water for nonconserving air-conditioners.

It was also made clear that the Missouri River was the source of the water supply of the district and that the only limit on the supply, present or future, insofar as the district is concerned was or would be the limit of the capacity and facilities of the district.

It was further made clear that the same rate for water use was charged for all water used by persons having nonconserved air-conditioning, whether used in the air-conditioners or not, as was charged to all others who did not have nonconserved air-conditioning.

It was in view of these facts and known conditions that the surcharge was imposed. As pointed out, the surcharge was $36 per ton of capacity of each conditioner.

The theory on which it is based has been reduced to a mathematical formula, although clearly it is at least in large measure hypothetical and speculative. It is true of course that in a situation such as this hypotheses and speculative considerations are not avoidable. The formula produces an appropriate surcharge of $37.25 but this was reduced to an even $36.

The surcharge was based upon 7½ percent per annum of $675, that being the part of the reproduction cost of an entire new plant attributable to the maximum use of water in a 1 ton nonconserving air-conditioning unit less the difference between the estimated revenue from water used and the commodity cost thereof or $13.35, giving a result of $37.25.

The estimated reproduction cost of the plant was $66,000,000. The calculated actual cost prior to the addition which was completed in 1957 was slightly less than $23,000,000. As pointed out the capital cost of the addition completed in 1957 was approximately $14,000,000. Whether or not this was included in the $66,000,000 cost of reproduction has not been made clear. Be that as it may the total actual cost with the completion of the added capacity in 1957 was approximately $37,000,000.

At this point the question is propounded: What was the true basis of fixation of the amount of this surcharge? One answer which has been pointed out by the district is that it was to discourage the use of nonconserved water air-conditioning and to bring about its discontinuance. This, as the record discloses, was in large measure accomplished. But as indicated this motive furnished no basis for the imposition of the surcharge, there being a lack of adequate information upon which to base a declaration that this use repre-

sented a classification to which the district could apply a separate and distinct charge.

The design could not properly have been to make a rate charge for a use for which a rate had not been previously charged. The record discloses that the standard meter rate was made for all water used. The record fairly discloses that in delivery of this water no loss was entailed. In fact it is pointed out without controversy that so long as sufficient plant and capacity exist, the use of water in nonconserving air-conditioning equipment insofar as relative cost of operation is concerned adds no burden.

In the light of what has been said with reference to past, present, and future, if the design was to impose this as a current operating charge it was patently discriminatory.

In the light of well-established principles the surcharge was not only discriminatory but was unreasonable and accordingly unenforceable.

It is true, as has been pointed out by section 14-1015, R. R. S. 1943, that the board of directors of the district has the power and authority to determine what shall be a reasonable water rate for any particular service. This power and authority is not however without restrictions.

The general rules are set out in 12 McQuillin, Municipal Corporations (3d Ed.), § 34.97, p. 299, as follows:

"The rule forbidding unjust discrimination has been variously expressed: The charges must be equal to all for the same service under like circumstances. A public service corporation is impressed with the obligation of furnishing its service to each patron at the same price it makes to every other patron for the same or substantially the same or similar service. It 'must be equal in its dealings with all.' It 'must treat the members of the general public alike.' All patrons of the same class are entitled to the same service on equal terms. 'The law will not and cannot tolerate discrim-

ination in the charges of these quasi-public corporations. There must be equality of rights to all and special privileges to none.' 'A person having a public duty to discharge is undoubtedly bound to exercise such office for the equal benefit of all.' 'All should be treated alike; equality of rights requires equality of service.' 'The duty owed to all alike involves obligations to treat all alike.' 'The common law upon the subject is founded on public policy which requires one engaged in a public calling to charge a reasonable and uniform price to all persons for the same service rendered under the same circumstances.'

"The numerous cases on this subject all tend to establish the same general principle, that those engaged in serving the public cannot make unreasonable and unjust discrimination, either in service or rates, among their patrons. Discriminations between patrons by a public service company, including discriminations as to rates, are invalid, provided the discrimination is an unjust one, * * *."

Section 35.37, p. 686, from the same text, contains the following which has the effect of making the general rules applicable to the situation under examination in this case:

"Where a municipality owns its water or light works, it is settled that it has the right to charge rents against consumers who make use of its service, just as does a privately operated public utility. However, the rates must be reasonable, although the municipality may charge a rate which will yield a fair profit, and need not furnish the supply or service at cost; and the same rules in regard to the reasonableness of rates apply as in case of the rates of private companies owning a public utility. * * * Otherwise stated, where the municipality owns its plant, the rates for water, light or any other product, furnished by it must be fair, reasonable and just, uniform and nondiscriminatory. The same rules enforced against public service corporations in these respects, as herein already stated, are applied with full

force to the municipality. Judicial review may usually be had as to the reasonableness of the rates."

The principles thus declared are supported by the decisions of this court and of courts of other jurisdictions. See, Western Union Telegraph Co. v. Call Publishing Co., *supra;* American Water-Works Co. v. State ex rel. Walker, *supra;* Hoover v. Deffenbaugh, *supra;* Annotation, 50 A. L. R. 126.

It cannot well be gainsaid that if the record disclosed that the furnishing of water for use in nonconserving air-conditioning equipment was a service materially other and different from general use, which was more costly to render for any reason, and a charge was made on that account which was not unreasonable or discriminatory, it would be sustained. In determining validity this and all other elements bearing upon costs would be proper subjects of consideration in arriving at a rate charge.

In the instance here however, as has been several times indicated, there is no evidence that surrounding conditions which have or will in the foreseeable future come to pass will ratably increase the cost of this service over that which prevails in the area served by the district.

As against this the district urges that it is entitled to charge for the water used and in addition thereto make and collect this surcharge which in effect would be in the nature of a partial amortization of the costs of reproduction of the district's existing plant and facilities.

This theory may not on the record be sustained for two reasons. The first is that there is an absence of evidence that the other users of water were in any manner likewise burdened. The second is that there is nothing to indicate that it would be so allocated, but on the contrary it is reasonably inferable that it would become simply part and parcel of regular operating revenue. This would clearly be a discrimination against the users of water passing through nonconserving air-

conditioners. The application of this theory would be clearly discriminatory whether applied to a valuation of $66,000,000, $37,000,00, or $22,000,000.

The only other basis advanced to support the surcharge is that it was reasonable and proper as a provision to be exercised in anticipation of a future need and necessity for expansion of the plant and production capacity of the district to meet the requirements of nonconserving air-conditioning equipment and the normal requirements of service attendant upon the growth and expansion of the area to be served by the district.

It shall not be the purpose here to say that the district does not have the legal right in the anticipation of future expansion to make some provision therefor out of the revenues obtained from current operations. On the other hand it is not the purpose to say that it does have such right. That question is not being passed upon herein. Assuming however that it does have such right it must be said that reasonably one group of users may not be singled out and the provision made to attach to it to the exclusion of others, or if it is attached to all it may not be attached unequally.

In the light of what has been said it is clear that if the district purposed to and was in its overall operations so anticipatorily functioning, the users of nonconserving air-conditioning were being subjected to it on an equal basis with all others and in addition and alone these users of nonconserving air-conditioning were subjected to the surcharge. As has been pointed out, as to relative cost of current operation and absence of evidence of a valid basis for separate classification, no justification for the surcharge can be found. It was clearly discriminatory.

The record, on the theories considered herein, substantiates the contention of the appellees that the imposition of the surcharge is oppressive, discriminatory, and unreasonable, and accordingly its validity may not be sustained.

For the reasons herein set out the judgment of the district court is affirmed.

AFFIRMED.

ELLWOOD B. CHAPPELL and PAUL E. BOSLAUGH, JJ., not participating.

LINCOLN SERVICE AND SUPPLY, INC., APPELLANT, V. LOUIS LORENZEN, DOING BUSINESS AS LORENZEN FERTILIZER COMPANY, APPELLEE.

107 N. W. 2d 333

Filed February 3, 1961. No. 34877.

1. **Contracts: Pleading.** In an action on an express contract the defendant may show under a general denial that the contract differed in terms from that pleaded, or that no contract was in fact made.
2. **Pleading: Trial.** A party will not be permitted to plead one cause of action and upon the trial rely on proof establishing another. In order that a recovery may be had in an action the pleadings and the proof must agree.

APPEAL from the district court for Buffalo County: ELDRIDGE G. REED, JUDGE. *Affirmed.*

Kenneth H. Dryden, for appellant.

Luebs, Elson & Tracy, for appellee.

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

WENKE, J.

Lincoln Service and Supply, Inc., a corporation, brought this action in the district court for Buffalo County against Louis Lorenzen, doing business as Lorenzen Fertilizer Company. The purpose of the action is to recover a judgment against the defendant for the contract price of a tank car of nitrogen solution in the sum of $2,510.05. Trial was had to a jury and, upon the issues raised and evidence adduced, it returned a verdict for the defendant. Judgment was entered on the verdict dismissing plaintiff's petition. Plaintiff filed

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

Appellant Lincoln Service and Supply, Inc., will be herein referred to as plaintiff; appellee Louis Lorenzen will be herein referred to as defendant; and Allied Chemical and Dye Corporation will be herein referred to as Allied.

Plaintiff did not object to nor, in his motion for new trial, make any complaint about the instructions given by the trial court in submitting the cause to the jury. It has always been the rule of this court that in order to obtain a review of a question in this court, other than one of jurisdiction, the party complaining must have presented the question fairly and fully to the court below. See, Creighton v. Newton, 5 Neb. 100; Greenberg v. Fireman's Fund Ins. Co., 150 Neb. 695, 35 N. W. 2d 772.

Plaintiff is a Nebraska corporation with its principal place of business located in Grand Island, Nebraska. It operates under the trade name of Lincoln Pellett Size Fertilizer. Its main business is the manufacturing of chemically combined dry fertilizer but it also acts as a distributor for manufacturers in the nitrogen field, including Allied. Plaintiff had a contract with the Nitrogen Division of Allied to that effect covering a period from July 1, 1957, to June 30, 1958. Defendant had been operating as a dealer in commercial fertilizers of this type in Shelton, Nebraska, since 1956. However, in the fall of 1957, he installed the necessary equipment to become a manufacturer and distributor thereof.

On December 28, 1957, plaintiff, through Jack Richards, its sales supervisor in its Grand Island office, took an order from Don Flory, field representative of Allied, for one 10,000-gallon tank car of Allied 28 percent nitrogen solution to be sent to defendant. Richards thereupon called Ralph Hill, who takes orders for the Nitrogen Division of Allied, and directed him accordingly. Nitrogen Division of Allied thereupon shipped a tank

carload of such fertilizer to defendant which defendant received and placed in his storage tank but for which he refuses to pay plaintiff. Thereafter, on November 6, 1958, plaintiff brought this suit. As a basis for recovery plaintiff alleged that: "* * * on December 28, 1957, this plaintiff under the trade name of Lincoln Pellett Size Fertilizer sold and delivered to defendant herein, at defendant's special instance and request certain goods, wares and merchandise, consisting of a ten thousand gallon tank car of nitrogen solution for the agreed and reasonable value of $2510.05, * * * that demand has been made for the payment of said account on this defendant which said demands have been refused; that plaintiff is entitled to recover from defendant the sum of $2510.05."

Plaintiff offered evidence to the effect that sometime between December 25 and 31, 1957, Don Flory, field representative of Allied, contacted defendant by telephone about filling his (defendant's) storage tank with fertilizer; that defendant agreed to take a tank car of fertilizer if he could get it on a consignment basis as per terms of a distributor's contract (meaning the distributor's contract between plaintiff and Allied); that by such terms it was to be paid for by defendant as he disposed of it but not later than June 15, 1958; that Flory then called Jack Richards, plaintiff's sales supervisor, and advised him of this arrangement; that Richards thereafter contacted Ralph Hill, order taker for Nitrogen Division of Allied, and directed him to send a tank car of nitrogen solution to defendant; that the Nitrogen Division of Allied did so; that the contract price thereof was $47.80 per ton; that defendant received the tank carload of nitrogen solution and put it in his storage tank; that defendant has disposed of all of the nitrogen solution; that demand for payment of the contract price has been made upon defendant; and that defendant has failed and refused to pay the contract price or any part thereof.

Defendant admits that he received the tank carload of nitrogen solution shipped by the Nitrogen Division of Allied for which plaintiff here seeks to recover the contract price and that he has never paid therefor, although demand has been made upon him to do so, but denies ever having ordered it from plaintiff or anyone else but says he received it under an arrangement with Allied for storage and because of that fact does not owe plaintiff therefor. In support of this defense he adduced evidence to the effect that in the early part of December 1957, after he had completed the installation of the equipment hereinbefore referred to, Don Flory, field representative of Allied, Homer Dudley, sales representative of Allied, and Frank Snyder, chemist for Allied, came to his place of business in Shelton; that they approved his storage facilities; that they then discussed with him the proposition of Allied sending out a tank carload of nitrogen solution for storage in his tank; that it was agreed Allied would immediately send him a tank carload of such solution for that purpose: that Allied was to pay him $3 per ton for the storage thereof and for any additional such solution it would distribute through his tanks; that settlement therefor was to be made at the end of the year; that arrangements were made for the payment of such solution if he disposed thereof; that one carload was sent by the Nitrogen Division of Allied under this arrangement; that he received such carload and placed it in his tanks; and that he has never settled with Allied for this carload of nitrogen solution nor has Allied settled with him for the storage thereon.

Without going into further detail, of which there is a great deal, it becomes evident that there is a dispute between the parties as to whether or not plaintiff sold and delivered this nitrogen solution to the defendant at defendant's special instance and request for the agreed price of $2,510.05. The trial court specifically submitted this issue to the jury by its instructions

Nos. 1, 5, and 7. Instruction No. 7 was properly given under our holding in Sorenson v. Townsend, 77 Neb. 499, 109 N. W. 749, to the effect that: "In an action on an express contract the defendant may show under a general denial that the contract differed in terms from that pleaded, or that no contract was in fact made." See, also, Olsen v. Collins, 75 Neb. 749, 106 N. W. 784. On this disputed issue the jury found for defendant.

But plaintiff contends the trial court, when it made a motion for that purpose, should have instructed a verdict for it on the basis that defendant was liable to it under an implied agreement to pay the contract price for the merchandise he had received and that failing to do so resulted in prejudicial error. Howard L. Peterson, manager of plaintiff, was, over objection, permitted to testify that the contract price was the fair and reasonable value of the nitrogen solution.

Here plaintiff's petition alleged an express contract for the purchase of the merchandise shipped, that is, that it was done at defendant's specific instance and request. Evidence was adduced by plaintiff to that effect. No attempt was made to amend the pleadings for the recovery on the basis of an implied agreement. We think the court was correct in submitting the cause to the jury on that basis for we have always held that in order to recover the allegations and the proof must agree. See, Talbott v. City of Lyons, *ante* p. 186, 105 N. W. 2d 918; School Dist. No. 145 v. Robertson, *ante* p. 176, 105 N. W. 2d 735; Casford v. City of McCook, 133 Neb. 191, 274 N. W. 464. As stated in School Dist. No. 145 v. Robertson, *supra:* "In order that a recovery may be had in an action the pleadings and the proof must agree. * * * A party will not be permitted to plead one cause of action and upon the trial rely on proof establishing another. * * *." Consequently a plaintiff may not plead a cause of action on an express agreement and then, over objection, prove and recover on a cause of quantum meruit. See, United States Rubber

Co. v. Grigsby, 113 Neb. 695, 204 N. W. 817; Kirkendall, Jones & Co. v. Davis, 41 Neb. 285, 59 N. W. 915.

Plaintiff contends defendant was permitted to testify, over objection, to negotiations he had with third persons, representatives of Allied, which were not had in the presence of and were had without the knowledge of its representatives. Ordinarily this contention would have merit but here plaintiff adduced evidence to the effect that it was a distributor of Allied, offering in evidence its contract with the Nitrogen Division of Allied to that effect; that Don Flory, field representative of Allied, obtained the order from defendant and they agreed to the terms and conditions thereof; that the terms and conditions thereof related to the distributor's contract which plaintiff had with the Nitrogen Division of Allied; and that the shipment was made pursuant to and under the terms of the order which Flory had taken. Under this situation it was proper for defendant to show all of the facts substantiating his view of the agreement with representatives of Allied, including Flory, under which he claims he consented to the carload of nitrogen being shipped to him by Allied. We find no merit to plaintiff's contention in this respect.

Plaintiff also contends that defendant is estopped to deny he purchased the merchandise for the purchase price of which recovery is here sought. It is true defendant received the merchandise but that does not estop him from showing what he claims to be the basis upon which he received it. See Sorenson v. Townsend, *supra*. Since that basis, if true, would prevent plaintiff from recovering, the question of which version is true was for the jury and is not one of law for the court.

We find plaintiff has had a fair trial upon the cause of action which it pleaded as a basis for its right to recover and, in support of which, it adduced the evidence that it did. In view thereof we affirm the action of the lower court.

AFFIRMED.

JAMES D. CONWAY, APPELLEE, v. COUNTY OF ADAMS, NEBRASKA, APPELLANT.
107 N. W. 2d 418

Filed February 10, 1961. No. 34819.

1. **Trusts.** The cardinal rule applicable to the construction of a written instrument creating a trust is to determine the intent of the settlor and to give effect thereto if it is not in conflict with law.
2. ———. Rules of construction of trusts are intended for use in doubtful cases when language used is not clear, but these rules have no application when the language used clearly expresses the settlor's intent.
3. ———. Where an instrument creating a trust declares the trust estate to be personal property, and the declaration does not conflict with law, it has binding force and effect.

APPEAL from the district court for Adams County: NORRIS CHADDERDON, JUDGE. *Reversed and remanded with directions.*

Clarence S. Beck, Attorney General, *Homer G. Hamilton,* and *Donald L. Brock,* for appellant.

Cline, Williams, Wright & Johnson, Richard N. Thompson, Conway & Irons, and *John N. Marvel,* for appellee.

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

YEAGER, J.

This is an action by James D. Conway, plaintiff and appellee, against the County of Adams, defendant and appellant, to recover $55.04 paid as taxes levied by the county assessor of Adams County on certain property for the year 1958. The plaintiff's position was that the tax was void for the reason that the property was not subject to tax in the State of Nebraska. He paid the tax and in due course made claim for refund. Refund was denied whereupon this action was instituted. There was a trial to the court on a stipulation of facts, which has been preserved as a bill of exceptions. At the conclusion of the trial judgment was rendered in favor

of the plaintiff and against the defendant. From this judgment the defendant has appealed.

It is apparent from the record that on and prior to December 1, 1955, Deerfield Gas Production Company, a Delaware corporation, and Kearney Gas Production Company, a Delaware corporation, were engaged in the production and sale of natural gas and the development and operation of certain oil and gas leases covering lands located in what was known as the Hugoton Field in the State of Kansas. Apparently on December 1, 1955, these two companies transferred all of their interest to another company known as Kansas-Nebraska Natural Gas Company, Inc., except that they retained a share of a certain gas production payment. This share of the gas production payment was conveyed in trust to The Central National Bank and Trust Company of Topeka, Kansas. This was in amount 6 cents a thousand cubic feet of gas produced in the area. Thus it appears that Kansas-Nebraska Natural Gas Company, Inc., became obligated to pay the Deerfield Gas Production Company and the Kearney Gas Production Company 6 cents a thousand cubic feet of gas produced. In turn the right to receive the payments was conveyed to the trustee. The placement in trust was for the purpose of sale of that which was reserved. It is reasonably inferable that the proceeds of sale, after expenses, went to Deerfield Gas Production Company and Kearney Gas Production Company.

To carry out the purposes of the trust, that is the disposition by sale of this 6 percent interest in gas production payments, the interest was divided into 935,999 separate and undivided units.

The plaintiff, a resident of Adams County, Nebraska, was on March 1, 1958, the owner of 1,529 of these units and was entitled in the proportion that these units bore to the total of 935,999 to participate in the 6 percent interest in the gas production payments.

The tax involved here was on these units. The amount

is not in controversy and it is not questioned that the units were held by the plaintiff in Adams County, Nebraska. The question for determination is that of whether or not the units were an interest in real estate in the State of Kansas. The district court held that they were and on that ground held them not taxable in the State of Nebraska. The defendant contends otherwise, hence the appeal to this court.

The factual description and legal status of the property on which the tax was assessed and levied must be ascertained from the contents of what is denominated "Trust Indenture Hugoton Gas Trust," which is in the bill of exceptions, together with appropriate inferences and applicable legal principles. In this respect the parties are in accord. This instrument will be referred to as the indenture.

If interests of the owners of the units are to depend upon the description thereof contained in the indenture which was creative of those interests, it must follow that these units were personal property and not interests in real estate. This matter has not been considered by the parties in their briefs but it is of such significance under law that it may not with propriety be disregarded.

In Article IV of the indenture the instruments of conveyance of the units are denominated "Certificates of Beneficial Interest." Section 2 of the article contains the following which is declaratory of the status of these units of interest in the trust: "Said Certificates are and shall be held and construed to be in all respects personal property and shall in no wise pass to or vest in any owner or holder thereof or his heirs, devisees or assignees thereof as real estate and said Certificates shall be bequeathed, assigned, disposed of and distributed as personal estate."

The cardinal rule applicable to the construction of a written instrument creating a trust is to determine the intent of the settlor and to give effect thereto if

it is not in conflict with law. County of Holt v. Gallagher, 156 Neb. 457, 56 N. W. 2d 621. See, also, Roats v. Roats, 128 Neb. 194, 258 N. W. 264; Scully v. Scully, 162 Neb. 368, 76 N. W. 2d 239. There is nothing in the record to indicate that the expressed intent contained in the indenture is in conflict with law.

In the case of County of Holt v. Gallagher, *supra,* it is pointed out that rules of construction of trusts are intended for use in doubtful cases when language used is not clear, but these rules have no application when, as in this case, the language used clearly expresses the settlor's intent.

In instances where the instrument creating the trust declares the character of the trust estate, that is, if it is declared to be personal property, and does not conflict with law, the declared intent has binding force and effect. The general rule is stated in 90 C. J. S., Trusts, § 186 (a), p. 79, as follows: "Whether the interest of a beneficiary is an interest in real property or in personal property depends on the provisions of the trust instrument. * * * The interest of beneficiaries who have, under the terms of the trust agreement, no right, title, or interest in the realty as such, either legal or equitable, but only an interest in the earnings and proceeds with power to direct the trustee to deal with the title and manage and control the property, and the right to receive proceeds from rentals, which right is to be deemed personal property, is personal property only and not real estate." See, also, Smith v. Bank of America Nat. Trust & Savings Assn., 14 Cal. App. 2d 78, 57 P. 2d 1363; Wright v. Security-First Nat. Bank, 35 Cal. App. 2d 264, 95 P. 2d 194; Ephraim v. Metropolitan Trust Co., 28 Cal. 2d 824, 172 P. 2d 501; Liberty Nat. Bank v. Kosterlitz, 329 Ill. App. 244, 67 N. E. 2d 876.

In the light of this it becomes clear that it became and was the duty of the district court to accept the clearly declared intent contained in the indenture, which was that the units of interest were personal property and not

real property. As personal property they were taxable in Adams County, Nebraska.

The rules applicable to situations where there is doubt as to the meaning of description contained in instruments creating trusts, which rules were presented by the briefs, were entitled to no consideration.

Accordingly the judgment of the district court is reversed and the cause remanded with directions to render judgment in favor of the defendant and against the plaintiff.

REVERSED AND REMANDED WITH DIRECTIONS.

SIMMONS, C. J., participating on briefs.

ELLWOOD B. CHAPPELL and PAUL E. BOSLAUGH, JJ., not participating.

FREEPORT MOTOR CASUALTY COMPANY, A CORPORATION, APPELLEE, V. MCKENZIE PONTIAC, INC., A CORPORATION, ET AL., APPELLANTS.

107 N. W. 2d 542

Filed February 10, 1961. No. 34852.

1. **Subrogation.** A payment of a liability of another by one who is under no legal or moral obligation to pay the same does not entitle the volunteer to subrogation in the absence of an agreement to that effect.
2. **Bailments.** A bailee of a chattel for the mutual benefit of the parties to the bailment or for hire, in the absence of an express contract, is liable to the bailor only for any loss resulting from the negligence of the bailee.
3. **Negligence: Evidence.** 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.
4. ———: ———. Negligence is a question of fact and may be proved by circumstantial evidence. All that the law requires is that the facts and circumstances proved, together with the inferences that may be legitimately drawn from them, shall indicate, with reasonable certainty, the negligent act complained of.

5. **Automobiles: Damages.** In an action for damages to an automobile, where the automobile cannot be placed in substantially as good condition as it was before the injury, the measure of damages is the difference between its reasonable market value immediately before and immediately after the accident.

APPEAL from the district court for Douglas County: JAMES M. FITZGERALD, JUDGE. *Reversed and remanded with directions.*

Lawrence R. Brodkey, for appellants.

Ross & O'Connor, for appellee.

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

WENKE, J.

Freeport Motor Casualty Company, a corporation organized and existing under the laws of Illinois, brought this action in the district court for Douglas County against McKenzie Pontiac, Inc., a Nebraska corporation, Roderick E. McKenzie, and Thomas Record. Plaintiff, for its cause of action, alleges that it insured John F. Bergmann's 1955 Pontiac Catalina coupé automobile against comprehensive loss or damage; that while said policy was in force Bergmann's automobile was stolen while in the possession and custody of defendants for repair; that said car was totally demolished; that said theft and resulting damage to Bergmann's automobile were caused by the defendants' negligence; and that as a result of the Bergmann automobile being stolen and demolished plaintiff was required to pay Bergmann, under the terms of its policy, the sum of $1,397.50, which it herein seeks to recover. Trial was had to a jury upon the issues raised by the parties. However, at the conclusion of the trial, plaintiff moved for a judgment against the defendants on its rights as subrogee of John F. Bergmann. This motion the trial court sustained and rendered a judgment for the plaintiff in the sum of $1,397.50, with interest at the rate of 6

percent from date thereof against each of the defendants. Defendants, and each of them, thereupon filed a motion for new trial. This appeal was taken from the overruling thereof.

John F. Bergmann, at all times herein material, lived in Plattsmouth, Nebraska, where he owned and operated an appliance business and filling station. We shall hereinafter refer to him as Bergmann. He and his mother, Clara Bergmann, owned a 1955 Pontiac Catalina coupé automobile which was insured by appellee. On Friday, May 31, 1957, Bergmann took this automobile to appellant McKenzie Pontiac, Inc., located at Twenty-fourth Street and Deer Park Boulevard in Omaha, Nebraska, to have seat covers put on and the differential repaired.

Appellant McKenzie Pontiac, Inc., a Nebraska corporation, is apparently owned by appellant Roderick E. McKenzie, to whom we shall hereinafter refer as McKenzie. McKenzie had incorporated the business he was conducting at Twenty-fourth Street and Deer Park Boulevard in Omaha as McKenzie Pontiac, Inc. Appellant Tommy Record, a mechanic and to whom we shall hereinafter refer as Record, was at that time working for McKenzie Pontiac, Inc., and had been working for McKenzie since November 1948. McKenzie was primarily operating a used car business at this point but was also operating a limited repair service in connection therewith for his customers.

Bergmann left the automobile with Record, who was a friend of his. Bergmann testified that when he left the automobile with Record he noticed a carnival company had set up for operation on a vacant lot about one-half to three-quarters of a block north of the intersection of Twenty-fourth Street and Deer Park Boulevard. During the afternoon of Saturday, June 1, 1957, while the Bergmann automobile was still in the possession and custody of appellants, it was stolen and thereafter, later

that same day, damaged beyond repair. As a result appellee paid the Bergmanns the sum of $1,650.

The foregoing is only intended to be a general statement setting forth the relationship of the parties and of what happened. We shall set out the facts in greater detail in connection with our discussion and disposition of the errors complained of.

Appellants claim appellee affirmatively alleged a legal liability to pay Bergmann but failed to prove that was true, contending a mere volunteer cannot maintain an action based on subrogation. We said in Scandinavian Mutual Ins. Co. v. Chicago, B. & Q. R. R. Co., 104 Neb. 258, 177 N. W. 178, that: "A payment of a liability of another by one who is under no legal or moral obligation to pay the same does not entitle the volunteer to subrogation in the absence of an agreement to that effect." Assuming, but not deciding, that what appellants claim is true and that appellee acted in the capacity of a volunteer in paying the Bergmanns, we still think appellee can maintain the action for in the "Release" signed by both Bergmann and his mother, when they acknowledged having received from appellee the sum of $1,650, is the following provision: "* * * said Company (appellee) * * * is hereby subrogated to all rights of recovery which the assured (Bergmanns) may have * * * against any * * * person or persons on account of said loss or damage, * * *."

"A bailee of a chattel for the mutual benefit of the parties to the bailment or for hire, in the absence of an express contract, is liable to the bailor only for any loss resulting from the negligence of the bailee." Federal Ins. Co. v. International Harvester Co., 164 Neb. 698, 83 N. W. 2d 382. See, also, Shiman Bros. & Co. v. Nebraska Nat. Hotel Co., 146 Neb. 47, 18 N. W. 2d 551; Nagaki v. Stockfleth, 141 Neb. 676, 4 N. W. 2d 766; Carty v. Lemmon Auto Co., 72 S. D. 559, 37 N. W. 2d 454. Bergmann's contract with appellants for the repair of his automobile was one of bailment for hire and

appellee, as subrogee of the Bergmanns, has, as such, whatever rights the Bergmanns may have had against appellants under the foregoing principle.

In its petition appellee alleges, "that the defendants, and each of them, were (specifically) negligent in each of the following particulars, * * * (b) In parking John F. Bergmann's automobile across the street from the premises used by McKenzie Pontiac, Inc. (c) In leaving the car keys in the automobile of John F. Bergmann when it was parked unattended across the street from the premises of the McKenzie Pontiac, Inc. * * *."

"A litigant who charges his adversary with negligence has the burden throughout the litigation to establish it." Federal Ins. Co. v. International Harvester Co., *supra.* See, also, Shiman Bros. & Co. v. Nebraska Nat. Hotel Co., *supra;* Thrasher v. Greenlease-Ledterman, Inc., 208 Okl. 507, 257 P. 2d 795.

"In an action for negligence the burden is on the plaintiff to show that there was a negligent act or omission by the defendant and that it was the proximate cause of plaintiff's injury or a cause which proximately contributed to it." Sipprell v. Merner Motors, 164 Neb. 447, 82 N. W. 2d 648. See, also, Bowerman v. Greenberg, 142 Neb. 721, 7 N. W. 2d 711. Of course, as we have often said, the mere happening of an accident does not prove negligence. See, Bowerman v. Greenberg, *supra;* Bowers v. Kugler, 140 Neb. 684, 1 N. W. 2d 299.

Appellants contend the court erred in holding them guilty of negligence as a matter of law and, in fact, contend the evidence adduced is insufficient to raise an issue of fact, in that respect, for a jury. In considering these contentions the following have application:

"If a motion for a directed verdict is made at the close of the plaintiff's evidence and again at the close of all the evidence, or in the alternative to dismiss plaintiff's case, to test the sufficiency of the evidence to support a verdict, it must be considered in the light most favorable to the successful party, that is, every

controverted fact must be resolved in his favor and he should have the benefit of every inference that can reasonably be deduced therefrom." Dorn v. Sturges, 157 Neb. 491, 59 N. W. 2d 751. See, also, Moncrief v. Interstate Transit Lines, 129 Neb. 168, 261 N. W. 163.

"Where different minds may draw different inferences or conclusions from the facts proved, or if there is a conflict in the evidence, the matter at issue must be submitted to the jury to be determined; but, where the evidence is undisputed, and but one reasonable inference can be drawn from the facts, the question is one of law for the court." Snyder v. Farmers Irr. Dist., 157 Neb. 771, 61 N. W. 2d 557.

"Negligence consists of doing what a reasonable and prudent person would not have done, or in not doing what a reasonable and prudent person would have done under the existing circumstances." Blanton v. Michael, Swanson & Brady Produce Co., 138 Neb. 883, 295 N. W. 883.

"The gist of negligence is failure to exercise the care of a reasonable and prudent person under a given set of circumstances." Fulcher v. Ike, 142 Neb. 418, 6 N. W. 2d 610.

The evidence is not in material dispute. There was evidence adduced to the effect that on Friday, May 31, 1957, Bergmann took his automobile to McKenzie's place of business at Twenty-fourth Street and Deer Park Boulevard in Omaha, Nebraska, to have seat covers put on and the differential repaired; that he turned his automobile over to Record, an employee of McKenzie Pontiac, Inc., for that purpose; that Record agreed to perform these services, for which a charge was made and collected; that Record had the seat covers put on by others but repaired the differential himself; that when he had completed the repairs he road-tested the job and then, because there was no parking space available in the garage where he worked, he parked it on the premises of the Skelly Oil Company service station just across

the street north from McKenzie Pontiac, Inc., leaving the keys on the sun visor above the driver's seat; that he parked it there after 4 p.m.; and that at that time there were four attendants on duty at the station.

There is evidence to the effect that for about 11 years McKenzie had made arrangements with whomever operated this service station for permission to park automobiles thereon whenever he had insufficient room for that purpose in his garage, which had only one service stall. He further testified that under this arrangement that if automobiles were parked there during the daytime they had to be left unlocked with the keys in the automobile, but not in the ignition, so the attendants on duty at the filling station could, if necessary, move any automobile parked there. Bergmann, who had been an employee of McKenzie when he operated in Plattsmouth as McKenzie Motors and for a short time in Omaha at Twenty-fourth Street and Deer Park Boulevard after McKenzie ceased his operations in Plattsmouth, became acquainted with this operation and the manner in which it was done. There were always three, four, or five attendants on duty at the station when it was open for business, which it was until about 10 p.m. However, automobiles that were to be left parked overnight had to be locked.

Record testified he parked the Bergmann automobile on the Skelly Oil Company service station grounds and then returned to the place of business where he worked. He then called Bergmann on the telephone and told him his automobile was ready and for him to come and get it. This was about 4:30 p.m. When he had completed doing so he looked out of the window to see if the Bergmann automobile was still where he had left it but discovered it was gone. That was about 10 minutes after he had parked it. The automobile had been stolen, and was found later that evening near Nebraska City, Nebraska. When found it had been in an accident, ap-

parently rolling over three or four times. It was damaged beyond repair.

Appellants attempted to introduce evidence to show why automobiles were parked at this particular service station and the manner in which it was being done; and that it was being done in the same manner as it was being done by others in the same business under similar circumstances in that area and in Omaha generally. When, over objection thereto, this evidence was excluded proper offers of proof to that effect were made. We think, under our holding in O'Dell v. Goodsell, 152 Neb. 290, 41 N. W. 2d 123, the court erred in so ruling. Therein we said: "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." See, also, Tite v. Omaha Coliseum Corporation, 144 Neb. 22, 12 N. W. 2d 90, 149 A. L. R. 1164. As stated in Munger Automobile Co. v. American Lloyds of Dallas (Tex. Civ. App.), 267 S. W. 304: "All of the circumstances surrounding the manner and method that appellant used to protect the cars left with it for repair, and the success or failure which it had accomplished by the methods used in protecting property from theft, were admissible before the jury, in order that the jury might determine from all the facts whether appellant exercised ordinary care to prevent the automobile committed to its care from being stolen." Evidence coming within the scope of the foregoing principles should have been admitted and the trial court was in error in excluding it.

We think the evidence adduced presents a factual situation for a jury as to whether or not appellants were negligent in what they did and not one of law for the court. We find the trial court erred in this respect but do not agree with appellants that it does not present a question for a jury.

Appellants claim the trial court was in error in holding, as a matter of law, that their conduct was the proximate cause of the theft and destruction of the Bergmann automobile; in fact, they contend the evidence adduced was insufficient to support a jury finding to that effect. This contention is primarily based on the fact that there was no direct evidence adduced to show that the thief or thieves, who stole the automobile, used the key or keys that had been left in the car on top of the sun visor to perpetrate the theft.

"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, 169 Neb. 517, 99 N. W. 2d 878. See, also, Anderson v. Byrd, 133 Neb. 483, 275 N. W. 825.

"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, 161 Neb. 182, 72 N. W. 2d 831. See, also, Hersh v. Miller, *supra.*

Appellants' primary fault, in so contending, lies in the fact that they seek to apply the circumstantial evidence rule applicable only in criminal cases. See Davis v. Dennert, 162 Neb. 65, 75 N. W. 2d 112. Therein we held the circumstantial evidence rule applicable in civil cases to be as follows: "Negligence is a question of fact and may be proved by circumstantial evidence. All that the law requires is that the facts and circumstances proved, together with the inferences that may be legitimately drawn from them, shall indicate, with reasonable certainty, the negligent act complained of."

From the facts and circumstances proved, together

with the inferences that may be legitimately drawn therefrom, we think a jury could find that the key or keys left in the automobile by Record were the means used by the thief or thieves to start the automobile when they stole it from the place where it had been parked by Record.

Bergmanns' right to recover, as far as the measure of damage is concerned, is, under the situation disclosed by the evidence adduced, as follows: "In an action for damages to an automobile, where the automobile cannot be placed in substantially as good condition as it was before the injury, the measure of damages is the difference between its reasonable market value immediately before and immediately after the accident." Dorn v. Sturges, *supra*. See, also, Lund v. Holbrook, 153 Neb. 706, 46 N. W. 2d 130; Helin v. Egger, 121 Neb. 727, 238 N. W. 364. The appellee, having only the rights of the Bergmanns, is limited accordingly. Competent, relevant, and material evidence for the purpose of establishing the damage to the Bergmanns' automobile should be admitted. The trial court, over objection, received evidence adduced by appellee which was clearly incompetent for this purpose while it excluded competent evidence offered by appellants for that purpose.

We have come to the conclusion that appellants were and are entitled to a new trial. We therefore reverse the order of the trial court overruling their motion for that purpose and remand the cause to the district court with directions that appellants be given a new trial.

REVERSED AND REMANDED WITH DIRECTIONS.

OREN CLARY ET AL., APPELLANTS, V. STATE OF NEBRASKA, DEPARTMENT OF ROADS AND IRRIGATION OF THE STATE OF NEBRASKA, APPELLEE.

107 N. W. 2d 429

Filed February 10, 1961. No. 34875.

1. **Eminent Domain.** The purchase of land for a right-of-way in lieu of condemnation carries with it all of the incidents of eminent domain or condemnation insofar as damages by reason of construction are concerned.
2. ———. It is now the settled law of this state that for all injuries which arise on account of the proper construction or future operation of an improvement, an adjoining landowner must be compensated in the original condemnation proceedings.
3. ———. The owner of adjoining land is entitled to compensation not only for such injuries as might result from the use of the land appropriated in its natural state, but also for all which would result from a proper construction, improvement, and maintenance of the highway, taking into consideration, where channel changes are involved, the contingency of erosion.

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

Baskins & Baskins, for appellants.

Clarence A. H. Meyer, Attorney General, and *Harold S. Salter,* for appellee.

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

SPENCER, J.

This is an action brought to recover equitable relief and damages caused by erosion occasioned by the diversion of a watercourse. Judgment was rendered for defendant. Plaintiffs appeal.

Plaintiffs Oren Clary and Naomi Clary, husband and wife, hereinafter referred to as appellants, are the owners of Section 15, Township 15 North, Range 42 West of the 6th P. M., Garden County, Nebraska. This section was acquired by Oren Clary through descent from his parents, Morse P. and Lou C. Clary. On Feb-

ruary 7, 1939, Morse P. and Lou C. Clary gave an option to the Central Nebraska Public Power and Irrigation District, hereinafter referred to as district, for a right-of-way across said section. On May 4, 1939, Morse P. and Lou C. Clary executed and delivered a warranty deed to said district, conveying title to the right-of-way. The right-of-way was secured by the district for the purpose of relocating U. S. Highway No. 26, hereinafter referred to as highway, which was being inundated by the construction of McConaughy Dam across the North Platte River.

When completed, the district, in accordance with agreements, gave the new highway across appellants' land to the State of Nebraska. It then became a part of the state highway system.

Appellants present two questions: First, the liability of the State for damages for the obstruction of a natural watercourse; and second, whether the provisions of the deed constituted a bar to recovery.

Appellants contend that the district, being a public power and irrigation district organized under S. F. 310, Laws of Nebraska 1933, chapter 86, page 337, now sections 70-601 to 70-672, R. R. S. 1943, had no authority to exercise the power of eminent domain to acquire real estate for the construction of a highway. The question is material on the availability of presumptions attendant to the conveyance of property to one having the power of eminent domain. The right-of-way in question was not acquired by condemnation proceedings but by purchase.

This exact question was raised against this same district in a condemnation relating to this same highway in Feltz v. Central Nebraska Public Power & Irr. Dist., 124 F. 2d 578. In that case, the Circuit Court of Appeals for the Eighth Circuit determined that the district was a qualified licensee under the Federal Power Act, 16 U. S. C. A., § 791a et seq., and as such licensee had the power of eminent domain for the purpose stated. The

question, therefore, as to whether the Nebraska statutes giving the district power to condemn are sufficiently broad to cover a condemnation for the relocation of a highway to be covered by the dam, which we do not decide, is immaterial herein. We have no quarrel with the law of eminent domain cited by appellants. We do question its applicability to the facts herein.

The trial court found that there was no improper construction in the relocation of the highway. There is not one iota of evidence in the record indicating improper construction, except as it may be inferred from the fact that erosion did occur. Suffice it to say that appellants had the burden of proof on improper construction. They have not sustained that burden.

In Snyder v. Platte Valley Public Power & Irr. Dist., 140 Neb. 897, 2 N. W. 2d 327, we said: " 'It is now the settled law of the state that for all injuries which may arise on account of the proper construction or future operation of an improvement, an adjoining proprietor must be compensated in the original condemnation proceedings.' " We also held in that same case that: "The purchase of lands for a right of way in lieu of condemnation carries with it all of the incidents of eminent domain or condemnation in so far as damages by reason of construction are concerned."

In Psota v. Sherman County, 124 Neb. 154, 245 N. W. 405, we said: " 'The owner of adjoining lands is entitled to compensation not only for such injuries as might result from the use of the land appropriated in its natural state, but for all which would result from a proper construction, improvement, and maintenance of the highway, taking into consideration such embankments, cuts, bridges, culverts, and ditches as shall be required or warranted for the purpose of a proper construction and maintenance.' "

In the instant case, the option agreement, exhibit 23, referred to an attached plat. The deed, exhibit 22, contained the following language: "Plats of the above

described tracts of land *are attached hereto and made a part hereof.*" (Italics supplied.) The plat which is material herein is exhibit 18. It shows the proposed channel change.

Applying the principles announced above to the present case, it would seem that the new channel construction shown on the plat attached to the deed was a necessary improvement for the purpose of properly maintaining the highway. We therefore hold that there can be no question but that the acquisition in the instant case contemplated a diversion of the old channel.

We do not agree with appellants that the term "damage" is related only to the construction of the highway, but hold, under the facts in this case, that the channel change was appurtenant to the construction of the highway. The deed, exhibit 22, recites: "The above named consideration includes payment to the grantors *for damages sustained by reason of the occupation and construction on said real estate by* The Central Nebraska Public Power and Irrigation District and their successors and assigns." (Italics supplied.)

Under the well-settled law of this state, it must be presumed that appellants' predecessors in interest were compensated, or at least had an opportunity to be compensated, for all damages that could reasonably be contemplated, including the contingency of erosion.

We conclude that the trial court was correct in holding that appellants could not recover. The judgment of the trial court should be and it hereby is affirmed.

AFFIRMED.

LORIN R. SUMMERVILLE, APPELLANT, V. NORTH PLATTE VALLEY WEATHER CONTROL DISTRICT, A CORPORATION, ET AL., APPELLEES.

LORIN R. SUMMERVILLE, APPELLANT, V. P. COOPER ELLIS, COUNTY TREASURER OF SCOTTS BLUFF COUNTY, APPELLEE, NORTH PLATTE VALLEY WEATHER CONTROL DISTRICT, A CORPORATION, INTERVENER-APPELLEE.

107 N. W. 2d 425

Filed February 10, 1961. No. 34878.

1. **Attorney and Client.** Where one has gone into a court of equity, and, taking the risk of litigation on himself, has created or preserved or protected a fund in which others are entitled to share, such others will be required to contribute their share to the reasonable costs and expenses of the litigation, including reasonable fees to the litigant's counsel.
2. ———. An allowance for attorney's fees and expenses in such cases can only be made after the services have been rendered, the litigation has been successfully terminated, and a determination made that actual benefit has accrued to others in the class.
3. **Attorney and Client: Judgments.** A petition for an allowance of attorney's fees and expenses in such cases is an independent proceeding, supplemental to the original proceeding, and not a request for a modification of the original judgment.
4. ———: ———. A petition for an allowance of attorney's fees and expenses in such cases may be filed after the expiration of the term at which the original judgment was entered.
5. **Attorney and Client.** The right to an allowance of attorney's fees and expenses in such cases is not waived by a failure to include a request for such an allowance in the original petition.

APPEAL from the district court for Scotts Bluff County: RICHARD M. VAN STEENBERG, JUDGE. *Reversed and remanded.*

Atkins & Ferguson and *Clark G. Nichols,* for appellant.

Lyman & Winner and *W. H. Kirwin,* for appellees.

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

BOSLAUGH, J.

This proceeding was commenced by the filing of an

application for the allowance of attorney's fees and expenses from a fund that was alleged to have been rescued and preserved as a result of the litigation in which the 1957 Weather Control Act of Nebraska was determined to be unconstitutional and void in Summerville v. North Platte Valley Weather Control Dist., 170 Neb. 46, 101 N. W. 2d 748. The parties in this proceeding are identical with the parties in the former appeal.

The decree of the district court in the original action declared the statute in question to be unconstitutional and void; enjoined the county treasurer of Scotts Bluff County, Nebraska, from disbursing any of the taxes levied by the defendant Weather Control District; and retained jurisdiction of the cause for the distribution of such taxes in the hands of the county treasurer.

The appellant, who will be referred to herein as the plaintiff, filed his application for the allowance of attorney's fees and expenses on April 2, 1960. The mandate of this court was filed in the district court on April 4. On April 19 the plaintiff served a notice of hearing on the application upon the attorneys of record for the appellees, who will be referred to herein as the defendants.

The application was heard on May 10, 1960, and taken under advisement. On May 23 the district court found that it was without jurisdiction "at this late date" to grant the application of the plaintiff for the allowance of attorney's fees. The plaintiff then perfected an appeal to this court.

The plaintiff's assignment of error is that the trial court erred in finding that it was without jurisdiction to grant his application.

The parties agree that where one has gone into a court of equity and, taking the risk of litigation on himself, has created or preserved or protected a fund in which others are entitled to share, such others will be required to contribute their share to the reasonable costs and expenses of the litigation, including reasonable

fees to the litigant's counsel. Gamboni v. County of Otoe, 159 Neb. 417, 67 N. W. 2d 489.

The trial court did not assign any reason for its finding that it was without jurisdiction. The defendants argue that the trial court had no jurisdiction for the reason that the plaintiff filed his application after the expiration of the term at which the original decree was rendered. The record does not show when the various terms expired but, for the purpose of this opinion, we have assumed that the plaintiff's application was filed at a term after the term in which the original decree was rendered.

The defendants further argue that since the original decree ordered the defendants, or one of them, to pay the costs of the action, the court cannot at a subsequent term make an allowance of attorney's fees and expenses from a fund created, preserved, or protected by the litigation which resulted in the original decree. The defendants state that if the court were to grant the plaintiff's application, the court would be modifying a judgment after term when its jurisdiction had expired.

The defendants have confused the allowance of expenses and attorney's fees from a fund rescued or preserved by litigation with the award or taxation of costs as between adversary parties. It is true that as to the latter the court after term has but limited power with respect to changes or modification in the taxation and award of costs. Rehn v. Bingaman, 152 Neb. 171, 40 N. W. 2d 673.

The allowance of expenses and attorney's fees to a litigant who has carried on litigation at his own expense which results in the rescue and preservation of a fund in which a number of parties will share is a different matter and is governed by different principles. The allowance of the fees and expenses requested by the plaintiff is a matter that is dependent, in the first instance, upon the litigation being successful. It is a matter which, properly, is not before the court until the

litigation has ended. In Blacker v. Kitchen Bros. Hotel Co., 133 Neb. 66, 273 N. W. 836, the court said: "Where one goes into a court of equity, and takes the risk of litigation on himself, and creates or protects a fund to a share in which others are entitled, those others will not be permitted to lie back and share the results of these successful labors without contributing their due share. But this rule is based on the theory that all in the class benefited should contribute to the expense. Their share of the expense is dependent entirely upon the success of the litigation. It necessarily follows that no liability for attorney's fees and expenses accrues until the litigation has been successfully terminated with actual benefits accruing to others in the class. If the litigant is unsuccessful, no benefit to others in the class accrues and he must undergo the fate of any other unsuccessful litigant; that is, pay the costs and expenses himself. We know of no rule, nor have we found any case, that authorizes the allowance of attorney's fees and expenses in a case such as we have before us, on any basis other than that of benefits accruing as a result of successful litigation. * * * At the time the allowances were made in the instant case, it had not been determined whether the litigation was beneficial to other bondholders for the reason that there had been no final determination of the matter. We are of the opinion that the trial court could properly allow attorney's fees and expenses in connection with services rendered that were beneficial to other members of the class, but that its attempt to allow expenses and attorney's fees for work to be done in the future is without authority of law. Such allowances against others similarly situated being based upon the benefits received by them, there is nothing upon which to base such an allowance until the services have been performed and the resulting benefits, if any, determined."

When the mandate of this court had been filed in the district court, the litigation had ended and it was

then proper for the plaintiff to request that an allowance of expenses and attorney's fees be made.

In Sprague v. Ticonic Nat. Bank, 307 U. S. 161, 59 S. Ct. 777, 83 L. Ed. 1184, the United States Supreme Court held that a plaintiff was entitled to petition the district court for an allowance of counsel fees and expenses after the mandate had been received and after the expiration of the term at which the decree had been entered. The court said: "Without considering the historic authority of a court of equity in such matters, the District Court deemed itself powerless because foreclosed by the mandate in Ticonic Bank v. Sprague, *supra*. The general proposition which moved that Court —that it was bound to carry the mandate of the upper court into execution and could not consider the questions which the mandate laid at rest—is indisputable. Compare Kansas City Southern Ry. Co. v. Guardian Trust Co., 281 U. S. 1. But that leaves us still to consider whether the immediate issue now in controversy was disposed of in the main litigation and therefore foreclosed by the mandate. While a mandate is controlling as to matters within its compass, on the remand a lower court is free as to other issues. See In re Sanford Fork & Tool Co., 160 U. S. 247; Ex parte Century Indemnity Co., 305 U. S. 354. Certainly the claim for 'as between solicitor and client' costs was not directly in issue in the original proceedings by Sprague. It was neither before the Circuit Court of Appeals nor before this Court. Its disposition, therefore, by the mandate of either Court could be implied only if a claim for such costs was necessarily implied in the claim in the original suit, and its failure to ask for such costs an implied waiver. These implications are repelled by the basis on which such costs are granted. They are not of a routine character like ordinary taxable costs; they are contingent upon the exigencies of equitable litigation, the final disposition of which in its entire process including appeal places such a claim in much better

perspective than it would have at an earlier stage. Such are the considerations which underlay the decision in Trustees v. Greenough, 105 U. S. 527, in holding that an order allowing costs 'as between solicitor and client' was a final judgment for purposes of appeal because 'the inquiry was a collateral one, having a distinct and independent character.' We, therefore, hold that the issue in the instant case is sufficiently different from that presented by the ordinary questions regarding taxable costs that it was impliedly covered neither by the original decree nor by the mandates, and that neither constituted a bar to the disposal of the petition below on its merits. * * * Finally, we must notice the separate ground taken by the Circuit Court of Appeals on the basis of what it deemed the requirements of terms of court. The new Rules of Civil Procedure have rendered anachronistic the technical niceties pertaining to terms of court as to both law and equity, but the ruling of the District Court here in question was made prior to the operation of the new Rules. Since we view the petition for reimbursement as an independent proceeding supplemental to the original proceeding and not a request for a modification of the original decree, the suggestion of the Circuit Court of Appeals—that it came after the end of the term at which the main decree was entered and therefore too late —falls."

We believe that the reasoning of the court in Sprague v. Ticonic Nat. Bank, *supra*, is controlling in this case. The district court erred in finding that it did not have jurisdiction to consider the application of the plaintiff for the allowance of attorney's fees and expenses.

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

REVERSED AND REMANDED.

SECURITIES ACCEPTANCE CORPORATION, A DELEWARE CORPORATION, ET AL., APPELLANTS, V. ROBERT M. BROWN, APPELLEE.

107 N. W. 2d 540

Filed February 17, 1961. No. 34832.

SUPPLEMENTAL OPINION

Master and Servant. One of the implied terms of a contract of employment is that the employee will hold sacred any trade secrets or other confidential information which he acquires in the course of his employment, and that an employee who has left his employment is under an implied obligation not to use trade secrets or other confidential information which he has acquired in the course of his employment, for his own benefit or that of a rival, to the detriment of his former employer.

APPEAL from the district court for Lincoln County: ISAAC J. NISLEY, JUDGE. On motion for rehearing. See *ante* p. 406, 106 N. W. 2d 456, for original opinion. *Former opinion clarified. Motion for rehearing overruled.*

Matthews, Kelley & Stone and *Baskins & Baskins,* for appellants.

McGinley, Lane, Shanahan & McGinley, for appellee.

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

WENKE, J.

Appellants, in their motion for rehearing, contend this court erred in holding the provisions of paragraphs V, VI, and VII of the parties' contract of employment unenforcible because the contract does not contain a provision limiting the area in which such restrictions are to apply. These three paragraphs are set out in full in our original opinion. Appellants base their contention on the claim that at common law one of the implied terms of a contract of employment is that the employee, after he has left his employment, is under an implied obligation not to use or disclose to others any trade secrets or other confidential information which

he has acquired in the course of his employment to the detriment of his former employer and that such implied obligation is neither limited as to time nor area except as the parties may do so by their contract of employment.

This contention was not presented to this court when the cause was originally presented for our consideration and, because of that fact, would not ordinarily be considered when presented for the first time on a motion for rehearing. However, because of the fact that our opinion, as now written, could be misleading in this respect, we think it desirable to file a supplemental opinion for the purpose of clarification.

Insofar as paragraphs V, VI, and VII of the parties' agreement relate to trade secrets or confidential information, we think the principle hereinafter stated is applicable and our opinion, insofar as we held these provisions were "unenforcible because there is no limitation on area" was in error. The principle above referred to is stated in 165 A. L. R. at page 1454, under the annotation of "Employee-Confidential Information" as follows: "* * * one of the implied terms of a contract of employment is that the employee will hold sacred any trade secrets or other confidential information which he acquires in the course of his employment, and that therefore an employee who has left his employment is under an implied obligation not to use trade secrets or other confidential information which he has acquired in the course of his employment, for his own benefit or that of a rival, and to the detriment of his former employer." See, also, Junker v. Plummer, 320 Mass. 76, 67 N. E. 2d 667, 165 A. L. R. 1449; Byrne v. Barrett, 268 N. Y. 199, 197 N. E. 217, 100 A. L. R. 680; Westervelt v. National Paper & Supply Co., 154 Ind. 673, 57 N. E. 552; H. B. Wiggins Sons' Co. v. Cott-A-Lap Co., 169 F. 150; Witkop & Holmes Co. v. Boyce, 61 Misc. 126, 112 N. Y. S. 874, 131 App. Div. 922, 115 N. Y. S. 1150; Robb v. Green (1895), 2 Q. B. D. 1, affirmed in

2 Q. B. D. 315. It should, of course, be understood that the parties can contractually provide to limit this common law duty, which the parties did here as to time.

If the above common law duty has been violated then injunction would be available. See, 35 Am. Jur., Master & Servant, § 100, p. 529; Annotation, 165 A. L. R. 1457, Employee-Confidential Information; Grand Union Tea Co. v. Dodds, 164 Mich. 50, 128 N. W. 1090, 31 L. R. A. N. S. 260; Westervelt v. National Paper & Supply Co., *supra;* Witkop & Holmes Co. v. Boyce, *supra;* Robb v. Green, *supra.*

What relief, if any, should be granted depends upon the facts and circumstances of each case. We do not think, from the evidence here adduced, that any injunctive relief is proper. We think what the court said in H. B. Wiggins Sons' Co. v. Cott-A-Lap Co., *supra,* is here applicable. Therein the court said: "If the injunction issues, it means that hereafter no man can work for one and learn his business secrets, and after leaving that employment engage himself to a rival in business, without carrying on his back into that business the injunctive mandate of a court of equity. There is nothing whatever in the facts of this case, except opportunity to do wrong and a suspicion in the mind of the rival that wrong will be done. The remedy asked for is an extraordinary one, and should not be lightly indulged in. The chancellor ought never to come into such a frame of mind that he assumes human nature to be essentially and inherently evil. Furthermore, the danger of irreparable injury is not manifest."

The other contention raised in appellants' motion for rehearing is without merit. With the foregoing clarification we adhere to our original opinion and overrule appellants' motion for rehearing.

FORMER OPINION CLARIFIED.

MOTION FOR REHEARING OVERRULED.

EMMA OLSON, APPELLEE, V. ADOLPH L. FEDDE ET AL., APPELLANTS, IMPLEADED WITH HAROLD L. CAMP ET AL., APPELLEES.

107 N. W. 2d 663

Filed February 17, 1961. No. 34858.

1. **Adverse Possession.** 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.
2. ———. The possession is sufficient if the land is used continuously for the purpose to which it may be in its nature adapted.
3. ———. The title to land becomes complete in the adverse occupant when he has maintained an actual, continuous, notorious, and adverse possession thereof, claiming title to the same against all persons, for 10 years.
4. ———. When a fence is constructed as a boundary line fence between two properties and the parties concerned claim ownership of the land to the fence during the statutory period without interruption in their possession or control during that time, they will acquire title by adverse possession to any land that was improperly enclosed with or added to the land they owned at the time the fence was constructed.

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

Kenneth H. Dryden and *J. Karr Taylor,* for appellants.

Smith & Lebens and *Claude D. Lutton,* for appellee.

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

MESSMORE, J.

This is an action brought by Emma Olson as plaintiff, in the district court for Cass County, against Adolph L. Fedde and Mary Ann Fedde, husband and wife, Harold L. Camp, and all persons having or claiming any interest in and to a tract of land described in the plaintiff's petition. The purpose of the action was to quiet title to said tract of land in the plaintiff, to enjoin the defendants from entering upon or using the land, to

enjoin the defendants from claiming any right, title, or interest in and to such land, and for damages.

The trial court found generally in favor of the plaintiff and against the defendants; that the plaintiff was the owner of the real estate described in her petition; that she has been in actual, continuous, peaceable, open, notorious, exclusive, and adverse possession thereof for more than 10 years under claim of ownership and during all of that time had asserted title to the premises against all persons; that the plaintiff was entitled to a decree quieting title in her; and that the plaintiff was entitled to a permanent injunction against the defendants. In addition the trial court found in favor of the plaintiff and against the defendant Adolph L. Fedde in the sum of $300, being $2.50 a rod for 120 rods of fence; and that the costs be taxed to the defendants Adolph L. Fedde, Mary Ann Fedde, and Harold L. Camp. Judgment was rendered accordingly.

The defendants Adolph L. Fedde and Mary Ann Fedde filed a motion for new trial which was overruled. The defendants Fedde perfected appeal to this court.

The plaintiff alleged in her petition that she was the owner of a tract of land in the southeast quarter of the southwest quarter of Section 4, and in the north half of Section 9, all in Township 12 North, Range 10 East of the 6th P. M., Cass County, Nebraska, more particularly described as follows: "Commencing at the Northeast corner of the Southeast Quarter of the Northwest Quarter, Section Nine, Township Twelve North Range Ten East; thence South 0° 00′, 141.9 feet to the northerly right-of-way line of the C. B. & Q. Rail Road; thence South 45° 14′ East, 117.9 feet; thence N. 11° 51′ East, 785 feet more or less to the southerly bank of the Platte River; thence Northwesterly along said river bank 2100 feet more or less to it's intersection with the C. B. & Q. right-of-way; thence southeasterly along the C. B. & Q. right-of-way to the North line of the Southeast Quarter of the Northwest Quarter in

Section 9, Township Twelve North, Range 10 East; thence East along said North line 131.9′ to the point of beginning; containing 21 acres more or less."

The plaintiff further alleged that she had been in actual, open, notorious, exclusive, adverse, continuous, and peaceable possession of all of said lands for more than 50 years last past; and that for more than that period of time neither the defendants nor any of them had been in possession of any part of said premises or asserted any claim thereto. The petition further alleged that the defendants Fedde were the owners of property immediately adjoining property of the plaintiff on the east; and that the defendant Harold L. Camp was either their tenant in possession or agent for the purpose of moving sand and gravel.

As a second cause of action, the plaintiff alleged that through the use of heavy equipment, the defendants had destroyed trees, grass, and vegetation on the land of the plaintiff as heretofore described, and prayed for damages.

The answer of the defendants Fedde denied all of the allegations contained in the plaintiff's petition not admitted; admitted ownership and described the land east of the land described in the plaintiff's petition; and admitted further that said defendants had leased a portion of said property to defendant Harold L. Camp for mining sand and gravel. The prayer was for an award of immediate possession by them of the land described in the plaintiff's petition and that title thereto be quieted in these answering defendants.

The defendant Harold L. Camp, by answer, denied each and every allegation contained in the plaintiff's petition; alleged that he had a lease from defendant Adolph L. Fedde on land adjoining the property described in the plaintiff's petition; that he was given specific permission by defendant Adolph L. Fedde to go upon the land described in the plaintiff's petition and did so under such defendant's direction and control; and

that the defendants Fedde were the owners of said property described in the plaintiff's petition and were entitled to lease said property to this answering defendant. The prayer was for a dismissal of the plaintiff's petition.

The plaintiff's reply to the answer of the defendants Fedde, and for reply to the answer of Harold L. Camp, denied each and every allegation contained therein except such allegations or parts thereof as admitted the truth of plaintiff's petition.

It was stipulated by the parties that a jury trial of any damage or law issues be waived.

The trial court rendered a default judgment in favor of the plaintiff and against all the defendants who had been properly served and had failed to answer or appear. That such can be properly done if the facts so justify, see Severson v. McKenzie, 122 Neb. 827, 241 N. W. 774. See, also, Worm v. Crowell, 165 Neb. 713, 87 N. W. 2d 384.

For convenience we will refer to the defendants as Feddes, and to Adolph L. Fedde on occasion as Adolph Fedde; to the plaintiff as plaintiff or Emma Olson; and to the other persons by their first or last names, eliminating the middle initial.

The defendants assign as error that the trial court erred in finding generally for the plaintiff and against the defendants on the first cause of action, and against the defendant Adolph Fedde on the second cause of action, and in finding that the plaintiff was the owner of the land in controversy and had been in adverse possession of the same for a period of 10 years or more.

While the law requires this court, in determining an appeal in an equity action involving questions of fact, to reach an independent conclusion without reference to the findings of the district court, this court will, in determining the weight of the evidence, where there is an irreconcilable conflict therein on a material issue, consider the fact that the trial court observed the wit-

nesses and their manner of testifying. See, Johnson v. Erickson, 110 Neb. 511, 194 N. W. 670; Worm v. Crowell, *supra.*

"The claim of title to land by adverse possession must be proved by actual, open, exclusive, and continuous possession under a claim of ownership for the statutory period of 10 years. * * * The possession is sufficient if the land is used continuously for the purpose to which it may be in its nature adapted." Worm v. Crowell, *supra.* See, also, Burket v. Krimlofski, 167 Neb. 45, 91 N. W. 2d 57.

For actual possession, no particular act is required. What is sufficient to meet the requirements depends upon the character of the land and all of the circumstances of the case. See Hallowell v. Borchers, 150 Neb. 322, 34 N. W. 2d 404.

Counsel for the parties consented that the trial court view the premises. This court has held that, when the court views the topography of a certain locality, its findings are entitled to great weight. See, Independent Stock Farm v. Stevens, 128 Neb. 619, 259 N. W. 647; James v. McNair, 164 Neb. 1, 81 N. W. 2d 813.

With the foregoing rules in mind, we proceed to a summary of the facts in the instant case.

On January 30, 1891, Otha J. Wortman acquired title by warranty deed to "Government Lots 3, 4 and 5 and the SW¼ of NW¼ and the NE¼ of SW¼ and SW¼ of SE¼ of Sec. 9, Twp 12 N., Rge 10 E. of 6th P. M., in Cass County, Nebraska. Subject to the B & M R R Co's right of way." The Burlington & Missouri River Railroad Company acquired a right-of-way over a part of this land 150 feet wide running along the south bank of the Platte River in 1869. This railroad later became the Chicago, Burlington & Quincy Railroad, referred to in this opinion as the Burlington.

On October 13, 1903, Otha J. Wortman et al. conveyed to Emma Olson (plaintiff) the "South East ¼ of the North West ¼ and the North East ¼ of the

South West ¼ of Section 9 - Town 12 - Range Ten in Cass County Nebraska."

On April 1, 1904, Otha J. Wortman et ux., by warranty deed, conveyed to Axel Nelson the following described land: "Lots Four (4) and Five (5) and the Southwest quarter (SW¼) of the South East Quarter all in Section Nine (9) Township Twelve (12) Range Ten (10) East of the Sixth Principal Meridian, * * * Also the west Sixteen and twenty seven hundredth (16.27) acres of Lot five (5) in Section Ten (10) Town Twelve (12) Range Ten (10) East of the Sixth Principal Meridian."

On April 1, 1904, Otha J. Wortman et ux., by quitclaim deed, deeded to Axel Nelson "All that part of the East half of Section Nine (9) Township Twelve (12), Range Ten (10) East of the Sixth Principal Meridian lying North of the right of way of the Burlington and Missouri River Railroad, including the island in the Platte River in said Section."

On January 5, 1950, Raymond P. Nelson et al., by warranty deed, deeded to George I. Gade et ux. the land described as follows: "Fractional Southeast Quarter (SE¼) of Section Nine (9) Township Twelve (12) Range Ten (10) East of the 6th P. M., Cass County, Nebraska, more particularly described as Lots Four (4) and Five (5) and the Southwest Quarter (SW¼) of the Southeast Quarter (SE¼) of said Section Nine (9) * * *; and the West 16.27 acres of Lot Five (5) Section Ten (10) Township Twelve (12) Range Ten (10) East of the 6th P. M. Cass County, Nebraska."

On January 5, 1950, Raymond P. Nelson et al. deeded to George I. Gade et ux., by quitclaim deed, "That part of the East Half of Section Nine (9) Township Twelve (12) Range Ten (10) East of the 6th P. M., Cass County, Nebraska, lying North of the right of Way of the Burlington Railroad, including island in the Platte River in said section; also the land that lies North of the West 16.27 acres of lot 5, Section 10, Township 12,

Range 10, Cass County, Nebraska, which land is North of the right of way of Burlington Railroad."

On December 30, 1955, George I. Gade et ux. deeded to Adolph L. Fedde et ux., "The fractional Southeast Quarter (SE¼) of Section Nine (9), Township Twelve (12) North, Range Ten (10) East of the Sixth Principal Meridian more particularly described as Lots Four (4) and Five (5) and the Southwest Quarter (SW¼) of the Southeast Quarter (SE¼) of said Section Nine (9), * * *; and the West 16.27 acres of Lot Five (5) of Section Ten (10) Township Twelve (12) North, Range Ten (10) East of the Sixth Principal Meridian, * * *."

On December 30, 1955, George I. Gade et ux., by quitclaim deed, conveyed to Adolph L. Fedde et ux., "that part of the East Half of Section Nine (9) Township Twelve (12) Range Ten (10), East of the Sixth P. M., Cass County, Nebraska, lying North of the right of way of the Burlington Railroad, including island in the Platte River in said section; also the land that lies North of the West 16.27 acres of Lot 5, Section 10, Township 12, Range 10 East of the Sixth P. M. Cass County, Nebraska, plus all land accreted to the above described property, which land is North of the railroad right of way of Burlington Railroad."

The above description of lands constitutes the history of conveyances up to the time this case was heard. The land acquired by Emma Olson, plaintiff, is west of the land acquired by Axel Nelson, now the Fedde land. What is designated as Nelson Island is the land over which this controversy arises, and Nelson Island, as it is commonly referred to in the record, is northwest of the Burlington right-of-way and of the Olson and Fedde land.

The defendants Fedde contend that the conveyance to them constituted them as the owners of the record title to the land in dispute in this case, and that the plaintiff has no claim to such land by adverse possession.

A survey was made of Sections 4 and 9, Township 12

North, Range 10 East of the 6th P. M., in Cass County, Nebraska, about June 13, 1958. On the surveyor's first visit over the area, a standing fencepost was pointed out to him. This post was standing about 4 feet out of the ground. He and the group with him walked along the area toward the river where they found a cottonwood tree that had been used as a fencepost. This tree was about 36 inches in diameter. There was barbed wire buried in the bark of the tree, and the bark had grown over the wire. The wire was old and rusty. The wire in this cottonwood tree extended to the north and south, and was not much more than a foot in length. Also, to the south was found another fencepost lying on the ground with barbed wire in it, and other posts on the ground which were obviously fenceposts. Approximately 30 to 40 feet north of the cottonwood tree the surveyor found an old east-west fence. The posts were broken and rotted, and the wires were lying on the ground. He found no definite line or designation on the terrain or in the area to show a continuation of the north-south section line. He further testified that he was unable to sight the half-section line north and south from the center of the section south of the Burlington railroad with any degree of accuracy because south of the right-of-way was a steep bluff, heavily wooded. He further testified that the plot he surveyed consisted of approximately 21 acres.

The plaintiff lived on her 80 acres of land with her husband George Olson until his death in 1928. Her son-in-law, Martin Stenberg, moved to the farm in 1929, took over the management of the farm, and the plaintiff lives with him. The plaintiff was 94 years of age at the time of trial. Axel Nelson, the plaintiff's brother, and his wife Emma lived on the Nelson farm until Axel Nelson's death on April 20, 1939. On June 21, 1948, Emma Nelson died. There were three sons, Raymond, Elmer, and Allen, who are Axel Nelson's heirs at law.

Martin Stenberg testified that he moved to the Olson farm in February 1929; and that before he moved to the farm he visited the plaintiff and his father-in-law and was on the land in dispute prior to the time he was married in 1921. He further testified that there was a sandpit on the land in dispute before he moved on the farm; that he first observed this sandpit in 1923 or 1924; that there were railroad tracks in the vicinity of the sandpit about 200 or 300 feet south of the big cottonwood tree; that there was a spur used to haul gravel and sand from the sandpit to the Burlington main line; that this sandpit was on the Nelson property and belonged to the Moffett Sand and Gravel Company; that there was a lease between the plaintiff and the sand company, and the company paid the plaintiff rent for the use of a part of the property in dispute; that the only names on the lease were those of the Moffett Sand and Gravel Company, the plaintiff, and possibly George Olson; that said company obtained its fuel supply from a supply tank along the railroad; and that in 1923, there was a cement platform built along the railroad tracks which is still there. This witness further testified that before he moved onto the farm there was a channel that practically followed the railroad tracks. He first observed this channel in 1919. The sand company put in a dike above the spur and across the channel, and the dike is still in place. After the spur was taken out, the grade where the spur had been was used as a road. The character of the ground to the south, west, and northwest of the channel consisted of underbrush, grass, and weeds, and the only time there was any water over this land was at flood stage. At one time there were a number of channels in that area, which filled up. This witness and his brother cut cottonwood trees and felled them into the river to help fill up the channel. After he moved onto the farm in 1929, he observed a three-strand barbed-wire fence running north and south across this island. This fence constituted the boundary

line between the Olson and Nelson farms. In 1958, this witness erected a fence in the same place as the old fence, which ran straight north to the river. The old fence consisted mostly of split railroad ties, some cedar posts, and wire. There was a gate across the old spur south of the big cottonwood tree. He further testified that it was impossible to sight the half-section line when standing on the railroad tracks because of the heavy trees in that area; that he cut wood in the area, and sold it to purchase groceries; that the land in dispute could not be cultivated from 1921 to 1936, because it was low land and heavily timbered; and that from 1936 until the time he built a new crossfence in 1958, running in the same direction as the crossfence built in 1926, the land was used for the purpose of pasturing, hunting, fishing, and obtaining wood, the purpose for which it had always been used and for which it was adapted. He further testified that a man named Fulton operated a sawmill on this land off and on for a year, and received permission to do so from the plaintiff.

This witness further testified that he had known Axel Nelson since 1919, and during that time Axel Nelson never made any claim to the land in dispute, nor did the Nelson heirs, nor did George Gade; and that Adolph Fedde made no claim to this property prior to the time some bulldozing was done on the land in dispute in 1958. This witness further testified that he knew both Masser and A. J. Cianciola who had a cabin in the area north and just east of the crossfence; that in September or October 1957, Adolph Fedde asked this witness for permission for one Jay Enright to drive through the land to hunt on Moss Island, to the north of the land in dispute, and this permission was granted; and that in 1958, defendants Camp and Adolph Fedde talked to this witness about extending the spur on the land in dispute and were told that there had been a spur in that locality, and suggested that Camp talk to the plaintiff and to him about this matter. He further testified

that to his knowledge no one asked the plaintiff to cease her possession of this land, nor made any claim to it; that no effort was ever made by the plaintiff to hide her claim to the land in dispute and she at all times acted as the owner of this land; that people could see what this land was used for; and that it was continuously used for the purpose for which it was adapted. He further testified that there was a gate at one time from Olson's deeded land across the railroad right-of-way; that this was before 1929; that this witness helped George Olson take horses down the bluff, across the railroad tracks, and onto the land in dispute; and that at that time Axel Nelson had no stock on such land. This witness further testified that when he first knew the land in dispute the island, which has been referred to as Nelson Island, was on the property of Wortman, or Gade, or Nelson, and through the years worked west until it became one large island; that originally the big cottonwood tree marked the end of Nelson Island; that the crossfence was put in to keep Axel Nelson's cattle from going onto the Olson property and Olson's horses from going onto the Nelson property; that in 1929, there were no fences along the river north of the crossfence; that there was a fence built by George Olson along the railroad right-of-way; and that Axel Nelson had fences along the boundary of his land. In 1936, Axel Nelson asked this witness if he could use the wire on the crossfence to fence the north side of his land. This witness testified relative to a sawmill which he discussed with a man named Castin. This witness received rent for permitting the sawmill to be on the premises in dispute in the form of 124 2 x 6 boards. He informed the operators of the sawmill where to set their operation, and the place that they should stop the work. He further testified that he took horses and cattle and hauled wood from the land in dispute through the Nelson place; that while George Olson was alive, none of Nelson's cattle ran west of the crossfence where Olson

had his horses; and that west of Nelson Island, referred to also as the big island, where the crossfence was located, there were channels and small islands where George Olson used to pasture his horses and cattle.

Paul Olson testified that the plaintiff is his mother; that he was born in 1905, and lived on the Olson land with his parents until 1928, and has been on this land many times since 1928; that he knows Stenberg and of his occupancy of the Olson farm since 1929; that he hunted and fished on the land in dispute with his brother and Stenberg; that during 1924, he worked for the Moffett Sand and Gravel Company, and continued such work through the summer of 1925; that the spur was removed; and that he saw his father, George Olson, build the crossfence in May or early June 1926, in the same location as the new crossfence built by Stenberg in 1958. He recalled the gate over the spur, and also that he helped his father cut wood in the area in dispute, and trapped on this land. He further testified that the wire was in the crossfence 10 or 12 years, and most of the posts were there until 1942; that his mother claimed to be the owner of the land west of the crossfence and north of the tracks of the Burlington; that Axel Nelson owned the land east of the crossfence; that from 1928 to 1936, the land in dispute was used for pasturing, hunting, and fishing, and from 1936 to 1958, for grazing, hunting, and fishing; that Axel Nelson, until the time of his death in 1939, made no claim to the land west of his property-line fence; that from this witness' earliest memory he knew of no complaint about the plaintiff claiming such land or of the use of the land in dispute; that no one claimed ownership of this land other than the plaintiff; and that at the time the crossfence was built, the channel had been filled in.

Otto Olson testified that prior to 1925, he lived with his parents on the Olson farm. He further testified that he first saw the crossfence in 1926, running south from the cottonwood tree to the railroad, and observed the

gate across the spur; that he knew Axel Nelson, his heirs, Gade, and Adolph Fedde, and none of these persons ever made any claim to the land in dispute from the time he knew it; that although he had left home in 1925, he returned at various times; that he took a picture of the tree on the north end of the fence constructed by his father, showing the new fence and the wire from the old fence; that the old wire on the crossfence built in 1926, runs north and south the same as the new wire on the fence built in 1958; that he went through a gate in the Burlington fence to hunt and fish on the land in dispute; that he remembered two islands, one to the east and one to the west, when he was first there, and these islands joined together; and that there was a road to the west across the tracks near the high bank which his father used to take the cattle to the land in question.

Jess Fidler testified that he worked for the Western Sand and Gravel Company, and recalled that the Moffett Sand and Gravel Company sold out to Lyman & Richey in the spring of 1926. He came into the area in dispute to remove the equipment, and the spur was there at that time. This spur was crossed by a fence. He further testified that he recently observed a new fence in the area which was in approximately the same location as the fence built in 1926. He also recalled seeing a big cottonwood tree at the end of Nelson Island, and the fence ran from that location over close to the platform built for a gasoline tank near the tracks.

Allen Nelson testified that he was born on the Nelson farm and is the son of Axel and Emma Nelson. Emma Olson, the plaintiff, is his aunt. He testified that he knew Adolph Fedde and was familiar with the land in dispute; that he lived on the Nelson farm until 1938, was gone for a year, returned in 1939, then lived on such land until 1950. He recalled that there was a fence along the Burlington track and a crossfence along the line between the Olson and Nelson farms running north and south; that old railroad ties were used for

posts for this fence; and that this fence crossed the spur. He first saw this crossfence in 1926, which was the year it was constructed, and that fence stayed there for roughly 10 years. Later the wire was removed from that fence and he helped to do this. This was done for the purpose of building a fence along the riverbank to keep the cattle from crossing the river. This latter fence was built from the crossfence, the length of the island. After his father's death in 1939, this witness became part owner of the Nelson land. Neither he nor any member of his family ever claimed any land west of the crossfence. It was claimed by the Olsons. He further testified that before 1926, his father, Axel Nelson, had fences on his land, but had no fence west of the crossfence; that the wire was taken off the crossfence and used along the north side of the island; that before 1926, his father had cattle below the east-west fence along the river, and Olson's cattle were pastured above this location; that members of his family cut wood on the east end of the land in dispute; that if wood was cut on the west half of such land by members of his family it was done to help Stenberg; that George Olson had horses and calves west of the crossfence; and that these animals were taken down on a part of the north road which was on the Olson land.

Elmer Nelson testified that he was a son of Axel and Emma Nelson and lived on the Nelson farm until 1933; that he was familiar with the land in dispute; and that he first saw the crossfence in 1925 or 1926. He recalled that there was a wire gate over the spur. He testified that Olsons pastured the land west of the crossfence; that no member of the Nelson family ever claimed any interest in the land in dispute; that the plaintiff always claimed to own such land; that the channel started to fill in 35 years ago; and that the land in dispute was not considered an island but was considered as part of the mainland.

George Gade testified that he took possession of the

Nelson property on or about March 1, 1950; that he sold this land to the defendants Fedde in 1956; and that at that time he knew that the plaintiff claimed the land west of him and north of the railroad tracks. The agent who negotiated the deal between this witness and the Feddes took him down to what is called the island. There he saw evidence of a fence, roughly in the extension of the center section line, consisting of what he thought were some posts and some wire. He further testified that he never purported to own or claim the land west of the crossfence. When he sold the land to the Feddes, Adolph Fedde wanted him to give a quitclaim deed to all of the land on Nelson Island, and he told Adolph Fedde that he would give him a deed to the land north of his place, and no more. When he bought the land from the Nelson heirs there was in fact no island, and he bought only the land lying north of his place. His cattle ran over the entire area, with Stenberg's cattle. After he was on this land 2 years, he and Stenberg built a fence along the riverbank, north of the railroad tracks, clear to the west end of the land in dispute. This was a three-wire fence, with one electric wire. He told hunters where the property line was when they came to hunt, and told Castin to take wood only from that part of the land which he owned.

The agent who negotiated the sale between Gade and the Feddes testified that he pointed out to Fedde the west property line north of the railroad tracks and told Fedde that he could obtain a quitclaim deed to all of the land east of the crossfence.

Elmer Welton testified that he knew the area in dispute; that he did a lot of trapping, hunting, and fishing in such area in 1928, and for 6 or 7 years thereafter; and that this was the way in which he made his living. He further testified that he observed the crossfence, and had to open the gate to get over the spur to get to the place where he hunted and fished; that he saw the fence erected by Stenberg in 1958, which was in the same

location as the old crossfence; that the old crossfence remained in place for 10 years; and that the wire was taken off the posts, and the posts remained and were in approximately the same place as the fence constructed by Stenberg. When going into this disputed area, he went through the Axel Nelson place. He asked Axel Nelson for permission to go upon the land in dispute, was told by him to ask the plaintiff, and he obtained permission from the plaintiff to do so.

Clarence Vandeman, who was a partner of Elmer Welton, testified that he fished with Welton in the area in dispute; that he had a recollection of a fence constructed by George Olson that ran north and south; that he also recalled the spur and the gate; and that wire was attached to a good-sized cottonwood tree. He further testified that he had been in that area in recent months and had observed the new fence built by Stenberg which was in approximately the same location as the old crossfence; that the cottonwood tree was next to the riverbank; that after the wire was taken from the crossfence he could see the old fenceposts were in the same place; that he worked for the Burlington from 1946 to 1948, and would go up and down the tracks in that area; that the last time he recalled seeing the posts of the first crossfence was sometime between 1946 and 1948; that he knew the plaintiff, and asked her permission to hunt and fish in the area in dispute; and that he and Welton went through the gate on the Nelson land then up through the gate across the spur to the area in dispute.

Wally Wagner, a railroad section worker for the Burlington since 1917, testified that he knew George Olson and knew that the old crossfence was built in 1926, as he saw George Olson building it; that he helped unload the ties that George Olson used for posts; that George Olson also built the first fence along the railroad right-of-way; that no pasturing occurred in that area until it was fenced in; and that Stenberg constructed a cross-

fence in the same location as the old crossfence. This witness further testified that he helped to build the spur, and had opened and closed the gate in the fence that was built by George Olson.

Earl Dreamer testified that he was familiar with the land in dispute; that he knew Axel Nelson and his wife, but did not know the plaintiff or her husband; that he started to go on the land in dispute in 1917, and obtained permission to do so from Axel Nelson; that in order to get to this land he went through Nelson's yard to the east gate, then to a road across the railroad tracks; that he was on this land on an average of once every two weeks from 1917, and hunted there in 1919; that in 1927, he and other persons bought a cabin which was located south of the railroad tracks at the corner of the Axel Nelson place, across from the sandpit; that he hunted and fished over the entire island; that he never saw a crossfence running north and south across the island; that he had been over this land a great many times between 1927 and 1929; and that Axel Nelson built a fence to keep the cattle out of the river in 1934. This witness further testified that he remembered two fences built by Axel Nelson at the west end of the island, the first being built in 1927, and the second one in 1930.

Oscar Neumann testified that he had known the land involved in this litigation since 1920; that when he first went on this land in 1920, he did not ask permission of anyone to do so; and that he and his father fished from this island many times. He further testified that there was a meadow at the lower end of the island and a small channel that ran between it and the Nelson main island, which channel was 100 to 150 feet wide. The first time he asked permission to go on the island was in 1924, and he obtained this permission from the Nelsons. Since 1924, he had never seen a north-south crossfence across this island. The first time he ever saw a fence, it was along the right-of-way of the railroad in the 1930's. He testified that he had never seen a footpath or road from

the Olson property down the bluff and across the railroad tracks.

William Leddy testified that he knew the Nelson family and the Olson family; that he had been acquainted with the land in dispute since the early 1900's; and that he used to go on this land to hunt and fish. He started to do so in 1903, and was on this land a number of times all through the years up until the time Gade moved onto the Nelson land. He testified that the road across the Nelson place was the only way to get to the land in dispute; that he never saw a crossfence running north and south at any of the times he was on this land; and that he never saw a gate in the right-of-way fence along the Burlington tracks. He further testified that he never asked any person for permission to go onto this land, and saw neighbors, strangers, and numerous people on this land; that there were gates across the Nelson road all of the years that he went on this land, one at the Nelson house and one at the railroad right-of-way; and that he was on this land three or four times a year from 1903 until 1950.

Edgar Sweem testified that he had been a section foreman and knew the location of the property in dispute, but did not know much about the property. He further testified that he passed this property from May 10, 1937, until February 28, 1944, for the purpose of taking care of tracks, fences, and crossings. In 1937, there was a fence along the Burlington right-of-way. He never saw a row of posts that would designate where a crossfence running north and south had been located in 1937, on the numerous times he passed over that area. He further testified that there were no gates that he saw, except at the Nelson crossing; and that he knew Stenberg fed cattle on this land after 1937.

Francis Fulton testified that he operated a sawmill in 1953, and made arrangements with Gade to do so; that Gade sold timber to Fred J. Castin, and this witness cut the logs for the purchaser; that Gade never gave

him instructions confining his work to any one part of the island, but told this witness to pick his site, and help set the sawmill up; and that he never paid Stenberg any money or lumber of any kind. Later in 1956, he did cut lumber on the land in dispute for Adolph Fedde, and dealt with him, but never with Stenberg or any other person. No one ever told this witness that Olson claimed this land.

Ralph Dreamer testified that when he lived at home he and his father went onto the land in dispute. He remembered going on this land first in 1929, and had been on this land from 1929 up until the past year, hunting and fishing. He further testified that he did not remember a crossfence running north and south since he had been on this land.

Laura A. Dreamer corroborated the testimony of her husband Earl Dreamer to the effect that at the times she was on the land in dispute with him, as he testified, she never observed or saw any crossfence running north and south across the island.

W. O. Schewe testified that he knew Axel Nelson; that he went fishing on the land in dispute before Axel Nelson bought the farm; that the island was a kind of a jungle when he first went on it; that he never saw a crossfence running north and south across the island and which was constructed in 1926; that he did see a fence at the west end of this island that was built by Axel Nelson; and that to the best of his recollection there was no road down the hill on the Olson land that lead to the land in dispute.

Harold Buell testified that he knew the Nelsons and the Olsons; and that he went on the land in dispute ever since he could remember to hunt and fish and to help when that was demanded. Between 1930 and 1934, there was a fence along the railroad tracks, and a fence on the north side of the island. He could not remember any crossfence running north and south across the island. He further testified that Stenberg and Axel

Nelson had cattle on this land in 1934 or 1935, and these cattle ranged the entire island.

Adolph Fedde testified that when he took the warranty deed and the quitclaim deed to the Nelson property, he claimed all of the land in dispute; that after he took possession he sawed timber on this land, sowed grass, and had a bulldozer move onto it on two occasions to do some riprapping; and that he and the real estate agent who negotiated the deal between Gade and this witness were over nearly all of the exterior of the land in dispute. He denied that the agent pointed out any property lines which would separate the property which he purchased from the land in dispute. He further testified that the agent told this witness he was going to sell him just what the quitclaim deed called for. This witness further testified that he entered into a lease agreement with Camp for the purpose of pumping sand on the land in dispute. Some of the fence on the north side of the island washed into the river, and before work with the bulldozer could be started some of the fence was rolled up and some of the posts removed. This fence was in bad shape. This witness further testified that Fulton went onto this land with a bulldozer and toppled some of the trees into the river. This was a year or two prior to the time that Camp entered the land to do some bulldozing on it. This bulldozing ran from east to west across the entire island, and was done in 1956 or 1957. This witness further testified that he had seen the cottonwood tree that has been described with the wire in it; that the wire in that tree protruded from the tree at right-angles to the fence which was put in there, that is, the wire was sticking out of the west side of the tree; and that there were fenceposts standing up along the riverbank, east and west of this tree. With reference to whether or not there was any evidence of fenceposts to show that there had been a north-south fence, this witness testified that there were pieces of wood and posts all over the island,

and he could ascertain no evidence of any particular fenceposts being found in the immediate vicinity that would indicate that there had been a north-south fence built, as claimed by the plaintiff. This witness further testified that he leased land on the island for cabins, and different spots for duck hunting.

On cross-examination this witness testified that the written lease he had with Camp read as follows: "through all of that land north of the tracks and the east half of the section (section 9)." He further testified that he had a verbal agreement with Camp that if he wanted to pump on the other part, if this witness was satisfied with his pumping arrangements, he would let Camp pump in Section 10, or up on the other land.

A. J. Cianciola testified that he owned a cabin in the immediate area of the property in dispute. In 1956, he leased the ground from Adolph Fedde. At that time he told Adolph Fedde he wanted the last place he had for cabin purposes as he desired privacy. Later Adolph Fedde sold him a parcel of land that was on the east side of the crossfence, and pointed out a tree as one of the things that constituted the boundary line between his property and other owners. At the same time Adolph Fedde told this witness that he had had the land surveyed and that that was the property line, and told this witness not to exceed that property line because he was not sure who it belonged to.

The evidence relating to damages may be summarized as follows: Gade and Stenberg built a 3-wire fence with two barbed wires and one smooth wire along the riverbank. The entire distance where this fence was constructed was bulldozed out by the defendants. The distance covered by the bulldozing conducted by the defendants which destroyed this fence was approximately 2,100 feet. After the fence was constructed, Adolph Fedde asked Stenberg by what right he had constructed the fence. Stenberg asked Adolph Fedde who gave him permission to move onto the land with a bulldozer and

he replied that he had given Camp permission to go onto the land with the bulldozer. When Camp entered upon the land with his bulldozer, he bulldozed right along the river, and knocked down trees west of the Cianciola cabin. The reasonable price for the fence was testified to by Stenberg to be approximately $2.50 a rod. After viewing the premises, the court awarded damages to the plaintiff in the amount of $300.

In James v. McNair, *supra,* this court said: "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."

It is the established law of this state that, when a fence is constructed as a boundary line between two properties, and parties claim ownership of land up to the fence for the full statutory period and are not interrupted in their possession or control during that time, they will, by adverse possession, gain title to such land as may have been improperly enclosed with their own. See, Pfeiffer v. Scottsbluff Mortgage Loan Co., 105 Neb. 621, 181 N. W. 533; Krumm v. Pillard, 104 Neb. 335, 177 N. W. 171; Hallowell v. Borchers, *supra;* Konop v. Knobel, 167 Neb. 318, 92 N. W. 2d 714; McGowan v. Neimann, 144 Neb. 652, 14 N. W. 2d 326.

In the instant case the evidence shows that the plaintiff owned the only deeded land north of the railroad which laid north of her place. It consisted of a small triangular tract on the half section line, as shown by the surveys in evidence. This land never washed out, as the evidence shows that the channel of the Platte River came down along the railroad right-of-way, swerved away at the triangular tract, and then cut back near Nelson's crossing. This is shown by the fact that either on or in the immediate vicinity of this triangle the Moffett Sand and Gravel Company placed a concrete

platform for a supply tank on their first spur that was built, and which platform is now in existence. The original Wortman Island, later known as Nelson Island, ended at the crossfence. After the dike was put in by the people operating the sandpit, which dike was to the west, the area filled in rapidly. Therefore, the evidence discloses that the area in question was accreted to the railroad right-of-way and to the triangle owned by the plaintiff, as effectively as it was accreted to Nelson Island. George Olson built a fence in a north-south direction, starting as close to the section line as the terrain would permit, in 1926. Prior to the building of such fence and subsequent thereto, Axel Nelson never claimed any land beyond the boundary line of this fence. At all times the plaintiff claimed to own this land. Gade, who purchased the Nelson land from the Nelson heirs as the evidence discloses, never claimed to own the land in dispute.

From a review of the entire record, the evidence discloses that for a period of over 50 years no claim was ever made against the plaintiff's use of the property in dispute, and for a period of 30 years there was a fence, or evidence of a fence, indicating exactly where the claimed boundary line existed. For 10 years this boundary line running north and south was well fenced.

From an examination of the entire evidence, we are convinced that the plaintiff has been in the open, notorious, exclusive, continuous, and adverse possession of the strip of land in question for more than the statutory period of 10 years, and that she is entitled to have a decree granted showing that she is the owner of such land.

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

AFFIRMED.

ELLWOOD B. CHAPPELL and PAUL E. BOSLAUGH, JJ., not participating.

FRANKLIN M. PALMER, APPELLEE, v. GERALD R. MCDONALD, APPELLANT.

107 N. W. 2d 655

Filed February 17, 1961. No. 34864.

1. **Trial.** A motion for a directed verdict or for a judgment notwithstanding the verdict admits, for the purposes of a decision of the motion, the truth of the material and relevant evidence on behalf of the party against whom the motion is directed, and he is entitled to have each controverted fact found in his favor and have the benefit of fair inferences deducible from the evidence.
2. ———. In every case, before the evidence is submitted to the jury, there is a preliminary question for the court to decide, when properly raised, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed.
3. ———. In a case where a motion for a directed verdict has been made at the close of all of the evidence, which motion should have been sustained but was overruled and the case was submitted to a jury which returned a verdict contrary to the motion, and a motion for judgment notwithstanding the verdict is duly filed, it is the duty of the court to sustain the motion and render judgment in accordance with the motion for a directed verdict.
4. ———. 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.
5. **Automobiles: Negligence.** When one, being in a place of safety, sees or could have seen the approach of a moving 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.
6. **Highways: Negligence.** One who attempts to cross a street between intersections without looking is guilty of such negligence as will bar a recovery as a matter of law. If he testifies that he did look, it is implied that he looked in such a manner that he would see that which was in plain sight, unless some reasonable excuse for not seeing is shown.
7. **Negligence.** The rule with reference to cause which will afford the basis for an action for damages for negligence is that the

act must be a proximate cause of the accident and the ensuing injuries.

APPEAL from the district court for Sarpy County: JOHN M. DIERKS, JUDGE. *Reversed and dismissed.*

Fraser, Wenstrand, Stryker, Marshall & Veach, for appellant.

Wear, Boland, Mullin & Walsh and *A. Lee Bloomingdale,* for appellee.

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

MESSMORE, J.

This is an action at law brought in the district court for Sarpy County by Franklin M. Palmer, plaintiff, against Gerald R. McDonald, defendant, to recover damages for injuries sustained because of the negligence of the defendant when his automobile collided with the plaintiff, a pedestrian. The cause was tried to a jury, resulting in a verdict in favor of the plaintiff. The defendant filed a motion for judgment notwithstanding the verdict or in the alternative for a new trial. This motion was overruled and the defendant perfected his appeal to this court.

The plaintiff's petition alleged that on or about September 4, 1958, at about 5 p.m., the plaintiff was walking as a pedestrian from the west side to the east side of the paved street which runs generally in a north-south direction behind the building known as the Strategic Air Command Control Center at Offutt Air Force Base in Sarpy County (which will hereinafter be referred to as the headquarters building); that there was a large parking lot to the east of the headquarters building; that the street was undergoing heavy usage by pedestrians who were proceeding from the headquarters building to the parking area east of such building; that there were no marked crosswalk lines or lanes for use by pedestrians crossing this road, but by usage and

custom the plaintiff and numerous other pedestrians regularly utilized that road to cross from the headquarters building to the parking area; that this fact was well known by the defendant; and that there was a maximum speed limit of 10 miles an hour for vehicular traffic. The plaintiff further alleged that as he prepared to cross from the west to the east side of the road, there was located a long line of vehicles in a stationary position in the west half of the road; that prior to leaving the west curb of the road, the plaintiff ascertained that the southbound vehicles were in a stationary position and that there was ample opportunity and space for him to cross the west half of the road between the rear of a stopped southbound bus and a car that was southbound; that upon reaching a point approximately even with the east side of the bus, the plaintiff again made an observation to his right and left prior to entering onto the east half of the road, and ascertained that there was no north or southbound traffic located on the roadway which would constitute a danger to him; that thereafter the plaintiff proceeded into the road where he was struck by a northbound vehicle operated by the defendant; and that immediately prior to the happening of the collision, the defendant drove his car from its parking place in the parking area to the east of the road, turned his car to the north, and accelerated his car causing it to strike the plaintiff. The plaintiff then set forth in his petition several acts of negligence on the part of the defendant which the plaintiff claims constituted the proximate cause of his injuries, and prayed for damages.

The defendant's answer admitted the happening of the collision between his car and the plaintiff on September 4, 1958, which collision occurred immediately east of the headquarters building; specifically denied that the plaintiff was walking; alleged that said collision and resulting injuries and damages, if any, sustained by the plaintiff were through no fault or negligence on

the part of the defendant; and alleged that the plaintiff's negligence was the sole and proximate cause of the collision, which negligence was more than slight and directly contributed to and caused the accident.

The assignments of error necessary to consider in this appeal are that the trial court erred in overruling the defendant's motion for directed verdict at the conclusion of the plaintiff's case and at the conclusion of all of the evidence; and that the trial court erred in overruling the defendant's motion for a judgment notwithstanding the verdict.

The principal question presented on this appeal is whether or not the evidence establishes that the plaintiff was contributorily negligent in a degree sufficient to bar his recovery as a matter of law.

In determining the issues in this case, the following principles of law are applicable.

"A motion for a directed verdict or for a judgment notwithstanding the verdict admits, for the purposes of a decision of the motion, the truth of the material and relevant evidence on behalf of the party against whom the motion is directed, and he is entitled to have each controverted fact found in his favor and have the benefit of fair inferences deducible from the evidence." Spracklin v. Omaha Transit Co., 162 Neb. 351, 76 N. W. 2d 234. See, also, Jarosh v. Van Meter, *ante* p. 61, 105 N. W. 2d 531.

"In every case, before the evidence is submitted to the jury, there is a preliminary question for the court to decide, when properly raised, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed." Hickman v. Parks Constr. Co., 162 Neb. 461, 76 N. W. 2d 403, 62 A. L. R. 2d 1040. See, also, Jarosh v. Van Meter, *supra*.

In a case where a motion for a directed verdict has been made at the close of all of the evidence, which

motion should have been sustained but was overruled and the case was submitted to a jury which returned a verdict contrary to the motion, and a motion for judgment notwithstanding the verdict is duly filed, it is the duty of the court to sustain the motion and render judgment in accordance with the motion for a directed verdict. See, Corbitt v. Omaha Transit Co., 162 Neb. 598, 77 N. W. 2d 144; Jarosh v. Van Meter, *supra*.

"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, 169 Neb. 369, 99 N. W. 2d 605.

The record shows that Bernhard Muhsemann testified that he was an airman first class stationed at the Offutt Air Force Base on September 4, 1958, and was assigned to a police squadron; that part of his duties required him to investigate accidents that occurred on the base; that he was familiar with the area where the collision occurred between the defendant's car and the plaintiff, a pedestrian; that the rear of the headquarters building faces to the east; that the area east, at the rear of the building, contains a large parking lot running generally in a north-south direction with numerous lines painted on the pavement to indicate parking stalls; that approximately 400 cars park in this parking area; that directly north of the headquarters building there is another parking lot that holds approximately 250 cars; and that in all, there is parking space for approximately 650 cars belonging to persons working at the headquarters building. He further testified that there is a north-south road which lies between the rear of the headquarters building and the east parking lot; that this road is approximately 30 feet wide from curb to curb; that about 95 percent of the people working in the headquarters building get off duty at 5 p.m., and leave the building; that the speed limit on the road between

the headquarters building and the parking lot was 10 miles an hour on September 4, 1958; and that there were signs posted to that effect in that vicinity as well as regulations such as a daily bulletin put out by the provost marshal's office to the effect that pedestrians had the right-of-way in that area over vehicles. There were no painted crosswalks in this area. There were three entrances on the rear of the headquarters building which open out to the parking lot. A large percentage of the pedestrians walk across the road to get to their cars. This witness further testified that he received a call that an accident had occurred at gate No. 2, which is called the pedestrian gate. He and a flight sergeant arrived at the scene of the accident shortly after it occurred. He stated that it was more or less dusk, raining, and drizzling, and that the ground was wet at that time. Arriving at the scene of the accident he saw a pedestrian sitting in the road, and a 1953 4-door Plymouth car which belonged to the defendant was stopped in the immediate vicinity. He made an investigation and found skid marks approximately 20 feet in length from the rear of the defendant's car. There was a crack in the windshield of the defendant's car. The base ambulance arrived and the plaintiff was taken to the base hospital.

On cross-examination this witness testified that he did not see the accident; that there was a line of traffic stopped at the west curb of the road; that when he arrived at the scene of the accident the plaintiff was seated on the road on the left side of the defendant's car which was facing north; and that the front end of the car was not more than 4 feet south of the gate shack west of the roadway at the rear of the headquarters building.

The plaintiff offered in evidence the deposition of Elizabeth Borsen. On September 4, 1958, she was employed and had worked in the headquarters building. On the day in question she left work at approximately 5 p.m., and walked out the rear of the headquarters building to proceed to the east parking lot where the

car she was to ride home in was parked. The driver asked her to wait until he got the car. People were "pouring out" of the headquarters building to go home. She described the weather as "lousy." She waited between the second and third crossdrives on the east side of the road in question, immediately adjacent to the parking lot. She further stated that there were 10 or 12 entrances to the parking lot; that she noticed the defendant's car come out of the southernmost entrance of the parking lot and turn north on the north-south road; and that she watched the defendant's car as it proceeded north, and in her opinion the defendant "put on a little bit too much speed." She estimated the speed of the defendant's car as he drove north to be 20 miles an hour. She continued to watch the defendant for "a little bit." She turned her head to the south to see if the driver of the car she was to ride in was coming, then she looked north again and saw the plaintiff "sort of up against or on the fender of a car that was parked" on the west curb facing south, and the plaintiff fell to the ground. She saw the defendant "fly" out of his car, having applied his brakes and stopped his car in about a car length. She heard no horn sounded by anyone prior to the accident. When the defendant's car came to a stop, the rear of his car was either even with the plaintiff or north of him.

On cross-examination this witness testified that while she was standing on the east curb watching for her ride she observed an Air Force bus stopped on the west side of the street facing south, 20 or 25 feet north of where she was standing, and there were two or three southbound cars stopped behind or to the north of this bus. Her first impression was that she saw the plaintiff's body either up against the fender or on the fender of the car parked behind the bus.

The plaintiff read into evidence certain excerpts from the defendant's deposition, that there were cars proceeding south in the area where the accident occurred.

The southbound traffic was at a halt along the west side of the road, due to the congestion at the time of the employees quitting work at the base. He judged that the distance from the left side of the Air Force bus to the left side of his car would be 2 feet. He first saw the plaintiff at the time of impact. At that time the plaintiff was crossing the road from the west side to the east side.

The plaintiff testified that he was employed as chief of the policy and procedures branch in the procurement division at the Air Force Base. On the day of the collision, he had driven his car to work and had parked it in the parking lot immediately to the east of the headquarters building. He estimated that the parking lots held 400 or 500 cars, and that 2,500 people worked in the headquarters building, and most of them left their work at 5 p.m. He testified that pedestrians had to walk across the road, and there were no designated places to walk, they could walk where they could find room between cars. Pedestrians moved directly east in going from the headquarters building to the parking lot. The plaintiff further testified that he left the rear of the headquarters building, walked to the east some distance and then turned and walked north to the checkpoint where he showed his badge to the officer stationed there. He then walked south on the sidewalk along the west side of the road for a distance of approximately 50 feet where he found an opening in a line of cars which were stopped approximately 2 feet from the curb. He saw an Air Force bus, and the body portion of that bus was about 8 feet in width. This bus was stopped about 5 feet from the west curb. He trotted along from the check station down to a point where the bus was standing. As he moved along the west sidewalk, he observed the road and saw no cars coming north on the road. When he reached a point where the bus was stopped, he found that there was an opening of approximately 4 feet between the rear of the bus and

the car standing immediately behind the bus. When he reached the east side of the bus, he looked to the south and saw that there were no northbound cars on the road. He looked to the north, and seeing no southbound traffic moving he took a step out onto the road, glanced to the south as he did so, and the defendant's car was upon him. His impression was that the front portion of the defendant's left front fender struck the inner side of his left leg above the knee and on part of the knee. He was also injured on his right side where it struck the windshield of the defendant's car. When he took the step, he saw the defendant's car, and the collision occurred simultaneously. The defendant's car was not over a foot away from him when he saw it before the impact. He believed that almost simultaneously with the impact he heard a little "peep," and assumed that it was from the horn of the car behind the bus. He did not recall hearing any horn sounded by the defendant's car. The first thing he could remember after the accident was that he was lying on his back in the road, very close to the left side of the car which was stopped behind the bus. He remembered that after the collision someone came up to George Smith, the driver of the car that was stopped behind the bus, and Smith said to that person: "you know you were driving awfully fast." He assumed that Smith was talking to the defendant, but was not sure, as he did not see the man Smith was talking to.

On cross-examination this witness testified that as he walked toward the street, cars southbound were built up solid along the west curb. As he walked down the sidewalk looking toward the south and over the roadway, he had a fairly good view of the roadway, but the bus obstructed that view somewhat. As he walked south down the sidewalk, he continued to look to the roadway and to the south to see if there were any cars proceeding north on the road. He was trotting for 50 feet until he got just to the rear of the bus, and

was walking when he stepped off the curb and put his hand on the right fender of the car to his left, which was the car behind the bus, and was Smith's car. He then passed between that car and the bus, and looked to the left edge of the bus. He looked to the south and saw no traffic approaching, and looked to the north and saw no traffic approaching from that direction. He took one step, glanced back to the south, and the defendant's car was within a foot of him. When he paused at the east edge of the bus and looked to the south he was able to see probably 200 feet to the south, and at that time he saw no northbound cars.

Lieutenant Colonel Ruth McCraw testified that she was stationed and worked in the headquarters building at Offutt Air Force Base; that she left work at 5 p.m., on September 4, 1958; and that when she left the building with her superior officer to go to her car parked in the officer's parking lot directly behind the building, it was drizzling rain. When she got her car, she came out of the parking lot and was headed south to go around the headquarters building and out toward the Strategic Air Command gate. Immediately after leaving the parking lot she was stopped in the southbound lane of traffic on the north-south road. There were a number of cars in front of her, including an Air Force bus in front of the car preceding her car. She observed the plaintiff emerging between the back of the bus and the car preceding her car. The plaintiff was in a running trot going into the street from between the bus and the car. The plaintiff was looking in her direction, and did not hesitate or stop at any time. She saw the actual impact. The plaintiff hit the defendant's car sideways, just to the rear of the left front fender of the defendant's car which was northbound. The plaintiff's head hit the windshield of the defendant's car. The plaintiff fell to the ground between the two automobiles, right in the center of the road. This witness jumped out of her car and went to the plaintiff's aid.

She held his head in her lap. The defendant's car stopped "right there" in the road. She was not particularly looking to see a car coming, and as she saw the plaintiff crossing the road she saw the defendant's car coming up the road, and then she saw the impact. The plaintiff was directly centered in the roadway in front of the left wheel of the Smith car which was directly behind the bus, and next to the front side of the car that he hit. She believed the defendant stopped his car "dead still." At no time up to and after the impact did she hear any squealing of brakes or the sounding of a horn. While she was assisting the plaintiff after the collision, she heard the defendant say: "I am sorry, Mister, I didn't see you."

On cross-examination this witness testified that the impact took place a few feet in front of her car and to the left of it; that it would not have been possible, in her opinion, for the plaintiff to have been hit by the front part of the defendant's car because she saw his glasses fly back toward and onto the hood of the Smith car in front of her car; and that she saw his head hit the windshield, which could not have happened if the plaintiff had been in front of the defendant's car.

The deposition of the defendant was read into evidence. He testified that he was involved in the accident on September 4, 1958, between his car and a pedestrian, which took place back of the headquarters building at Offutt Air Force Base between 4 and 5 p.m.; that he had been at work and was leaving for home; that he was told there was a speed limit of 15 miles an hour and that his speed at the time of the accident was less than 10 miles an hour; that he was proceeding north, there were no cars immediately ahead of him, and he did not remember if there were any cars immediately behind him; that there was traffic proceeding south in the area where the accident happened; that the southbound traffic was "full" along the west side of the road, and the cars at that point were stopped

due to the traffic congestion; and that he was proceeding north from the east parking lot and, as he approached the gate guard, the plaintiff ran from between the southbound bus and the George Smith car. The plaintiff struck the left front fender of the defendant's car right ahead of the windshield, that is, the plaintiff ran into the left side of the defendant's car. His car did not travel over 2 feet after the accident, after he had applied the brakes. He testified that he saw the plaintiff just at the time of the impact; and that the plaintiff was trotting, and could not stop his forward movement.

James W. Nanney testified that on September 4, 1958, he was assigned to an air police squadron, and part of his duties was to investigate accidents; and that he made an investigation of an accident on September 4, 1958, accompanied by airman first class Muhsemann, and was told to go to gate No. 2. Upon arrival at the scene of the accident he saw someone lying in the road in the northbound lane, just east of the guard control point. He noticed a crack in the windshield of the defendant's car. This witness further testified that neither he nor Muhsemann saw the collision and therefore did not know what position the plaintiff was in, nor the position of the defendant's car at the time of the impact. He further testified that the Air Force bus was approximately up to 7½ feet in width, and the rear of the bus was a few feet south of the plaintiff as he was lying in the roadway.

It was stipulated that the testimony of George Smith, taken by interrogatories propounded in behalf of the defendant, should be received in evidence. This witness testified that he was employed at the Strategic Air Command, Offutt Air Force Base on September 4, 1958, and witnessed a collision between an automobile and a pedestrian; that he was in his car immediately behind the Air Force bus proceeding south in the line of traffic enroute home; that it was drizzling slightly at the time

of the accident; that when he saw the plaintiff, he was just passing the sentry box and through the security gate across the sidewalk between this witness' car and the bus stopped ahead of him; that the entire southbound line of traffic was stopped; that he saw the plaintiff trotting across the sidewalk between his car and the parked bus; that the plaintiff had his head down, apparently to avoid the rain; that the plaintiff did not hesitate nor look in either direction up or down the road prior to leaving the sidewalk; and that the plaintiff was in a slow trot heading east across the street. This witness stated that he observed the defendant's car proceeding north; that the speed of the defendant's car was approximately 10 or 15 miles an hour; that this witness tapped his horn in an effort to attract the plaintiff's attention to the oncoming traffic, but the plaintiff did not heed the warning and by the time the plaintiff reached the center of the roadway the defendant's car had reached the opening between the bus and this witness' car, and the plaintiff ran into the left front fender of the defendant's car; that the point of impact occurred about 4 feet in front of and to the left of this witness' car; and that there was about 2 feet of clearance between the two lines of traffic.

The plaintiff's evidence is to the effect that when he halted at the left edge of the bus, he looked to the south and had a view of 200 feet or more and did not see any cars approaching from that direction. He then took one step, and almost instantaneously with his taking of the step, the collision occurred. The testimony of two eyewitnesses, who were in a good position to see the accident and did see it, was positive that there was no hesitation on the part of the plaintiff; that he was on a trot; and that he did not look to the right before emerging out from behind the Air Force bus. From the testimony of the two eyewitnesses, it is apparent that the defendant's car had to be at the place of impact and in plain sight. It was northbound, and its left side was

some 2 feet from the side of the Air Force bus at the time of the collision.

The following, under the facts in the instant case, are applicable.

"When one, being in a place of safety, sees or could have seen the approach of a moving vehicle in close proximity to him and suddenly moves from a 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." Gade v. Carlson, 154 Neb. 710, 48 N. W. 2d 727.

The fact that there was no crosswalk across the north-south road to the parking lot to the east, and that pedestrians had the right-of-way over vehicles, does not dispense with the rule announced in Ficke v. Gibson, 153 Neb. 478, 45 N. W. 2d 436, as follows: "One who attempts to cross a street between intersections without looking is guilty of such negligence as will bar a recovery as a matter of law. If he testifies that he did look, it is implied that he looked in such a manner that he would see that which was in plain sight, unless some reasonable excuse for not seeing is shown."

While the plaintiff contends that the defendant was approaching from the south on the wrong side of the street, he did testify that when he moved out to the left side of the bus and looked to the right and left, he could see down the street beyond the bus for a block, or at last 200 feet or more, and saw no vehicles approaching; that he then looked left, took one step, looked up, and almost simultaneously saw the defendant's car; and that the front part of the left fender of the defendant's car came in contact with his body.

The rule with reference to cause which will afford the basis for an action for damages for negligence is that the act must be a proximate cause of the accident and the ensuing injuries. See Frerichs v. Eastern Nebraska Public Power Dist., 154 Neb. 777, 49 N. W. 2d 619.

Under the factual situation in the instant case the negligence of the defendant, if any, was not the proximate cause of the accident. If the defendant's car was over the center line of the road before or at the time of the accident, such would not constitute the proximate cause of the accident under the factual situation in this case.

We conclude that the trial court erred in submitting the case to the jury. The plaintiff's own negligence, under the facts shown, precludes the recovery on his part as a matter of law. The judgment of the district court is reversed and the cause dismissed.

REVERSED AND DISMISSED.

ELLWOOD B. CHAPPELL and PAUL E. BOSLAUGH, JJ., not participating.

WALTER A. ANDERSON ET AL., APPELLEES, V. OSCAR CARLSON, JR., ET AL., APPELLANTS, IMPLEADED WITH JOHN E. CARLSON ET AL., APPELLEES.
107 N. W. 2d 535

Filed February 17, 1961. No. 34884.

1. **Constitutional Law: Judgments.** A motion for summary judgment is a proper pleading to raise the question of constitutionality if the pleadings and admissions show there is no genuine issue of fact.
2. **Statutes.** Unless such construction would be inconsistent with the intent of the Legislature in the construction of the statutes of Nebraska, when the word "may" appears, permissive or discretionary action is presumed. When the word "shall" appears, mandatory or ministerial action is presumed.
3. ———. A word or phrase repeated in a statute will bear the same meaning throughout the statute, unless a different intention appears.
4. **Constitutional Law.** The constitutionality of a law is to be tested by what the act authorizes and what may be accomplished by it.
5. **Constitutional Law: Statutes.** A statute vesting an arbitrary discretion in a public officer without specifying a guide or stand-

ard for the measure of such discretion violates the constitutional provision prohibiting undue delegation of legislative power.

6. ———: ———. A statute permitting private individuals to fix the boundaries of a district to be supported by taxation, without affording property owners the opportunity to be heard by a competent tribunal upon the question of whether the property has been arbitrarily or unjustly included within the boundaries of the proposed district, is an unconstitutional delegation of legislative power and a taking of property without due process of law.

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

Richard E. Person and *John E. Dier,* for appellants.

Anderson, Storms & Anderson, Stiner & Boslaugh, and *Wilbur S. Aten,* for appellees.

W. C. Conover and *Franklin D. Carroll,* amici curiae.

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

SPENCER, J.

This is an action to declare the Rural Cemetery District Act unconstitutional and to enjoin the collection or levy of a tax. Plaintiffs' motion for summary judgment was sustained. Defendants appeal.

The appeal presents two questions: First, whether a motion for a summary judgment is a proper pleading to raise the question of constitutionality; and second, whether the Rural Cemetery District Act, Chapter 12, article 9, R. R. S. 1943, is constitutional.

Plaintiffs, hereinafter referred to as appellees, for themselves and all others similarly situated, filed a petition, which later was amended, against the officers and directors of Moses Hill Cemetery District of Phelps County and the district; the board of supervisors of Phelps County individually and as a board; Phelps County; the county clerk; and the county treasurer. The amended petition attacked the constitutionality of

the Rural Cemetery District Act, and prayed for an injunction against defendants, hereinafter referred to as appellants, from collecting any tax or levying any future tax or acquiring any property.

The material facts are not in dispute. On March 31, 1959, petitions for the formation of Moses Hill Cemetery District of Phelps County, Nebraska, hereinafter referred to as district, were filed with the county clerk. The petitions were signed by 138 resident freeholders. A map was attached, delineating the limits of the district. At its widest points, it is 15 miles long north and south, and 12 miles wide east and west. The north 7 miles are from 2 to 8 miles wide; the south 2 miles are 5 miles wide. We make this observation to indicate that adjoining sections were not included for reasons known only to the petitioners. Appellees in their brief suggest that the driving distance from one corner to another is more than 22 miles. On March 31, 1959, pursuant to section 12-903, R. R. S. 1943, the county clerk filed in her office a certificate determining that a majority of the resident freeholders in the proposed district had signed the petition. She then designated that the petitioners and other taxpayers of the proposed district meet on April 14, 1959, at the Moses Hill Church for the purpose of completing the organization of the district. Notice of the meeting appeared in the April 1 issue of the Holdrege Daily Citizen, a newspaper of general circulation in Phelps County. At the meeting, held as advertised, officers and directors were elected for the district. On July 2, 1959, a certificate, certified by the president and secretary of the district estimating the probable expense for the ensuing year, was filed with the county clerk. On August 27, 1959, the county board of Phelps County levied a tax of .12 mills upon the assessed value of all taxable property, except intangible property, in the district for the purpose of maintaining the district for the fiscal year 1959.

Appellants strenuously urge that the constitutional-

ity of a law cannot be raised by a motion for summary judgment. The only Nebraska case cited by either appellants or amici curiae to support appellants' position on this point is Peterson v. George, 168 Neb. 571, 96 N. W. 2d 627. No question of constitutionality was raised in that case. Further, we there stated: " 'The prerequisites of granting a summary judgment are that the movant establish that there is no genuine issue of fact in the case and that he is entitled to judgment as a matter of law.' "

Section 25-1330, R. R. S. 1943, provides as follows: "A party seeking to recover in district court upon a claim, counterclaim, or crossclaim or to obtain a declaratory judgment may, at any time after the filing of answer or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof." Appellants insist no claim is involved, and that appellees have not asked for a declaratory judgment. They are wrong on both points. The term "claim" as used in the statute is broader than appellants' inference, and includes an action for injunctive relief. Further, the prayer of the amended petition is for a declaratory judgment or determination that the district had no legal existence.

A motion for summary judgment is proper if the pleadings and admissions show there is no genuine issue of fact and the moving party is entitled to judgment as a matter of law. § 25-1332, R. R. S. 1943.

Appellants, in their reply brief, state as follows: "It would seem that all the pertinent information which could include records showing the intent of the Legislature, the various accomplishments which have been done under the scope of the law that is then being tested, and all the other facts, should be presented to the trial judge to give him all available information upon which he may base a decision of such great importance as to decide the fate of a law enacted by our Legislature."

We hold, from an examination of the pleadings and admissions, that there is no genuine issue of fact to be determined and that a motion for summary judgment was a proper pleading herein.

We quite agree with appellants that in an act of the Legislature, all reasonable doubt must be resolved in favor of constitutionality and that if a statute is subject to more than one construction, the court will adopt the one which will make the act constitutional. Hinman v. Temple, 133 Neb. 268, 274 N. W. 605, 111 A. L. R. 1217; Nelsen v. Tilley, 137 Neb. 327, 289 N. W. 388, 126 A. L. R. 729. These rules have no applicability to the facts herein.

In order to suggest a question on construction, appellants urge that the word "shall" be interpreted as permissive in order to uphold a legislative act. With this we do not agree. It is not the function of the courts to legislate. There may be occasions where it is apparent the word "shall" may have been used by inadvertence, and the rest of the act so indicates, in which case appellants' argument would have merit. However, that is not the case here. Section 12-903, R. R. S. 1943, reads as follows: "When a petition or petitions for the organization of a cemetery district has been signed and filed in accordance with section 12-902, the county clerk or clerks *shall* determine if a majority of the resident freeholders in the proposed district have signed the same and, if he or they find that they have, certify such fact. The county clerk *shall* thereupon designate a time and place for the petitioners and other taxpayers of the proposed district to meet at a place within such district to complete the organization. Notice of such meeting *shall* be given by one publication in a newspaper of general circulation in the county; Provided, that if the proposed district *shall* be within two or more counties, the county clerk of the county, wherein the largest number of petitioners thereon *shall* reside, *shall* fix the time and place for the organization meeting after he *shall*

have conferred with the clerk or clerks of the other counties interested in regard thereto and after the other clerk or clerks *shall* have certified as to the adequacy of the petition or petitions in that county." (Italics supplied.) The word "shall" is used eight times in this section. Which ones should we consider as permissive? Only the second one, as suggested by appellants?

There is no need for speculation. Section 12-903, R. R. S. 1943, was last amended in 1947. At the 1947 session, the Legislature enacted some general rules of construction. Section 49-802, R. R. S. 1943, so far as material herein, provides as follows: "Unless such construction would be inconsistent with the manifest intent of the Legislature, rules for construction of the statutes of Nebraska hereafter enacted shall be as follows: (1) When the word may appears, permissive or discretionary action is presumed. When the word shall appears, mandatory or ministerial action is presumed." There is also a rule of statutory construction that: "A word or phrase repeated in a statute will bear the same meaning throughout the statute, unless a different intention appears." Seward County Rural Fire Protection Dist. v. County of Seward, 156 Neb. 516, 56 N. W. 2d 700.

Appellants would have us hold that the statute imparts discretion with the county clerk to question the boundaries, or to question whether the district would promote the public health, convenience, welfare, and necessity of the signers of the petition. To so hold would be judicial legislation in which we do not intend to indulge.

Appellants suggest that appellees will place considerable emphasis on Elliott v. Wille, on rehearing, 112 Neb. 86, 200 N. W. 347, and Summerville v. North Platte Valley Weather Control Dist., 170 Neb. 46, 101 N. W. 2d 748, and attempt to distinguish the situation in those cases from the Rural Cemetery District Act. We note those differences, which were visually presented in argu-

ment, but find them to be immaterial on the point in question.

In Elliott v. Wille, *supra,* we held: "A legislative act, which authorizes private individuals to create and fix the boundaries of a district for public improvement, to be paid for by taxes levied on the property within the district, without any provision for determination by a competent tribunal whether the creation of the district and the construction of the improvement will promote public health, convenience or welfare, and without any provision for determination whether the owner's property has been arbitrarily or unjustly included in the district, or whether his property will receive any benefit from the proposed improvement, is invalid because it authorizes the taking of private property for a public use without just compensation and deprives the owner of his property without due process of law.

"The legislature may not delegate to private individuals either legislative or judicial functions."

In the opinion in the case of Summerville v. North Platte Valley Weather Control Dist., *supra,* filed 2 weeks after the trial court sustained appellees' motion for summary judgment, we also held: "The Legislature may authorize the organization of districts for public purposes by other governmental bodies, and the proceeding may be proposed or initiated by private individuals.

"Where it is authorized to be initiated by private individuals, there must be some provision for determining whether the particular district is for the public health, convenience, or welfare, and a means by which an aggrieved property owner, whose property is injuriously affected, may have his rights judicially determined.

"The Legislature may not delegate legislative functions to private persons."

Amici curiae, in support of appellants' position, devote the major portion of their brief to the attempt to show that an adequate tribunal exists under the Rural Cemetery District Act. They suggest the board of equaliza-

tion is such a tribunal. What issue may the taxpayers present to the county board of equalization? Gerrymandering of boundaries? Arbitrariness of the inclusion of their property? Whether the district as a whole will benefit the public health, convenience, welfare, or necessity? Whether inclusion of their property does not benefit the public health, convenience, welfare, or necessity?

Section 77-1606, R. R. S. 1943, provides for an appeal from the county board of equalization if "* * * the levy is for an unlawful or unnecessary purpose, or in excess of the requirements of a county, * * *." May the levy be for a lawful and necessary purpose as to a portion of the district and yet not be for the complaining taxpayer? The answers to these questions are obvious. Certainly the arguments made by amici curiae are ingenious, but at best illusory, and serve to show the absolute failure of the act to afford petitioners the remedies necessary to meet constitutional requirements. We hold the act does not provide a tribunal to review the rights of property owners included within the district.

If we were to interpret section 12-903, R. R. S. 1943, as contended for by appellants, we would have an act fixing an arbitrary discretion in a public officer without specifying a guide or standard for the measure of such discretion. This would violate the constitutional provisions prohibiting undue delegation of legislative power and the taking of property without due process of law.

In passing, we note appellees' suggestion that there is no requirement in section 12-903, R. R. S. 1943, for notice of the organization meeting to be given a sufficient time before the meeting to advise interested parties thereof. Only one publication is required. Appellees suggest this publication might be 1 day before the meeting, and could not possibly advise residents who depended upon mail delivery of the newspaper. There is nothing in the act to prevent it. The constitutionality

of a law is to be tested by what the act authorizes and what may be accomplished by it. See Blauvelt v. Beck, 162 Neb. 576, 76 N. W. 2d 738.

It will be observed by reading sections 12-902, 12-903, and 12-905, R. R. S. 1943, and noting the procedure followed in this case which is in conformity with those sections, that the act is tainted with the principal defects in Elliott v. Wille, *supra,* and Summerville v. North Platte Valley Weather Control Dist., *supra.* We believe these cases are decisive of the constitutional issues here involved.

It is to be noted that the act permits the individuals who promote the petition to fix the boundaries of the district without limitation in any way. There is no provision in the act for a determination by a competent tribunal as to whether the creation of the district will promote the public health, convenience, or welfare, and necessity. There is no provision for determining whether owners of property have been arbitrarily or unjustly included within the district or others have been excluded from the district. There is no provision to provide a determination whether the interested parties' property can receive any benefit from the proposed district.

We hold the Rural Cemetery District Act violates Article I, section 3, Constitution of Nebraska, which provides: "No person shall be deprived of life, liberty, or property, without due process of law." It also violates Article I, section 21, Constitution of Nebraska, which provides: "The property of no person shall be taken or damaged for public use without just compensation therefor." It further is in violation of Article III, section 1, Constitution of Nebraska, as an unlawful delegation of legislative functions to private persons.

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

AFFIRMED.

CHARLES F. SAYERS, APPELLEE, V. WILLARD L. WITTE, APPELLANT, IMPLEADED WITH COUNTY OF SAUNDERS, APPELLEE.

107 N. W. 2d 676

Filed February 24, 1961. No. 34842.

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.

APPEAL from the district court for Saunders County: ERNEST G. KROGER, JUDGE. *Affirmed.*

Marti, O'Gara, Dalton & Sheldon, for appellant.

Kanouff & Brown, for appellee.

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

MESSMORE, J.

This is an action at law brought in the district court for Saunders County by Charles F. Sayers, plaintiff, against Willard L. Witte, defendant, for personal injuries and property damage sustained by the plaintiff by virtue of a collision between the automobiles operated by the respective parties. The defendant, Willard L. Witte, filed a cross-petition for property damage which he alleged he sustained in said accident. The case was tried to a jury, resulting in a verdict finding against the plaintiff and against the defendant on his cross-petition. The plaintiff filed a motion for new trial

which was sustained. The defendant perfected appeal to this court.

For convenience we will refer to the parties as plaintiff and defendant rather than by their names, and at times to the automobiles of the parties as the plaintiff's or defendant's car, as occasion requires.

The plaintiff's amended petition alleged that the accident was proximately caused by the negligence and recklessness of the defendant in the following particulars: In driving his automobile at a rate of speed greater than was reasonable and proper having regard for the traffic, use, and condition of the road; in failing to reduce his speed when approaching the crest of a hill so as to be able to stop within the assured clear distance ahead; in failing to keep a proper lookout; in failing to apply his brakes in time to avoid colliding with the plaintiff's automobile; and in failing to stop or turn his automobile so as to avoid colliding with the automobile of the plaintiff.

The defendant, for his answer and cross-petition, alleged that the collision, injuries, and damages resulting therefrom were proximately caused by the negligent and careless acts of the plaintiff in the following particulars: The plaintiff failed to have and keep his automobile under proper management and control; failed to keep a proper lookout for other automobiles, particularly the automobile of the defendant; failed to yield the right-of-way to the defendant; and failed to bring his automobile to a stop or change, alter, or to divert the course of the same in order to avert striking defendant's automobile when he saw or, in the exercise of ordinary care, should have seen defendant's approaching automobile.

The plaintiff, by answer to the defendant's cross-petition, denied generally the allegations contained therein, and in reply to the defendant's answer denied generally the allegations contained therein.

The defendant assigns as error that the trial court

erred in granting the plaintiff a new trial.

This accident happened about 6 p.m., on February 14, 1958, on a graveled road approximately 1 mile north and three-fourths of a mile east of the junction of State Highway No. 92 and U. S. Highway No. 30-A with State Spur No. 692, in Saunders County. The plaintiff was operating a 1956 Chevrolet automobile and the defendant, at the time of the accident, was operating a 1952 Pontiac automobile.

The plaintiff testified that he was a deputy sheriff of Saunders County; that on February 14, 1958, he was informed there had been an accident; and that he went to the scene of the accident, made an investigation, and started back to his home. He thought he should return to the point of the accident and put out some flares to avoid other accidents in that locale. He approached the Thorsen farm, pulled into the driveway immediately west of the Thorsen home, and stopped. His automobile was clear off of the road. He then looked to the east and to the west where he had an unobstructed view to the top of a hill to the west. He backed from the driveway onto the road, and kept looking until he thought his car was straightened out. He stopped, took the car out of reverse gear, put it into drive gear, and proceeded forward. When his car was straightened out it was on the south side of the road. As he started forward, he had proceeded approximately a couple of car lengths when his car was violently struck in the rear. He was thrown forward against the steering wheel, lost control of the car, and it stopped in the ditch on the north side of the road 25 or 30 feet from the east edge of the driveway. The plaintiff further testified that there was snow on the road, and gravel showed through the snow in places; that the weather was cold; that he had no difficulty in stopping his car and had stopped his car on the hill on his way to the previous accident; that while backing out of the driveway, the window on the driver's side was down;

and that when his car was struck it was on his side of the road, which was the south side.

On cross-examination the plaintiff testified that instead of going into the Thorsen yard and turning around, he backed his car onto the road; that as he backed the car he continued to look to the west, to the top of the hill; that he had an unobstructed view for 400 feet west of the point where the accident happened; that he did not see the defendant's car; that the defendant's car struck his car on the left rear bumper causing his car to slide sideways turning it into a northeasterly direction into the ditch; that he did not hear a horn and had no occasion to operate his horn; and that his car was equipped with snow tires.

The defendant testified that he was on his way home at the time of the accident and was traveling east on the county road running by the Thorsen place. When he came to the top of the hill, the plaintiff's car was parked in the driveway, standing still. As he proceeded down the hill, he saw that the back-up lights on the plaintiff's car were on, and the plaintiff proceeded to back out of the driveway in a southwesterly direction. At the point of the accident, the hill slopes to the east. He first saw the plaintiff's car from approximately the crest of the hill. He estimated that the plaintiff's car was approximately 100 yards from the crest of the hill. This witness further testified that at that time he did nothing, but when he saw the plaintiff's car starting to back onto the road, he blew his horn and continued to do so for some period of time. He applied his brakes which slowed the speed of his car, and continued to apply his brakes. The plaintiff's car proceeded out onto the road until it was approximately on the south side, pointing in a northeasterly direction, then there was the impact of the two cars. His car struck the left rear bumper of the plaintiff's car, and the plaintiff's car came in contact with the approximate center of the front end of the defendant's car. The defendant's car

was not going very fast at the time of the impact, and moved approximately one car length after the impact occurred. The plaintiff's car was pointing in a northeasterly direction when the defendant's car came into contact with it, and the plaintiff's car proceeded across the road into the ditch on the east side of the driveway. The road was elevated with the ditches graded out, and the ditches were 5 feet deep on each side of the road. He went to the plaintiff's car which was in the bottom of and resting against the north side of the ditch. The gravel on the road extended to the edge of the road and the ditches sloped away from the road. There was no substantial shoulder on the road. In addition to applying his brakes, he endeavored to steer his car as far as possible to the south shoulder of the road. The road was slick because it had snowed the day before and the snow had melted somewhat during the afternoon of the day of the accident, and then had frozen again. The road was packed with snow, with a slight glaze on top. The antifreeze drained from the radiator of his car where his car came to rest after the impact, approximately a car length east of the point of impact. The grade at that point was sloping down in an easterly direction. His automobile remained in the same position after the accident. When he went over to the plaintiff's automobile, the plaintiff made a remark to the effect that "it's funny what some people do when they're in a hurry to get back to the accident—to do such a foolish thing—to back out on the road without seeing" an automobile approaching. The plaintiff denied making such a statement.

The defendant stated in a deposition that when he first saw the plaintiff's car, as he came to the top of the hill, it started to come out of the driveway, backing in a southwesterly direction; that the plaintiff's car had just barely started to move out of the driveway; and that the plaintiff's car was moving and not standing still.

The defendant testified on cross-examination that he

first applied his brakes 170 feet from the driveway; and that he blew his horn while he traveled a distance of 50 feet. On further cross-examination this witness testified that he applied his brakes approximately 300 feet from the point of the accident. The defendant did not give an estimate of the speed of his car at the time of the impact.

A witness testified that he had a conversation with the defendant on February 25, 1958, and the defendant told him that he was traveling east on the graveled road at a rate of speed of 45 or 50 miles an hour; and that when he first saw the plaintiff's car the front of it was about even with the north edge of the road where the driveway begins.

A trooper connected with the Nebraska Safety Patrol testified that he investigated the accident; that he received a call about 6 p.m.; that when he arrived at the place where the accident occurred he found two cars which were involved in the accident; and that the defendant's car was on the road and the plaintiff's car was in the ditch. The accident happened on a graveled road. The traveled part of this road was 22 feet in width, and the point where the accident happened was on the downgrade of a hill. There were glass and debris located approximately 10 feet north of the south side of the traveled portion of the road. With relation to the north edge of the traveled portion of the road, the debris was approximately 12 feet south of the north edge. He observed tracks made by the defendant's automobile. These tracks were along the south side of the road and extended about 13 steps from the defendant's automobile or an estimated distance of 32 feet. There was a track made to the west of the plaintiff's car to the point where that car was sitting when this witness arrived at the scene of the accident. This track was 20 feet to the edge of the road, and 22 feet on down into the ditch. The left portion of the defendant's car had been damaged. The left fender was pushed down on the

left wheel. This witness estimated the length of the plaintiff's car to be 16 or 17 feet, and the height approximately 5 feet.

An engineer made a plat of the area in which the accident occurred. Taking a point from the mailbox at approximately the west edge of the driveway in question to the highest point of the hill west would be 428 feet, and for roughly 9 feet it is almost level, then it starts sloping toward the west.

The sheriff of Saunders County testified that he talked to the defendant unofficially, after the accident, about the accident; and that the defendant told him that just as he "popped" over the hill he saw the back-up lights on the plaintiff's car go off.

At the close of the plaintiff's evidence and at the close of all of the evidence, the defendant moved for dismissal of the plaintiff's cause of action or in the alternative for a directed verdict, primarily for the reason that the evidence of the plaintiff established, as a matter of law, that he was guilty of contributory negligence which would bar recovery on his part. These motions were overruled.

The defendant concedes that the definition of gross negligence given by the trial court in instruction No. 6 is erroneous.

Section 25-1151, R. R. S. 1943, provides in part: "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. See Brackman v. Brackman, 169 Neb. 650, 100 N. W. 2d 774. See, also, 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.

As stated in Roby v. Auker, *supra,* 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." See, also, Morrison v. Scotts Bluff County, 104 Neb. 254, 177 N. W. 158.

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.

"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." Hickman v. Parks Constr. Co., 162 Neb. 461, 76 N. W. 2d 403, 62 A. L. R. 2d 1040.

We conclude that the facts in the instant case present

conflicting evidence relating to the questions of negligence and contributory negligence, and are questions for the jury under proper instructions.

According to the plaintiff's testimony, the farmyard at the Thorsen place was covered with snow, except for the driveway. He looked to the east and to the west before backing onto the road, and continued to look to the west until headed almost due east. He testified that no car was in sight during that time. When he started his car forward, as previously shown in the testimony, the rear of his car was struck by the defendant's car. This presented questions for the jury to determine as to whether or not the plaintiff kept a proper lookout, and the degrees of negligence of the respective parties based upon the facts. If the defendant saw the back-up lights of the plaintiff's car go off as he "popped" over the hill, as testified to by the sheriff, or if the defendant, from the top of the hill some 400 feet to the west, saw the plaintiff's car moving as he testified, then there was a question to present to the jury as to whether or not the defendant was negligent in not having his car under proper control.

We conclude that the trial court committed prejudicial error in giving instruction No. 6, as contended for by the plaintiff. We affirm the judgment of the trial court in granting a new trial.

AFFIRMED.

JOHN F. WEBB, APPELLANT, V. CONSUMERS COOPERATIVE ASSOCIATION, A CORPORATION, ET AL., APPELLEES.
107 N. W. 2d 737

Filed February 24, 1961. No. 34871.

Workmen's Compensation. An employee, sustaining an accidental injury arising out of and in the course of his employment, will not be denied compensation for failure to give notice of claim within 6 months or to commence his action within 1 year from

the date of the accident when it appears from the evidence that the injury was latent and did not result in compensable disability until after the expiration of the time for giving notice of claim and commencing action, provided notice is given and action commenced within the statutory period after the employee has knowledge that the accident has caused a compensable disability.

APPEAL from the district court for Scotts Bluff County: RICHARD M. VAN STEENBERG, JUDGE. *Reversed and remanded with directions.*

Wright & Simmons and *Robert M. Harris,* for appellant.

Lovell & Raymond, for appellees.

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

CARTER, J.

This is an action to recover benefits under the Workmen's Compensation Act. The trial court denied a recovery and plaintiff has appealed to this court.

Plaintiff filed his petition with the compensation court on April 16, 1959. The case was heard by a single judge of that court and an award entered. A hearing was had before the court sitting en banc and an award entered. An appeal was taken to the district court. The district court held that the findings of the compensation court were not sufficient to sustain an award, and reversed the award and remanded the cause to the compensation court for further proceedings. The plaintiff thereupon appealed to this court.

The evidence shows that plaintiff was employed by Consumers Cooperative Association as a mechanic in July 1950. On December 8, 1956, while engaged in balancing the wheels of a tractor, a tractor weight weighing approximately 300 pounds struck him in his midsection and pinned him against a wall, causing sharp pains in his low back. He continued to work with considerable pain until the week following, when he con-

sulted Dr. T. E. Riddell with reference to it. Dr. Riddell took X-rays and prescribed heat therapy. The injury was diagnosed by Dr. Riddell as a lumbo-sacral sprain with lacerations of ligaments about the lumbo-sacral joint. This treatment was continued for a few weeks, at the end of which time he returned to his employment.

On February 21, 1957, the plaintiff reinjured his back while picking up heavy materials during his employment. He went to Dr. Riddell and was treated at that time. He was placed in a hospital for 2 weeks. While in the hospital he was placed in traction and heat therapy was administered. After his release from the hospital in March 1957 he remained at home for an additional 2 weeks and then returned to his employment. During this period he was paid compensation from March 3 to April 1, 1957. His hospital and medical expenses in the amounts of $227.30 and $361.50 respectively were paid by the defendant insurance company. On September 17, 1957, he again wrenched his back while working under a truck, and was again treated by Dr. Riddell. In August 1958, while replacing a transmission in a truck by the use of a jack, he again injured his back and was again treated by Dr. Riddell. The evidence shows that these injuries were sustained while performing the usual duties of his employment and that they were not accidents within the meaning of the workmen's compensation law.

The evidence shows that plaintiff, following the August 1958 episode, placed himself under the care of Dr. Riddell on September 22, 1958. The latter took X-rays, administered heat therapy, and on October 21, 1958, placed him in traction in a hospital. On October 29, 1958, he was released from the hospital. After the August 1958 incident plaintiff for the first time complained of leg pains. Due to this, Dr. Riddell for the first time concluded that plaintiff was suffering from a herniated disk in the lower back. He thereupon re-

ferred plaintiff to Dr. Charles G. Freed of Denver, Colorado, a specialist in neurological surgery. Dr. Freed took X-rays and made a complete examination of the plaintiff. He was unable to determine with certainty the cause of plaintiff's disability, but believed it to be a herniated disk which he was able to confirm by surgery. On November 11, 1958, Dr. Samuel P. Newman, an orthopedic surgeon of Denver, Colorado, and Dr. Freed operated on plaintiff's back, which operation confirmed their belief that plaintiff was suffering from a herniated disk. Plaintiff was placed in a cast and sent home on November 26, 1958. On his return home he was placed in a hospital by Dr. Riddell, where he remained until January 15, 1959. He remained in the cast until Janary 15, 1959, after which he was fitted with a back brace. Dr. Freed saw plaintiff in May 1959 and determined that a recovery had taken place except for a partial permanent disability resulting from the fusing of the vertebrae.

The defendants contend that the claim is barred by section 48-137, R. R. S. 1943, in that a claim was not filed with the compensation court within 1 year after the last payment of compensation and expenses. The plaintiff asserts that the permanent nature of the disability was latent and that the statute applies from the time the employee acquired knowledge of the true character of the injury.

It is fundamental that a causal connection must be shown between an accident suffered by the claimant and the cause of his disability. McCauley v. Harris, 164 Neb. 216, 82 N. W. 2d 30. Whether or not there was a causal connection between the accident of December 8, 1956, and the herniated disk discovered on November 11, 1958, must be determined from the evidence of the medical experts who testified in the case. On this subject Dr. Newman testified: "My opinion is that the initiating cause goes back to December of 1956. The subsequent ones were aggravating contributions." Dr.

Freed testified that in his opinion the injury of December 8, 1956, was such that it could cause the herniated disk and he found nothing else that would account for the condition besides the injury. Dr. Riddell testified that in his opinion the injury in August 1958 was the precipitating cause of the herniated disk, that the accident of December 8, 1956, was when plaintiff first injured his back, and that he had a succession of injuries that might have precipitated the condition of the one in September 1958. The defendants offered no evidence on the subject of causal connection or the want thereof. The foregoing evidence sustains a finding that the accident of December 8, 1956, was the initial cause of the back injury and that subsequent injuries were aggravating contributions to the ultimate development of the herniated disk that led to surgery. It seems clear from the record that the ultimate disability was not known to the employee until November 1958, and that the medical experts did not find or suspect a herniated disk condition prior to October 1958. Under such circumstances the claimant is within the statutory period in filing his claim on April 16, 1959.

The rule as to latent disease or disability is as follows: "An employee, sustaining an accidental injury arising out of and in the course of his employment, will not be denied compensation for failure to give notice of claim within six months or to commence his action within one year from the date of the accident, when it appears from the evidence that the injury was latent and did not result in compensable disability until after the expiration of the time for giving notice of claim and commencing action, provided notice is given and action commenced within the statutory period after the employee has knowledge that the accident has caused a compensable disability." McCoy v. Gooch Milling & Elevator Co., 156 Neb. 95, 54 N. W. 2d 373. See, also, Plambeck v. Natkin & Co., *post* p. 774, 107 N. W. 2d 734, wherein the cases on this subject have been col-

lected. The claimant has established his claim to compensation.

The defendants contend that the finding of the compensation court that plaintiff is entitled to $3.85 per week for 271 6/7 weeks for 7 percent permanent partial disability to plaintiff's body as a whole is not sustained by the evidence. Four doctors gave their opinions as to the percentage of permanent partial disability as follows: Dr. Riddell, 5 percent; Dr. Newman, 7½ percent; Dr. Freed, 7 percent; and Dr. Heinke, 5 to 10 percent. The evidence supports a finding of 7 percent permanent partial disability to plaintiff's body as a whole.

Upon examination of the record de novo we arrive at the same conclusion as did the compensation court in its award under date of October 13, 1959. We adopt the award of that court as the conclusion of this court on the record before us. We reverse the judgment of the district court and remand the cause with directions to render a judgment for the plaintiff in conformity with the award of the compensation court sitting en banc under date of October 13, 1959.

REVERSED AND REMANDED WITH DIRECTIONS.

HAROLD M. GAUGHEN ET AL., APPELLANTS, V. LEONARD GAUGHEN ET AL., APPELLEES, IMPLEADED WITH ALICE JOAN EMANUEL ET AL., APPELLANTS.

107 N. W. 2d 652

Filed February 24, 1961. No. 34881.

1. **Wills. The court, in construing a will, is required to give effect to the true intent of the testator to the extent it can be ascertained from the whole instrument, if such intent is consistent with applicable rules of law.**
2. **———. A patent ambiguity in a will is one which appears upon the face of it. Such an ambiguity must be removed by interpretation according to legal principles and not by evidence, and the intention of the testator must be found within the four corners of the will.**

3. ———. **A bequest or devise to the children of two or more persons is distributed per capita unless a different intention is otherwise indicated in the will.**

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

William G. Line, for appellants.

Edward Asche and *George E. McNally,* for appellees.

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

BOSLAUGH, J.

This is an action to construe the will of Martin F. Gaughen, deceased.

Martin F. Gaughen was survived by three children, Harold M. Gaughen, Leonard Gaughen, and Marie Mundy. Harold M. Gaughen has two children, Leonard Gaughen has five children, and Marie Mundy has no children.

Harold M. Gaughen and his wife were the plaintiffs in the lower court. Leonard Gaughen, his wife and children, Marie Mundy and her husband, and the children, and the husband of one child, of the plaintiffs were the defendants.

The petition as amended requested a construction of that part of the will which made a devise of 240 acres of farmland in Dodge County, Nebraska. That part of the will, with the description of the property omitted, reads as follows: "I give and devise to my sons Harold Gaughen and Leonard Gaughen and my daughter Marie Mundy or to their spouses Mamie Gaughen, Thelma Gaughen and Leo Mundy, respectively, during their natural lives (description omitted); and in the event any of the spouses Mamie Gaughen, Thelma Gaughen or Leo Mundy should remarry, their life estate in the above described real estate shall cease; and upon the death of said life tenants or the remarriage of my children's spouses, Mamie Gaughen, Thelma Gaughen and

Leo Mundy, I give and devise the remainder of said real estate to the children of my son Leonard and the children of my son Harold, share and share alike and to the children born naturally of my daughter, Marie Mundy, if any, and in the event no children are born naturally to my daughter Marie, then I give and devise their share in said above described real estate to the children of my sons Harold and Leonard, share and share alike." The other provisions contained in the will have been omitted from the opinion because they are of no assistance in the construction of the portion quoted above. The parties do not contend otherwise.

The plaintiffs alleged that the will devised an undivided one-third interest in remainder to the children of Leonard Gaughen, an undivided one-third interest in remainder to the children of Harold M. Gaughen, and an undivided one-third interest in remainder to the natural-born children of Marie Mundy; and that in the event no children were born naturally to Marie Mundy, a one-third interest in remainder was to be distributed to the children of Harold Gaughen and Leonard Gaughen, share and share alike.

Alice Joan Emanuel, who is a daughter of the plaintiffs and is of age, and her husband filed a voluntary appearance in which they admitted the allegations of the petition and joined in its prayer.

Martin F. Gaughen, who is a son of Leonard Gaughen and is of age, filed an answer and cross-petition which alleged that the will was not ambiguous and provided for a per capita distribution of the remainder interest among the grandchildren of the testator. A similar answer and cross-petition was filed by the guardian ad litem for the other four children of Leonard Gaughen who are minors.

The trial court held that the will devised the remainder interest to the children of Leonard Gaughen, Harold Gaughen, and the natural-born children of Marie Mundy, share and share alike, or per capita and not per

stirpes. From that decree Harold M. Gaughen and his wife and children have appealed.

The question presented is whether the remainder interest devised to the grandchildren of the testator is to be distributed per capita or per stirpes.

The following statement from Dumond v. Dumond, 155 Neb. 204, 51 N. W. 2d 374, is applicable here: "In construing a will a court is required to give effect to the true intent of the testator insofar as it can be collected from the whole instrument, if such intent is consistent with applicable rules of law. Bodeman v. Cary, 152 Neb. 506, 41 N. W. 2d 797; Dennis v. Omaha National Bank, 153 Neb. 865, 46 N. W. 2d 606. Extrinsic evidence is not admissible to determine the intent of the testator as expressed in his will unless there is a latent ambiguity. Borah v. Lincoln Hospital Assn., 153 Neb. 846, 46 N. W. 2d 166. Such evidence is not admissible to determine the intent of the testator where the ambiguity is patent and not latent. In re Estate of Pfost, 139 Neb. 784, 298 N. W. 739. A patent ambiguity is one which appears upon the face of the instrument. It must be removed by construction according to settled legal principles and not by evidence, and the intention of the testator is to be determined from the four corners of the will itself. The controverted provision of the will in the case here presented is one appearing upon the face of the instrument and is therefore a patent ambiguity."

The testator in this case devised the remainder interest to the children of Leonard Gaughen and the children of Harold Gaughen, share and share alike, and to the natural-born children of Marie Mundy, if any. The general rule is that a devise or bequest to the children of two or more persons is distributed per capita unless a different intention is otherwise indicated in the will.

In Hill v. Bowers, 120 Mass. 135, the court said: "The general rule is that by a bequest to the children of A. and to the children of B., the children take per capita

and not per stirpes, in the absence of words indicating a different intention." See, also, Annotations, 16 A. L. R. 61, 78 A. L. R. 1404, 126 A. L. R. 175, 13 A. L. R. 2d 1054; 57 Am. Jur., Wills, § 1310, p. 867; 96 C. J. S., Wills, § 714, p. 94; Page on Wills (Lifetime Ed.), Vol. 3, § 1081, p. 287; Thompson on Wills (3rd Ed.), § 321, p. 483; Jarman on Wills (7th Ed.), Vol. 3, ch. XLII, part IV, p. 1687.

We find no indication in the will that the testator did not intend a per capita distribution. The use of the words "share and share alike" is an indication that the testator intended a per capita distribution.

In Kramer v. Larson, 158 Neb. 404, 63 N. W. 2d 349, the court held that a devise to the heirs at law and next of kin of the testator "share and share alike" required a per capita distribution among the beneficiaries designated. The court said: "The testator of the will in question by the phrase 'my heirs at law' designated his residuary beneficiaries and by the words 'share and share alike' he prescribed the manner in which they should take. The language used is appropriate to make the intention manifest. He thereby definitely indicated the quantum of the estate which each of his residuary beneficiaries should have. He did not intend that his 'heirs at law' should have the residue of his estate in the proportions provided by the statute as they would have taken if he had died intestate. That would not have been 'share and share alike.' "

The appellants contend that where a patent ambiguity exists and the will does not otherwise provide, there is a presumption that the testator intended that the distribution should follow the statute of descent. Although we do not consider it to be controlling in this case, we point out that under the statute of descent where the heirs of the deceased are lineal descendants who are all in the same degree of kindred to the deceased, they take equally. § 30-102, R. R. S. 1943.

The appellants also argue that "the children of my son

Leonard and the children of my son Harold" refers to two classes of beneficiaries but that "the children of my sons Harold and Leonard" refers to but one class. We do not agree that there is such a distinction between the words quoted. See Jarman on Wills (7th Ed.), Vol. 3, ch. XLII, part IV, p. 1687.

The appellants further argue that the testator did not intend a per capita distribution because he could have accomplished that result more easily by making the devise to "my natural-born grandchildren, share and share alike." The answer to this argument is that the testator did not want to restrict the class to natural-born grandchildren except in the case of the children of Marie, "if any."

The trial court held that the will devised the remainder interest to the children of Harold Gaughen and Leonard Gaughen and the children born naturally to his daughter, Marie Mundy, share and share alike, or per capita and not per stirpes. This was correct and to that extent the decree should be affirmed.

The decree also recited that the testator intended to have all of his grandchildren, the issue of Harold Gaughen, Leonard Gaughen, and Marie Mundy, share equally per capita as a single class and confirmed the title in the remainder interest in them. The decree should be modified to provide that all of the children of Harold Gaughen and Leonard Gaughen and the issue of Marie Mundy share in the remainder interest as a single class per capita, which class shall be subject to being opened to admit additional children of Harold Gaughen and Leonard Gaughen and issue of Marie Mundy. As so modified, the decree is affirmed.

AFFIRMED AS MODIFIED.

SCHOOL DISTRICT NO. 54 OF DOUGLAS COUNTY, NEBRASKA, EX REL. DENNIS P. HOGAN, JR., APPELLEE, V. SCHOOL DISTRICT OF THE CITY OF OMAHA, IN THE COUNTY OF DOUGLAS, STATE OF NEBRASKA, APPELLANT, IMPLEADED WITH SAM J. HOWELL, TREASURER OF DOUGLAS COUNTY, NEBRASKA, APPELLEE, SCHOOL DISTRICT NO. 54 OF DOUGLAS COUNTY, NEBRASKA, ALSO KNOWN AS RALSTON SCHOOL DISTRICT, INTERVENER-APPELLEE.

107 N. W. 2d 744

Filed February 24, 1961. No. 34928.

1. **Fines: Penalties.** Where fines, penalties, and license money arise and are paid in under rules, by-laws, or ordinances of cities, villages, precincts, or other subdivisions less than a county, such money shall be appropriated and used exclusively for the support of the common schools in the respective subdivision wherein it accrues.
2. ———: ———. Where fines, penalties, and license money arise and are paid in under the general laws of the state, such money shall be paid over to the counties respectively wherein the same may be levied or imposed, and appropriated exclusively to the support of common schools in the several school districts of such county.
3. **Constitutional Law: Statutes.** The Legislature can legalize no act which it could not have authorized before it was done. In other words, it cannot validate that which the Constitution either in express terms or by necessary implication prohibits.

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

Wm. Ross King, for appellant.

McGowan & Troia and *Ross & O'Connor,* for appellee School Dist. No. 54.

John C. Burke, for appellee Howell.

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

WENKE, J.

This appeal involves an action originally instituted in the district court for Douglas County by School Dis-

trict No. 54 of Douglas County, Nebraska, on the relation of Dennis P. Hogan, Jr., as relator, for itself and all other school districts in Douglas County, Nebraska, against the School District of the City of Omaha and Sam J. Howell, as the duly elected, qualified, and acting treasurer of Douglas County. School District No. 54 of Douglas County, also referred to as the Ralston School District, filed a petition of intervention and Sam J. Howell was also made a party defendant as the ex officio duly qualified and acting treasurer of the city of Omaha.

The purpose of the action, as stated in the prayer of the petition, is: "* * * for an accounting by the defendant, Sam J. Howell, of the money received by him and now on hand from fines and penalties arising under the general laws of the State of Nebraska, which fines and penalties have been received by him from the Municipal Court of the City of Omaha, Douglas County, Nebraska, and for judgment in the favor of the plaintiff against the defendant, Sam J. Howell, for a pro rata share of said moneys and for an accounting by the defendant School District of the City of Omaha, in Douglas County, Nebraska, of all such moneys received from the defendant County Treasurer arising from fines and penalties arising under the general laws of the State of Nebraska, imposed by the Municipal Court of the City of Omaha and for judgment against the defendant School District for their pro-rata share thereof, * * *." However, by stipulation, the relief sought has been limited to: "* * * an accounting and distribution by the County Treasurer, ex officio City Treasurer and Treasurer of the School District of Omaha, of fines and penalties on state complaints filed in the Municipal Court of the City of Omaha, Nebraska, paid to said Treasurer subsequent to the filing of this action." This was on August 26, 1958.

On July 25, 1960, the trial court rendered a decree to the effect: "* * * that all money from fines and penal-

ties, including bond forfeitures, arising under the general laws of the State of Nebraska, received by the Treasurer of Douglas County, Nebraska, ex officio Treasurer of the City of Omaha, Nebraska, from the Municipal Court of the City of Omaha, Douglas County, Nebraska, including both the funds now on hand with said Treasurer, as well as all monies hereafter received by said Treasurer from said source, shall be distributed among all of the SCHOOL DISTRICTS OF DOUGLAS COUNTY, NEBRASKA on a pro rata basis according to the enumeration of pupils last returned by the Secretaries of said respective Districts, and as by law provided." The law therein referred to as providing the basis for the distribution ordered is section 79-1304, R. R. S. 1943.

The School District of Omaha thereupon filed a motion for new trial and took this appeal from the overruling thereof.

The primary question presented by this appeal is, should all money collected by the municipal court of the city of Omaha, as a result of the imposition of fines and penalties imposed in prosecutions brought therein for violation of the general laws of the state, be ultimately distributed among all of the school districts of Douglas County or should it be distributed only to the school districts in the city of Omaha?

The facts involved are not in dispute. They are either admitted by the parties' pleadings or agreed to by stipulation. Dennis P. Hogan, Jr., was, at all times herein material, a resident and taxpayer of School District No. 54 of Douglas County; that he had, before bringing this suit, made demand on School District No. 54 to do so; and that said district had failed to take any action for that purpose. It is also stipulated that in the past the School District of the City of Omaha has received all money arising from the source herein claimed, that is, prior to the institution of this action all fines, penalties, and forfeitures collected by the municipal court of the city of Omaha for offenses against the laws of the

state prosecuted therein, which offenses had been committed within the city of Omaha, have been paid to the treasurer of the city of Omaha and by him credited to the School District of the City of Omaha.

Article VII, section 5, of the Nebraska Constitution, insofar as it is material to the question presented, provides as follows: "All fines, penalties, and license money, arising under the general laws of the state, * * * shall belong and be paid over to the counties respectively, where the same may be levied or imposed, and all fines, penalties, and license money arising under the rules, by-laws, or ordinances of cities, villages, precincts, or other municipal subdivision less than a county, shall belong and be paid over to the same respectively. All such fines, penalties, and license money shall be appropriated exclusively to the use and support of the common schools in the respective subdivisions where the same may accrue, * * *." This is the same language, for all practical purposes, as contained in the Nebraska Constitution of 1875. See Art. VIII, § 5, thereof.

In State ex rel. Helmer v. McConnel, 8 Neb. 28, wherein the construction of Article VIII, section 5, of the Nebraska Constitution of 1875 was involved, the court said, in discussing said section, that: "In distinguishing the 'fines, penalties, and license moneys arising under the general laws of the state,' from those 'arising under the rules, by-laws, or ordinances, of cities, villages,' etc., it is evident to us that reference was had, not to the primary source of the power, but to the immediate authority by which the fine or penalty is imposed, or the license granted." See, also, Hrabak v. Village of Dodge, 62 Neb. 591, 87 N. W. 358.

In State ex rel. Helmer v. McConnel, *supra,* this court held to the effect that where fines, penalties, and license money arise and are paid in under rules, by-laws, or ordinances of cities, villages, precincts, or other subdivisions less than a county, such money shall be appropriated and used exclusively for the support of the com-

mon schools in the respective subdivision where it accrues. See, also, School District of Omaha v. Gass, 131 Neb. 312, 267 N. W. 528.

In State ex rel. School Dist. of Omaha v. Heins, 14 Neb. 477, 16 N. W. 767, this court held: "It is the true intent and meaning of the first clause of sec. 5 of art. VIII (now sec. 5 of art. VII) of the constitution of the state, that all fines, penalties, and license money arising under the general laws of the state shall be paid over to the counties respectively where the same may be levied or imposed, and appropriated exclusively to the support of common schools in the several school districts of such county." See, also, School District of Omaha v. Gass, *supra.*

We think the foregoing constructions of this constitutional provision are correct and are here controlling. It will be observed that the Constitution does not impose any condition on this right by making it depend upon where the violation occurred, by whom it is prosecuted, or in what court it is prosecuted.

But appellant contends the Legislature gave it the right thereto when it enacted what is now section 14-227, R. R. S. 1943. It provides, insofar as here material, that: "All fines, penalties, and forfeitures collected for offenses against the ordinances of the city, or for misdemeanors against the laws of the state, committed within the city, *shall, unless otherwise provided by law,* be paid by the person receiving the same to the city treasurer." (Emphasis ours.)

The Legislature can not enact a valid law which conflicts with the Constitution. This court, as early as the case of City of Hastings v. Thorne, 8 Neb. 160, said: "That body (the Legislature) can legalize no act which they could not have authorized before it was done. In other words, they cannot validate that which the constitution either in express terms or by necessary implication prohibits."

We do not believe the Legislature attempted to vio-

late the foregoing principle for by the terms of section 14-227, R. R. S. 1943, it provides the provisions thereof shall not be applicable to situations where the law provides otherwise. As we have often said, the validity of a statute is favored and when susceptible of two constructions the one holding such statute valid will ordinarily be followed. See, Starman v. Shirley, 162 Neb. 613, 76 N. W. 2d 749; Metropolitan Utilities Dist. v. City of Omaha, *ante* p. 609, 107 N. W. 2d 397. Here the exception can properly be held to refer to both the law of the Constitution applicable thereto, which we have hereinbefore discussed, and statutes so providing. See §§ 26-118, 29-2702, and 29-2708, R. R. S. 1943. The latter clearly recognize the constitutional requirements.

Other questions are raised and discussed by appellant but they are either controlled by what we have held or have no application to the question involved. We think the holding of the trial court is correct. We, therefore, affirm the judgment which it rendered.

AFFIRMED.

HARRY PLAMBECK, APPELLANT, V. NATKIN & COMPANY, APPELLEE.

107 N. W. 2d 734

Filed February 24, 1961. No. 34940.

1. **Workmen's Compensation.** 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.
2. ———. An employee, sustaining an accidental injury arising out of and in the course of his employment, will not be denied compensation for failure to give notice of claim within 6 months or to commence his action within 1 year from the date of the accident, when it appears from the evidence that the injury was latent and did not result in compensable disability until after the expiration of the time for giving notice of claim and commencing action, provided notice is given and action commenced

within the statutory period after the employee has knowledge that the accident has caused a compensable disability.

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

Tesar & Tesar, for appellant.

Gaines, Spittler, Neely, Otis & Moore, for appellee.

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

SIMMONS, C. J.

This is a case arising under the Workmen's Compensation Act. It was heard by one of the judges of the court who dismissed the cause. It was again heard before the court sitting en banc. It was again dismissed. It was taken under statutory procedure to the district court where the plaintiff's petition was again dismissed.

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

The appeal presents primarily the question of whether or not the cause is barred by the 1-year limitation provision of section 48-137, R. R. S. 1943.

The matter comes up under the procedure which requires trial de novo here.

Plaintiff was 42 years of age at the time of the accident, was a steamfitter, and had been doing the heavy work of that trade for 20 years. He had been steadily employed by defendant as a steamfitter for 4 years. On May 15, 1957, while so employed, and when lifting a heavy pipe he slipped and strained his back. His fellow employees and his foreman were notified. He made out a written report of the accident. On May 22, 1957, he consulted his doctor and was directed to undergo home therapeutic treatments. He returned to the doctor on July 8, 1957, when his back was X-rayed. He was sent to another doctor. The diagnosis was that of a spondylolisthesis, or a slipping of the vertebra of his

back. The spondylolisthesis was "in all probability * * * a congenital deformity." A back of that nature is more prone to cause symptomatology should there be an unusual strain thrown upon it.

The doctor to whom plaintiff was referred prescribed a supporting belt. Plaintiff bought it, and defendant paid for it and also paid the two doctors' bills. No other payments were made to plaintiff. Defendant's contention here is that the 1-year limitation period began to operate when it made the last of the three payments for medical treatments above referred to. They were paid more than a year before the plaintiff filed his petition in the compensation court.

No question is presented as to the injury nor that it did not arise out of and in the course of employment. Likewise there is no claim of lack of notice or lack of claim for compensation within the statutory time.

Plaintiff's wages were $3.30 an hour for a 40-hour week, with occasional overtime. Plaintiff worked at all times from the date of his accident to April 20, 1958. He wore the brace furnished by defendant. He was given light work by defendant, and his fellow employees assisted him. In April 1958 he became unable to work as the result of an "exacerbation of an inflammatory process that afflicted both lower extremities." This was the return of a preexisting condition. It was relieved so that he returned to work in July 1958. He worked until September 14, 1958. His disability that then caused him to quit work is described as a rash and thrombophlebitis with stasis ulcers. He was required to sit during the day with feet elevated during the period of treatment and recovery. That situation appears to have cleared up in December 1958 but, as a result of his position and treatment, his back condition became worse and he became totally disabled for the hard work of his trade. The only medical evidence is that his condition is the result of the accident of May 15, 1957. On December 15, 1958, he went to the defendant and asked

for therapeutic treatment which had been recommended before surgery was undertaken. The defendant refused to furnish treatment because of a claim that it was no longer liable.

The petition for compensation was filed February 3, 1959.

Since March 1959 plaintiff has been employed, doing light work consisting of answering telephone calls, etc., in an office.

In summary, this record shows without substantial dispute that plaintiff suffered an accident on May 15, 1957; the examining physician reported it to defendant as a nondisabling injury; defendant furnished the only care required, to wit, the back brace; plaintiff continued to work until April 1958 and was paid full wages therefor; and he was off work because of a preexisting physical condition not connected with his employment from sometime in April to July 1958, when he again resumed work at full time and full pay until September 1958, when he was again off work because of a preexisting condition not connected with his employment. Defendant was advised of plaintiff's total disability on December 15, 1958, and that it was a result of the injury of May 1957.

Defendant offered no evidence challenging the correctness of this statement of facts.

We have decided the questions presented by this record.

A long-established rule is: "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." Tilghman v. Mills, 169 Neb. 665, 100 N. W. 2d 739.

In Travelers Ins. Co. v. Ohler, 119 Neb. 121, 227 N. W. 449, we held that an employee, sustaining an accidental injury arising out of and in the course of his employment, will not be denied compensation for failure

to give notice of claim within 6 months or to commence his action within 1 year from the date of the accident, when it appears from the evidence that the injury was latent and did not result in compensable disability until after the expiration of the time for giving notice of claim and commencing action, *provided notice is given and action commenced within the statutory period after the employee has knowledge that the accident has caused a compensable disability.*

This rule threads throughout our decisions. A study of the decisions show that they turn on the question of knowledge of a compensable disability. The rule may well have had its inception in Johansen v. Union Stock Yards Co., 99 Neb. 328, 156 N. W. 511. See, in sequence, Selders v. Cornhusker Oil Co., 111 Neb. 300, 196 N. W. 316; McGuire v. Phelan-Shirley Co., 111 Neb. 609, 197 N. W. 615; City of Hastings v. Saunders, 114 Neb. 475, 208 N. W. 122; Astuto v. V. Ray Gould Co., 123 Neb. 138, 242 N. W. 375; Collins v. Casualty Reciprocal Exchange, 123 Neb. 227, 242 N. W. 457; Marler v. Grainger Bros., 123 Neb. 517, 243 N. W. 622; Flesch v. Phillips Petroleum Co., 124 Neb. 1, 244 N. W. 925 (a case with marked fact similarities to the one here determined); Clary v. R. S. Proudfit Co., 124 Neb. 582, 247 N. W. 417. In Park v. School District No. 27, 127 Neb. 767, 257 N. W. 219, there was an application of this rule, where compensation was denied, because plaintiff showed an injury "if compensable at all" from the date of the accident. Here there is no claim of a compensable injury until December 15, 1958, other than the one for which compensation was furnished by supplying the brace and in the payment of the doctors' bills. The question is again discussed and the rule stated in Dunlap v. City of Omaha, 131 Neb. 632, 269 N. W. 422, where an injured person with knowledge that he was entitled to compensation failed to seek it during the statutory period.

Scott v. State, 137 Neb. 348, 289 N. W. 367, disposes of the question, if there be one here, of whether or not

the injury here involved is to be considered as "latent" under the rule. There the defendant had paid compensation. There was an application for increased compensation. Defendant contended that proceedings for compensation for the increased disability could not be brought except 1 year from the date of the last compensation payment. We held: "Equitably, an increased disability, where compensation has been paid periodically for more than six months under a valid agreement or a formal award, must be treated as analogous to a latent injury * * *." See, also, Lind v. Nebraska National Guard, 144 Neb. 122, 12 N. W. 2d 652, 150 A. L. R. 1449; Surratt v. Otoe Food Products Co., 146 Neb. 854, 21 N. W. 2d 862; Keenan v. Consumers Public Power Dist., 152 Neb. 54, 40 N. W. 2d 261; Hauff v. Kimball, 163 Neb. 55, 77 N. W. 2d 683.

We have here undertaken to answer the questions that are presented by this appeal. We find that the trial court erred in holding that this cause was barred by the statute of limitations. We find that it was not so barred. We find also that there is ample and in fact uncontradicted evidence that the plaintiff at the time of the hearing was totally and temporarily disabled, and that the disability began on December 15, 1958. There is not sufficient evidence upon which a finding of permanent total disability may be made. It is conceded that plaintiff suffered an injury on May 15, 1957, and that such injury arose out of and in the course of his employment. We find that the evidence shows without dispute that plaintiff's temporary total disability is the result of the injury of May 15, 1957. The amount of plaintiff's wages is as recited herein and is not in dispute.

The judgment of the district court is accordingly reversed and the cause remanded with directions to render a decree in accord with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

EDWIN HUGHES, APPELLANT, V. BLANCHE DE BARBERI ET AL., APPELLEES.

107 N. W. 2d 747

Filed March 3, 1961. No. 34812.

1. **Husband and Wife: Descent and Distribution.** The method by which a married man or woman can be divested of his or her estate of inheritance in the property of the other is provided by section 30-105, R. R. S. 1943.
2. ———: ———. Such an estate of inheritance can be voluntarily divested only by a conveyance executed by such husband and wife while residents of this state.
3. **Joint Tenancy: Tenancy in Common.** A contract by joint tenants to sell real estate in joint tenancy destroys the joint tenancy in the real estate. If the contract of sale is silent as to the relationship of the vendors as owners of the contract, they own it as tenants in common.
4. **Vendor and Purchaser: Husband and Wife.** A party to a written contract for the sale of her real estate, not a homestead, will not be excused from performance because her husband did not sign the agreement and refused to join in the deed, if the other party is willing to accept the conveyance by the wife without the husband joining in the deed.
5. **Husband and Wife: Specific Performance.** In such a case the court may decree specific performance of the agreement against the wife alone, if the other party consents thereto; the husband's marital rights in such real estate not being affected by the decree.
6. ———: ———. Where the purchaser fails in such a case to indicate by evidence or pleading that he will accept the deed of the wife without the husband joining therein, specific performance of the agreement will ordinarily be denied.

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

Gross, Welch, Vinardi, Kauffman & Schatz, for appellant.

Hugh J. Boyle and *Bernard E. Vinardi,* for appellees.

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

CARTER, J.

This is a suit for the specific performance of a written

contract for the purchase by plaintiff from defendants of a residence property for the sum of $21,000, and for the abatement of the purchase price to compensate plaintiff for failure to furnish a permanent easement across adjoining property as provided by the contract of sale. The trial court found for the defendants and plaintiff appeals.

The evidence shows that Lee Waller and Blanche de Barberi were the owners of the record title as joint tenants. On October 9, 1958, the plaintiff Hughes executed a purchase agreement by which he offered to pay $21,000 for the property. The purchase agreement was submitted to Lee Waller and Blanche de Barberi, who accepted the offer and signed the purchase agreement. Blanche de Barberi signed the name of her husband, Louis de Barberi, to the purchase agreement. It is the contention of the defendants that the failure of Louis de Barberi to sign the purchase agreement will not authorize a decree of specific performance as to him and therefore should not be granted against the other defendants. In disposing of this question we shall assume that the purchase agreement is in all respects a valid and binding contract of sale.

Section 30-105, R. R. S. 1943, so far as applicable here, provides: "The right of a married man or woman to inherit a part or all of the real estate of which his or her spouse was seized of an estate of inheritance at any time during the marriage, may be barred by a conveyance executed by such husband and wife while residents of this state, * * *." It seems clear that under this provision if the husband, Louis de Barberi, was seized of an estate of inheritance in the property described in the purchase agreement, he could not be divested of such interest by a conveyance of the property by the wife in which he did not join. The determining factor is whether or not Louis de Barberi was possessed of an estate of inheritance in the property which his wife held in joint tenancy with her mother, Lee Waller.

We point out that Lee Waller is a widow. Blanche de Barberi is the daughter of Lee Waller and the wife of Louis de Barberi. All are residents of Nebraska. The defendants de Barberi claim no homestead rights in the property. While it might be argued that during the existence of the joint tenancy an estate of inheritance by the husband in the joint tenancy was purely speculative in that it is conditional on Blanche de Barberi acquiring a fee title as the survivor, a question we do not here decide, yet we are of the opinion that Louis de Barberi had an estate of inheritance in the property because of the destruction of the joint tenancy by the execution of the purchase agreement by the joint tenants. This question was considered in Buford v. Dahlke, 158 Neb. 39, 62 N. W. 2d 252. We there came to the conclusion that an agreement to sell joint property executed by all the joint tenants destroys the joint tenancy. We necessarily conclude that the execution of the contract of sale in the instant case had the effect of destroying the joint tenancy, and it necessarily follows that Louis de Barberi became possessed of an estate of inheritance in the wife's interest in the property as a tenant in common, which would come to him upon her death during his lifetime.

The contract of purchase in the case before us is not void. It has the effect of a contract for the sale of the interests of the joint tenants. The husband not having signed the purchase agreement has not divested himself of his estate of inheritance.

In Zvacek v. Posvar, 118 Neb. 163, 223 N. W. 792, the court in its headnotes stated the rule as follows: "A party to a written contract for the sale of his real estate, not a homestead, will not be excused from performance because the wife did not sign the agreement and refused to join in the deed, if the other party is willing to accept conveyance by the vendor without the wife joining in the deed. * * * In such case, the court may decree specific performance of the agreement

against the vendor alone, if the other party consents thereto; the wife's marital rights in such real estate not being affected by such decree." See, also, Davis v. Merson, 103 Neb. 397, 172 N. W. 50; Gartrell v. Stafford, 12 Neb. 545, 11 N. W. 732, 41 Am. R. 767; Lutjeharms v. Smith, 76 Neb. 260, 107 N. W. 256.

The plaintiff in the instant case seeks specific performance against the joint tenants, Lee Waller and Blanche de Barberi, and the nonsigning husband of Blanche de Barberi. Since the husband did not sign the purchase agreement, specific performance may not be decreed against him. Plaintiff has not indicated by pleading or evidence that he was willing to accept a deed from the joint tenants alone, and consequently subject to the rights of the husband, Louis de Barberi, in the property. Under such circumstances a court of equity will not order a partial specific performance.

The plaintiff contends that Louis de Barberi is estopped from disputing the validity of the purchase agreement under the doctrine announced in Haugh v. Lanz, 187 Iowa 841, 172 N. W. 199; Trepel v. Sendrovitz, 119 N. Y. S. 2d 374; and Harper v. Albright, 228 Ark. 760, 310 S. W. 2d 475. Even if the rule of these cases is the law of this state, the evidence is wholly insufficient to bring this case within the scope of the rule therein announced.

Other matters assigned as error in the appeal are not discussed in view of our holding that specific performance of the purchase agreement was properly denied for the reason stated.

The decree of the district court denying plaintiff's prayer for specific performance of the purchase agreement is affirmed.

AFFIRMED.

ELLWOOD B. CHAPPELL and PAUL E. BOSLAUGH, JJ., not participating.

IN RE APPLICATION OF HAROLD E. YOUNG.
HAROLD E. YOUNG, DOING BUSINESS AS YOUNG'S SERVICE, APPELLEE, V. MORGAN DRIVE AWAY, INC., ET AL., APPELLANTS, IMPLEADED WITH MARJORIE J. SPIDELL, APPELLEE.

107 N. W. 2d 752

Filed March 3, 1961. No. 34823.

1. **Public Service Commissions.** An order of the Nebraska State Railway Commission, making ultimate findings of fact in the language of the statutes, is not void because of the failure of the commission to make basic findings of fact in the order upon which the ultimate facts rest.
2. **Public Service Commissions: Motor Carriers.** 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.
3. ———: ———. The declared policy of section 75-222, R. R. S. 1943, is, in part, to regulate transportation in the public interest, and to promote efficient service without undue preferences or advantages, and unfair or destructive competitive practices. The declared policy does not condemn competition. It does condemn unfair or destructive competitive practices.
4. ———: ———. The primary object of the regulation of public utilities by the Nebraska State Railway Commission is not to establish a monopoly or to guarantee the security of investment in public service corporations, but, first and at all times, to serve the interests of the public.
5. ———: ———. Our holding in In re Application of Canada, 154 Neb. 256, 47 N. W. 2d 507, modified to the extent and in the manner set forth in our opinion.

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

Story, Pilcher, Howard & Hickman and *Nelson, Harding & Acklie,* for appellants.

Theodore L. Richling, for appellee Young.

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

WENKE, J.

On May 28, 1959, Harold E. Young, doing business at 2663 St. Marys Avenue in Omaha, Nebraska, under the name of Young's Service, filed an application with the Nebraska State Railway Commission seeking to obtain authority to operate as a motor carrier for hire in intrastate commerce upon the highways of Nebraska in the moving of house trailers and mobile homes over irregular routes throughout the state, such hauling to originate or terminate in Omaha or within a radius of 250 miles thereof.

Protests to the granting of this authority were filed with the commission by Marjorie J. Spidell of Omaha, Nebraska; Cecil R. Schelby, doing business as Mike's Trailer Sales of Lincoln, Nebraska; National Trailer Convoy, Inc., of Tulsa, Oklahoma; and Morgan Drive Away, Inc., of Elkhart, Indiana. Each of these protestants either had, or had made application for, authority to operate in the same field applied for by Young.

A hearing was had on the application before an examiner appointed by the commission for that purpose. The examiner filed a report with the commission on October 13, 1959, recommending that the application be granted. Exceptions were filed thereto by each of the protestants. These the commission overruled, finding: "2. That 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, R. R. S. 1943, as amended, and the requirements, rules and regulations of the Commission thereunder.

"3. That the proposed service is or will be required by the present or future public convenience and necessity to the following extent:

SERVICE AUTHORIZED:

House trailers and mobile homes.

ROUTE OR TERRITORY AUTHORIZED:

Between points and places within a 250 mile radius of Omaha, and between points and places within said

radial area on the one hand, and on the other hand, all points and places in Nebraska, over irregular routes.

"4. That a certificate of public convenience and necessity should be issued to Harold E. Young, dba Young's Service, Omaha, Nebraska in Application No. M-11068, authorizing operations as described in paragraph No. 3 above." It therefore ordered "* * * that a certificate of public convenience and necessity be, and the same is hereby, issued to Harold E. Young, dba Young's Service, Omaha, Nebraska in Application No. M-11068, authorizing operations as described in paragraph No. 3 of the findings above, * * *."

Motions for rehearing were filed by Morgan Drive Away, Inc., and National Trailer Convoy, Inc. These motions for rehearing were overruled by the commission and thereafter Morgan Drive Away, Inc., National Trailer Convoy, Inc., and Cecil R. Schelby took this appeal therefrom.

Appellants contend the order of the commission is devoid of requisite basic findings of fact and is therefore unlawful and void. We have already set forth the commission's findings. They respond generally to the requirements of section 75-230, R. R. S. 1943, which provides, insofar as here material, that: "* * * 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; * * *."

In Ferguson Trucking Co., Inc. v. Rogers Truck Line, 164 Neb. 85, 81 N. W. 2d 915, wherein the commission's findings were also substantially in the language of the

statute, the same issue was raised. We therein stated we could find no statute that places such a requirement on the commission and, in the absence thereof, declined to place such a requirement on it, holding: "An order of the Nebraska State Railway Commission, making ultimate findings of fact in the language of the statutes, is not void because of the failure of the commission to make basic findings of fact in the order upon which the ultimate facts rest." While in Skeedee Independent Tel. Co. v. Farm Bureau, 166 Neb. 49, 87 N. W. 2d 715, and Oakdale Tel. Co. v. Wilgocki, *ante* p. 425, 106 N. W. 2d 486, we have been critical of the commission's conduct in connection with its handling of the matter before it in these cases, however, neither of these cases either overrules or modifies our holding in Ferguson Trucking Co., Inc. v. Rogers Truck Line, *supra*.

But appellants call our attention to section 84-915, R. S. Supp., 1959, which was enacted by the Legislature subsequent to our holding in Ferguson Trucking Co., Inc. v. Rogers Truck Line, *supra*. That section, insofar as here material, provides: "Every decision and order adverse to a party to the proceeding, rendered by an agency in a contested case, shall be in writing or stated in the record *and shall be accompanied by findings of fact* and conclusions of law. *The findings of fact shall consist of a concise statement of the conclusions upon each contested issue of fact.*" (Emphasis ours.) It will be observed the language quoted, particularly that emphasized, authorizes the commission to do exactly what it did and is not contrary to our holding in Ferguson Trucking Co., Inc. v. Rogers Truck Line, *supra*. We find appellants' contention in this regard to be without merit.

"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." Preisendorf Transp., Inc. v. Herman Bros., Inc., 169 Neb. 693, 100 N. W. 2d 865.

In view of appellee having this burden it is appellants' contention that appellee has not adduced sufficient evidence to meet the standards this court has set up where new or extended original authority is being sought. The rule referred to is as follows: " '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.' " Preisendorf Transp., Inc. v. Herman Bros., Inc., *supra.* We have applied this rule to situations wherein authority was being sought to operate a regular bus line within a city, to operate a regular bus line between cities, to operate regular freight lines, and to operate irregular freight operations. See, Furstenberg v. Omaha & C. B. St. Ry. Co., 132 Neb. 562, 272 N. W. 756; In re Application of Effenberger, 150 Neb. 13, 33 N. W. 2d 296; In re Application of Moritz, 153 Neb. 206, 43 N. W. 2d 603; In re Application of Canada, 154 Neb. 256, 47 N. W. 2d 507; Edgar v. Wheeler Transport Service, Inc., 157 Neb. 1, 58 N. W. 2d 496; Christensen v. Highway Motor Freight, 158 Neb. 601, 64 N. W. 2d 99; Schmunk v. West Nebraska Express, 159 Neb. 134, 65 N. W. 2d 386; Houk v. Peake, 162 Neb. 717, 77 N. W. 2d 310; Miller v. Consolidated Motor Freight, Inc., 168 Neb. 712, 97 N. W. 2d 265; Preisendorf Transp., Inc. v. Herman Bros., Inc., *supra.*

Under this principle we have said: "The question of the adequacy of service of existing carriers is implicit in the issue of whether or not convenience and

necessity demand the service of an additional carrier in the field. Obviously the existence of an adequate and satisfactory service by motor carriers already in the area is complete negation of a public need and demand for added service by another carrier." In re Application of Canada, *supra.* See, also, Schmunk v. West Nebraska Express, *supra;* Houk v. Peake, *supra.*

Applying this evidentiary conclusion to applications for irregular route authority on a statewide basis would mean, once a certificate of public convenience and necessity had been issued granting such authority to a holder capable of and willing to satisfactorily serve the entire state, he would have an absolute right thereto and the commission would be without authority to grant such authority to any other applicant. We do not think that was the intent and purpose of the Motor Carrier Act.

The commission is purely a regulatory body. In re Application of Moritz, *supra.*

"The declared policy of section 75-222, R. R. S. 1943, is, in part, to regulate transportation 'in the public interest,' and to promote 'efficient service' without 'undue preferences or advantages, and unfair or destructive competitive practices.' The declared policy does not condemn competition. It does condemn 'unfair or destructive competitive practices.'" Ferguson Trucking Co., Inc. v. Rogers Truck Line, *supra.* See, also, Edgar v. Wheeler Transport Service, Inc., *supra.*

"The primary object of the regulation of public utilities by the railway commission is not to establish a monopoly or to guarantee the security of investment in public service corporations, but, first and at all times, to serve the interests of the public." Furstenberg v. Omaha & C. B. St. Ry. Co., *supra.* See, also, Houk v. Peake, *supra;* Christensen v. Highway Motor Freight, *supra;* In re Application of Moritz, *supra;* Moritz v. State Railway Commission, 147 Neb. 400, 23 N. W. 2d 545.

While the conclusion reached in In re Application of

Canada, *supra,* hereinbefore quoted, would apply rather strictly to cases involving applications for authority to operate buses within a city or in regular route service between cities and generally to regular route freight lines, it would, however, have very limited application to applications seeking authority to operate irregular route authority. We think our holding in In re Application of Canada, *supra,* should be so modified.

"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." Preisendorf Transp., Inc. v. Herman Bros., Inc., *supra.*

"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." Preisendorf Transp., Inc. v. Herman Bros., Inc., *supra.* As stated in Ferguson Trucking Co., Inc. v. Rogers Truck Line, *supra:* " 'This court has no power to regulate public utilities. Its function on appeal is limited to an examination of the jurisdiction of the railway commission over the subject matter and a determination of whether or not the order made by the railway commission is reasonable as distinguished from arbitrary action. The policy or wisdom of its action cannot be reviewed by the courts where the foregoing requirements to lawful action are found to exist.' "

The evidence shows that appellee, within the past 12 years, has developed a substantial towing business in the city of Omaha and the immediately surrounding territory, having adequate personnel and equipment for that purpose. The record fully supports the commission's finding No. 2, and appellants make no contention to the contrary. They do, however, contend that it does

not support the commission's finding No. 3.

The record shows that the commission had not taken over the regulation of this type of operations on the state's highways until very recently. Protestant Morgan Drive Away, Inc., which operates in this field on a national basis with some 650 to 700 units, had obtained statewide authority of this character in 1955; protestant Cecil R. Schelby, doing business as Mike's Trailer Service, had been given the same statewide authority sometime shortly thereafter; protestant Marjorie J. Spidell, operating as Nebraska Trailer Service, was given statewide authority on August 17, 1959, just shortly before the examiner held his hearing herein on September 14, 1959; and protestant National Trailer Convoy, Inc., which operates in this field on a national basis with some 700 units, had made application for such authority on which a hearing had been held on September 3 and 4, 1959, but which had not been acted on at the time of the examiner's hearing herein. It thus becomes evident that at least two of the protestants, at or about the time appellee was seeking the authority which the commission granted him, felt there was a public need in this field for additional services. We think the evidence shows there was and that the authority herein granted appellee will serve a useful purpose in helping supply that need.

The record shows the trailer or mobile home business is expanding; that factories manufacturing such products have come into Nebraska; that the number of trailer courts or parks are increasing; and that the existing trailer courts or parks are increasing in size. All of this has and will lead to increased business in the field of moving these trailers or mobile homes on the highways of the state. There do not appear to be too many motor carriers in this field having intrastate authority. Considering the evidence as a whole, in relation to the standards applicable to the application here being considered, we cannot say the commission acted

either unreasonably or arbitrarily in granting the authority it did to appellee. We therefore affirm its action doing so.

AFFIRMED.

JOHN SCHROEDER ET AL., APPELLANTS, V. HOMESTEAD CORPORATION, APPELLANT, IMPLEADED WITH MARGARET A. WILLIAMS ET AL., APPELLEES, WILLIAM W. FREELAND, INTERVENER-APPELLEE.

107 N. W. 2d 750

Filed March 3, 1961. No. 34870.

Appeal and Error. In the absence of a bill of exceptions it is presumed that issues of fact presented by the pleadings are established by the evidence, that they were correctly decided, and the only issue that will be considered on appeal is the sufficiency of the pleadings to support the judgment.

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

Roy M. Harrop and *George Evens,* for appellants.

Roy I. Anderson and *O'Hanlon & O'Hanlon,* for appellees.

John S. Barrett, for intervener-appellee.

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

SIMMONS, C. J.

This is an appeal from the district court for Washington County.

The notice of appeal recites that it is from decrees rendered on August 31, 1959, January 4, 1960, and April 12, 1960, and from the overruling of a motion to vacate the judgment and decree or in the alternative the overruling of a motion for a new trial. We do not find a decree of August 31, 1959, in the transcript. We

do find a decree of January 4, 1960. However, this decree is shown to have been set aside by "consent of the parties" and another decree rendered April 12, 1960. It is from that decree and subsequent proceedings that the appeal is evidently taken.

The action seems to have been brought by one John Schroeder as plaintiff against Homestead Corporation, two named parties, and all persons claiming any right, title, or interest in certain described real estate "all in Harrison County, Iowa." The petition refers to one Roy M. Harrop as "co-owner," and Harrop verifies as attorney for the plaintiff. Later Harrop is carried as a plaintiff with Schroeder in the title of pleadings. The "Homestead Corporation" is carried as a defendant throughout, although in its answer referred to later herein is the recital that it is "Now American Cooperative Company, A Corporation."

We are assured in appellant's brief that this is the second appearance of this case in this court. Reference is made to Schroeder v. Homestead Corporation, 163 Neb. 43, 77 N. W. 2d 678. However we find nothing in the record before us to connect that appeal and the instant one save the similarity of names and some facts and contentions of the parties.

Schroeder, Harrop, and Homestead Corporation are recited as appellants.

On November 10, 1960, on motion of appellees the purported bill of exceptions herein was stricken by this court. That order became final.

We here must examine the record, then, under the long-recognized rule that: In the absence of a bill of exceptions it is presumed that issues of fact presented by the pleadings are established by the evidence, that they were correctly decided, and the only issue that will be considered on appeal is the sufficiency of the pleadings to support the judgment. Brierly v. Federated Finance Co., 168 Neb. 725, 97 N. W. 2d 253.

We go then to the pleadings insofar as they relate to the decree rendered herein.

The petition was filed under the Uniform Enforcement of Foreign Judgments Act, sections 25-1587 to 25-15,104, R. R. S. 1943. The petition pleaded the existence of a judgment rendered in the district court for Harrison County, Iowa, and prayed that the judgment be registered in Washington County, Nebraska. An authenticated copy of the Iowa judgment was attached to the petition. It involved a large tract of land along the Missouri River.

Later there was filed by Schroeder and Harrop as "plaintiffs" a praecipe and application for writ of scire facias for execution on the registered judgment and decree.

A notice to show cause was issued and served on several persons. Issues were made up on that notice by parties claiming to own parts of the land in severalty.

The parties so noticed answered and denied generally; several of them, with spouses, alleged ownership of the land involved by record title and adverse possession; they alleged that the land involved in the litigation had all accreted to their land throughout the years and had been in existence for more than 20 years; and some of them alleged actions to quiet title and res judicata. They further alleged that the land involved in fact existed in Washington County, Nebraska, and not in Iowa during all of the time plaintiffs were undertaking to obtain possession in Iowa and that plaintiff's "foreign judgment" was void because of nonjurisdiction of the courts of Iowa over the subject matter of the action. They further alleged that the action was barred by the statute of limitations contained in Laws 1943, c. 130, § 4, p. 436, Vol. 2 A, R. R. S. 1943, appendix, page 663. Schroeder, Harrop, and Homestead Corporation replied denying generally and asserted several affirmative defenses to the allegations of the answer.

The trial court in its decree of April 12, 1960, re-

cited that the trial proceeded for 8 separate days until "all the evidence had been presented by all of the parties"; and that the court in company with counsel had viewed the premises. It found generally against Schroeder, Harrop, and Homestead Corporation and in favor of the appellees claiming ownership. It made several specific findings of fact in accord with its general findings.

It then decreed that the purported judgment of the district court for Harrison County, Iowa, was void. It denied registration of the judgment and the application for the writ of scire facias.

By specific reference, to parties appellees' specific lands, it held that the land was owned by the parties in fee simple, free and clear of any right, title, claim or demand of Schroeder, Harrop, and the named corporation. It cancelled any instruments of record concerning the title to the land and any rights of Schroeder, Harrop, or the corporation therein, and barred them from asserting any claim of right to possession or ownership of lands described in the decree.

Under the rule of law above announced, the judgment of the trial court is affirmed.

AFFIRMED.

JEANNE M. SCULLEY, APPELLANT, V. LARRY T. SULLIVAN, SR., ET AL., APPELLEES.
108 N. W. 2d 82

Filed March 3, 1961. No. 34872.

Insurance. Under the statutes which were effective and controlling in this case, in order to effect the cancellation of a policy of **insurance by the insurer, it was necessary that there be a tender back to the insured of the paid but unearned premium.**

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

William S. Padley, for appellant.

Cook & Cook, for appellee Motor Vehicle Cas. Co.

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

YEAGER, J.

This is a proceeding in garnishment in an action by Jeanne M. Sculley, plaintiff and appellant herein, against Larry T. Sullivan, Sr., and Larry T. Sullivan, Jr., defendants, to recover damages for personal injuries and damages to property by the plaintiff from the defendants. That action resulted in a judgment in favor of the plaintiff for $1,804.16 and costs in the amount of $23.55. The action for damages grew out of a collision between an automobile operated by Larry T. Sullivan, Jr., and one operated by the plaintiff on December 15, 1953. The automobile operated by Larry T. Sullivan, Jr. was owned by Larry T. Sullivan, Sr., who had obtained liability insurance which covered liability for operation by Larry T. Sullivan, Jr., in the amount of $5,000 for bodily injury to one person and $5,000 for property damage. The designated policy period was from September 19, 1953, to September 19, 1954. The premium, which was paid, was $29.70. The insurance was procured from Motor Vehicle Casualty Company, an insurance corporation, garnishee and appellee here. The insurance was procured by and through the agency of Bernard A. Norsworthy of Gothenburg, Nebraska, who was carrying on his business in the name of Norsworthy Agency. The premium on the insurance was paid to Norsworthy.

A notice of cancellation of the policy of insurance, apparently originating at Elmhurst, Illinois, bearing the date of October 29, 1953, was sent by mail to Larry Sullivan. The declared effective date of cancellation was November 6, 1953. The notice bears no signature but from type which is a part of the notice it appears to have been sent out by a general agency of the insurance

company located at Fremont, Nebraska, at the request of the company. The notice stated that there was a return premium of $29.70. This was, as is clear, due Larry T. Sullivan, Sr., upon cancellation. No return of premium however accompanied the notice. A copy of this notice, as he believes, was sent to Norsworthy. The record discloses, and about this there is no controversy, that neither the company nor Norsworthy ever refunded the premium.

Norsworthy was promptly notified of the accident which resulted in the judgment in favor of plaintiff and against the defendants. The insurance company did not defend the action. After the judgment was rendered some portion of the amount thereof was paid by Larry T. Sullivan, Sr. The amount or extent of such payment is not disclosed by the record here.

Following the part payment of the judgment the plaintiff in appropriate manner instituted garnishment proceedings in that action to recover from the insurance company, which will be hereinafter referred to as the appellee, the balance of the judgment with interest and costs.

The garnishment proceeding is predicated on a contention that the policy of insurance issued by the appellee to Larry T. Sullivan, Sr., was in full force and effect at the time of the accident which was the basis of the judgment, and that notwithstanding the notice it had not been effectually canceled, and thus the appellee was liable for the payment of the judgment.

There is no dispute here about the question of whether or not the appellee is liable if the policy of insurance was in force and effect. The appellee effectually concedes that it is liable if the policy was in force and effect.

The only question for determination is that of whether or not the policy of insurance was canceled by the notice which has been described, or by the notice coupled with the acts of the parties and of Norsworthy, who

acted as agent for the appellee at the time of the issuance of the policy.

The parties are in accord that the following from section 44-379, R. R. S. 1943 (Reissue of 1952), was in full force and effect at all times of concern in this case and that under it, in order to effect the cancellation of a policy of insurance by the insurer, it was necessary that there be a tender back to the insured of the paid unearned premium: "Any company or association also reserves the right to cancel any policy or any part thereof by tendering to the assured the paid unearned premium." See, also, German Ins. Co. v. Rounds, 35 Neb. 752, 53 N. W. 660; Petersen v. Ohio Casualty Ins. Co., 131 Neb. 128, 267 N. W. 393; Schnell v. United Hail Ins. Co., 145 Neb. 768, 18 N. W. 2d 112.

The record discloses that Norsworthy received the premium for and on behalf of the appellee. There is no evidence that it ever returned or directed the return of the unearned premium.

The substantial theory of the appellee however is that the premium must be treated as having been in the hands of Norsworthy and held by him as agent for Larry T. Sullivan, Sr., with his knowledge and consent for the purpose of applying it in payment of other insurance, because of conduct of Larry T. Sullivan, Sr., and Norsworthy after notice of cancellation had been received, coupled with a suggestion, not in anywise supported by competent evidence, that although the premium had been received by Norsworthy it had not been paid or accounted for to the appellee. No witness testified that the premium had not been accounted for by Norsworthy to the appellee.

The only testimony bearing on the question of whether or not Norsworthy had accounted to the appellee for the premium was in substance that by custom he made transmittals monthly and that it was possible that he had not transmitted this premium but in point of fact he did not know.

As to what occurred between Larry T. Sullivan, Sr., and Norsworthy, it is disclosed that after receiving the notice the two had a conversation or conversations relative to the cancellation and Norsworthy promised to get other insurance. There is no competent evidence that in this was involved a question of the source of premium for new or other insurance. Again there is testimony to the effect that there was a possibility that this was discussed, but if so there was no memory of it by the person who gave the testimony.

In the light of this state of the record the conclusion is inevitable that there is no competent evidence on which to base a finding that the appellee either actually or constructively paid or tendered the unearned premium on the policy of insurance which was issued by the appellee to Larry T. Sullivan, Sr. The garnishment should have been sustained and a judgment rendered in favor of the plaintiff for the amount due and unpaid on the judgment of the plaintiff against the defendants with interest at the rate of 6 percent per annum from the date of the judgment, the costs of that action, and the costs of this garnishment proceeding.

The bill of exceptions indicates that the defendant Larry T. Sullivan, Sr., has paid a part of the judgment to the plaintiff. She is of course not entitled to recover that portion from the appellee.

The judgment of the district court is reversed and the cause remanded to the district court with directions to render judgment in favor of the plaintiff and against the appellee in accordance with the conclusion reached in this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

LESLIE W. RUSH, APPELLEE, V. MORINE S. RUSH, APPELLANT.
108 N. W. 2d 79

Filed March 3, 1961. No. 34880.

1. **Divorce.** By the terms of section 42-303, R. R. S. 1943, no person is entitled to a divorce for any cause arising in this state unless he has had an actual residence in the state for at least 1 year next before bringing the suit with a bona fide intention of making this state his permanent home, unless the marriage was solemnized in this state and the applicant shall have remained herein from the time of marriage to the filing of the petition.
2. ———. By the terms of this section of the statute no person shall be entitled to a divorce for any cause arising out of this state unless one of the parties shall have resided within the state for at least 2 years next preceding the bringing of the action.
3. ———. Also by the terms of this section of the statute a person serving in the armed forces of this country who has been continuously stationed in any military base or installation for the period of 1 year shall be deemed a resident in good faith of this state and the county where such military base or installation is located for the period he has been so stationed.
4. ———. Under the law of this state no decree of divorce shall be rendered solely on the declarations, confessions, or admissions of the parties, but the court shall, in all cases, require other satisfactory evidence of the facts alleged in the petition for that purpose.

APPEAL from the district court for Lancaster County: HARRY A. SPENCER, JUDGE. *Affirmed in part, and in part reversed and dismissed.*

Thomas J. Gorham, for appellant.

Richard A. Vestecka, for appellee.

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

YEAGER, J.

This is an action for divorce instituted in the district court for Lancaster County, Nebraska, by Leslie W. Rush, plaintiff and appellee, against Morine S. Rush, defendant and appellant. The case was tried to the court

and a decree was rendered granting an absolute divorce to plaintiff and awarding defendant alimony in the amount of $157 a month until the decree became final and thereafter $960 payable in monthly payments of $80 each. Defendant was awarded an attorney's fee for the services of her attorney in the amount of $250 and the costs were also taxed to the plaintiff. The defendant filed a motion for new trial which was overruled. From the decree granting the plaintiff a divorce and the order overruling the motion for new trial the defendant has appealed.

The grounds of the appeal are that the decision is not sustained by sufficient evidence; that there is insufficient corroborating evidence; and that the decree is contrary to law.

By the petition filed by the plaintiff it is declared that the parties were married in Mobile, Alabama, October 3, 1941; that the plaintiff has been for more than 1 year a resident of Lancaster County, Nebraska; that the defendant is a resident of Mobile, Mobile County, Alabama; and that no children were born of the marriage.

As grounds for divorce the plaintiff alleged that the defendant had been guilty of extreme cruelty of such a character as to destroy the objects of the marriage relationship between the parties. The defendant filed an answer denying the charges of cruelty. She did not file a cross-petition.

Particular acts of cruelty are charged but it is not deemed necessary to set them out herein. The reason for this lack of necessity is that the record viewed in the light most favorable to the plaintiff does not support a right of action for divorce in favor of plaintiff and against the defendant in the State of Nebraska, and further even if it did the decree would have to fail by reason of a total lack of corroboration of the charges made against the defendant.

The plaintiff was at the time of the commencement of this action and prior thereto a technical sergeant sta-

tioned at the Lincoln Air Force Base. He came to the base and to Nebraska September 13, 1958. The action was commenced September 14, 1959. The defendant was a resident of Mobile, Alabama, and was never in Nebraska until she appeared at the trial of this case which was started on May 9, 1960. The parties separated in Mobile, Alabama, on July 3, 1957, and were never together thereafter. He actually departed to serve in an overseas assignment from which, on his return, he came to the Lincoln Air Force Base. He did not communicate with her from the time he left until after his return.

On the trial of the case the plaintiff gave testimony as to claimed acts of cruelty practiced upon him prior to his departure in 1957. There was no direct or circumstantial evidence to support any of this. As to what occurred after he came to Nebraska he testified that he needed certain pictures as an aid to an application or effort to be assigned to recruiting service. Just what pictures he wanted were not particularly described but it appears they were of the defendant and of her son by an earlier marriage. She refused to send the pictures. A long distance telephone call or calls followed and it appears that the conversation was not pleasant. The plaintiff stated that in a letter he extended an invitation to her to come to Lincoln, Nebraska. By his testimony however he made it clear that he did not desire that she come, and he did not intend to allow her to do so. This is a fair résumé of what happened as between the parties in the State of Nebraska. There is no testimony corroborating this even if this could be recognized as cruelty which may be ground for divorce.

From the brief of the plaintiff it appears to be the theory that this refusal of pictures caused a reversion of plaintiff to the claimed cruelties occurring before July 3, 1957, and in consequence he became severely and seriously disturbed in mind as a result of which he

lost weight and lost efficiency in the performance of his duties.

There is testimony that at one time the plaintiff did manifest evidence of disturbance. The evidence however was of his condition and not of any act or failure to act on the part of the defendant.

Under the facts as disclosed by the record and the statutes of this state it becomes clear that the decree of divorce granted to the plaintiff is contrary to law.

Section 42-303, R. R. S. 1943, provides in part: "(1) No person shall be entitled to a divorce for any cause arising in this state who has not had actual residence in this state for at least one year next before bringing suit for divorce with a bona fide intention of making this state his or her permanent home, unless the marriage was solemnized in this state and the applicant shall have resided therein from the time of the marriage to filing the petition."

By the same section it is provided that for any cause arising out of the state no person shall be entitled to a divorce for any cause unless one of the parties shall have resided within this state for at least 2 years next before bringing the suit.

The plaintiff had the right to claim a residence in this state by further terms of this section. By these further terms it is provided that a person serving in the armed forces who has been continuously stationed in any military base or installation for the period of 1 year shall be deemed a resident in good faith of this state and the county where such military base or installation is located.

The action here was instituted on the second day after the expiration of the year which entitled the plaintiff to claim residence. The plaintiff, having had residence of but 1 year, could not legally maintain his action for divorce for any cause arising out of the state. He was barred from maintaining action until the expiration of 2 years after coming to this state.

If it be assumed, as it is not, that the plaintiff had the right under law to maintain his action for divorce it would be necessary to say that he has not shown by the proper weight of evidence that he was entitled to a decree of divorce from the defendant. There has been no corroboration of any acts of cruelty committed by the defendant in the State of Nebraska or elsewhere. A basic essential to the right to a decree of divorce is that there must be corroboration of the facts alleged in the petition.

Section 42-335, R. R. S. 1943, provides: "No decree of divorce and of nullity of a marriage shall be made solely on the declaration, confessions or admissions of the parties, but the court shall, in all cases, require other satisfactory evidence of the facts alleged in the petition for that purpose." See, also, Pestel v. Pestel, 158 Neb. 611, 64 N. W. 2d 299; Workman v. Workman, 164 Neb. 642, 83 N. W. 2d 368; Goodman v. Goodman, 168 Neb. 841, 97 N. W. 2d 336.

The decree of the district court to the extent that it grants a divorce to the plaintiff and alimony to the defendant is reversed and the action dismissed. To the extent that it awards an attorney's fee to the defendant for her attorney and costs, it is affirmed. The defendant is awarded a fee of $250 for the services of her attorney in this court.

AFFIRMED IN PART, AND IN PART REVERSED AND DISMISSED.

JEANETTA FISHER ET AL., APPELLANTS, V. CHICAGO, BURLINGTON & QUINCY RAILROAD, A CORPORATION, APPELLEE.

107 N. W. 2d 740

Filed March 3, 1961. No. 34882.

1. **Railroads.** It is the law of Missouri that a railroad track of itself is a sign and warning of danger, requiring one who is

about to cross the track to look and listen for approaching trains before driving onto the railroad track.

2. **Railroads: Automobiles.** Under the law of Missouri a driver of a motor vehicle, particularly one familiar with a railroad crossing and about to drive thereon, must exercise the highest degree of care to keep a lookout and to observe and watch for the approach of trains.
3. ———: ———. Under the law of Missouri the driver of a motor vehicle, who has a clear view along a railroad track and who drives upon the track in daylight when by looking he could have seen an approaching train, is guilty of negligence as a matter of law.
4. ———: ———. Under the law of Missouri, if the evidence establishes when demonstrated by actual measurements, tests, and photographs that it would have been physically impossible for the driver of a motor vehicle not to see an approaching train in time to avoid a collision if he had discharged the duty imposed on him by law to look for approaching trains, the negligence of the driver in failing to discharge such duty is the proximate cause of the collision.
5. ———: ———. Under the law of Missouri the negligence of the driver of the motor vehicle in such a situation is the proximate cause of the collision, and the railroad company is not liable in damages for the death of the driver.

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

Paul P. Chaney and *Dwight Griffiths,* for appellants.

Mason, Knudsen, Dickeson & Berkheimer, J. W. Weingarten, Richard M. Duxbury, and *Jean B. Cain,* for appellee.

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

CARTER, J.

This is an action for the recovery of damages for the wrongful death of Frank J. Fisher by reason of injuries sustained when the truck he was driving was struck by defendant's train at a railroad crossing about 2 miles north of Watson, Missouri. The Employers Mutual Casualty Company is a party plaintiff as the workmen's compensation carrier for the employer of deceased, who

became obligated for compensation payments and seeks reimbursement as authorized by section 48-118, R. R. S. 1943. The trial court directed a verdict against the plaintiffs at the close of plaintiffs' evidence and plaintiffs have appealed.

The action was brought under the wrongful death statute of Missouri, section 537.080, R. S. Mo. 1949. The plaintiffs pleaded the statutory and common law of Missouri. The sufficiency of the pleading of the common law of Missouri is questioned by the defendant, but since the common law of Missouri requires the same result as that in Nebraska in the instant case, the case will be decided on the statutory and common law of Missouri.

The evidence shows that the deceased was an employee of the Falls City Mercantile Company. On April 9, 1958, while in the course of his employment, the deceased was driving a truck belonging to his employer about 2 miles north of Watson, Missouri. He was traveling a regular route over which he had traveled many times previously. He was driving south on a gravel road and was struck by defendant's train at the point where the railroad track crosses the highway. The deceased died about 2 hours after the collision without making any statement as to what occurred.

The evidence shows that the railroad track lies in a northwest and southeast direction from the crossing where the accident occurred. The physical facts are shown by maps and photographs. In the angle formed by the road and railroad right-of-way to the north of the railroad crossing, were the farm buildings of Wincel and Rosena Murry. The closest farm building was approximately 800 feet north of the railroad crossing. To the west of the Murry residence were some peach trees along the railroad right-of-way, the south end of which were approximately 725 feet north of the railroad crossing. From the south end of the peach trees to the railroad crossing there was nothing to obstruct

the vision to the west. In other words, one approaching the railroad crossing from the north on the highway had a clear view for 725 feet to observe the approach of a train from the northwest.

Rosena Murry testified that she was working in her kitchen and saw the approach of the train as it crossed a bridge more than a half mile to the north. She observed the headlight on the diesel engine but heard no bell or whistle. Wincel Murry testified that he was scooping corn about 1,000 feet north of the railroad crossing. He stated that it was a nice clear day and that vision was good. He observed the deceased go south on the highway at a speed of 30 to 40 miles an hour. He saw the train approaching south of the railroad bridge. He said it was going at a speed of 70 to 75 miles an hour when it went by. He heard no whistle or bell, and said that he would have heard them if they had been sounded.

There is evidence which shows that 151 feet north of the railroad crossing and on the right side of the highway to one approaching from the north was a crossbuck sign on which were painted the words "Railroad Crossing." At a distance of 288 feet north of the railroad crossing on the right side of the road was a round highway sign with a black cross and the letters "RR" on a light background.

It is the contention of the plaintiffs that defendant's employees were negligent in operating the train in that they failed to sound a whistle and bell, as required by section 389.990, R. S. Mo. 1949, as amended. Applying our oft-repeated rule, that on appeal from a judgment dismissing plaintiff's case at the close of his evidence such evidence will be construed in the light most favorable to the plaintiff and every controverted fact will be resolved in his favor, we find that there was evidence of negligence on the part of the defendant. It is the contention of the defendant, however, that the deceased

was guilty of such negligence as would bar a recovery as a matter of law.

It is the law of Missouri that a railroad track of itself is a sign and warning of danger, requiring one who is about to cross it to look and listen for approaching trains before driving onto such railroad track. The driver of a motor vehicle about to drive onto a railroad track must exercise the highest degree of care to keep a lookout, and to observe and watch for the possible approach of trains. Where the driver of a motor vehicle when having a clear view along a railroad track drives upon the track in daylight when by looking he could have seen an approaching train, he is guilty of negligence as a matter of law. Failure of one, in approaching a railroad crossing with which he is familiar, to see that which is plainly visible is conclusive evidence of negligence. Where the negligence of a truck driver in failing to discharge his duty to look for approaching trains before driving onto a railroad crossing was the proximate cause of driver's death in a collision with the train, the railroad company is not liable in damages for the death of the driver. If a traveler, by looking, could have seen an approaching train in time to avert an accident, it will be presumed that he did not look, or, if he did look, that he did not heed what he saw. Such conduct is held to be negligence per se and constitutes the proximate cause of the accident, and bars a recovery. Lohmann v. Wabash R. R. Co., 364 Mo. 910, 269 S. W. 2d 885; Pipes v. Missouri Pacific R. R. Co. (Mo.), 338 S. W. 2d 30. See, also, Milk House Cheese Corp. v. Chicago, B. & Q. R. R. Co., 161 Neb. 451, 73 N. W. 2d 679; Neusbaum v. Chicago & N. W. Ry. Co., 162 Neb. 754, 77 N. W. 2d 299.

We shall briefly review the facts in the record that bring the case within the foregoing rules. The deceased was familiar with the road he was traveling. There was a warning sign 288 feet north of the crossing and another 151 feet north of it. He had a duty to look

and listen as he approached the crossing. His view to the right was wholly unobstructed for 725 feet, during which distance the approaching train was in plain view. His duty required him to look to his right and to see the train that was in plain sight. He had the further duty to have his truck under such control that he could avoid any danger that his looking and listening disclosed, or, in the exercise of the highest degree of care, should have disclosed. He was charged with seeing that which was clearly visible and his failure to do so is negligence of such a degree as to bar a recovery as a matter of law under the applicable common law of the State of Missouri.

The trial court correctly directed a verdict for the defendant. The judgment of the trial court is affirmed.

AFFIRMED.

GEORGE BUSHEY, BY JUDITH ANN BUSHEY, HIS WIFE AND NEXT FRIEND, APPELLANT, V. GERALD FRENCH, APPELLEE.
108 N. W. 2d 237

Filed March 10, 1961. No. 34885.

1. **Trial.** In a civil action tried to a jury, in which either party is entitled to recover money from the adverse party, the jury is required to assess the amount of the recovery in its verdict as provided by section 25-1119, R. R. S. 1943.
2. **Trial: Judgments.** When the question of liability is for the jury and plaintiff has adduced evidence of damages for injuries sustained, a verdict for the plaintiff in the amount of "$ no money" is contrary to law and insufficient to sustain a judgment for the defendant.
3. **Trial.** The assessment of "$ no money" in such a verdict nullifies its effect as a verdict in favor of plaintiff. Being neither a verdict for the plaintiff nor a verdict for the defendant, it is in effect no verdict at all.
4. ———. It is error for the trial court to accept such a verdict. It is the duty of the trial court in such a situation to point out its defects to the jury and send it back to the jury with directions to return a verdict in accordance with law and the instructions of the court.

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

John McArthur, for appellant.

Marti, O'Gara, Dalton & Sheldon, for appellee.

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

CARTER, J.

This is an action for the recovery of damages sustained in an automobile accident while plaintiff was an occupant of defendant's automobile. The jury returned the following verdict: "We, the Jury, duly impaneled and sworn in the above entitled cause, do find for the plaintiff and assess the amount of his recovery against defendant in the sum of $ *No Money.*" The trial court entered a judgment for the defendant on the verdict. Plaintiff has appealed.

The only question raised by the appeal is: When the question of liability is for the jury and plaintiff has adduced evidence of damage for injuries sustained, is a verdict for plaintiff in the amount of "$ No Money" contrary to law and insufficient to sustain a judgment for defendant?

This precise question does not appear to have been before this court. The rule in other jurisdictions is: A verdict finding for the plaintiff and assessing the amount of his recovery against the defendant in the sum of "$ no money" confers no authority to enter a judgment upon it. Klein v. Miller, 159 Ore. 27, 77 P. 2d 1103, 116 A. L. R. 820; Ridenour v. Lile, 93 Ohio App. 435, 114 N. E. 2d 166; Sellers v. Mann, 113 Ga. 643, 39 S. E. 11. In the Klein case the court said in considering a similar verdict: " 'It is impossible to ascertain from this verdict whether the jury intended to find for the plaintiff or for the defendants. Because of its uncertainty in this respect, it is not sufficient to support a valid judgment.' McLean v. Sanders, supra. * * *

In the case at bar the verdict is not for the defendant. Its assessment of 'no damages' nullifies its effect as a verdict in favor of plaintiff. Being neither a verdict in favor of plaintiff nor a verdict in favor of defendant, it is in effect no verdict at all."

In the Ridenour case, after holding a similar verdict insufficient to support a valid judgment because it was impossible to ascertain from such verdict whether the jury intended to find for the plaintiff or the defendant, the court said: "In the present case, upon the return of the verdict the trial court erred in accepting same. It was the duty of the trial court to point out this defect to the jury and send it back with instructions either to assess the damages recoverable by defendant from plaintiff or else return a verdict finding a certain definite sum due plaintiff from defendant on plaintiff's petition, a certain definite sum due defendant from plaintiff on defendant's cross-petition, strike a balance and make a finding of a definite sum in dollars and cents due either plaintiff or defendant, as the computation showed. This error rendered the entire verdict invalid both as to the issues raised by the petition and the answer thereto and as to the issues raised by the cross-petition and the reply."

We point out that the Nebraska statute, as in the jurisdictions cited, provides that when either party is entitled to recover money from the adverse party the jury in its verdict must assess the amount of recovery. § 25-1119, R. R. S. 1943.

The defendant relies upon Ambrozi v. Fry, 158 Neb. 18, 62 N. W. 2d 259. In that case the jury returned a verdict for plaintiff and assessed the amount of her recovery at "$ none." The court refused to accept the verdict in that form, telling the jury that if it found for the plaintiff she was entitled to some damages. The jury after further deliberation returned a verdict in the sum of $75. The defendant filed a motion for judgment on the first verdict for "$ none." Plaintiff filed

a motion for a new trial, which was granted. The judgment of the trial court was affirmed for the reason that the verdict of $75 was so grossly inadequate that the trial court properly granted a new trial. The difficulty arises in that this court cited and distinguished the case of Royal Indemnity Co. v. Township of Island Lake, 177 Minn. 408, 225 N. W. 291. This case appears to be in conflict with the cases hereinbefore cited in this opinion. While it was clearly distinguishable on the facts in the Ambrozi case, we do not agree with its reasoning as it applies to the case presently before us. We think the reasoning of the cases hereinbefore cited should be adopted as the law of this state, particularly in view of section 25-1119, R. R. S. 1943. See Annotation, 116 A. L. R. 828. In any event, the Ambrozi case does not conflict with our holding in the present case since it cannot be disputed that plaintiff in the instant case sustained pain and suffering and some disability for which he was entitled to be compensated if liability was established.

We conclude that the trial court erred prejudicially in receiving the verdict, in rendering judgment for the defendant thereon, and in not sustaining plaintiff's motion for a new trial.

The defendant asserts that the verdict, even if erroneous, is not prejudicially so for the reason that defendant's motion for a directed verdict should have been sustained. Defendant's position is correct if the trial court erred in overruling the motion for a directed verdict. This question requires a consideration of the evidence.

Plaintiff's evidence is to the following effect: Plaintiff asked defendant to drive him to a certain place of business in Lincoln and agreed to pay him $2 for so doing. They preceeded north on Tenth Street, the defendant doing the driving and plaintiff riding with him in the front seat. It was raining and snowing. There were from 2 to 3 inches of slush and snow covering the

street. Plaintiff testified that defendant on several occasions turned out of the tracks made by other vehicles to splash water, slush, and snow on approaching vehicles. Plaintiff protested this conduct on two occasions without effective result. Immediately preceding the accident defendant again pulled left into the deeper slush, his car skidded, the rear end slid around to the right and projected the car into the path of a car coming from the north, resulting in a collision. Plaintiff testified to a statement by defendant tending to establish defendant's responsibility for the accident. Plaintiff was seriously injured. Plaintiff suffered a broken rib and injury to his abdomen. It was necessary that he submit to surgery, at which time about one-fourth of his liver was removed. He also suffered a contusion of the right lung. He was in Lincoln General Hospital from March 4 to March 31, 1959. He was in the Lincoln Air Force Base hospital from March 31 to May 7, 1959. He testified to pain and suffering endured by him and to the limitations of physical activity resulting from his injuries. There is evidence that plaintiff's medical and hospital bills were paid by the government. The evidence is clear that if liability attached to the defendant, plaintiff is entitled to recover for pain and suffering, and for any temporary and permanent disability sustained.

The defendant testified to a different story as to how the accident happened, and denied making any statements indicating negligence on his part. It is not necessary to detail the evidence of the defendant other than to show a conflict in the evidence requiring its submission to a jury.

We conclude that the facts as testified to by the parties and their witnesses were very conflicting and raised issues to be determined by a jury. The contention of defendant that he was entitled to a directed verdict is without merit. We find that other contentions asserted by the defendant in support of the judgment rendered

for the defendant on the verdict returned are likewise without merit.

We hold the verdict returned by the jury was insufficient to sustain a judgment for the defendant. The trial court erred, therefore, in rendering such judgment. The judgment is reversed and the cause remanded to the district court for a new trial.

REVERSED AND REMANDED.

WENKE, J., not participating.

EDITH WRONA, APPELLANT, V. FRED A. SCHRAWGER, APPELLEE.

108 N. W. 2d 95

Filed March 10, 1961. No. 34886.

1. **Trial.** A motion for a directed verdict must, for the purpose of a 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 said 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 facts in evidence.
2. **Negligence: Trial.** When different minds may reasonably draw different conclusions from the same facts as to whether or not they establish negligence or contributory negligence, such issues should be submitted to the jury.
3. **Trial.** If there is any evidence which will sustain a finding for the party having the burden of proof in a cause the trial court may not disregard it and direct a verdict against him.

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

Tesar & Tesar, for appellant.

Wear, Boland, Mullin & Walsh, for appellee.

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

MESSMORE, J.

This is an action at law brought by Edith Wrona as

plaintiff in the district court for Douglas County, against Fred A. Schrawger, defendant, to recover damages for personal injuries sustained by the plaintiff when she was struck by an automobile driven by the defendant while she was crossing a street in a crosswalk in the city of Omaha. At the close of the plaintiff's case the defendant made a motion for a directed verdict in favor of the defendant or, in the alternative, to dismiss the plaintiff's petition. The trial court sustained the defendant's motion, dismissed the plaintiff's petition and cause of action, and rendered judgment for the defendant. The plaintiff filed a motion for new trial which was overruled. From the order overruling the plaintiff's motion for new trial, the plaintiff appeals.

The plaintiff's petition, insofar as necessary to consider here, alleged that the defendant's negligence and carelessness were the proximate cause of the accident and injuries sustained by the plaintiff in the following particulars: In failing to stop his automobile in compliance with the red traffic signal for traffic traveling east and west at the intersection; in failing to maintain a lookout for the plaintiff who was lawfully crossing the street in the pedestrian crosswalk; in failing to sound his horn or give any signal to the plaintiff of his approach to the intersection; in failing to apply his brakes in time to avoid striking the plaintiff; and in failing to yield the right-of-way to the plaintiff who was crossing the intersection and street with the traffic control lights in her favor.

The defendant's answer to the plaintiff's petition alleged that if the plaintiff sustained any injuries or damages, the same were the direct and proximate result of her own negligence and want of care which caused and directly contributed to cause the accident.

The plaintiff assigns as error that the trial court erred in dismissing the plaintiff's petition and cause of action; and that the trial court's findings and judgment are not supported by the evidence and are contrary to law.

The plaintiff testified that on October 25, 1958, her husband picked her up in his automobile from her place of work about noon, and let her out at Fourteenth and Douglas Streets in Omaha; that Fourteenth Street is a one-way street for traffic moving to the south, and Douglas Street is a one-way street for eastbound traffic; that after she left her husband's car she went to the southwest corner of the intersection of Douglas and Fourteenth Streets; that the traffic signals on Douglas Street at that time were red; that she stood on the corner and waited for the signal light to change, and when it changed she started to cross Douglas Street in the crosswalk which she estimated to be 10 or 15 feet wide; that she believed she was walking in about the middle of the crosswalk; and that after the signal light turned green she took 7 or 8 steps into the street when she was struck by the defendant's automobile. This witness further testified that she first noticed the defendant's automobile when she had taken 2 or 3 steps out into the street in the crosswalk. At that time the defendant's automobile was 4 or 5 car lengths, or about 70 or 75 feet, west of the crosswalk. She kept on walking, believing that the defendant would stop his automobile. She was not able to tell the speed of the defendant's automobile, but testified that it was moving and that the left front fender of the defendant's automobile struck her on her left hip while she was in the crosswalk. This witness further testified that she believed she screamed just before being struck by the defendant's automobile; that after being struck by it she was in a sitting position on the pavement, facing east; that from the time she left the curb until she was struck by the defendant's automobile she heard no sound of a horn or warning of any kind; that the defendant's automobile did not deviate or turn in any direction from the time she first saw it; and that there were other cars to the north of the defendant's car which were standing still waiting for the traffic light to change in their favor so they

could proceed east. After the impact, the plaintiff was assisted by two boys who helped her back to the curb, and she waited until the police came and then was taken to the Douglas County Hospital.

The cross-examination of the plaintiff showed that at the time she was struck by the defendant's automobile she had reached the north edge of the first driving lane on the south side of Douglas Street.

A detective sergeant connected with the Omaha police department testified that on October 25, 1958, he was let out of a police car by his partner at the corner of Fourteenth and Douglas Streets; that he was on duty and was going to the Chrysler Cafe on the south side of Douglas Street between Fourteenth and Fifteenth Streets; that he went to the northwest corner of the intersection and waited for the traffic light to change so that he could walk south on the west crosswalk across Douglas Street; that he saw the plaintiff facing him, waiting for the signal light to change; that she was on the southwest corner of the intersection; and that as the signal light changed, this witness started to walk south in the crosswalk and the plaintiff started to walk north in the crosswalk on Douglas Street. This witness further testified that when the plaintiff left the curb an automobile came from the west proceeding east and struck the plaintiff on her left side with its left front headlight and fender; and that the plaintiff rolled off the car and sat on the street facing east. This witness further testified that he believed the plaintiff was out in the crosswalk 6 or 7 steps, or possibly 15 to 18 feet, into the intersection at the time the accident occurred; that the automobile that struck the plaintiff was traveling in the first traffic lane south on Douglas Street; that the crosswalk on Douglas Street is a marked crosswalk; that the plaintiff was walking near the marked line of the crosswalk closest to the west side thereof and was within the crosswalk; that as the defendant's automobile struck the plaintiff it made a noise like a

"thump"; and that the defendant applied his brakes and his automobile "rocked." This witness further testified that when the defendant's automobile stopped, the front of it was mostly through the crosswalk and fairly close to the east boundary of the crosswalk; and that after the accident this witness went directly across the street and told the defendant to shut off the motor of his automobile. He talked to the defendant and asked him what happened. The defendant told him that he had brought his wife downtown, let her out at Brandeis store, and was heading east on Douglas Street. He had a dog in his lap and it started to vomit. He endeavored to push the dog aside to keep it from vomiting on him, and he did not see the plaintiff.

A police officer assigned as investigator for the traffic bureau of the city of Omaha testified that he investigated the accident, and when he arrived at the scene of the accident he talked to the defendant. The defendant stated that he was proceeding east on Douglas Street and the signal light was red for eastbound traffic; that he could not state how far away from the intersection he noticed the traffic light; that arriving at the intersection he noticed the dog was sick and tried to push it away from him; that his automobile was traveling about 5 to 8 miles an hour; and that he struck a pedestrian and did not see her until the time of impact. The defendant pointed out to this witness the point of impact, and it was measured and found to be 20 feet north of the south curb of Douglas Street and about 1 foot east of the west line of the crosswalk, but inside the confines of the crosswalk. Douglas Street is 60 feet wide at this point, and there are four traffic lanes and two parking lanes across Douglas Street.

The following are applicable to the instant case.

"A motion for a directed verdict must, for the purpose of a decision thereon, be treated as an admission of the truth of all material and relevant evidence submitted an behalf of the party against whom the mo-

tion is directed, and said 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 facts in evidence." Halliday v. Raymond, 147 Neb. 179, 22 N. W. 2d 614. See, also, Buie v. Beamsley, *ante* p. 181, 105 N. W. 2d 738.

Section 39-751, R. R. S. 1943, provides in part: "The driver of any vehicle upon a highway within a business or residence district shall yield the right-of-way to a pedestrian crossing such highway within any clearly marked crosswalk or any regular pedestrian crossing included in the prolongation of the lateral boundary line of the adjacent sidewalk at the end of a block, except at intersections where the movement of traffic is being regulated by traffic officers or traffic direction devices."

"If there is any evidence which will sustain a finding for the party having the burden of proof in a cause the trial court may not disregard it and direct a verdict against him." Burhoop v. Brackhan, 164 Neb. 382, 82 N. W. 2d 557.

"When different minds may reasonably draw different conclusions from the same facts as to whether or not they establish negligence or contributory negligence, such issues should be submitted to the jury." Hammond v. Morris, 147 Neb. 600, 24 N. W. 2d 633. See, also, Buie v. Beamsley, *supra*.

We conclude that under the facts as shown by the record in this case, the questions of the negligence of the defendant while driving his automobile at the time of the accident, and the contributory negligence of the plaintiff, if any, are questions of fact to be determined by a jury.

For the reasons given herein, the judgment of the trial court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

WENKE, J., not participating.

DUNLOP TIRE & RUBBER CORP., A CORPORATION, APPELLANT, V. KELLY P. RYAN ET AL., APPELLEES.
108 N. W. 2d 84

Filed March 10, 1961. No. 34891.

1. **Limitations of Actions: Pleading.** A petition showing on its face that the cause of action stated therein is barred by the statute of limitations is subject to general demurrer.
2. ———: ———. In pleading the statute of limitations of a foreign state, it is unnecessary to set out in the pleading an exact copy thereof, or to give its title and date of approval. It is sufficient, as against a general demurrer, to allege the substance of the statute relied on.
3. **Contracts.** As a general rule a contract is considered as entered into at the place where the offer is accepted, or where the last act necessary to a meeting of the minds or to complete the contract is performed.
4. ———. The general rule in this jurisdiction is that the state in which the last act of a contract is performed which is necessary to the validity of the contract is the situs of the contract.
5. **Contracts: Conflict of Laws.** A general rule in this jurisdiction is that a contract made in another state and valid under its governing laws is considered valid here, and will be enforced, unless the enforcement of the contract would violate the positive law or the settled public policy of this state or would work an injury to this state or its citizens.
6. **Limitations of Actions: Contracts.** The statutes of this state provide in what time actions may be brought; and a contract which provides that no action shall be brought thereon, or for a breach thereof, unless within a time therein specified, which is different from the time which the statute fixes for bringing an action on such contract or for a breach thereof, is against public policy and will not be enforced by the courts of this state.
7. **Limitations of Actions: Guaranty.** An action instituted in Nebraska on a written guaranty executed in and to be performed in Nebraska is subject to the provisions of the statute of limitations in Nebraska.

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

Silverman & Silverman, for appellant.

Sidner, Lee, Gunderson & Svoboda and *Chester N. Sutton,* for appellees.

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

YEAGER, J.

This is an action by Dunlop Tire & Rubber Corp., a corporation, plaintiff and appellant, against Kelly P. Ryan and Boyd Hammond, defendants and appellees, to recover a judgment on a written guaranty of payment for goods, wares, and merchandise sold by the plaintiff to Kelly Ryan Equipment Company. The action was commenced by the filing of a petition in the district court. The defendants by separate general demurrers asserted that the petition failed to state a cause of action. The demurrers were sustained. Thereafter judgment was rendered dismissing the action. From this judgment the plaintiff has appealed.

By the petition, which was filed October 8, 1959, it is pleaded, to the extent necessary to set forth here, that the plaintiff was duly organized and existing under the laws of the State of New York, and the defendants are residents of Washington County, Nebraska; that on or about February 6, 1950, the defendants executed and delivered to plaintiff a guaranty in writing wherein they guaranteed the payment to the plaintiff of any and all indebtedness then existing or any future indebtedness thereafter incurred by Kelly Ryan Equipment Company on account of goods, wares, and merchandise sold to it; and that the guaranty was not to exceed $10,000. A copy of the written guaranty was attached to and made a part of the petition.

It was further alleged that on July 23, 1954, the plaintiff sold to Kelly Ryan Equipment Company goods, wares, and merchandise of the reasonable value of $1,694; that no portion of this sum has been paid; that this amount is due; and that it is due the plaintiff from the defendants.

It was further pleaded that by the terms of the guaranty it was provided that: " 'This guaranty shall be

governed by and construed under the laws of the State of New York' "; that under the laws of the State of New York the limitation on contracts, express or implied, is 6 years; and that said law was and is now in full force and effect. The prayer was for judgment for $1,694 with interest and costs in the action. It is assumed by the plaintiff that the declaration of the guaranty that it shall be construed under the laws of New York was inclusive of application of the New York statute of limitations. There is no specific declaration relating to any statute of limitations.

The theory on which the demurrers were sustained apparently was that by the statute of limitations of the State of Nebraska action was barred, which bar was apparent on the face of the petition. This is the theory on which the parties have assumed that the decision was rendered.

The controlling rule in this area is that a petition showing on its face that the cause of action stated therein is barred by the statute of limitations is subject to general demurrer. See, Dufrene v. Anderson, 67 Neb. 136, 93 N. W. 139; Brainard v. Hall, 137 Neb. 491, 289 N. W. 845; Vielehr v. Malone, 158 Neb. 436, 63 N. W. 2d 497.

The theory of the plaintiff on the appeal is that under the terms of the guaranty, as disclosed by the petition, the statutes of Nebraska did not control the limitation of the time within which the action could be commenced but that it was controlled by the limitation contained in the statutes of the State of New York, and that in this light the judgment was erroneous. The plaintiff does not contend that the judgment was erroneous if the right to institute action was controlled by the Nebraska statute of limitations. The limitation of the Nebraska statute is 5 years and the pleaded limitation of the New York statute is 6 years.

The defendants assert in their brief that the statute of New York has not been pleaded sufficiently to permit

of its consideration here, and for that reason the judgment should be affirmed. In the early case of Minneapolis Harvester Works v. Smith, 36 Neb. 616, 54 N. W. 973, this court said: "In pleading the statute of limitations of a foreign state, it is unnecessary to set out in the pleading an exact copy thereof, or to give its title and date of approval. It is sufficient, as against a general demurrer, to allege the substance of the statute relied on." The pleading which was the basis of this pronouncement was the following, which was found to be sufficient as the pleading of a foreign statute: " 'That by the laws of Iowa the statute provides that an action of debt on a promissory note may be commenced within ten years from the time the cause of action accrued.' "

The pleading in the petition in this case of the statute of New York is as follows: "That under the laws of the State of New York, the limitation on contracts, express or implied, is six years." A comparison of this with what was said in Minneapolis Harvester Works v. Smith, *supra*, leads to the conclusion that the statute of New York was sufficiently pleaded.

The question remaining for determination is that of whether or not the allegations of the petition sufficiently state a cause of action requiring application of the statute of limitations of the State of New York. It is to be observed that the petition on its face does not declare the place where the guaranty was made and neither does it declare a place of performance in case performance is called for. The instrument however by its heading indicates that it was executed in Nebraska. As a part thereof appears "Blair, Nebraska Feb. 6, 1950." There is no allegation in the petition which declares that the guaranty or agreement exacts performance or part performance by the defendants anywhere outside the State of Nebraska. Also from other terms contained in the agreement an inescapable inference flows that the agreement and the guaranty became effective with

the signing by the defendants. By these terms it is declared that notice to the defendants of acceptance of the guaranty by the plaintiff was waived. In other words nothing remained to be done after signing to validate and make effective the guaranty.

In the light of this it becomes apparent the last act performed to constitute and make effective the guaranty was done and performed in the State of Nebraska. Accordingly, on the petition the guaranty must be regarded as a Nebraska transaction.

The general rule is stated in 17 C. J. S., Contracts, § 356, p. 813, as follows: "The place where a contract was made is to be determined in accordance with the intention of the parties. As a rule, a contract is considered as entered into at the place where the offer is accepted, or where the last act necessary to a meeting of the minds or to complete the contract is performed."

In Avondale v. Sovereign Camp, W.O.W., 134 Neb. 717, 279 N. W. 355, this court said: "The authorities are to the effect that the state in which the last act of a contract is performed is the situs of the contract." See, also, McElroy v. Metropolitan Life Ins. Co., 84 Neb. 866, 122 N. W. 27, 23 L. R. A. N. S. 968; Young v. Order of United Commercial Travelers, 142 Neb. 566, 7 N. W. 2d 81; Refrigeration & Air Conditioning Institute, Inc. v. Hilyard, 146 Neb. 42, 18 N. W. 2d 548.

In the case here the portion of the general rule relating to intention cannot be resolved in favor of plaintiff since, as indicated, there is nothing in the petition to indicate that there was any intention that the contract should be regarded as having been made at any place other than Nebraska. The guaranty must therefore be regarded as a Nebraska obligation or agreement, and any right of action arising under it arose in the State of Nebraska.

If it be assumed, as the plaintiff has done, that the declaration of the guaranty that the laws of New York shall include the statute of limitations it could avail

the plaintiff nothing in this case. It could have application only if a cause of action arose in one state and the action to enforce it was instituted in another. It could have no application in a case where the state in which the cause of action arose and in which the action to enforce it was the same. As to whether or not a statute of limitations may be treated as a matter of substance in the construction of contractual obligations there is a lack of uniformity of opinion in the reported cases. But few courts of last resort have spoken on the subject. The subject is considered in Annotation, 68 A. L. R. 217, and Annotation, 146 A. L. R. 1356.

This court has not passed upon the subject directly and specifically. The following has been stated in Kindler v. Kindler, 169 Neb. 153, 98 N. W. 2d 881: "The general rule is that a contract valid 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." See, also, 15 C. J. S., Conflict of Laws, § 4, p. 858, § 11, p. 880.

By the petition was pleaded a cause of action based upon a written guaranty entered into in the State of Nebraska seeking in the courts of Nebraska enforcement of an obligation pursuant to an agreement which extended the limitation upon the right to maintain action for recovery beyond the period fixed by the statutes of Nebraska.

The attempt to so extend the right was void. In Miller v. State Ins. Co., 54 Neb. 121, 74 N. W. 416, 69 Am. S. R. 709, this court said: "The statutes of this state provide in what time actions may be brought; and a contract which provides that no action shall be brought thereon, or for a breach thereof, unless within a time therein specified, which is different from the time which the statute fixes for bringing an action on such contract or for a breach thereof, is against public policy

and will not be enforced by the courts of this state." This pronouncement was approved in the following cases: Omaha Fire Ins. Co. v. Drennan, 56 Neb. 623, 77 N. W. 67; Grand View Building Assn. v. Northern Assurance Co., 73 Neb. 149, 102 N. W. 246, affirmed 203 U. S. 106, 27 S. Ct. 27, 51 L. Ed. 109; Williams v. Western Travelers Accident Assn., 97 Neb. 352, 149 N. W. 822; Avondale v. Sovereign Camp, W. O. W., *supra;* Young v. Order of United Commercial Travelers, *supra.*

This rule of course does not apply to a valid contract entered into in a foreign state. The rule in such instance is that where a provision of a contract, valid in a foreign state where the contract was entered into is a bar to recovery, such provision is required to be enforced in this state under the full faith and credit clause of the Constitution of the United States, although such provision is void under the laws of this state. See Young v. Order of United Commercial Travelers, *supra.*

In the light of the observations contained herein it must be said that the petition in this case failed to state a valid cause of action and accordingly the court did not err in sustaining the demurrer and in rendering judgment of dismissal.

The judgment is affirmed.

AFFIRMED.

WENKE, J., not participating.

LEONARD GAMBLE, APPELLEE, V. EDWARD GAMBLE ET AL., APPELLANTS.

108 N. W. 2d 92

Filed March 10, 1961. No. 34903.

1. **Master and Servant. In the absence of any statutory regulation of the subject, where a servant continues work with knowledge, actual or constructive, of dangers to which an ordinarily prudent man would refuse to subject himself, he is guilty of contributory negligence, particularly where he has created the danger.**

2. ———. Where an employee, capable of understanding and discretion, fails to exercise ordinary care and prudence to avoid defects and dangers which are open and obvious, he will ordinarily be deemed to have assumed the risk, and no liability attaches to the employer.

3. ———. A servant cannot undertake the performance of a service where the danger is so obvious that injury could be anticipated, even in obedience to the command of the master, and then maintain a cause of action for injuries sustained. The servant will be deemed to have assumed the risk.

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

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

Sam S. Diedrichs, for appellee.

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

CARTER, J.

Plaintiff brought this action against the defendants to recover damages for personal injuries sustained when plaintiff's horse slipped and fell on him while he was engaged in rounding up cattle as an employee of defendants. The jury returned a verdict for the plaintiff and a judgment was rendered thereon. The defendants have appealed.

On January 18, 1957, plaintiff, Leonard Gamble, was employed as a ranch hand by his two uncles, the defendants Edward and Henry Gamble. We shall hereafter refer to the parties by their given names. The evidence shows that Leonard had worked for Edward and Henry for 18 months before the accident occurred which resulted in this litigation. Leonard was 23 years of age and experienced in caring for and handling cattle, including the use of a horse in moving them. Leonard had been raised in the neighborhood and was familiar

with the terrain of the Gamble ranch, including the school section on which the accident happened.

On the morning of January 18, 1957, Edward informed Leonard and Lane Dikeman, another ranch hand, that the three of them would move the steers on the school section to the home place because of his fear of a storm. It was a clear, sunny day. There was some snow and ice on the ground. There had been some thawing which resulted in slippery spots that made it more dangerous than usual in riding a horse. When told that they were to move the cattle Leonard said: "Don't you think it is awful slick to go there?" Edward replied: "We got to get them out that morning." Later Leonard told Edward it was getting "awful slick" and he didn't think they should get the cattle that day. Leonard testified that Edward said: "Well, you know what you can do." Leonard testified that he construed the latter statement to mean that he must help get the cattle or quit his job. In view of the verdict for plaintiff we accept Leonard's version of these conversations under the familiar rule that on appeal from a judgment rendered on a jury verdict the evidence will be considered in the light most favorable to the successful party.

The evidence shows that Leonard went to his own home for lunch, saddled his own horse which was not shod, met Edward and Dikeman at a designated point, and they proceeded to the school section. The evidence shows that the school section had a very rough terrain. It consisted of numerous ridges and canyons which, particularly in the south half of the section, were dangerous for a horseman because of the steepness of the canyon banks. After entering the pasture Edward directed Leonard to round up the cattle in the south part of the section, saying that he and Dikeman would work the north part.

Leonard thereupon proceeded south, riding the crest of a ridge until he came to one of the few places where

he could descend to the canyon floor with a horse. He rode down the slope from the ridge until the path led him to the steep canyon bank where the descent was usually made. Leonard estimated that the steep portion of the canyon bank was about 15 feet high and that the path at this point was quite steep for a horse to negotiate in getting to the bottom of the canyon. He observed that there was some snow and ice on the path and there had been some thawing, which made the path very slick in spots. He testified that due to the dangerous condition of the path he decided to dismount and lead the horse to the bottom of the canyon. While he was dismounting for this purpose the horse slipped and fell on him, causing very serious injuries. It is for the injuries thus sustained that the instant case was brought.

It is the contention of the plaintiff that it was negligence on the part of defendants to direct or order plaintiff to round up cattle in this canyon pasture when the surface of the ground was slick, as we have hereinbefore described. The defendants deny that the facts establish any negligence on their part and assert that in any event plaintiff assumed the risk of the danger of which he had complete knowledge.

"As a general rule it is the duty of a servant to take such precautions against known or apparent dangers arising from defective or dangerous machinery, appliances, tools, or places as an ordinarily prudent man would take under the same or similar circumstances, especially where the servant is in control of the cause or subject of danger." 56 C. J. S., Master and Servant, § 454, p. 1283.

This rule has been applied in this jurisdiction. In Lownes v. Furman, 161 Neb. 57, 71 N. W. 2d 661, a case similar in principle in which an employee, with knowledge of a defective door-covering to a moving blower on a feed grinder, attempted to close the door-covering without shutting off the power, which resulted in the

loss of the ends of his fingers, this court said: "We think appellant, being fully aware the machine was operating while he attempted the makeshift plan for keeping the door closed, assumed all risk resulting therefrom and, in addition thereto, was contributorily negligent as a matter of law, in a degree sufficient to defeat any right to recover that he might otherwise have had, by permitting his fingers to extend into the blower casing while the machine was operating."

In the foregoing case we cited with approval the rules announced in Ring v. Kruse, 158 Neb. 1, 62 N. W. 2d 279, as follows: "In the absence of any statutory regulation of the subject, where a servant continues work with knowledge, actual or constructive, of dangers which an ordinarily prudent man would refuse to subject himself to, he is guilty of contributory negligence, particularly where he has created the danger.

"As a general rule, where the servant has actual knowledge of the dangers to which the service exposes him or where the defects or dangers are so patent and obvious that in the exercise of ordinary care, in the performance of the services for which he was employed, he should have known of their existence, he assumes the risk of injury incident thereto."

It is urged that the rule is different where the master directs or orders the performance of the work. In Ittner Brick Co. v. Killian, 67 Neb. 589, 93 N. W. 951, the rule is stated as follows: "A servant can not undertake the performance of a service, even in obedience to the command of the master, where the danger is so obvious that injury would be inevitable, and if he does so, he will be held guilty of contributory negligence."

It is the rule in this state that where the master orders a servant into a place of apparent danger, or where the mode of doing the work is dangerous and apparent to a person of capacity and knowledge of the subject, and the servant is injured, the servant is guilty of negligence sufficient to bar a recovery. This is on the basis

that an employee who is capable of understanding and discretion and who fails to exercise ordinary care and prudence to avoid defects and dangers which are open and obvious, is chargeable with negligence or contributory negligence in such a degree as to bar a recovery. Anderson v. Evans, 164 Neb. 599, 83 N. W. 2d 59; Ring v. Kruse, *supra*. In such cases an employee will ordinarily be deemed to have assumed the risk of danger. Groat v. Clausen, 139 Neb. 689, 298 N. W. 563; Corley v. Hubbard, 129 Neb. 38, 260 N. W. 551.

Plaintiff relies on Sioux City & P. R. R. Co. v. Finlayson, 16 Neb. 578, 20 N. W. 860, 49 Am. R. 724; Lee v. Smart, 45 Neb. 318, 63 N. W. 940; Dehning v. Detroit Bridge & Iron Works, 46 Neb. 556, 65 N. W. 186, and other cases of similar import. These cases are grounded on an exception to the general rule and have no application to the case at bar.

Under the foregoing rules the plaintiff assumed the risk of the dangers that were obvious and admittedly known to him. The trial court was clearly in error in not directing a verdict in favor of the defendants. The judgment is reversed and the cause remanded to the district court with directions to dismiss plaintiff's petition.

REVERSED AND REMANDED WITH DIRECTIONS.

WENKE, J., not participating.

STATE OF NEBRASKA, APPELLEE, V. DONALD NOLL, APPELLANT.

108 N. W. 2d 108

Filed March 10, 1961. No. 34918.

1. **Statutes.** In general, the word "may" used in statutes will be given ordinary meaning unless it would manifestly defeat the object of the statutes, and when used in a statute is permissive, discretionary, and not mandatory.
2. ———. In defining the term "discretion" when invoked as a

guide to judicial action, it means a discretion exercised not arbitrarily or willfully, but with regard to what is right and equitable under the circumstances and the law, and directed by the reason and conscience of the judge to a just result.

3. **Health: Statutes.** The Sexual Psychopath Act was intended to permit the removal of a sexual psychopath from society until he is cured or is no longer a menace to the safety of others.
4. ———: ———. The Sexual Psychopath Act is not intended as a legal bypass whereby a sexual psychopath, after a relatively short stay in a mental institution, could be released to continue as a menace to society.
5. ———: ———. The intent of the Sexual Psychopath Act is to require confinement until such time as the offender is not likely to attack or otherwise inflict injury, loss, pain, or other evil on the objects of his uncontrolled and uncontrollable desires.

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

Robert E. Otte, for appellant.

Clarence A. H. Meyer, Attorney General, and *Dwain L. Jones*, for appellee.

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

SPENCER, J.

This is an action for the release of a sexual psychopath pursuant to the written recommendation of the superintendent of the Lincoln State Hospital.

Appellant, hereinafter called defendant, appeals from an order denying his release. Defendant raises three issues. First, that the statute only gives the court the discretion to release or put him on probation, and that it does not have authority to recommit him. Second, if the court does have discretion to recommit, it abused that discretion. Third, if the hospital superintendent's recommendation for release is not the standard or criteria for release, the statute is unconstitutional.

The facts are as follows: Defendant was adjudged to be a sexual psychopath December 7, 1957, and was committed to the Norfolk State Hospital. He later was

transferred to the Lincoln State Hospital where he is now confined. On January 26, 1960, the superintendent of the Lincoln State Hospital wrote the trial judge as follows: "Donald Noll was committed to the Lincoln State Hospital as a sexual psychopath under your jurisdiction, and received on December 17, 1957. He has been in the hospital continuously since that date. It is the opinion of our psychiatric staff that Mr. Noll has received maximum benefit from his treatment. Therefore, in accordance with Nebraska statute, Section 29-2906, I am recommending that Donald Noll be discharged from the Lincoln State Hospital. Pending approval by your Court, we shall await further orders from you." Thereafter, defendant filed his petition for release. The State answered, and the matter proceeded to trial on July 8, 1960. The trial court, after hearing, ordered defendant returned to the Lincoln State Hospital, not to be discharged until further order of the court. Defendant appeals.

We find that the original petition alleged three acts of exhibitionism on the part of defendant. At the hearing, where he was represented by counsel, defendant, in addition to the acts charged, admitted that on August 15, 1957, he induced a 4½-year-old girl to come into his home in Norfolk. He admitted he took off some of her clothes, and some of his own, and that he put his body against her. This certainly was a serious sexual offense. Defendant further admitted that he was charged in 1952, in Spokane, Washington, with three counts of indecent exposure, and was sentenced to the State Penitentiary at Walla Walla on two of those counts. He was discharged from the penitentiary April 30, 1954.

There is no proof of any nature in the record that defendant has recovered from the condition for which he was committed. There is no proof that he would no longer constitute a danger to society. In fact, the two psychiatrists who testified for defendant agree that

he is still a sexual psychopath within the definition of the statute.

Section 29-2901, R. R. S. 1943, provides in part: "* * * the term sexual psychopath shall mean any person who, by a course of misconduct in sexual matters, has evidenced an utter lack of power to control his sexual impulses and who, as a result, is likely to attack or otherwise inflict injury, loss, pain, or other evil on the objects of his uncontrolled and uncontrollable desires."

One of defendant's psychiatrists, the assistant superintendent of the Lincoln State Hospital, goes so far as to say that if defendant is released, he is of the opinion defendant will resort to his previous sexual psychopath behavior. In this state of the record, the trial court did not abuse its discretion in recommitting defendant, if it had such discretion.

Section 29-2906, R. R. S. 1943, provides as follows: "After commitment of any person found to be a sexual psychopath, such provisions of Chapter 83, article 3, as are not in conflict with the provisions of this section shall be applicable with respect to the care and custody of such sexual psychopath; Provided, that regarding the right of discharge provided by section 83-342, the superintendent of the institution to which commitment is made shall make written recommendation for discharge to the court from which the person was committed. *Such court after considering such recommendation may at its discretion free or release on probation the person committed.*" (Italics supplied.) It is defendant's contention that the trial court must accept the superintendent's recommendation and is limited to one of two alternatives, whether to free defendant or to release him on probation. With this contention we do not agree.

Section 49-802, R. R. S. 1943, which was effective when the Sexual Psychopath Act was adopted, provides in part: "(1) When the word *may* appears, permissive or discretionary action is presumed. When the word *shall*

appears, mandatory or ministerial action is presumed." (Italics supplied.)

We held in Roy v. Bladen School Dist. No. R-31, 165 Neb. 170, 84 N. W. 2d 119: "In general, the word 'may,' used in statutes, will be given ordinary meaning, unless it would manifestly defeat the object of the statutes, and when used in a statute is permissive, discretionary, and not mandatory."

It is to be noted that section 29-2906, R. R. S. 1943, incorporates into the Sexual Psychopath Act such provisions of Chapter 83, article 3, R. R. S. 1943, covering the care, custody, and release of mentally ill as are not in conflict with specific provisions of the Sexual Psychopath Act. It is apparent that the Legislature intended by the specific reference to the right of discharge provided by section 83-342, R. R. S. 1943, to deprive the authorities at a state hospital of any right to discharge sexual psychopaths who had not been cured. It clearly limits their sole authority to the making of a recommendation which would be considered by the committing court. We find that it is the obvious intent of the entire act to place the right of discharge entirely with the court. We hold that the court, if it concurs in the recommendation of the superintendent, may free a sexual psychopath or release him on probation. If, however, it does not concur, he should be retained in the institution. Such discretion is not to be exercised at the arbitrary whim of the judge, but is for the purpose of giving effect to the intention of the Legislature and the spirit of the act. Its exercise must be in furtherance of justice, governed by sound principles and just reason, to be determined by the facts and circumstances of the case.

In Pettegrew v. Pettegrew, 128 Neb. 783, 260 N. W. 287, defining the term "discretion," we said: " 'When invoked as a guide to judicial action it means a sound discretion, that is to say, a discretion exercised not arbitrarily or wilfully, but with regard to what is right and equitable under the circumstances and the law,

and directed by the reason and conscience of the judge to a just result.' "

It is very evident that the Sexual Psychopath Act was intended to permit the removal of a sexual psychopath from society until he is cured or is no longer a menace to the safety of others. This act was not intended as a legal bypass whereby a sexual psychopath, after a relatively short stay in a mental institution, could be released to continue to be a hazard to society. The obvious intent of the act is to require his confinement until such time as he is not "likely to attack or otherwise inflict injury, loss, pain, or other evil on the objects of his uncontrolled and uncontrollable desires."

Most states have enacted sexual psychopath acts in some form. They differ materially. Yet, in all of them, the primary purpose, the one mentioned first, is the protection of society. Their secondary purpose, the one always mentioned last, is the treatment of the person committed and his protection. In re Craft, 99 N. H. 287, 109 A. 2d 853; People v. Willey, 128 Cal. App. 2d 148, 275 P. 2d 522.

Defendant admits that the procedure for commitment provided by the Sexual Psychopath Act is constitutional. He contends, however, that the act does not provide proper criteria for the release of sexual psychopaths, and for that reason defendant is deprived of due process of law.

Due process of law is a vague concept. In Solesbee v. Balkcom, 339 U. S. 9, 70 S. Ct. 457, 94 L. Ed. 604, the dissenting opinion has the following language: "It is now the settled doctrine of this Court that the Due Process Clause embodies a system of rights based on moral principles so deeply embedded in the traditions and feelings of our people as to be deemed fundamental to a civilized society as conceived by our whole history. Due process is that which comports with the deepest notions of what is fair and right and just. The more fundamental the beliefs are the less likely they are to

be explicitly stated. But respect for them is of the very essence of the Due Process Clause. In enforcing them this Court does not translate personal views into constitutional limitations. In applying such a large untechnical concept as 'due process,' the Court enforces those permanent and pervasive feelings of our society as to which there is compelling evidence of the kind relevant to judgments on social institutions."

We do not agree with defendant that no standards are found for the release of persons committed as sexual psychopaths. Definite standards do exist and are incorporated into the act. As noted above, the provisions of Chapter 83, article 3, R. R. S. 1943, are incorporated into the Sexual Psychopath Act. Section 83-340, R. R. S. 1943, provides that any patient who is cured shall be immediately discharged. Section 83-342, R. R. S. 1943, provides a method for the release of dangerous patients who are not cured, but puts the discretion in the court to determine whether such person may safely be released. Section 83-343, R. R. S. 1943, provides that the writ of habeas corpus shall be available to any person confined in a state hospital and that the decision of the judge shall not bar the issuance of a writ a second time whenever it shall be alleged that the person confined has been cured.

It is obvious that the Legislature in the Sexual Psychopath Act attempted to achieve two principal objectives. The first was the protection of society through the removal of the offender who cannot refrain from certain acts of behavior. The second was his treatment leading to his restoration to society as a healthy contributing member. In this respect, the act is in perfect harmony with the basic objectives of our legal system.

It is also obvious that the Legislature had in mind that the type of conduct covered by the Sexual Psychopath Act was not the same as that which might be displayed by a person who was mentally ill. The Legislature has very properly seen fit to vest discretionary

power in the court for the release of committed sexual psychopaths. There are ample standards available for testing the soundness of such discretion upon appeal. There is no denial of due process.

We find the trial court did not abuse its discretion and properly recommitted defendant to the Lincoln State Hospital. The judgment of the trial court is affirmed.

AFFIRMED.

WENKE, J., not participating.

GLORIA RUTH IVINS, APPELLANT AND CROSS-APPELLEE, V. JAMES RUSH IVINS, APPELLEE AND CROSS-APPELLANT.
108 N. W. 2d 99

Filed March 17, 1961. No. 34869.

1. **Pleading: Trial.** Where a party answers after an adverse ruling on his motion or demurrer, and goes to trial on the merits of an issue he has elected to join, he waives the error, if any, in the ruling.
2. **Divorce: Appeal and Error.** On appeal in an action for divorce the cause is tried de novo in this court.
3. **Divorce.** A general rule in the determination of whether or not a ground for divorce has been established is that acts asserted as grounds for divorce must be corroborated.
4. ———. There is no rule whereby to measure the amount of corroboration required but each case must be decided upon its own facts and circumstances.
5. ———. The charge of adultery must be clearly established by competent testimony before a decree of divorce may be granted on that ground.
6. ———. In an action for divorce on the ground of adultery it is not necessary to show an overt act of adultery but before it may be said that the charge has been proved the evidence of facts and circumstances must be such as to lead the mind of a just and reasonable person to the conclusion of guilt.
7. **Divorce: Evidence.** The testimony of an alleged paramour that he had adulterous relations with a wife whose husband is seeking a divorce on the ground of adultery should be received with caution and carefully scrutinized.
8. **Divorce: Appeal and Error.** A divorce case is tried de novo in

this court under the rule that where the evidence is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court saw and heard the witnesses and accepted one version of the facts rather than the other.

9. **Divorce: Parent and Child.** In a divorce case where the custody of minor children is involved the rule is that the custody of the children is to be determined by their best interests, with due regard for the superior rights of fit, proper, and suitable parents.

10. ———: ———. In awarding the custody of minor children of tender years the best interests of the children usually require that they be given into the care and custody of the mother if she is a suitable and fit person.

11. **Divorce.** The fact that a decree of divorce may be granted to a husband on grounds other than adultery does not bar the wife from the right to alimony and division of property.

12. ———. In determining the question of alimony or division of property as between the parties the court will consider the respective ages of the parties to the marriage; their earning ability; the duration of the marriage; the conduct of each party during the marriage; their station in life, including the social standing, comforts, and luxuries of life which the wife would probably have enjoyed; the circumstances and necessities of each; their health and physical condition; and their financial circumstances as shown by the property they owned at the time of divorce, its value at that time, its income-producing capacity, if any, whether accumulated or acquired before or after the marriage, the manner in which it was acquired, and the contributions each has made thereto. From these elements and all other relevant facts and circumstances, the court will determine the rights of the parties and make an award that is equitable and just.

APPEAL from the district court for Dawes County: RICHARD M. VAN STEENBERG, JUDGE. *Affirmed in part, and in part reversed and remanded with directions.*

William A. Stewart and *Bevin B. Bump,* for appellant.

W. E. Mumby and *Stubbs & Metz,* for appellee.

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

YEAGER, J.

This is an action for divorce instituted by Gloria Ruth

Ivins, plaintiff and appellant, against James Rush Ivins, defendant and appellee. A trial was had to the court after which a decree was rendered granting a divorce to the defendant. Also custody of the two children of the parties was granted to the defendant. An attorney's fee, in addition to a previous fee of $400, was allowed to the plaintiff in the amount of $750. Also the plaintiff was awarded an automobile and a judgment in the amount of $145. Motion for new trial was duly filed by plaintiff. This motion was overruled. From that portion of the decree granting a divorce and custody of the children to the defendant the plaintiff has appealed. The defendant asserts in his brief that the appeal was taken from the order overruling the motion for new trial only, and not from the decree. This is an erroneous statement. The notice of appeal states that the appeal is "from the decision rendered herein, and from the order overruling the motion for new trial." From the portion allowing a fee for the attorney for plaintiff a cross-appeal has been taken by the defendant.

The plaintiff has set forth numerous assignments of error as grounds for reversal, but from the record it appears that but one question is presented for determination. The question is that of whether or not on the evidence contained in the record, and applicable law, the decree rendered has been sustained.

The other assignments relate to interim procedural rulings which have not come to this court in such manner as to permit of their review.

After these rulings were made the plaintiff, without reservation, answered over and the case was tried on its merits. This amounted to a waiver of objection to the rulings previously made. The controlling principle is the following: "Where a party answers after an adverse ruling on his motion or demurrer, and goes to trial on the merits of an issue he has elected to join, he waives

error, if any, in such ruling." Dinkel v. Hagedorn, 156 Neb. 419, 56 N. W. 2d 464.

It is urged that the court erred in rulings on objections to the testimony of Harley E. McWilliams which came into the record by deposition taken in California. Testimony of this witness is quoted in the statement of the case in the brief, however it is not pointed out in the argument what part or parts are claimed to be improper. This of course must be disregarded.

By the petition filed herein the plaintiff alleged, to the extent necessary to state here, that the parties were married on June 15, 1947; that the parties were residents of Crawford, Dawes County, Nebraska; that two sons were born of the marriage, one, Orville Rush Ivins, on February 10, 1950, and the other, James Joel Ivins, on August 5, 1952; and that the defendant had been guilty of extreme cruelty which amounted to grounds for divorce from the defendant. By the prayer of the petition she asked for a divorce, custody of the children, temporary and permanent alimony, support for the children, and costs of suit.

A detailed statement of the charges of cruelty against the defendant is not required here since on this appeal the question of the propriety of the denial of a decree of divorce to plaintiff is not presented. The question of whether or not a decree of divorce should have been granted to the defendant with custody of the children is the basic one here for consideration.

The defendant filed an answer to the petition in which, to the extent necessary to state here, he denied the charges of cruelty made against him by the plaintiff.

In addition to the answer he filed a cross-petition on the basis of which he prayed for a divorce, custody of the children, and that the plaintiff be denied alimony and attorney's fees. By the third paragraph of the cross-petition he charged that the plaintiff had been guilty of extreme cruelty toward him which entitled him to a divorce. The charges in this respect were in per-

tinent substance as follows: That plaintiff was guilty of extreme cruelty in that for several years she exhibited an abnormal tendency to be unduly familiar with other men; that she accompanied other men on secret trips in and around Crawford, Nebraska; that she accepted the attention of various men in the home of the parties during the absence of the defendant and at other places to the extent that her conduct in this respect has become a matter of common knowledge and repute; and that she has willfully failed and refused so to conduct herself as to promote a happy family life, all of which have destroyed the ends and objects of matrimony.

By the fourth paragraph of the cross-petition he charged that he had been informed and verily believed that plaintiff, during the past several years, had committed adultery with several men. The name of no man was set forth.

The plaintiff by appropriate pleading denied the allegations of cruelty and of adultery. In addition she pleaded that if she had been guilty of extreme cruelty it had been condoned.

Before proceeding to consider the evidence relating to the charges of cruelty made against the plaintiff, it is pointed out that any contention made that the charges, if proved, were condoned is on the record baseless. This is so because the record without controversy makes it clear that the defendant had no knowledge of any of the misdeeds charged against her until after the separation of the parties and the commencement of this action. It is also made clear by all witnesses including the defendant that the plaintiff took good care of the children and treated them properly and that it was not until after the action was instituted that the defendant concluded that she was not a proper person to be entrusted with their custody and control. As to this there is likewise no controversy.

To sustain the charges made against the plaintiff eight

witnesses were called by the defendant besides the defendant himself. Two of these gave no information of significance at all. They were John Kurtz and Gordon Moody.

One William Hudson testified that while in attendance at an affair at Crawford he and plaintiff sat in an automobile and engaged in what might be called an amorous interchange, but that no adulterous act was involved. This was admitted by plaintiff but she denied that she made any advances. His version was to the contrary. There were no witnesses to the incident.

Harold Hunt testified that one evening the plaintiff was sitting in her automobile when one Loy Pierce came along in another automobile. She sounded her automobile horn and drove away. His assumption was that she followed Pierce away.

Hope Reece testified that she saw Loy Pierce at the Ivins home many times, sometimes as often as three times a week. She said that on some of the occasions the defendant was also there.

Harold Glendy testified that on an occasion in 1955 at night when he and three other persons were returning home he observed a parked automobile which he passed. He identified two persons in the parked automobile as the plaintiff and Harley E. McWilliams. He said he saw the two rise up in the front seat. None of the other occupants of his automobile gave testimony on the trial.

On September 29, 1959, the deposition of Harley E. McWilliams was taken in Los Angeles, California. It was read in evidence at the trial. He lived in Crawford, Nebraska, and had known the parties to this case from 1946 to 1958. He had visited in their home and visited and associated with them socially. He testified that on occasions there was kissing and fondling between him and the plaintiff which extended over a period of between 1 and 2 years. His testimony indicates that he was the person in the automobile with plaintiff in

the incident described by Harold Glendy. He testified that on one occasion he went to the home of the plaintiff between 10 p.m. and midnight where he remained for several hours. He said that so far as he knew the Ivins children were in bed upstairs. He said that on that occasion, and on no other occasion, he had sexual intercourse with the plaintiff. He did not even approximately know the date. He said that as near as he could tell it was in the fall of 1956, in "their living room, or den, wherever they had a fire place." He gave no information the effect of which was to confirm his statement and none which could lead to the discovery of incidental facts the effect of which could lead to either confirmation or denial. Insofar as the record here is concerned the witness never disclosed this information to anyone until he disclosed it to the defendant when he called to see McWilliams in California in the summer of 1959.

The remaining witness is Lillie Sikorski, a married woman, who had lived in Crawford for 12 years. She came to the United States from Germany in 1947. She was married to Ralph Sikorski, a rancher, after coming to this country. At the time of the trial she was 53 years of age. She had been twice married and divorced before coming to this country. She became acquainted with the parties about 7 years before the trial. The homes of the two families were directly across the street from each other. For 5 years she cleaned house and did what is known as babysitting for the plaintiff and was often in the Ivins home. According to her testimony during all the time she was a close friend and confidant of the plaintiff. She also testified to certain incidents of social association away from the home. Without going into detail, she gave testimony of a number of amorous incidents between the plaintiff and Harley E. McWilliams and plaintiff and Loy Pierce. She also testified as to incidents whereby by telephone calls made by her and by the older son of the Ivins contacts

were arranged between the plaintiff and these men. She also testified to incidents when the plaintiff was alone with these men. She never however testified to any act or circumstance from which an inference could flow that an adulterous act had been committed as distinguished from mere opportunity. She gave much evidence such as has been characterized here but no good purpose would be served by setting forth its details herein. What has been reviewed, it is considered, sufficiently presents the basis for determination first of the question of whether or not the court erred in granting a decree on the ground of adultery, and if it did, whether or not on hearing de novo in this court a divorce should be granted to defendant on the ground of cruelty.

The rule as to the character of the hearing to be had here is that on appeal to this court in a divorce action the cause is tried de novo. See, Pestel v. Pestel, 158 Neb. 611, 64 N. W. 2d 299; Birth v. Birth, 165 Neb. 11, 84 N. W. 2d 204.

A general rule in the determination of whether or not a ground for divorce has been established is that acts asserted as grounds for divorce must be corroborated. Nuss v. Nuss, 148 Neb. 417, 27 N. W. 2d 624; Pestel v. Pestel, *supra;* Smith v. Smith, 160 Neb. 120, 69 N. W. 2d 321; Workman v. Workman, 164 Neb. 642, 83 N. W. 2d 368; O'Neill v. O'Neill, 164 Neb. 674, 83 N. W. 2d 92, 66 A. L. R. 2d 875; Goodman v. Goodman, 168 Neb. 841, 97 N. W. 2d 336.

Adultery, which is a ground for divorce, is a criminal offense the penalty for which is imprisonment in the county jail not exceeding 1 year. In the statutes as applied to a married woman it is defined as follows: "If (1) any married woman shall hereafter commit adultery, or desert her husband and live and cohabit with another man, * * * every person so offending shall upon conviction thereof be imprisoned in the county jail not exceeding one year." § 28-902, R. R. S. 1943.

It requires no citation of authority to say that before

one so charged criminally could be convicted of the offense the evidence would have to be sufficient to prove guilt beyond a reasonable doubt.

It is true that it has not been said that this same degree of proof is required where adultery has been charged as a ground for divorce. It has already been pointed out however that proof of an alleged ground of divorce must be corroborated. The cases already cited make it clear that the rule applies where the alleged ground is adultery. There is however no rule whereby to measure the amount of corroboration required but each case must be decided upon its own facts and circumstances. See, Peterson v. Peterson, 153 Neb. 727, 46 N. W. 2d 126; Spray v. Spray, 156 Neb. 774, 57 N. W. 2d 926; Roberts v. Roberts, 157 Neb. 163, 59 N. W. 2d 175; Sewell v. Sewell, 160 Neb. 173, 69 N. W. 2d 549.

The general rule as to the weight of evidence necessary to sustain a charge of adultery as a ground for divorce was stated as follows in James v. James, 29 Neb. 533, 45 N. W. 777: "The charge of adultery is a serious one, and it should be clearly established by competent testimony before a decree of divorce should be granted on that ground." See, also, Sewell v. Sewell, *supra*.

It is true that it is not necessary to show an overt act of adultery but the charge of adultery must be proved by evidence of such circumstances as will lead the mind of a just and reasonable person to the conclusion of guilt. Stackhouse v. Stackhouse, 88 Neb. 184, 129 N. W. 257; Cook v. Cook, 141 Neb. 294, 3 N. W. 2d 450.

The question of whether or not the plaintiff has been proved guilty of adultery by the weight of evidence exacted by these rules must depend for the most part by reference to the testimony of McWilliams and Sikorski, particularly as to content and credibility.

McWilliams testified to a single act. In this he said he participated. There was no fact or circumstance testified to by him which pointed to any other fact or

circumstance which could be regarded as corroboration. His testimony was so unrelated to any testimony of others as to time or incidents that the testimony of others could not be regarded as corroboration of his testimony. In addition to this, as he was the person who claims to have participated with the plaintiff in the act, his testimony was subject to caution and careful scrutiny.

This court said in Sewell v. Sewell, *supra:* "The voluntary testimony of an alleged paramour that he had intimate relations with a wife whose husband is seeking a divorce on the ground of adultery should be received with caution and carefully scrutinized." In the opinion in that case is contained a characterization of a man, and an appropriate attitude to be taken toward his testimony, who testifies that he has been guilty of conduct like that claimed by McWilliams in this case. That characterization will not be repeated here, but no reason becomes apparent why it should not be applicable to McWilliams.

In the light of these observations as to this testimony and the controlling legal rules it may not well be said that the charge of adultery with McWilliams has been sustained. It was in no wise corroborated.

Coming now to the testimony of the witness Sikorski, it is quite true that she testified, truthfully or falsely, to numerous incidents of indiscretion covering a period of years on the part of the plaintiff which were not comportable with a proper attitude toward harmony in her marriage relation. Her testimony however at no point referred to any act or condition or physical appearance of anything which was in proof of the commission of an act or acts of adultery as distinguished from suspicion. In addition to the things which she said that she observed she testified that on one occasion the plaintiff told her that she was afraid that she was pregnant by a man not her husband. All of the matters reflecting adversely upon the plaintiff were denied by her.

This witness breathed no word of all of this that she

claims as true to the defendant. She, according to her testimony, was a conspirator with plaintiff to bring about claimed indiscreet contacts of plaintiff with named men. She gave no information to anyone except to her husband. Whether she informed her husband before or after the commencement of this action is not made clear, but it is clear that it was not communicated to the defendant until after the action was commenced. The reason for the change of allegiance has not been made apparent by the record. Expediency is hinted in this instance as well as in the case of McWilliams, but there is nothing in the record to justify a safe conclusion that this was true. The very fact however that there was such a radical change of attitude of friendly allegiance must necessarily cast a cloud upon the veracity of the testimony given on the trial in this case.

The conclusion reached is that there has been a failure of sufficient proof to sustain the charge of adultery contained in the cross-petition. There is a failure of substantial corroboration of this charge.

As already pointed out an action for divorce is triable de novo in this court. Without restating what has already been said about the evidence relating to the conduct of the plaintiff and without elaborating thereon it may be said that if the trial court believed the testimony of the witnesses for the defendant it could have found that the plaintiff had been guilty of extreme cruelty which was sufficient to destroy the existing marriage relationship between the parties. It could have likewise found that there had been corroboration. It is obvious that the court did so believe.

Having heard the witnesses' testimony and having observed their demeanor it had the right to believe them. In Pestel v. Pestel, *supra,* this court said: "A divorce case is tried de novo in this court, under the rule that where the evidence is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court saw and

heard the witnesses and accepted one version of the facts over the other." See, also, Wakefield v. Wakefield, 157 Neb. 611, 61 N. W. 2d 208; Schlueter v. Schlueter, 158 Neb. 233, 62 N. W. 2d 871.

The conclusion reached therefore is that on the record presented a decree of divorce should be granted to the defendant from the plaintiff on the ground of extreme cruelty.

As to the custody of children this court in Gorsuch v. Gorsuch, on motion for rehearing, 143 Neb. 578, 11 N. W. 2d 456, said: "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."

In application of the foregoing rule this court said in Speck v. Speck, 164 Neb. 506, 82 N. W. 2d 540: "In awarding the custody of minor children of tender years under the foregoing rule, the best interests of the children usually require that they be given into the care and custody of the mother if she is a suitable and fit person." See, also, Bath v. Bath, 150 Neb. 591, 35 N. W. 2d 509; Lichtenberg v. Lichtenberg, 154 Neb. 278, 47 N. W. 2d 575; Cowan v. Cowan, 160 Neb. 74, 69 N. W. 2d 300.

The evidence in this record stands undisputed, even by the defendant himself, that the plaintiff was regarded as a fit and proper person to have charge of and the care of the children of the parties at all times prior to the commencement of the action for divorce. Also there is an absence of evidence that thereafter she was guilty of any conduct which would render her unfit. The charge of unfitness made by the defendant was based solely on claimed information secured after the commencement of the divorce action. While it is of no controlling significance the children, as the record indicates, were by mutual agreement allowed to remain

with the plaintiff during the pendency of the case in the district court.

In the light of the disclosed facts and the controlling legal principles it appears that the custody of the children should be awarded to the plaintiff subject of course to the further order of the court if conditions should change.

Reasonably there should be an award to plaintiff for the support and maintenance of the children and also an award to plaintiff as alimony and division of property. The fact that a decree of divorce may be granted to a husband on grounds other than adultery does not bar the wife from the right to alimony and division of property. See, § 42-318, R. R. S. 1943; Phillips v. Phillips, 135 Neb. 313, 281 N. W. 22; Malone v. Malone, 163 Neb. 517, 80 N. W. 2d 294. The fixing of the amount of alimony rests, in each case, within the sound discretion of the court. See Holmes v. Holmes, 152 Neb. 556, 41 N. W. 2d 919.

This court said in Kinch v. Kinch, 168 Neb. 110, 95 N. W. 2d 319: "In determining the question of alimony or division of property as between the parties the court will consider the respective ages of the parties to the marriage; their earning ability; the duration of the marriage; the conduct of each party during the marriage; their station in life, including the social standing, comforts, and luxuries of life which the wife would probably have enjoyed; the circumstances and necessities of each; their health and physical condition; and their financial circumstances as shown by the property they owned at the time of divorce, its value at that time, its income-producing capacity, if any, whether accumulated or acquired before or after the marriage, the manner in which it was acquired, and the contributions each has made thereto. From these elements and all other relevant facts and circumstances, the court will determine the rights of the parties and make an award that is equitable and just."

Facts not disclosed by the record make difficult the solution of the problem of what would be a proper award of alimony and division of property and of support for the children. There is information as to the value of the property of the defendant but there is nothing authentic as to how or when it was accumulated.

An appraisal appearing in the record discloses that the value of the property at the time of trial was $164,725. Other information discloses that in 1957 he had salaries and bonuses amounting to $10,560. In 1958 his salaries were $11,300 and in 1959 they were $13,800. Also it is disclosed that in 1958 he received as bonuses and dividends $4,260 and in 1959, $13,065 from like sources.

It appears from this that as a minimum, even though it should be true that none of the property was accumulated during the married life of the parties, in view of the award of custody of the children to the plaintiff, the plaintiff should receive as alimony and distribution of property, $25,000. It also appears that an award for child support should be made in the amount of $300 a month until the older child shall attain his majority and then continue in the amount of $150 a month until the younger shall attain his majority. This award of child support should of course be subject to the further order of the court in the event of changed conditions.

Since by this opinion the decree on the ground of adultery is not being allowed to stand the award of an attorney's fee by the district court for plaintiff's attorney was not improper. There is nothing to indicate that under the circumstances it was excessive. The cross-appeal in relation thereto may not be sustained.

The decree granting the defendant a divorce on the ground of adultery and awarding him the custody of the children is reversed. That portion of the decree awarding the plaintiff the automobile, $145, and the attorney's fee of $750 is affirmed. This attorney's fee of $750 was in addition to a temporary fee which was allowed. The allowance of the temporary fee is also

affirmed. The cause is remanded to the district court with directions to render decree granting the defendant a divorce on the ground of extreme cruelty; awarding the custody of the children of the parties to the plaintiff; and requiring the defendant to pay to her for their support and maintenance $300 a month until the older shall attain his majority, and thereafter $150 a month until the other shall attain his majority, subject to the further order of the court. As to custody the defendant shall have the right to visit the children at all reasonable times and the defendant shall have the right to have the children visit and be with him over reasonable periods of time when it will not interfere with their education. If agreement may not be reached in this matter either party may submit the matter for determination to the district court. It shall be adjudged that the defendant pay to plaintiff as alimony and division of property $25,000, of which $5,000 shall be due and payable on issuance of mandate herein, and the balance shall become payable in the amount of $5,000 annually thereafter until the total amount shall have been paid. The plaintiff is awarded for the services of her attorney in this court a fee in the amount of $750.

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

WENKE, J., not participating.

JOHN H. FREY, APPELLANT AND CROSS-APPELLEE, V. ALBERT P. HAUKE, APPELLEE AND CROSS-APPELLANT.

108 N. W. 2d 228

Filed March 17, 1961. No. 34873.

1. **Judgments.** When a question of fact is once determined on its merits, that question is settled so far as the litigants are concerned and it may not be relitigated between the same parties.
2. **Partnership.** The burden of proof is upon the plaintiff to prove

an oral contract of partnership for a fixed term by clear, satisfactory, and unequivocal evidence.

3. ———. The fact that a partnership incurred debts and charged its assets for their payment is no proof of an agreement that the partnership shall continue until its debts are paid, for those debts may be paid as well after as before dissolution.
4. ———. A managing partner who acquiesces in the matter of the depreciation relating to the partnership business as set up by an accountant is in no position to complain about such depreciation.
5. ———. If a partner claiming an interest in the profits earned after the dissolution of the partnership has no interest in the assets or capital of the partnership after dissolution, he is not entitled to share in the profits earned.
6. ———. The good will of a partnership consists of every possible advantage acquired by it in carrying on its business.
7. ———. The chief elements of value in partnership good will are continuity of name, place, and organization.
8. **Appeal and Error.** Actions in equity, on appeal to this court, are triable de novo, subject, however, to the rule that when evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have adopted one version of the facts rather than the opposite.

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

Wright & Simmons, James R. Hancock, and *Robert M. Harris,* for appellant.

Lyman & Winner and *Stubbs & Metz,* for appellee.

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

MESSMORE, J.

This is an action in equity brought by John H. Frey as plaintiff in the district court for Scotts Bluff County, against Albert P. Hauke, defendant, for an accounting between the respective parties as partners, and for damages for the breach of a partnership agreement entered into by them.

We set forth certain findings of the trial court perti-

nent to this appeal: The decision in the case of Hauke v. Frey, 167 Neb. 398, 93 N. W. 2d 183, was the law in this action, and the statement appearing therein, as follows: "* * * indicated a partnership which was to continue until plans could be worked out and a corporation organized to take its place" was binding upon the trial court; that a partnership for a definite term or particular undertaking as described in paragraph 1 (b) of section 67-331, R. R. S. 1943, existed between the parties prior to March 14, 1957; that the partnership was not a partnership at will at the time of its commencement; that the partnership became a partnership at will on March 14, 1957, by reason of a writing designated exhibit No. 25; that the partnership being a partnership at will on March 19, 1957, the defendant had a right to terminate the same, and plaintiff was not entitled to damages for the wrongful termination thereof; that the depreciation figure used in the accounting procedure of the firm's accountant was proper; that prior to the dissolution of the partnership the profits of the same were $5,722.92, one-half of which or $2,861.46, was awarded to the plaintiff; that the good will of the partnership at the time of dissolution was valued at $10,000, one-half of which or $5,000 was awarded to the plaintiff; that the income and expense statements prepared by the accountant for the partnership, shown by exhibits, accurately represented the income and expense of the partnership from September 1, 1956, through March 31, 1957; that the obligation of the plaintiff on the conditional sales contract should thereafter be defendant's separate obligation and plaintiff held harmless from this and all other obligations of the partnership; that the plaintiff drew no salary for that part of March 1957 prior to March 19, 1957, and was entitled to 19/31 of $425, or $260.49 for the period from March 1 to March 19, 1957; and that the plaintiff was entitled to interest at the rate of 6 percent per annum from March 19, 1957, on all sums found due on that date. In all, the trial court

awarded the plaintiff $8,241.95 plus interest at 6 percent per annum from March 19, 1957, until paid, and taxed the costs to the defendant.

The plaintiff filed a motion for new trial; the defendant filed a motion for new trial; and the trial court overruled both of these motions. The plaintiff perfected appeal to this court.

The plaintiff's petition alleged in substance that on or about March 27, 1956, he and the defendant orally entered into a partnership agreement for the construction, purchase, and operation of equipment for a bowling alley to be housed in a building to be built by the defendant and owned by him; that the defendant was to advance the funds necessary for the commencement of the business; that the plaintiff was to manage the business and receive a salary of $425 a month; that the defendant was to receive $500 a month for the rent of the building; and that each party was to share evenly in the partnership assets, that is, the profits, and in the same degree as to the losses. The petition further alleged that the agreed life of the partnership was the life of the parties; that the business was established in conformity with the oral agreement between the parties; that the parties individually and as partners executed notes and other instruments obligating them to pay large sums of money in behalf of the business; that the partnership agreement was complied with in all respects until March 19, 1957; that since March 19, 1957, the defendant has had exclusive possession of the business, dealt with it as his own, received the profits, failed to account to the plaintiff, and had therefore breached the partnership agreement; and that the defendant wrongfully dissolved the partnership and converted the partnership property to his own use and deprived the plaintiff of expected profits and salary during the life of the partnership, to the plaintiff's damage.

The defendant's amended answer denied the allegations of the plaintiff's petition except those specifically

admitted, and alleged that any partnership agreement between the parties was dissolved and terminated not later than March 14, 1957; that no profit was made from the partnership business prior to that date; that any agreement for the partnership did not fix any term for the continuance of the same; that it was a partnership at will; that the plaintiff did not contribute any capital to the business; and that insofar as any personal obligations the plaintiff had assumed relating thereto, if any, the defendant offered to hold the plaintiff harmless with respect thereto.

The plaintiff's reply to the defendant's amended answer alleged certain facts in addition to those set forth in his petition, and prayed for an accounting for the period of time from the commencement of the partnership business to and including the date of any decree that might be entered and the time thereafter during which such matter might be pending upon appeal until a full accounting was made; for damages for breach of the partnership agreement; and for such other relief as may be just and equitable.

The plaintiff set forth numerous assignments of error. We will hereinafter discuss those deemed pertinent to a determination of this appeal.

The plaintiff testified that he and the defendant talked about going into the bowling alley business together on different occasions, and discussed how much cash it would take to get into the business and the length of the finance plan with reference to purchasing equipment. The plaintiff further testified that he and the defendant went to Denver to talk to the Brunswick-Balke-Collender people, hereafter referred to as the Brunswick Company, about going into the bowling alley business; that on March 27, 1956, he and the defendant ordered bowling alley equipment, and both of them signed the order as partners. This order was later modified. He further testified that he and the defendant had an oral agreement that the defendant was to re-

ceive $500 a month for the rental of a building; that the plaintiff was to receive $425 a month as salary for managing the business; that the Brunswick Company was to be paid for the bowling equipment out of the proceeds of the business; and that after the Brunswick equipment was paid for there would be money available to reinvest in other bowling equipment and expand the business which both the plaintiff and defendant agreed could occur. No length of time was specified as to how long the plaintiff was to manage the business. It was agreed that the business would be called the Bowl Arena. The building was to be constructed to accommodate 12 bowling alleys. An order was signed for 10 bowling alleys.

The plaintiff had an agreement with Terry Carpenter reciting that Carpenter would not start in the bowling alley business, and that the plaintiff would not sell any alcoholic liquor or beer in Terrytown.

The defendant owned lots near Terrytown, between Scottsbluff and Gering, which were in a suitable location for a bowling alley and upon which the building was to be constructed. The defendant hired a contractor to build the building. The defendant used his own funds to pay for the construction of the building. The business was commenced on August 31, 1956. The plaintiff acted as manager, kept the daily records, and advised the firm's accountant with respect to keeping the books. The plaintiff, by his promotion of the business, succeeded in establishing 96 bowling teams in 7 leagues, and arranged for 30 or 35 weeks of bowling. These teams bowled on an average of once a week, except on certain holidays. There was also open bowling, which was distinct from the leagues.

On March 14, 1957, the plaintiff wrote a letter to the defendant in which the plaintiff said that he and the defendant could not continue business together any longer and that the only alternative would be for the plaintiff to buy out the defendant, the defendant to buy out the plaintiff, or the two find someone to buy

out both of them. The plaintiff then made certain proposals to the defendant with respect to the defendant buying the plaintiff out and with respect to the plaintiff buying the defendant out. In this letter the plaintiff stated that his offer would be in effect only until March 16, 1957, since the defendant had fixed a time limit for the plaintiff to decide what he wished to do.

There is an exhibit in evidence which shows the conditions under which the defendant would continue with the business venture, primarily by the formation of a corporation with the assets of the business to be the property of the corporation, a stock purchasing agreement, and other matters relating to the business and the corporation, if formed.

On March 18, 1957, the plaintiff's managership of the business was terminated by a letter to the plaintiff by the defendant.

On March 19, 1957, Hauke filed a petition in the district court for Scotts Bluff County, seeking to enjoin Frey from participation in the business. A temporary restraining order was granted. Frey filed an answer and cross-petition. The district court decided that injunction should not be granted, and dissolved the restraining order. Hauke appealed to this court, and the judgment of the district court was affirmed. See Hauke v. Frey, *supra.*

With reference to the value of the business on March 19, 1957, the plaintiff testified that prior to opening the business the defendant advanced a downpayment for the bowling alley equipment, fountain equipment, and furniture and equipment in a total amount of $22,943.94, $15,500 of which was a downpayment for the bowling equipment with the Brunswick Company. The contribution of the plaintiff to the partnership amounted to $120.60, which the trial court ordered returned to the plaintiff. The plaintiff also secured the contract of noncompetition from Terry Carpenter, which he stated had value. Just how much value is not determinable from

the record. The plaintiff and defendant contracted to pay $42,814.98 in installments on the bowling equipment.

Considering all of the factors, such as the value of the equipment in place, location of the business, the number of alleys with relation to the population, the fact that the building was built for a bowling alley, that the landlord had an interest in the business providing a favorable rent price for the bowling alleys, the potentiality of the business over the years, the fact that the building was heated and had air-conditioning facilities, also that there was adequate parking, and that the business was located outside of the city limits creating a favorable tax situation, the expected life of the bowling equipment, but not excluding the unpaid balance on the conditional sales contract, the value of the business in the plaintiff's opinion was $92,000.

The defendant testified that the value of the business on March 17, 1957, was $23,000, that was what he had in it, and it would have no other value.

In August 1958, the defendant installed automatic pinsetters. Prior to this installment there were semi-automatic pinsetters installed, model B-10, which were traded in on the new equipment. The total price of the new equipment was $119,958.84. The total down-payment was $9,666. The time balance owed was $110,-292.84. This order was made by the defendant with the Brunswick Company, and he alone signed the order.

An expert testified that the bowling league season starts in September and continues to be good into April of each year; that this type of business has increased greatly in the last few years; that there are very few bowling alley failures; that he knew of no repossessed bowling alleys; and that with reasonable maintenance all of the equipment that was purchased by the plaintiff and defendant, with the exception of the bowling pins, would have a life of about 30 years. This witness further testified that a profit of from 17 to 25 percent on the investment would be expected with a well-managed

bowling alley; and that in any community where the population ratio is one alley to every thousand people or more, the business would be good.

The record shows that in addition to the 10 alleys owned by the parties, there were 8 other alleys in the community, and that the population of the trade area was estimated at 80,000 people.

We have examined the exhibits relating to the amount of business transacted when the plaintiff was manager of the business and when others managed the business after the plaintiff ceased to do so. In addition we have examined all of the exhibits that in any way pertain to the business as to its gross business in the years stated in such exhibits, the net return of the business, and the expenses relative thereto. It would serve no useful purpose to set out these figures.

The defendant testified that he never discussed with the plaintiff what would be invested by either him or the plaintiff, or the respective interests that each would have in the business before they went to Denver; that while they were in Denver he made a downpayment on the bowling equipment; that the plaintiff had no money to make a downpayment; that after he returned from Denver he and the plaintiff endeavored to raise some money, without success; and that the defendant borrowed money on his life insurance, from the bank, and from his personal account in a drugstore business, in the amount of $70,000. He further testified that the construction of the building started about May 1, 1956; that he had no conversation with the plaintiff as to how long the business would continue; that after the building was constructed, up to the time of trial, he never had any conversation with the plaintiff with reference to the continuation of the business; that he never had a conversation with the plaintiff as to the profits of the business paying for the Brunswick Company equipment; and that a salesman connected with the equipment company in a conversation with the plain-

tiff and defendant when they were looking over a bowling alley establishment in Golden, Colorado, indicated the possibility of making payments on the equipment from the profits of the business.

On cross-examination the defendant testified that he tried to agree with the plaintiff, but they could not arrive at any agreement. However, he and the plaintiff did agree on the amount of rent, the name of the business, the plaintiff's salary, and that the plaintiff was to manage the business.

There is testimony in the record to the effect that every 10 years the Brunswick Company comes out with a new line of equipment used for modernizing the bowling alley business. This did not mean that all of the items were worn out, just that they would be out of style. The losses because of depreciation of equipment used would be on a 10-year basis.

Another witness who handled bowling alleys for resale testified that from past experience certain items will be changed, not periodically but probably within a 10-year period; and that all accessory items will be changed, such as ball returns, seating arrangements, scoring tables or Tell-A-Scores, that is, the styles would be changed, but not so much the basic use of the items.

An accountant employed by Gustafson, the head of an accounting firm, set up the books of the partnership. This witness testified that the books were set up with all equipment at a 10 percent depreciation rate for federal income tax purposes; and that he was not requested to use that rate of depreciation by either the plaintiff or defendant.

An accountant for the defendant, who prepared exhibits for the defendant in this trial, testified that he set up the defendant's books for the Bowl Arena on a 10 percent depreciation basis without any direction from anyone. The reason for doing so was that such depreciation would be acceptable to the Internal Revenue

Service as a method of depreciation for income tax purposes.

In Hauke v. Frey, *supra,* this court said: "It was, under the evidence, the intention of the parties to convert the relationship into a corporation but this they were apparently never able to accomplish. * * *

"The conclusion reached is that there was a partnership although there is not in evidence an agreement containing either complete details of organization or of functions after organization. This court said in Bard v. Hanson, 159 Neb. 563, 68 N. W. 2d 134: 'The scope of a partnership may be evidenced by written or oral agreement, or implied from the conduct of the parties and what was done by them.' The acts of the parties and what was done, as disclosed by the testimony of plaintiff, indicated a partnership which was to continue until plans could be worked out and a corporation organized to take its place.

"This being a partnership the plaintiff could not by injunction deprive the defendant of his possession of the partnership property and his rights in the management of the partnership business.

"Section 67-318 (e), R. R. S. 1943, provides: 'All partners have equal rights in the management and conduct of the partnership business.'

"The general rule is that one partner may not maintain an action against his copartner on account of a partnership transaction where there has been no settlement of the partnership accounts and business. See, Sanley v. Davies, 113 Neb. 614, 204 N. W. 385; Mullikin v. Pedersen, 161 Neb. 22, 71 N. W. 2d 485."

When a question of fact is once determined on its merits, that question is settled so far as the litigants are concerned and it may not be relitigated between the same parties. See, Gilcrist v. Wright, 169 Neb. 799, 101 N. W. 2d 158; Shepard v. City of Friend, 141 Neb. 866, 5 N. W. 2d 108; Niklaus v. Phoenix Indemnity Co., 166 Neb. 438, 89 N. W. 2d 258.

We believe that this court's opinion in Hauke v. Frey, *supra,* is clear in that it held that there was a partnership existing between the plaintiff Hauke and the defendant Frey; that injunction would not prevail as against the defendant Frey; and that it was the intent of the parties to form a corporation. These are facts which cannot be relitigated.

The plaintiff contends that the defendant has taken the plaintiff's share of the business originated by him and a substantial income expected from such business for the rest of his life; further, that the amounts awarded to plaintiff by the trial court were substantially less than the damage actually sustained by the plaintiff; and that the definite term of the partnership terminated not earlier than May 15, 1961, the date of the last payment due the Brunswick Company on the conditional sales agreement for the purchase of the bowling alley equipment.

We have heretofore made reference to exhibit No. 25, a letter dated March 14, 1957, written by the plaintiff to the defendant. The trial court found that exhibit No. 25 was not admissible as an admission against interest so far as the values set forth therein, it being an offer in compromise, but that exhibit No. 25 was admissible to show that the plaintiff, by writing the letter to the defendant, terminated the "definite term or particular undertaking" as that term is used in section 67-331 (1) (b), R. R. S. 1943, and the term for which the partnership was to have existed became a partnership at will by reason of the writing contained in exhibit No. 25.

The burden of proof of showing a partnership for a fixed term is placed on the plaintiff in this case. The question presented is, has the plaintiff proved an oral contract, the terms of which are clear, satisfactory, and unequivocal when all of its parts and the elements of the contract are taken into consideration? See Riley v. Riley, 150 Neb. 176, 33 N. W. 2d 525.

The plaintiff's testimony is to the effect that he had an oral agreement with the defendant to pay for the bowling alley equipment out of the profits of the business. The defendant denied that there was any such agreement, but stated that he hoped that the profits of the business would pay for such equipment, and that the partnership would continue for the life of the parties.

In Owen v. Cohen, 19 Cal. 2d 147, 119 P. 2d 713, it appears that on January 2, 1940, the plaintiff and defendant entered into an oral agreement whereby they became partners in the operation of a bowling alley. The partners did not expressly fix any definite period of time for the undertaking. For the purpose of securing necessary equipment, the plaintiff advanced $6,986.63 to the partnership, with the understanding that the amount so contributed was to be considered a loan to the partnership and was to be repaid to the plaintiff out of the prospective profits of the business as soon as it could reasonably do so. Differences arose between the parties with regard to the management of the partnership affairs and their respective rights and duties under the agreement. The business opened on March 15, 1940. The action was instituted June 28, 1940. The purpose of the action was for a dissolution of the partnership and sale of its assets. The court found that the partners did not agree upon any definite term for the continuance of said partnership, nor upon any particular undertaking to be accomplished, consequently there was a partnership at will, and concluded that the plaintiff had a right to a dissolution of the partnership.

In Seufert v. Gille, 230 Mo. 453, 131 S. W. 102, 31 L. R. A. N. S. 471, the court said that the mere fact that a firm has incurred debts and charged its assets for their payment is no proof of an agreement that the firm shall continue until its debts are paid, for those debts may be paid as well after as before dissolution.

The testimony of the plaintiff is to the effect that no definite length of time, within his recollection, for the

partnership to continue was ever decided. It appears from the record that the plaintiff and defendant agreed that there was no express agreement as to a fixed time for the partnership to continue. The contract with the Brunswick Company made no requirement relating to the profits to pay for the equipment furnished. This contract provided for the payments to be completed in a period of 5 years. This fact, standing alone, would be insufficient to establish a partnership agreement for a fixed term. This would be true in view of Hauke v. Frey, *supra,* wherein the court said the acts of the parties "indicated a partnership which was to continue until plans could be worked out and a corporation organized to take its place."

In the light of the record and what has been said above, it is apparent that the parties never intended the partnership for a fixed period of time. What they really intended to do was to create a corporation. They failed in this idea as indicated in Hauke v. Frey, *supra,* which is the law of the case on this phase of it.

We believe that exhibit No. 25, part of which is heretofore mentioned, was admissible in evidence for the purpose for which the trial court admitted it. In any event, the evidence discloses that the partnership was a partnership at will, and the trial court was correct in so finding.

The plaintiff contends that he should not be bound by the book-rate depreciation as testified to by the two accountants; and that the market value of the business must be used instead of the book value to determine his interest in the partnership. Several cases are cited touching upon this proposition by both the plaintiff and defendant which we deem unnecessary to discuss. In the instant case, as we view the evidence, the plaintiff made no complaint as to how the partnership books were set up. The defendant gave Schaaf no instructions relating to the books or in what manner they should be kept. The plaintiff had access to the books at all times

until the dissolution of the partnership when they were taken over by the defendant, and was the sole manager of the business.

As stated in 40 Am. Jur., Partnership, § 323, p. 356: "One of the ordinary duties of partners is to keep true and correct books showing the firm accounts, such books being at all times open to the inspection of all the members of the firm. This duty primarily rests on the managing or active partner, and he cannot defeat the rights of his copartner to a settlement and a proper distribution of the assets by failing to keep his accounts."

The plaintiff, as manager of the business, had every opportunity to change the manner of keeping the firm books if he desired to do so. Suffice it is to say that in any event the evidence discloses that the plaintiff in fact acquiesced in the manner of keeping the partnership books. There is no merit to the plaintiff's contention as above set forth.

There are many authorities relating to the right of a partner to share in the profits after the dissolution of the partnership. With reference to the plaintiff's right to do so, we believe the following to be applicable.

In 40 Am. Jur., Partnership, § 390, p. 398, it is said: "The right of a partner to share in the profits earned by the continuation of a partnership business after the dissolution of the firm is founded upon the use to which such partner's interest in the capital of the firm has been put in earning these subsequent profits, and if the partner claiming an interest in the profits earned after the dissolution of the partnership has no interest in the assets or capital of the firm after dissolution, he is not entitled to share in the profits earned."

The plaintiff contends that the trial court erred in fixing the amount of the good will of the partnership business. The following are applicable to this proposition.

In Adams v. Adams, 156 Neb. 540, 57 N. W. 2d 131, this court said: "There is no known invariable rule

for the ascertainment of intangible or good will value. 38 C. J. S., Good Will, § 6, p. 953. There are however certain factors which must be regarded in order to arrive at a valuation. 38 C. J. S., Good Will, § 6, p. 953; 68 C. J. S., Partnership, § 396, p. 910."

In 38 C. J. S., Good Will, § 6, p. 954, it is said: "A principle applied in some cases is that the valuation of good will may be fairly arrived at by multiplying the average net profits for a period of years by a number of years, such number being suitable and proper, having reference to the nature and character of the particular business under consideration. Three factors have been said to enter into net profits: (1) Interest on the capital; (2) personal services of the party; and (3) the good will of the concern."

In 68 C. J. S., Partnership, § 69, p. 501, it is said: "The good will of a partnership has been defined as every possible advantage acquired by the firm in carrying on its business, whether connected with premises or name or other matter. Included in the good will of a partnership is the right to use the established firm name. It has been said that the chief elements of value in partnership good will are continuity of name, place, and organization."

Taking into consideration the nature of the business, the promotion thereof by the plaintiff which resulted in a substantial business, and the factors relating to good will of the business, we conclude that the trial court did not err in finding that $10,000 was the value of the good will of this business.

The defendant's brief contains a cross-appeal contending that the trial court erred by overvaluing the good will of the business at $10,000 and by awarding half of the value of the good will that had inured to the business to the plaintiff. We conclude that the cross-appeal should be dismissed.

"Actions in equity, on appeal to this court, are triable de novo, subject, however, to the rule that when evi-

dence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have adopted one version of the facts rather than the opposite." Dunbier v. Rafert, 170 Neb. 570, 103 N. W. 2d 814.

The plaintiff raised other assignments of error which we deem unnecessary to discuss in view of what has heretofore been stated.

The costs of this appeal shall be taxed to the plaintiff.

For the reasons given in this opinion we affirm the judgment of the trial court.

AFFIRMED.

WENKE, J., not participating.

EDWARD SEKORA, APPELLEE, V. LEROY MANGERS, APPELLANT.
108 N. W. 2d 240

Filed March 17, 1961. No. 34898.

1. **Automobiles: Trial.** Upon approaching a highway intersection, it is the duty of the driver of an automobile to look to the right and left for approaching vehicles; whether or not he did his full duty in that regard may, in some cases, be a question of law where undisputed evidence or physical facts and circumstances control, but otherwise it is ordinarily one of fact for the jury upon consideration of all the evidence.
2. ———: ———. Before a verdict can be properly directed in such a case the position of the defendant's automobile must be definitely located in a favored position, otherwise the question becomes one for the jury.
3. **Automobiles.** The lawfulness of the speed of an automobile within the prima facie limits fixed is determined by the further test of whether the speed was greater than was reasonable and prudent under the conditions then existing.
4. **Negligence: Trial.** When different minds may reasonably draw different conclusions from the same facts as to whether or not they establish negligence or contributory negligence, such issues should be submitted to the jury.

APPEAL from the district court for Nuckolls County: STANLEY BARTOS, JUDGE. *Affirmed.*

Stiner & Boslaugh, for appellant.

W. E. Garrison, for appellee.

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

MESSMORE, J.

This is an action at law brought in the district court for Nuckolls County by Edward Sekora, plaintiff, against LeRoy Mangers, defendant, to recover damages for personal injuries sustained by the plaintiff and property damage to his automobile due to the negligence of the defendant in a collision between the defendant's automobile and the plaintiff's automobile. The case was submitted to a jury, resulting in a verdict in favor of the plaintiff in the amount of $3,500. The defendant filed a motion for judgment notwithstanding the verdict or, in the alternative, for a new trial. This motion was overruled. From the overruling thereof, the defendant appeals to this court.

The plaintiff's petition alleged in substance that on September 19, 1958, the plaintiff was driving his automobile in a northerly direction on the east side of State Highway No. 14, hereafter referred to as highway 14, and the defendant was driving his automobile in the same direction at a point 6 miles north of Nelson; and that the defendant ran into the rear end of the plaintiff's automobile causing damage to the plaintiff's automobile and injuries to the plaintiff. The plaintiff further alleged that the defendant was negligent in the operation of his automobile in the following particulars: (1) In operating his automobile at a rate of speed such as to endanger the safety of others lawfully upon said highway; (2) in failing to apply his brakes in time to avoid colliding with the rear of plaintiff's automobile; and (3) in failing to have his automobile under proper con-

trol as he approached the plaintiff's automobile when by the exercise of ordinary care on his part he knew or should have known he was liable to collide with the plaintiff's automobile. The plaintiff prayed for damages for personal injuries and for property damage to his automobile.

The defendant's answer to the plaintiff's petition denied every allegation therein except those admitted, and alleged an affirmative defense charging that the plaintiff was negligent in the operation of his automobile in the following particulars: (1) That the plaintiff entered highway 14 from the west traveling on State Highway No. 4, hereafter referred to as highway 4, at a time when he could have seen the defendant's automobile approaching on highway 14 from the south and he failed to look and see said approaching automobile; (2) that he failed to yield the right-of-way to the defendant who approached him from the right; (3) that he failed to stop or apply his brakes and thereby avoid said collision; (4) that he failed to have his automobile under proper control in approaching the intersection; (5) that he drove his automobile directly into the path of the defendant's automobile approaching and reaching said intersection from the south at approximately the same time when it was dangerous to all concerned to do so; (6) that he was traveling less than 10 miles an hour as he approached said intersection, thereby giving the defendant reason to believe that he would stop before entering the intersection; and (7) that he failed in approaching said intersection from the west to keep in the right lane of traffic on highway 4 and he failed in turning to the left to pass beyond the center of the intersection of said two highways as required by law. The defendant in his cross-petition prayed for property damage to his automobile.

The plaintiff's reply to the answer of the defendant was a general denial of the allegations therein, except those admitted in plaintiff's petition. Plaintiff's answer

to the defendant's cross-petition was in effect a general denial of the affirmative defense alleged therein.

The defendant assigns as error that the trial court erred in failing to sustain the motions of the defendant for a directed verdict made at the close of the plaintiff's case-in-chief and renewed at the conclusion of all of the evidence; and in failing to sustain the defendant's motion for a judgment notwithstanding the verdict or in the alternative for a new trial.

Section 39-7,109, R. R. S. 1943, provides in part: "The following rules shall govern the overtaking and passing of vehicles proceeding in the same direction, subject to those limitations, specifications, and special rules hereinafter stated: (a) The driver of a vehicle overtaking another vehicle proceeding in the same direction shall pass to the left thereof at a safe distance and shall not again drive to the right of the roadway until safely clear of the overtaken vehicle; * * *."

Section 39-7,108, R. R. S. 1943, provides in part: "(1) No person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions then existing. * * * (3) The following speeds shall be prima facie lawful, but in any case when such speed would be unsafe, they shall not be lawful: * * * (c) sixty-five miles per hour between the hours of sunrise and sunset and fifty-five miles per hour between the hours of sunset and sunrise upon any * * * highway that is a part of the state highway system outside of a city or village; * * *. (4) The fact that the speed of a vehicle is lower than the foregoing prima facie limits shall not relieve the driver from the duty to decrease speed when approaching and crossing an intersection, * * * and speed shall be decreased as may be necessary to avoid colliding with any * * * vehicle * * * on or entering the highway in compliance with legal requirements and the duty of all persons to use due care; * * *."

Section 39-728, R. R. S. 1943, provides: "Motor vehicles traveling upon public highways shall give the

right-of-way to vehicles approaching along intersecting highways from the right, and shall have the right-of-way over those approaching from the left when said vehicles shall reach the intersection at approximately the same time. In all other cases the vehicle reaching the intersection first shall have the right-of-way."

Section 39-741, R. R. S. 1943, provides in part: "(7) Intersection shall mean the area embraced within the prolongation of the lateral curb lines or, if none, then the lateral boundary lines of two or more highways which join one another at an angle, whether or not one such highway crosses the other; * * *."

The foregoing provisions of the statutes relate to this appeal.

The record shows that this accident occurred about 4:15 p.m., on September 19, 1958. The day was clear and the pavement dry. The plaintiff was driving a 1952 Ford Tudor which was 5 feet 8 inches wide and 16 feet long. The defendant drove a 1957 Ford Vanette which was of ordinary car length but about 8 feet high and a little wider than the average automobile. It was a walk-in van about 17 feet long which weighed about 5,000 pounds and carried a cargo load of potato chips, Fritos, and rice weighing about 1,000 pounds.

The plaintiff testified that he was a farmer, 39 years of age, who for 3 years had lived a quarter of a mile north of the intersection where the accident occurred. At the time of the accident he had his five children with him. Their ages ranged from 2½ years to 10 years. He had picked up his children at school, and the accident occurred on his way home.

The defendant was 25 years of age at the time of the trial and was a route driver for a concern that sold snack products. He was alone in his automobile.

Highways 4 and 14 constitute a junction where the two highways join. Highway 4 runs east and west and highway 14 runs north and south. Highway 14 is surfaced with blacktop. Highway 4 extends west from

highway 14 and is graveled except for the area extending about 200 feet west of highway 14 which is blacktopped. As highway 4 approaches highway 14 from the west, it becomes wider from its normal width of 30 feet to a width of 346 feet when it joins highway 14. There is an embankment on the south side of highway 4 extending from the point where the blacktop on highway 4 joins the gravel at a point about 200 feet west of the midline of highway 14 to a point 57 feet west of the midline of highway 14. A driver proceeding east on highway 4, approaching highway 14, would be unable to see traffic approaching from the south on highway 14 in the area where this embankment is located on the south side of highway 4. After reaching a point 57 feet west of the midline of highway 14, a driver of an automobile would be able to see south to the crest of a hill on highway 14 which slopes down to the intersection. The crest of the hill is 1,600 feet south of the midline of highway 4.

At the time the accident occurred, there was a mailbox on the east side of highway 14, 57.3 feet north of the midline of highway 4, and a highway sign on the east side of highway 14, 219 feet north of the midline of highway 4. There are no stop signs at the intersection, nor signs governing the speed of automobile drivers on highway 14 approaching the intersection from the south.

The plaintiff testified that he entered the intersection in the area of the mailbox, which has now been removed, at a speed of 20 to 30 miles an hour as he entered highway 14; that prior to entering highway 14, he looked to the north and to the south and did not see any automobiles on highway 14; that he then entered highway 14; and that he heard a horn blow, then his automobile was struck in the rear part by the front end of the defendant's automobile. The only car he saw after entering highway 14 was the defendant's automobile. The plaintiff did not apply his brakes because he was afraid if he stopped his automobile suddenly

the defendant's automobile would hit his automobile again, and he just coasted to the north on highway 14. He then backed his automobile up, stopped, and got out of it. The defendant was getting out of his automobile. The plaintiff further testified that the defendant's automobile struck all of the right rear half of his automobile and a part of the left rear half of it; that the defendant's automobile, after the impact, was still on the highway off to the right of the blacktop; that he had a conversation with the defendant and it was decided that someone in authority should investigate the accident; and that the defendant told the plaintiff that he thought the speed of his automobile was 65 miles an hour. The plaintiff further testified that his automobile was in its proper lane going north on highway 14 when it was struck; that each lane of highway 14 is about 12 feet in width; and that the defendant said something about going around to the left side of the plaintiff's automobile to pass, but the defendant thought the ditch was too deep at that point, then he thought about going to the right to pass the plaintiff's automobile, and then struck the plaintiff's automobile. The defendant said that he had a load of boxes in his automobile which made his load rather topheavy. The plaintiff was familiar with this corner and with the intersection. He testified that he was traveling about 35 miles an hour as he approached the intersection, and reduced his speed to between 20 and 30 miles an hour as he entered the intersection; that he did not stop his automobile but had made his turn into the intersection and was driving north on his right side of highway 14 when the accident occurred; that he saw the defendant driving north toward him by looking into his rearview mirror, and the defendant's automobile looked very close to him when he heard the horn; that as he entered highway 14, there was 57 feet where he could see anybody coming from the south; that he looked to the south within that 57-foot area and could see to the south 1,600 feet; that he

had traveled 200 feet from the center of the intersection when the accident occurred; and that he finally got his speed up to 35 miles an hour. The plaintiff further testified that the damage to his automobile was in the amount of $518.37. There is also testimony in the record relating to injuries received by the plaintiff as a result of the accident.

The defendant testified that on the day of the accident he was going north on highway 14; that he was familiar with the intersection of highways 4 and 14; that he was traveling at a rate of speed of 55 miles an hour; and that as he proceeded north he saw the plaintiff's automobile coming from the west slowly cutting north at about 15 miles an hour. The defendant slowed down as he came to the intersection, believing the plaintiff would stop his automobile. At that time the front end of the defendant's automobile was touching the center of the intersection or very close to the center of the intersection. The defendant testified that he applied his brakes hard, but that they probably did not make any skidmarks until his automobile had proceeded north a ways because his automobile did not skid easily; that when he first realized that the plaintiff's automobile was coming in front of him, he could not go around it because the plaintiff was cutting across the intersection into highway 14, and when the plaintiff got across the centerline of the highway there was no time for him to pass the plaintiff's automobile; that he did not believe he could avoid the accident by turning his automobile to the right; and that when he got to the place at about the center of the intersection he could see the plaintiff, but he did not believe the plaintiff looked to see him, as the plaintiff was looking the other way. The defendant further testified that he was in his right lane going north, and the plaintiff's automobile was in the right lane going north on highway 14 when the collision occurred; that the defendant at that time was traveling at a rate of speed of 35 miles an hour; and that the

plaintiff and defendant talked after the collision, and the defendant thought he had made a statement that his automobile was traveling at 55 miles an hour. The defendant testified that the damage to his automobile was in the amount of $60.50.

On cross-examination the defendant testified that at a point 173 feet south of the center of the intersection he could see the plaintiff's automobile, and this automobile was within his vision until the time of the impact; that the plaintiff's automobile was ready to enter the intersection when he first saw it; that the plaintiff never got his automobile completely straightened out until the defendant was pretty close behind him; and that the plaintiff did not make a "square" turn but "rounded the corner." This witness further testified that it was at least 219 feet north of the centerline of the intersection where the impact occurred and that he kept the brakes on his automobile applied for a distance of 219 feet; and that the impact occurred 44 feet north of the end of the intersection.

On re-cross-examination the defendant testified that the plaintiff's automobile was in the intersection of highways 4 and 14 before the automobile of the defendant started to approach the intersection.

A deputy sheriff testified that he was called to the scene of the accident. The plaintiff and defendant were there when he arrived. He took certain measurements. He established a point to measure from, which was the mailbox 57.3 feet north of the midline of the intersection. He measured from that point north 132 feet, and at that point the defendant's automobile made skidmarks, or black marks, for a distance of 38 feet, so by his measurements the point of impact was 170 feet from the mailbox. He further testified that the black marks were out of the intersection; that the intersection had a "rounding corner" to the north from the west; that it was about 44 feet north of the end and out of the intersection where the impact occurred; and that

the point of impact was on the right side of highway 14 going north.

On cross-examination this witness testified that the corner where highway 4 intersects with highway 14 is a big, wide corner; that he filed a report to the effect that the defendant's automobile traveled 132 feet north from the mailbox; that the defendant applied his brakes but hit the plaintiff's automobile; that the plaintiff failed to see the defendant's automobile coming north on highway 14 and pulled out in front of the defendant's automobile; and that the defendant was unable to stop his automobile, and hit the rear end of the plaintiff's automobile. On redirect examination this witness testified that the statement that plaintiff's automobile pulled out in front of the defendant's automobile was his conclusion; and that the accident did not actually happen in the intersection of highways 4 and 14, at all.

The record discloses that there is no dispute in the evidence that the accident occurred 44 feet north of the end of the intersection of highways 4 and 14. The evidence also is to the effect that the plaintiff had negotiated the turn into and across the intersection of highways 4 and 14 and was proceeding in his proper lane of travel to the north on highway 14 when his automobile was struck in the rear by the defendant's automobile.

In Costello v. Hild, 152 Neb. 1, 40 N. W. 2d 228, this court said: "Upon approaching a highway intersection, it is the duty of the driver of an automobile to look to the right and left for approaching vehicles; whether or not he did his full duty in that regard may, in some cases, be a question of law where undisputed evidence or physical facts and circumstances control, but otherwise it is ordinarily one of fact for the jury upon consideration of all the evidence." See, also, Roberts v. Carlson, 142 Neb. 851, 8 N. W. 2d 175.

In Gorman v. Dalgas, 151 Neb. 1, 36 N. W. 2d 561, it is said: "The rules in this state are: '* * * when a person enters an intersection of two streets or highways

he is obligated to look for approaching cars and to see those within that radius which denotes the limit of danger. * * * If he fails to see an automobile not shown to be in a favorable position, the presumption is that its driver will respect his right of way and the question of his contributory negligence in proceeding to cross the intersection is a jury question. * * * Before a verdict can be properly directed in such a case the position of the defendant's car must be definitely located in a favored position, otherwise the question becomes one for the jury. * * * Where he looks and does not see an approaching vehicle, or, seeing one, erroneously misjudges its speed or distance, or for some other reason assumes that he can proceed and avoid a collision, the question is usually one for the jury.' Whitaker v. Keogh, 144 Neb. 790, 14 N. W. 2d 596." See, also, Elliott v. Swift & Co., 151 Neb. 787, 39 N. W. 2d 617; Ripp v. Riesland, 170 Neb. 631, 104 N. W. 2d 246.

"When different minds may reasonably draw different conclusions from the same facts as to whether or not they establish negligence or contributory negligence, such issues should be submitted to the jury." Hammond v. Morris, 147 Neb. 600, 24 N. W. 2d 633.

In Coyle v. Stopak, 165 Neb. 594, 86 N. W. 2d 758, this court said: "The lawfulness of the speed of a motor vehicle within the prima facie limits fixed is determined by the further test of whether the speed was greater than was reasonable and prudent under the conditions then existing." See, also, Davis v. Dennert, 162 Neb. 65, 75 N. W. 2d 112; Tate v. Borgman, 167 Neb. 299, 92 N. W. 2d 697.

The record discloses evidence whereby the jury could find that the defendant was operating his automobile at a rate of speed greater than was reasonable and prudent under the circumstances then existing. This evidence consists of the skidmarks, the damage to the plaintiff's automobile, the rate of speed the plaintiff was traveling at the time of the accident, the force with

which the defendant's automobile struck the plaintiff's automobile, and the evidence of the deputy sheriff to the effect that there were no indications upon highway 14 that the defendant applied the brakes of his automobile at a distance of more than 38 feet.

In the light of the evidence and the authorities heretofore cited, we conclude that the judgment of the trial court should be, and is, affirmed.

AFFIRMED.

WENKE, J., not participating.

IN RE PETITION OF THE NEBRASKA ELECTRIC GENERATION AND TRANSMISSION COOPERATIVE, INC., A COOPERATIVE CORPORATION.

GEORGE MOYER ET AL., APPELLEES, V. NEBRASKA ELECTRIC GENERATION AND TRANSMISSION COOPERATIVE, INC., A COOPERATIVE CORPORATION, APPELLANT.

108 N. W. 2d 89

Filed March 17, 1961. No. 34906.

Trial: Appeal and Error. When evidence is conflicting, the verdict of a jury, or the finding of fact by a court in a law action for damages where a jury is waived, will be set aside where manifestly excessive and clearly wrong.

APPEAL from the district court for Madison County: DAYTON R. MOUNTS, JUDGE. *Reversed and remanded for a new trial.*

Kenneth M. Olds and *Donald R. Reed,* for appellant.

Moyer & Moyer and *Frederick M. Deutsch,* for appellees.

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

SIMMONS, C. J.

This is a condemnation case. The Nebraska Electric

Generation and Transmission Cooperative, Inc., a cooperative corporation, condemner, will be referred to as the defendant.

The defendant brought condemnation proceedings for a right-of-way for a 230,000 volt transmission line across lands owned by George and Earl Moyer. Their wives and their tenant are also parties. The appraisers allowed $1,500 in damages. The Moyers appealed to the district court. The Moyers will be referred to as plaintiffs.

The action was tried to the district court, a jury having been waived. It resulted in a judgment for the plaintiffs for $6,975. We reverse the judgment and remand the cause for a new trial.

Plaintiffs Moyer are the owners of the northeast quarter, the east half of the northwest quarter, and the northwest quarter of the northwest quarter of a section of Madison County land. For many years it has been farmed as a unit operation.

Defendant condemned a right-of-way for a transmission line across said land beginning at a point west of the northeast corner of the northwest quarter, thence running southeast across the northeast quarter of said land to a point east of the southwest corner of the southeast quarter. In short, the transmission line ran diagonally northwest to southeast across the approximate center of the farm.

The defendant condemned only the land taken by the poles and the right to maintain said line across said land.

There were to be five structures of two poles each set 20 feet apart carrying three wires and two shield wires. Only one of the structures is in the northwest quarter of the land. Defendant also condemned the right of ingress and egress to construct, operate, or remove said lines.

The land involved consists in part of 30 acres of pastureland, 10 acres of land used as the farmstead, and 1 acre used as a cemetery. The farmstead is in the south-

east corner of the land and about 50 rods from the transmission line. The cemetery is west thereof and in the southwest corner of the land. The cultivatable land remaining is 239 acres. The lay of the land is such that it is farmed east and west. Corn and oats appear to be the principal crops. All witnesses agree that it is a highly productive farm.

By stipulation the element of future damages was reserved and not considered.

The trial court rendered judgment for the plaintiffs for $6,975.

The two poles of each structure are set perpendicular to the transmission line direction, which makes them at an angle to east-and-west lines and at an angle to north-and-south lines.

The corn rows run east and west. Before the poles were erected on the land there was nothing to interfere with straight-line farming operations.

The testimony indicates that there are five structures on plaintiffs' land. However, the south structure is either astride the fence row or close to it. The tenant refers to three structures in his cornfield.

The north structure is in the pasture. There is no contention that it interferes in any way with the farming operations. There is evidence that the three or three and one-half structures in the fields create areas of untillable land, elliptical in form, which are about 50 feet long and 40 feet wide at the widest point. The evidence is that the farming operations are conducted by tractor power with machinery that projects wider than the tractor. The evidence indicates that the size of these tracts is based on the distance from the poles of tractor operations, and not the distance of plowing, planting, or cultivating from the poles. There is evidence that the actual land taken out of cultivation is a much smaller area than that above stated.

We are here dealing with the inconvenience of farming operations around those three and one-half uncul-

tivatable areas of land and the depreciation that their existence causes to the value of the land as a unit. We find no evidence of the amount of loss involved in the lack of production in the above areas.

There is evidence that to keep the rows straight it is necessary to make some short corn rows and turnarounds. There is no evidence of the number of such rows or the amount of land removed from production by such a process of farming, unless it is contained in the size given for the larger pieces described above. There is no evidence that the short rows or the turnarounds affect the productivity of the remainder of the tillable land. There is no evidence that the method of farm operation caused by the structures in anywise costs the plaintiffs expense or lack of revenue save for the small area involved in the three and one-half elliptical structures. The evidence affirmatively refutes any loss of productivity from the structure in the 30-acre pasture. The evidence does not show any damage to the 10 acres involved in the farmstead area or the 1 acre involved in the cemetery area.

There is evidence that the structures have been built according to approved safety practices. We find no evidence to which any finding of damages for fear of danger from that source can be allocated, although some hazard to human beings and animals exists from the presence of the line.

There is evidence that the 239 tillable acres of land are irrigable. There is no evidence of any intent to irrigate. The evidence of availability of water for irrigation is speculative and conjectural. There is evidence that if large-nozzle spray irrigation is ever undertaken that irrigation in close proximity to the lines would contain an element of danger, but that so far as this record is concerned is purely speculative.

There is evidence that weeds will grow around the structures and that it will require about 12 hours' work per year to cut them by hand two times to prevent the

spread of weed seed onto cultivated land. We find no evidence that this will either add materially to the cost of operation or reduce the revenue from the land. It would appear to be nothing more than is involved in cutting of weeds along fence rows.

Plaintiffs offered the evidence of two expert witnesses who fixed the fair market value of the land at $225 per acre before condemnation, and $190 per acre after condemnation, a difference of $35 per acre. The plaintiffs offered another witness who fixed the damage per acre at between $30 and $40 per acre.

Defendant offered the evidence of two expert witnesses who testified that the value of the land in the northwest quarter of the section had not been reduced at all, and that the value of the 160 acres of land in the northeast quarter of the section had been reduced not to exceed $15 per acre.

It appears from the pleadings that defendant will have the right of ingress and egress upon said land. No attempt appears to have been made to evaluate the damage to the plaintiffs by that right.

It does not appear by what process the trial court arrived at its finding of damages. For the purposes of this case we accept the defendant's contention that the trial court's finding has the impact of a jury's verdict. It does appear that the amount allowed the plaintiffs followed the base of the evidence and amounts to $25 per acre, which is the mean between the evidence of the plaintiffs and that of the defendant. The judgment is the equivalent of $25 per acre damage to tillable land, pasture, and farmstead.

We have held that: When the evidence is conflicting, the verdict of the jury will not be set aside unless it is clearly wrong. Kennedy v. Department of Roads & Irrigation, 150 Neb. 727, 35 N. W. 2d 781.

Stated otherwise that rule would be: When evidence is conflicting, the verdict of a jury, or the finding of fact by a court in a law action for damages where a

jury is waived, will be set aside where manifestly excessive and clearly wrong.

As we view it, the judgment in this case is manifestly excessive and clearly wrong. We find no basis upon which it can be sustained properly.

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

REVERSED AND REMANDED FOR A NEW TRIAL.

WENKE, J., not participating.

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Actions.

1. A legislative body which creates a right of action has power to determine the conditions under and the time within which it must be brought. *County Board of Platte County v. Breese* 37
2. An insured cannot disregard a written contract as evidenced by a policy of insurance furnished him by the insurer and have an action at law upon an alleged oral agreement inconsistent with the policy or a recovery thereon not warranted by the terms of the policy of insurance. *Rodine v. Iowa Home Mutual Cas. Co.* 263

Adverse Possession.

1. Adverse possession of land must be proved by actual, open, exclusive, and continuous possession under a claim of ownership for the statutory period of 10 years. *Olson v. Fedde* 704
2. The possession is sufficient if the land is used continuously for the purpose to which it may be in its nature adapted. *Olson v. Fedde* 704
3. The title to land becomes complete in the adverse occupant when he has maintained an actual, continuous, notorious, and adverse possession thereof, claiming title to the same against all persons, for 10 years. *Olson v. Fedde* 704
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Appeal and Error.

1. Rule for consideration of equity action de novo on appeal stated. *State ex rel. Nebraska State Bar Assn. v. Jensen* 1
2. It is not the province of the Supreme Court in reviewing the record in an action at law to resolve conflicts in or weigh the evidence. *Nisi v. Checker Cab Co.* 49
   Johnston v. Robertson 324
   Graves v. Bednar 499
3. It is presumed in a law action that controverted facts were decided by the jury in favor of the

successful party, and its finding based on conflicting evidence will not be disturbed unless clearly wrong. *Nisi v. Checker Cab Co.* 49
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4. Rulings of 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 instrastate commerce. *L. E. Whitlock Truck Service v. Shippers Oil Field Traffic Assn.* 78
5. An order of the railway commission that is arbitrary and unreasonable will be vacated and set aside on appeal to the Supreme Court. *L. E. Whitlock Truck Service v. Shippers Oil Field Traffic Assn.* 78
6. Under rules of the Supreme Court, a bill of exceptions may be amended by written agreement attached to the bill at any time before the case is submitted to the Supreme Court. *Hilligas v. Farr* 105
7. Under rules of the Supreme Court, proposed amendments not agreed to by all of the parties shall be heard and decided by the district court, after notice, and the order of the district court thereon shall be attached to the bill of exceptions prior to the time the case is submitted to the Supreme Court. *Hilligas v. Farr* 105
8. An amendment to a bill of exceptions will not be considered by the Supreme Court which has not been presented in compliance with rules of the Supreme Court. *Hilligas v. Farr* 105
9. In a case coming to the Supreme Court on appeal, error will not be presumed but it must affirmatively appear from the record. *Hilligas v. Farr* 105
10. The rule that error will not be presumed but must appear from the record applies in the instance of an appeal from an order granting a new trial, or any other appealable order, where a ruling depends upon an examination of the evidence taken at the trial. *Hilligas v. Farr* 105
11. The entire record of the evidence must be presented to the Supreme Court to meet the requirements of the rule that error will not be presumed but must appear from the record. *Hilligas v. Farr* 105
12. In the absence of a proper bill of exceptions, all assignments of error which require for their deter-

mination a reference to such a bill must be overruled. *Hilligas v. Farr* 105

13. Where a party has sustained the burden and expense of a trial and has succeeded in securing the verdict of a jury on the facts in issue, he has a right to keep the benefit of that verdict unless there is prejudicial error in the proceedings by which it was secured. *Law v. Gilmore* 112

14. Instructions not complained of in such a way as to be reviewable in the Supreme Court will be taken as the law of the case, and if, when tested by such instructions, the verdict is not vulnerable to the objections lodged against it, the assignments will not be sustained. *Law v. Gilmore* 112

15. Errors sufficient to cause the granting of a new trial must be errors prejudicial to the rights of the unsuccessful party. *Law v. Gilmore* 112

16. When testimony is offered and admitted in evidence without objection being made thereto, error cannot be predicated thereon on appeal. This rule applies to the district court when reviewing its own proceedings on motion for a new trial. *Law v. Gilmore* 112

17. A party is not permitted to proceed with the trial without objection and speculate on the outcome of the jury's verdict, and, if unfavorable, contend that a mistrial should have been declared, when he did not ask for the same at the time. *Law v. Gilmore* 112

18. Where a motion for a directed verdict was made at the close of plaintiff's evidence and sustained by the trial court, the ruling of the trial court thereon cannot be reviewed by the Supreme Court in the absence of a motion for a new trial assigning such error and a ruling thereon secured in the trial court. *Hungerford v. Knudsen* 125

19. Where it is sought to review the judgment of the district court in a law action, no required motion for a new trial having been filed, the Supreme Court will examine the record to ascertain if the pleadings state a cause of action or defense which support the judgment. It will not go back of the verdict rendered by the jury or findings of fact made by the trial court to review anything done or any proceeding had. *Hungerford v. Knudsen* 125

20. On appeal to the Supreme Court in a workmen's compensation case the cause is considered de novo upon the record. *Knaggs v. City of Lexington* 135

21. Where the evidence is conflicting and cannot be

reconciled, the Supreme Court will consider the fact that the district court that tried the cause de novo and observed the demeanor of witnesses gave credence to the testimony of some rather than to the contradictory testimony of others. *Knaggs v. City of Lexington* 135

22. An exception to the general rule that only final orders are appealable appears in statute authorizing appeal from entry of judgment notwithstanding the verdict. *Otteman v. Interstate Fire & Cas. Co., Inc.* 148

23. The interlocutory character of an order sustaining a motion for new trial is not destroyed by the fact that by the terms of statute authorizing entry of judgment notwithstanding the verdict, an appeal may be taken therefrom. *Otteman v. Interstate Fire & Cas. Co., Inc.* 148

24. The denial of a motion for a continuance in order to secure evidence is not reversible error where it appears that the testimony of the absent witness would be either false or immaterial. *Kennedy v. State* 160

25. In the absence of an abuse of discretion, the Supreme Court will not interfere with a trial court's ruling on the granting of recesses and continuances on account of emotion and hysteria of a witness. *Wamsley v. State* 197

26. Where incidents occur during the trial of a rape case which tend to create sympathy for the prosecutrix and hostility toward the defendant, it is the duty of the court, on request, to instruct the jury to disregard such incidents and to arrive at the verdict solely upon the evidence. A failure to give such an instruction under such circumstances ordinarily constitutes prejudicial error. *Wamsley v. State* 197

27. Where, in a criminal case, any one of several errors assigned would not in itself be sufficient to warrant a reversal, nevertheless, if all of them in the aggregate justify the conclusion that defendant was not accorded a fair trial, it becomes the duty of the court to award a new trial. *Wamsley v. State* 197

28. The findings of a court in a law action in which a jury is waived have the effect of a verdict of a jury and will not be disturbed on appeal unless clearly wrong. *State Farm Mutual Automobile Ins. Co. v. Kersey* 212

29. In an action where a jury is waived, it is not within

the province of the Supreme Court to resolve conflicts in or to weigh evidence. If there is a conflict in the evidence, it will be presumed that controverted facts were decided by the trial court in favor of the successful party and the findings will not be disturbed unless clearly wrong. *State Farm Mutual Automobile Ins. Co. v. Kersey* 212

30. In considering the sufficiency of the evidence to sustain a judgment rendered by a court in a case where a jury is waived, the evidence must be considered most favorably to the successful party, any controverted fact must be resolved in his favor, and he must have the benefit of every inference reasonably deducible from the evidence. *State Farm Mutual Automobile Ins. Co. v. Kersey* 212

31. On appeal from a decision of the railway commission, which requires the exercise of legislative authority, the only questions to be determined are whether or not the commission acted within the scope of its powers and whether or not the order complained of is reasonable and not arbitrarily made. *City of Scottsbluff v. United Tel. Co. of the West* 229

32. The function of the Supreme Court, in determining whether or not there is evidence sufficient for submission of the case to the jury, is not to weigh evidence, but to ascertain whether or not there is evidence to sustain the verdict of a jury in the exercise of its function as the trier of the facts. *Johnston v. Robertson* 324

33. A party may not complain of misconduct of counsel if, with knowledge of such misconduct, he does not ask for a mistrial, but consents to take the chance of a favorable verdict. *Davis v. State* 333

34. An appeal to the district court from action of the county board of equalization is heard as in equity, and upon appeal therefrom to the Supreme Court, it is tried de novo. *L. J. Messer Co. v. Board of Equalization* 393

35. The determination of a matter which is involved in the litigation and discussed in an opinion is not to be regarded as mere dictum, even though it is only indirectly involved in the decision of the question upon which the case turns. *Securities Acceptance Corp. v. Brown* 406

36. On appeal to the Supreme Court from an order of the railway commission, while acting within its jurisdiction, the question for determination is the

sufficiency of the evidence to prove that the order is not unreasonable or arbitrary. *Oakdale Tel. Co. v. Wilgocki* 425

37. Instructions to a jury must be considered together, so that they may be properly understood, and, if as a whole they fairly state the law applicable to the evidence when so construed, error cannot be predicated on the giving thereof. *Morton v. Travelers Indemnity Co.* 433
Graves v. Bednar 499

38. Instructions must be considered and construed together. If they are not sufficiently specific in some respects, it is the duty of counsel to offer requests for instructions that will supply the omission. Unless this is done, the judgment will not ordinarily be reversed for such defect. *Morton v. Travelers Indemnity Co.* 433

39. The purpose of assignments of error required by the rules of the Supreme Court is to advise appellee and the court of the issues on appeal which are submitted for consideration and decision. *Phillips Petroleum Co. v. City of Omaha* 457

40. A consideration by the Supreme Court of a cause on appeal is limited to errors assigned and discussed, except the court may at its option note a plain error not assigned. *Phillips Petroleum Co. v. City of Omaha* 457
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41. The proof on the trial of a jury case should be confined to legal evidence tending to prove or disprove an issue made by the pleadings. An improper matter submitted to the jury for its consideration by the trial court is prejudicial error if it may have influenced the verdict. *Phillips Petroleum Co. v. City of Omaha* 457

42. The reception of improper evidence in a jury trial must be considered prejudicial error unless it appears that it did not affect the result. *Phillips Petroleum Co. v. City of Omaha* 457

43. In determining whether there was error in a sentence or part of an instruction, the entire instruction and all the other instructions should be considered. The meaning should be determined from the instructions as a whole. *Phillips Petroleum Co. v. City of Omaha* 457

44. Under annexation of lands to school district statute, an appeal may be taken from the action of the

county superintendent to the district court but without providing a method. *McDonald v. Rentfrow* 479

45. Where no method of appeal is provided by statute, the appropriate procedure is a proceeding in error. *McDonald v. Rentfrow* 479

46. The district court was without jurisdiction to hear the appeal in this case except as a proceeding in error. *McDonald v. Rentfrow* 479

47. The absence of jurisdiction of the district court may be taken advantage of at any stage of the proceedings. *McDonald v. Rentfrow* 479

48. A proceeding in error from the action of a county superintendent must come to the district court on a petition in error and a transcript. *McDonald v. Rentfrow* 479

49. In an error proceeding, the petition should contain the assignments of error, and the transcript should contain the final judgment or order sought to be reversed. *McDonald v. Rentfrow* 479

50. In a proceeding in error in the district court where a finding and judgment is the basis of the proceeding, the finding and judgment should be affirmed in the absence of a bill of exceptions containing the material and relevant evidence, and where the transcript fails to disclose any prejudicial error. *McDonald v. Rentfrow* 479

51. A transcript on appeal imports absolute verity and is the exclusive evidence of the proceedings. *McDonald v. Rentfrow* 479

52. In the case of a proceeding in error from the action of a county superintendent to the district court where no error is found, it is the duty of the district court to affirm the action of the county superintendent and of the clerk of the district court to certify the decision to the county superintendent. *McDonald v. Rentfrow* 479

53. In determining the sufficiency of evidence to sustain a verdict it must be considered most favorably to the successful party, any controverted fact resolved in his favor, and he must have the benefit of inferences reasonably deducible from it. *Graves v. Bednar* 499

54. If instructions are not sufficiently specific in some respects, it is the duty of counsel to offer requests for instructions that will supply the omission. Unless this is done, the judgment will not ordinarily be reversed for such defects. *Graves v. Bednar* 499

55. The rules of the Supreme Court require separate numbering and paragraphing in the brief of assignments of error. *Turnell v. Mahlin* 513
56. Appeals to the Supreme Court in the matter of the appointment of guardians are heard and determined de novo. *Workman v. Workman* 554
57. The selection and appointment of guardians is a matter within the discretion of the county court making such selection and appointment. Ordinarily the Supreme Court will not interfere therewith unless an abuse of discretion is shown. *Workman v. Workman* 554
58. Where the trial court gives no reason for an order determining a cause and it cannot be determined from the record, on appeal to the Supreme Court the successful party in the trial court has the duty to point out the reason or reasons which he contends justifies the decision of the trial court. *Barker v. Wardens & Vestrymen of St. Barnabas Church* 574
59. On appeal in an action for divorce, the cause is tried de novo in the Supreme Court. *Waldbaum v. Waldbaum* 625
Ivins v. Ivins 838
60. When the evidence on material questions of fact in a divorce action is in irreconcilable conflict, the Supreme 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. *Waldbaum v. Waldbaum* 625
61. In the absence of a bill of exceptions it is presumed that issues of fact presented by the pleadings are established by the evidence, that they were correctly decided, and the only issue that will be considered on appeal is the sufficiency of the pleadings to support the judgment. *Schroeder v. Homestead Corp.* 792
62. Divorce cases are triable de novo on appeal, subject to the rule of better opportunity of trial court to judge the credibility of witnesses. *Ivins v. Ivins* 838
63. Equity case is triable de novo on appeal, subject to rule of better opportunity of trial court to judge the credibility of witnesses. *Frey v. Hauke* 852
64. In a law action when the evidence is conflicting, a verdict of the jury or a finding of fact by the court where a jury is waived will be set aside

where manifestly excessive and clearly wrong. *Moyer v. Nebraska E. G. & T. Coop.* 879

Assault and Battery.

In a prosecution for assault which involves specific intent, the intent must be proved as charged. *Blackstone v. State* 155

Assumpsit, Action of.

Wherever one person has money to which in equity and good conscience another is entitled, the law creates a promise by the former to pay it to the latter and the obligation may be enforced by assumpsit. *Barker v. Wardens & Vestrymen of St. Barnabas Church* 574

Attorney and Client.

1. A disciplinary proceeding is not a lawsuit with formalities of pleading. Technicalities cannot be invoked to defeat the charges where undisputed facts show conduct which is ethically wrong. *State ex rel. Nebraska State Bar Assn. v. Jensen* 1
2. Disbarment proceedings are essentially civil and not criminal in character, and the recognized rules governing civil practice are applicable thereto. *State ex rel. Nebraska State Bar Assn. v. Jensen* 1
3. In a proceeding for the disbarment of an attorney, the presumption of innocence applies, and the culpability of the person charged must be established by a clear preponderance of the evidence. The court should be satisfied to a reasonable certainty that the charges are true. *State ex rel. Nebraska State Bar Assn. v. Jensen* 1
4. Obligations of oath taken by a lawyer upon admission to practice stated. *State ex rel. Nebraska State Bar Assn. v. Jensen* 1
5. A lawyer owes his first duty to the court. He assumed his obligations toward it before he ever had a client. He cannot serve two masters, and the one he has undertaken to serve primarily is the court. *State ex rel. Nebraska State Bar Assn. v. Jensen* 1
6. A duty rests on the courts to maintain the integrity of the legal profession by disbarring or suspending attorneys who indulge in practices designed to bring the courts or the profession into disrepute, to perpetrate a fraud on the courts, or to corrupt and de-

feat the administration of justice. *State ex rel. Nebraska State Bar Assn. v. Jensen* 1

7. In granting a license to practice law it is on the implied understanding that the party receiving it shall in all things demean himself in a proper manner, and abstain from such practices as cannot fail to bring discredit upon himself, the profession, and the courts. *State ex rel. Nebraska State Bar Assn. v. Jensen* 1

8. The ethical standards relating to the practice of law in this state are the Canons of Professional Ethics of the American Bar Association which have been adopted and which are from time to time approved by the Supreme Court of this state. *State ex rel. Nebraska State Bar Assn. v. Jensen* 1

9. Any conduct on the part of an attorney evidencing his unfitness for the confidence and trust which attend the relationship of attorney and client or which is unworthy of public confidence constitutes a ground for suspension or disbarment. *State ex rel. Nebraska State Bar Assn. v. Jensen* 1

10. Violation of codes of ethics or any conduct on the part of an attorney in his professional capacity which tends to bring reproach on the legal profession constitutes ground for suspension or disbarment. *State ex rel. Nebraska State Bar Assn. v. Jensen* 1

11. The purpose of a disbarment proceeding is not so much to punish the attorney as it is to determine in the public interest whether he should be permitted to practice law. *State ex rel. Nebraska State Bar Assn. v. Jensen* 1

12. In a disciplinary action against an attorney the referee is charged with the duty to determine the truth, and has the right to question witnesses on both sides of the litigation to reach a determination as to the true facts. In doing so the referee has not committed error. *State ex rel. Nebraska State Bar Assn. v. Jensen* 1

13. A contract for a contingent fee dependent upon the amount of alimony awarded in divorce suit is void as against public policy. *State ex rel. Nebraska State Bar Assn. v. Jensen* 1

14. The conduct of a lawyer before the court and with other lawyers should be characterized by candor and fairness. *State ex rel. Nebraska State Bar Assn v. Jensen* 1

15. Lapse of time since the acts on which a disciplinary proceeding is based is generally not available to the respondent as a defense. *State ex rel. Nebraska State Bar Assn. v. Jensen* 1
16. Function of bar committees in proceedings to discipline or disbar an attorney stated. *State ex rel. Nebraska State Bar Assn. v. Jensen* 1
17. The power of the court to award attorneys' fees taxed as costs in legal proceedings is generally dependent upon statutory authority. Statutes so providing must be strictly construed and applied. *Morton v. Travelers Indemnity Co.* 433
18. Where one has gone into a court of equity, and, taking the risk of litigation on himself, has created or preserved or protected a fund in which others are entitled to share, such others will be required to contribute their share to the reasonable costs and expenses of the litigation, including reasonable fees to the litigant's counsel. *Summerville v. North Platte Valley Weather Control Dist.* 695
19. An allowance for attorney's fees and expenses in a class action can only be made after the services have been rendered, the litigation has been successfully terminated, and a determination made that actual benefit has accrued to others in the class. *Summerville v. North Platte Valley Weather Control Dist.* 695
20. A petition for an allowance of attorney's fees and expenses in a class action is an independent proceeding, supplemental to the original proceeding, and not a request for a modification of the original judgment. *Summerville v. North Platte Valley Weather Control Dist.* 695
21. A petition for an allowance of attorney's fees and expenses in a class action may be filed after the expiration of the term at which the original judgment was entered. *Summerville v. North Platte Valley Weather Control Dist.* 695
22. The right to an allowance of attorney's fees and expenses in a class action is not waived by a failure to include a request for such an allowance in the original petition. *Summerville v. North Platte Valley Weather Control Dist.* 695

Automobiles.

1. A qualified expert, upon laying a proper foundation, may give his opinion as to the speed of an auto-

mobile, based on the length of skid marks made by it when brakes were applied. *Nisi v. Checker Cab Co.* 49

2. Various factors, such as skid marks, distance traveled after impact, and force of impact, constitute pertinent evidence in arriving at an estimate of the rate of speed of an automobile, either by those involved in an accident or those in authority investigating the accident immediately thereafter. *Nisi v. Checker Cab Co.* 49

3. Proof of violation of a statute or city ordinance relating to speed does not of itself establish negligence in an action for damages but it is evidence which is to be considered in determining whether a party is guilty of negligence. *Nisi v. Checker Cab Co.* 49

4. In the absence of a prohibition by statute or ordinance a person may cross a street at any place and is not limited to crossing at intersections. The driver of an automobile owes to one crossing a street at a point not a regular crossing the duty of reasonable and ordinary care under the circumstances. *Nisi v. Checker Cab Co.* 49

5. It is a question for the jury whether the operator of a motor vehicle equipped with headlights should have observed a pedestrian crossing a street. *Nisi v. Checker Cab Co.* 49

6. In those cases where reasonable minds may differ on the question of whether or not the operator of an automobile exercised the care, caution, and prudence required of him under the circumstances of the particular situation, the issue of negligence on the part of the operator is one of fact to be determined by a jury. *Nisi v. Checker Cab Co.* 49

7. A pedestrian crossing a street at a place other than a street intersection or crosswalk in direct violation of a city ordinance is required to keep a constant lookout for his own safety in all directions of anticipated danger. *Jarosh v. Van Meter* 61

8. Doctrine of right-of-way as between driver of an automobile and a pedestrian stated. *Jarosh v. Van Meter* 61

9. Degree of care required to be exercised by a pedestrian crossing a street stated. *Jarosh v. Van Meter* 61

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

and prudent under the existing circumstances. *Hilferty v. Mickels* 246

11. Speed of an automobile, as a basis for negligence, may be established by circumstantial evidence. *Hilferty v. Mickels* 246

12. The observance of a practice or custom which is contrary to a statute does not prevent a motorist from being guilty of a violation of the statute. *Hilferty v. Mickels* 246

13. A motorist entering a public highway from a private driveway is not required to yield the right-of-way to an automobile being driven on the left hand side of the highway. *Hilferty v. Mickels* 246

14. A right-of-way does not include a right to encroach on that part of a highway on which a vehicle from the opposite direction is entitled to travel. *Hilferty v. Mickels* 246

15. It is a motorist using a public highway approaching a private driveway who is proceeding in his proper lane of travel in a prudent and reasonable manner, who is given the statutory right-of-way. *Hilferty v. Mickels* 246

16. The user of a public highway is required at all times to use reasonable care considering the existing conditions and circumstances. *Hilferty v. Mickels* 246

17. A motorist must be attentive to where he is traveling on a highway, to what is ahead of him in the direction of his travel or in the direction from which others may be expected to approach, and to know what is in front of him for a reasonable distance. *Hilferty v. Mickels* 246

18. In an action for damages to an automobile, where the automobile cannot be placed in substantially as good condition as it was before the injury, the measure of damages is the difference between its reasonable market value immediately before and immediately after the accident. *Freeport Motor Cas. Co. v. McKenzie Pontiac, Inc.* 681

19. When one, being in a place of safety, sees or could have seen the approach of a moving 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. *Palmer v. McDonald* 727

20. Under the law of Missouri, a driver of a motor

vehicle, particularly one familiar with a railroad crossing and about to drive thereon, must exercise the highest degree of care to keep a lookout and to observe and watch for the approach of trains. *Fisher v. Chicago, B. & Q. R. R.* 804

21. Under the law of Missouri, the driver of a motor vehicle, who has a clear view along a railroad track and who drives upon the track in daylight when by looking he could have seen an approaching train, is guilty of negligence as a matter of law. *Fisher v. Chicago, B. & Q. R. R.* 804

22. Under the law of Missouri, failure of driver of motor vehicle to see approaching train, when under physical facts he should have seen it, was the proximate cause of a collision at crossing. *Fisher v. Chicago, B. & Q. R. R.* 804

23. Under the law of Missouri, the negligence of the driver of the motor vehicle in such a situation is the proximate cause of the collision, and the railroad company is not liable in damages for the death of the driver. *Fisher v. Chicago, B. & Q. R. R.* 804

24. Duty of driver of an automobile approaching a highway intersection and consideration of evidence in such a case stated. *Sekora v. Mangers* 868

25. Before a verdict can be properly directed in a highway intersection case, the position of the defendant's automobile must be definitely located in a favored position, otherwise the question becomes one for the jury. *Sekora v. Mangers* 868

26. The lawfulness of the speed of an automobile within the prima facie limits fixed is determined by the further test of whether the speed was greater than was reasonable and prudent under the conditions then existing. *Sekora v. Mangers* 868

Bail.

1. Liability of the makers of a bail bond becomes absolute when the surety thereon fails to deliver principal into custody or procure his attendance. *State v. Morse* 87

2. Bail bond is defined. *State v. Morse* 87

3. A judgment rendered on account of a forfeited bail bond may not exceed the amount of the penalty of the bond. *State v. Morse* 87

Bailments.

A bailee of a chattel for the mutual benefit of the parties or for hire, in the absence of an express contract, is liable to the bailor only for any loss resulting from the negligence of the bailee. *Freeport Motor Cas. Co. v. McKenzie Pontiac, Inc.* 681

Bills and Notes.

1. The taking of a new note for an existing note is a renewal of the old indebtedness, and not a payment of the debt, unless there is a specific agreement between the parties that the new note shall extinguish the original debt. *Kehr v. Blomenkamp* 304
2. If the consideration for a note and mortgage is the suppression of a criminal prosecution, the transaction is illegal and void and no recovery can be had thereon. *Grasso v. Dean* 648

Bonds.

1. A sinking fund is defined to be a fund arising from particular taxes, imposts, or duties, which is appropriated toward the payment of the interest due on a public loan and for the payment of the principal. *Talbott v. City of Lyons* 186
2. Requirements for creation of sinking fund for the payment of municipal bonds stated. *Talbott v. City of Lyons* 186

Brokers.

A broker is one who is engaged for others on a commission to negotiate contracts relative to property with the custody of which he has no concern. *Carey v. Humphries* 578

Burglary.

1. The material elements of the crime of possession, custody, or control of burglary tools or instruments may be proved by direct or circumstantial evidence. *Kennedy v. State* 160
2. In a prosecution for possession of burglar's tools and instruments, the ownership thereof is ordinarily immaterial. *Kennedy v. State* 160
3. In a prosecution for possession of burglar's tools or instruments, the possession may be actual or constructive, and unless expressly provided by statute, possession upon one's person is not necessary. Two persons may have constructive possession or

one may have actual possession and the other constructive possession. *Kennedy v. State* 160

4. The possession of burglar's instruments or tools with a guilty intent may be joint as well as several, and where the guilty intent of several is manifested by their joint act, it becomes a joint offense. *Kennedy v. State* 160

5. The words "possession, custody or control," as used in statute, express an alternative of terms, definitions, or explanations of the same thing in different words. *Kennedy v. State* 160

Conflict of Laws.

A contract made in another state and valid under its governing laws is considered valid here, and will be enforced, unless the enforcement of the contract would violate the positive law or the settled public policy of this state or would work an injury to this state or its citizens. *Dunlop Tire & Rubber Corp. v. Ryan* 820

Constitutional Law.

1. The term "due process of law" is defined. *State ex rel. Nebraska State Bar Assn. v. Jensen* 1

2. Due process of law is satisfied whenever an opportunity is offered to invoke the equal protection of the law by judicial proceedings appropriate for the purpose and adequate to secure the end and object sought to be attained. *State ex rel. Nebraska State Bar Assn. v. Jensen* 1

3. A defendant in a criminal prosecution has a constitutional right to a public trial by an impartial jury. When it appears to the Supreme Court that a defendant has not been accorded a fair trial, its duty is to grant a new trial. *Wamsley v. State* 197

4. Where statutes imposing tax penalties were not uniform as to class and were discriminatory, they were violative of designated constitutional provisions. *Creigh v. Larsen* 317

5. Before a law can be determined unconstitutional, the express provision of our Constitution which the law contravenes must be pointed out. *Metropolitan Utilities Dist. v. City of Omaha* 609

6. Ordinances and statutes are presumed to be constitutional; unconstitutionality must be clearly established; and courts will not pass on a question of

constitutionality unless it becomes necessary to do so. *Metropolitan Utilities Dist. v. City of Omaha* 609

7. A motion for summary judgment is a proper pleading to raise the question of constitutionality if the pleadings and admissions show there is no genuine issue of fact. *Anderson v. Carlson* 741

8. The constitutionality of a law is to be tested by what the act authorizes and what may be accomplished by it. *Anderson v. Carlson* 741

9. A statute vesting an arbitrary discretion in a public officer without furnishing a guide or standard for the exercise of such discretion violates the constitutional provision prohibiting undue delegation of legislative power. *Anderson v. Carlson* 741

10. A statute permitting private individuals to fix the boundaries of a district to be supported by taxation, without affording property owners the opportunity to be heard by a competent tribunal as to the propriety of being included therein, is an unconstitutional delegation of legislative power and a taking of property without due process of law. *Anderson v. Carlson* 741

11. The Legislature can legalize no act which it could not have authorized before it was done. In other words, it cannot validate that which the Constitution either in express terms or by necessary implication prohibits. *School Dist. No. 54 v. School Dist. of Omaha* 769

Continuances.

1. An application for continuance is addressed to the sound discretion of the court, and the ruling thereon will not be disturbed in the absence of a clear abuse of discretion. *State ex rel. Nebraska State Bar Assn. v. Jensen* 1
Kennedy v. State 160

2. In determining whether or not the trial court has abused its discretion in refusing to grant a continuance it is proper to look to the entire record in the case. *Kennedy v. State* 160

3. The denial of a motion for a continuance in order to secure evidence is not reversible error where it appears that the testimony of the absent witness would be either false or immaterial. *Kennedy v. State* 160

4. In the absence of an abuse of discretion, the Supreme Court will not interfere with a trial court's

ruling on the granting of recesses and continuances on account of emotion and hysteria of a witness. *Wamsley v. State* 197

Contracts.

1. A fundamental and indispensable basis of an enforceable agreement is a meeting of the minds of the parties thereto. *Voss v. Linn* 32
2. When a written contract has been unconditionally delivered to take effect as a legal obligation, a contemporaneous oral agreement, providing that the contract is not to be performed if a certain condition or contingency occurs, cannot be shown. *Voss v. Linn* 32
3. Existing law becomes part of every contract. This is true not only between individuals but between individuals and the government. *Stoller v. State* 93
4. The rule that a party will not be permitted to plead one cause of action and upon the trial rely on proof establishing a different cause applies to suits on contracts. *School Dist. No. 145 v. Robertson* 176
5. Where there is a question as to the meaning of a contract, it is to be construed most strongly against the party preparing it. *Podewitz v. Gering Nat. Bank* 380
6. The meaning of a written contract will be interpreted in the light of all the surrounding circumstances. *Podewitz v. Gering Nat. Bank* 380
7. Language used in a contract prepared by one of the parties thereto, which is susceptible to more than one construction, should receive such a construction as the party preparing the same at the time supposed the other party would give to it, or such a construction as the other party would be fairly justified in giving to it. *Podewitz v. Gering Nat. Bank* 380
8. The practical interpretation given contracts by the parties to them while they are engaged in their performance, and before any controversy has arisen concerning them, is one of the best indications of their true intent. The courts will ordinarily enforce such construction. *Podewitz v. Gering Nat. Bank* 380
9. At common law all contracts in restraint of trade were against public policy and void. *Securities Acceptance Corp. v. Brown* 406
10. A contract in partial restraint of trade may be

valid if ancillary to an actual transaction made in good faith to afford fair protection to one in whose favor the restriction is made. *Securities Acceptance Corp. v. Brown* 406

11. Restrictions against competition are not favored. An agreement which limits the right of a person to engage in a business or occupation will be strictly construed, and will not be extended by implication or construction beyond the fair or natural import of the language used. *Securities Acceptance Corp. v. Brown* 406

12. Contracts restricting competition should receive a reasonable construction, so as to give effect to the intention of the parties thereto and carry out, rather than defeat, the purpose for which they were executed. *Securities Acceptance Corp. v. Brown* 406

13. Injunction should not be granted to enforce a negative covenant in a contract of employment, unless the court is satisfied that the enforcement will be just and equitable and will not work undue hardship or oppression. *Securities Acceptance Corp. v. Brown* 406

14. A contract of employment may constitute a valid consideration for an agreement that the employee will not compete with his employer during the term of the employment, or thereafter, within such territory and during such time as may be reasonably necessary for the protection of the employer's business. *Securities Acceptance Corp. v. Brown* 406

15. Three general requirements of a valid contract in partial restraint of trade stated. *Securities Acceptance Corp. v. Brown* 406

16. Satisfactory proof is required where injunctive relief is sought in cases dealing with the performance of personal services. *Securities Acceptance Corp. v. Brown* 406

17. Equity will interfere in behalf of the employer and restrain the breach of a negative covenant not to engage in a competing business, providing the covenant does not offend against the rule that as to the time during which the restraint is imposed, or as to the territory it embraces, it shall be no greater than is reasonably necessary to secure the protection of the business or good will of the employer. *Securities Acceptance Corp. v. Brown* 406

18. A contract in restraint of trade, which is neither limited in time nor space, is against public policy and void. *Securities Acceptance Corp. v. Brown* 406

19. A contract in partial restraint of trade must be reasonable in its terms and limited in its extent, that is, limited as to both time and space. *Securities Acceptance Corp. v. Brown* 406
20. Where the conditions appear to be reasonable in their terms and operation, contracts containing restrictive provisions may be enforced although they are only limited as to either time or space. *Securities Acceptance Corp. v. Brown.* 406
21. Where, pursuant to the terms of an executory contract, materials are to be furnished and labor is to be performed in placing the same in usable condition, the contract is not divisible as between the material and labor so as to pass title to the materials before the required labor is performed, unless, by the terms of the contract, it is evident the parties intended otherwise. *Goedeker v. Peter Kiewit Sons' Co.* 532
22. A disguised threat of criminal punishment may be as effective for the purpose of inciting fear as a direct statement, and if it produces the desired condition of the mind, may amount to duress. *Grasso v. Dean* 648
23. Any wrongful influence designedly exerted by an interested party and producing a condition of mind that deprives the other party of the exercise of his free will may amount to duress and invalidate a contract signed while the influence prevails. *Grasso v. Dean* 648
24. In an action on an express contract the defendant may show under a general denial that the contract differed in terms from that pleaded, or that no contract was in fact made. *Lincoln Service & Supply, Inc. v. Lorenzen* 671
25. As a general rule a contract is considered as entered into at the place where the offer is accepted, or where the last act necessary to a meeting of the minds or to complete the contract is performed. *Dunlop Tire & Rubber Corp. v. Ryan* 820
26. The state in which the last act of a contract is performed which is necessary to the validity of the contract is the situs of the contract. *Dunlop Tire & Rubber Corp. v. Ryan* 820
27. A contract made in another state and valid under its governing laws is considered valid here, and will be enforced, unless the enforcement of the contract would violate the positive law or the settled

public policy of this state or would work an injury to this state or its citizens. *Dunlop Tire & Rubber Corp. v. Ryan* 820

28. A contract which provides that no action shall be brought thereon, or for a breach thereof, unless within a time therein specified, which is different from the time which the statute fixes for bringing an action on such contract or for a breach thereof, is against public policy and will not be enforced by the courts of this state. *Dunlop Tire & Rubber Corp. v. Ryan* 820

Courts.

1. Function of bar committees in proceedings to discipline or disbar an attorney stated. *State ex rel. Nebraska State Bar Assn. v. Jensen* 1
2. A court of general jurisdiction has inherent power to vacate an adjudication made by it in a civil case at any time during the term of court in which it was made. *Otteman v. Interstate Fire & Cas. Co., Inc.* 148
3. The question of whether or not a metropolitan water district has acted unreasonably and arbitrarily in the performance of its functions in the matter of service rendered and rates charged is one of those which is properly subject to judicial review and examination. *Erickson v. Metropolitan Utilities Dist.* 654

Criminal Law.

1. Where time is not an ingredient of a crime, a variance between the information and the proof is not fatal if the date proved is within the statute of limitations. *Ware v. State* 74
2. Where the undisputed evidence shows that the criminal act charged, if committed, was not barred by the statute of limitations, a failure to instruct as to the statute of limitations is not prejudicially erroneous. *Ware v. State* 74
3. 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. *Ware v. State* 74
4. The charge that one accused of crime is an habitual criminal is not the charge of a distinct offense or

crime. It is a direction of attention to facts which under the statute and the crime charged in the information are determinative of the penalty to be imposed. *Kennedy v. State* 160

5. The habitual criminal law does not set out a distinct crime, but provides that the repetition of criminal conduct aggravates the offense and justifies heavier penalties. *Kennedy v. State* 160

6. It is proper to set out the aggravation of a criminal offense justifying heavier penalties contemplated by the habitual criminal law either in the count charging the crime or in a separate count in the information. *Kennedy v. State* 160

7. When a proper record of a previous conviction has been produced, it becomes a matter of law for the court to determine whether or not that record establishes a previous conviction for the violation of a statute. *Kennedy v. State* 160

8. The refusal of the district court to suspend for an indefinite time the trial of a criminal case to enable the defendant to procure the attendance of a witness is not, in the absence of a showing of diligence, an abuse of judicial discretion. *Kennedy v. State* 160

9. The test by which to determine the sufficiency of circumstantial evidence in a criminal prosecution is whether the facts and circumstances tending to connect accused with the crime charged are of such conclusive nature as to exclude every reasonable hypothesis except that of guilt. *Kennedy v. State* 160

10. Rule as to sufficiency of circumstantial evidence in a criminal case stated. *Kennedy v. State* 160

11. In a criminal case, the Supreme Court will not interfere with a verdict of guilty based upon the evidence, unless it is so lacking in probative force that it can say, as a matter of law, that it is insufficient to support a finding of guilt beyond a reasonable doubt. *Kennedy v. State* 160

12. Rule as to when a trial court is justified in directing a verdict of not guilty in a criminal case stated. *Kennedy v. State* 160

13. Remarks of the prosecutor in final summation of the evidence to the jury which do not mislead and unduly influence the jury and thereby prejudice the rights of the defendant do not constitute misconduct. *Kennedy v. State* 160

14. An argument by a prosecuting attorney, which is

based on the evidence and inferences drawn therefrom, does not ordinarily constitute misconduct. *Kennedy v. State* 160

15. Where competent evidence is adduced to support every element of the offense charged, it is ordinarily for the jury to determine if the offense has been established by evidence beyond a reasonable doubt. *Wamsley v. State* 197

16. It is improper and generally prejudicial for a prosecuting attorney in a criminal case to declare to the jury his personal belief in the guilt of the defendant unless the belief is expressed as a deduction from the evidence. *Wamsley v. State* 197

17. Where, in a criminal case, any one of several errors assigned would not in itself be sufficient to warrant a reversal, nevertheless, if all of them in the aggregate justify the conclusion that defendant was not accorded a fair trial, it becomes the duty of the court to award a new trial. *Wamsley v. State* 197

18. A defendant in a criminal prosecution has a constitutional right to a public trial by an impartial jury. When it appears to the Supreme Court that a defendant has not been accorded a fair trial, its duty is to grant a new trial. *Wamsley v. State* 197

19. When a witness has been previously examined in open court with the opportunity for cross-examination, which has been fully availed of, and the witness cannot be procured for examination at the second trial, the evidence so given upon a former trial for the same offense may be used on the second trial. *Davis v. State* 333

20. In order to use evidence of a witness given at a former trial, it must affirmatively appear that the personal attendance of the witness at the trial cannot be had. This question is in the sound discretion of the trial court, and that discretion will not be interfered with upon appeal unless an abuse of discretion is affirmatively shown. *Davis v. State* 333

21. It is proper to instruct the jury that the flight of the accused is a circumstance which may be considered by it, and from which it may draw an inference of guilt in connection with other circumstances. *Davis v. State* 333

22. An instruction that prior conviction of the accused may be considered only for the purpose of affecting

his credibility is not prejudicial error as commenting on his credibility. *Davis v. State* 333

23. It is the better practice for the court, even when no request is made, to instruct the jury that evidence as to the previous conviction of the accused of a felony is to be considered as affecting his credibility as a witness, and not as tending to prove the crime as charged. *Davis v. State* 333

24. Inquiry by a party of his own witness as to prior statements inconsistent with his testimony is permissible for certain specified purposes. *Welton v. State* 643

25. 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 a proper instruction has not been requested by the party complaining. *Welton v. State* 643

Damages.

1. The future pain and suffering which a jury may consider in the assessment of damages are such as the evidence shows with reasonable certainty will be experienced by the injured person. *Hermilla v. Peterson* 365

2. Damages for permanent injury cannot be based upon speculation, probability, or uncertainty but must have as a basis therefor evidence that permanent damages are reasonably certain as a proximate result of the injury. *Hermilla v. Peterson* 365

3. It is the duty of the trial court to inform the jury as to each item or element of damage it should consider in reaching its verdict. *Phillips Petroleum Co. v. City of Omaha* 457

4. The rule is that damages, to be recoverable, must be direct and certain. Contingent, remote, or speculative damages relating to the loss of crops and damage to land will not be allowed. *Turnell v. Mahlin* 513

5. In an action for damages to an automobile, where the automobile cannot be placed in substantially as good condition as it was before the injury, the measure of damages is the difference between its reasonable market value immediately before and immediately after the accident. *Freeport Motor Cas. Co. v. McKenzie Pontiac, Inc.* 681

Deeds.

1. A description in a deed must be construed like any other document. If some part is inconsistent with the other parts, that which is repugnant may be rejected altogether if sufficient remains from which the intention of the parties can be ascertained. *Podewitz v. Gering Nat. Bank* 380
2. A tax deed is not required to state that the land has been offered at public sale. All that it requires is a statement therein as to whether the sale, pursuant to which it is being issued, was public or private. *Podewitz v. Gering Nat. Bank* 380

Descent and Distribution.

1. The method by which a married man or woman can be divested of his or her estate of inheritance in the property of the other is provided by statute. *Hughes v. de Barberi* 780
2. An estate of inheritance can be voluntarily divested only by a conveyance executed by a husband and wife while residents of this state. *Hughes v. de Barberi* 780

Divorce.

1. A contract for a contingent fee dependent upon the amount of alimony awarded in divorce suit is void as against public policy. *State ex rel. Nebraska State Bar Assn. v. Jensen* 1
2. Where the evidence in a divorce suit sustains a finding of cruelty on the part of the husband toward the wife, and is corroborated as required by law, the action of the district court in granting a divorce to the wife is proper and ordinarily will not be interfered with by the Supreme Court. *Kramer v. Kramer* 128
3. Rule for determination of alimony in divorce case stated. *Kramer v. Kramer* 128
   Waldbaum v. Waldbaum 625
   Ivins v. Ivins 838
4. A decree of divorce may not be granted on the uncorroborated declarations, confessions, or admissions of the parties, and in all cases corroborative evidence of the facts alleged to constitute a ground for divorce is required. *Laughrey v. Laughrey* 132
   Rush v. Rush 800
5. The corroboration relied upon in a suit for a divorce must in itself be competent evidence of

the acts and conduct asserted as a ground for divorce. *Laughrey v. Laughrey* 132

6. On an appeal to the Supreme Court in a divorce action, the cause is tried de novo. *Waldbaum v. Waldbaum* 625
Ivins v. Ivins 838

7. Extreme cruelty as ground for divorce is defined. *Waldbaum v. Waldbaum* 625

8. Extreme cruelty may consist of personal injury or physical violence, or it may be acts or omissions of such character as to destroy the peace of mind or impair the bodily or mental health of the one upon whom they are inflicted or toward whom they are directed, or be such as to destroy the objects of matrimony. *Waldbaum v. Waldbaum* 625

9. It is impossible to lay down any general rule as to the degree of corroboration required in a divorce action, as each case must be decided on its own facts and circumstances. *Waldbaum v. Waldbaum* 625
Ivins v. Ivins 838

10. Condonation is forgiveness for the past upon condition that the wrongs shall not be repeated. It is dependent upon future good conduct, and a repetition of the offense revives the wrong condoned. *Waldbaum v. Waldbaum* 625

11. In awarding custody of a child, the primary concern of the court in its sound discretion is the best interest and welfare of the child, having due regard for the rights of fit, proper, and suitable parents. *Waldbaum v. Waldbaum* 625
Ivins v. Ivins 838

12. In a case where the fixing of the custody of a minor child is concerned, the wishes of the child are not controlling, but if the child has reached sufficient age and has the ability to express an intelligent preference, such an expression is entitled to consideration. *Waldbaum v. Waldbaum* 625

13. The division of property and allowance of alimony in divorce actions are always to be determined by the facts in each case. *Waldbaum v. Waldbaum* 625

14. A person is not entitled to a divorce for any cause arising in this state unless he has had an actual residence in the state for at least 1 year next before bringing the suit with a bona fide intention of making this state his permanent home, or unless the marriage was solemnized in this state and the applicant shall have remained herein from the time

of marriage to the filing of the petition. *Rush v. Rush* 800

15. By statute, no person is entitled to a divorce for any cause arising out of this state unless one of the parties shall have resided within the state for at least 2 years next preceding the bringing of the action. *Rush v. Rush* 800

16. By statute, a person serving in the armed forces who has been continuously stationed in any military base or installation for the period of 1 year is deemed a resident in good faith of this state and the county where such military base or installation is located. *Rush v. Rush* 800

17. In the determination of whether or not a ground for divorce has been established, it is a general rule that acts asserted as grounds for divorce must be corroborated. *Ivins v. Ivins* 838

18. The charge of adultery must be clearly established by competent testimony before a decree of divorce may be granted on that ground. *Ivins v. Ivins* 838

19. In an action for divorce on the ground of adultery it is not necessary to show an overt act of adultery but the evidence of facts and circumstances must be such as to lead the mind of a just and reasonable person to the conclusion of guilt. *Ivins v. Ivins* 838

20. The testimony of an alleged paramour that he had adulterous relations with a wife whose husband is seeking a divorce on the ground of adultery should be received with caution and carefully scrutinized. *Ivins v. Ivins* 838

21. Divorce cases are triable de novo on appeal, subject to the rule of better opportunity of trial court to judge the credibility of witnesses. *Ivins v. Ivins* 838

22. In awarding the custody of minor children of tender years the best interests of the children usually require that they be given into the care and custody of the mother if she is a suitable and fit person. *Ivins v. Ivins* 838

23. The fact that a decree of divorce may be granted to a husband on grounds other than adultery does not bar the wife from the right to alimony and division of property. *Ivins v. Ivins* 838

Duress.

1. A disguised threat of criminal punishment may be as effective for the purpose of inciting fear as a direct statement, and if it produces the desired

condition of the mind, may amount to duress. *Grasso v. Dean* 648

2. Any wrongful influence designedly exerted by an interested party and producing a condition of mind that deprives the other party of the exercise of his free will may amount to duress and invalidate a contract signed while the influence prevails. *Grasso v. Dean* 648

3. Where a parent is induced to execute an instrument by threats and fear of criminal punishment of a child, the instrument is the result of duress and the contract may be voided. *Grasso v. Dean* 648

Elections.

Inducements in the way of statements and representations made to influence a voter, although false and fraudulent, will not invalidate an election if it does not appear that by force and fraud the voter was compelled to vote in a way he did not desire to vote. *Talbott v. City of Lyons* 186

Electricity.

1. An electric company maintaining wires carrying electricity is required to exercise the care that a person of ordinary prudence would exercise under the circumstances. It is not an insurer against injury. *Roos v. Consumers Public Power Dist.* 563

2. Among the circumstances to be considered in an action for damages arising out of a break in a wire carrying electricity is the well-known dangerous character of electricity and the inherent risk of injury to persons or property when it is uncontrolled. Therefore, the care used must be commensurate with and proportionate to that danger. *Roos v. Consumers Public Power Dist.* 563

3. The duty of due care with which an electric company is charged consists not only in the installation of the dangerous instrumentality but in the maintenance thereof in a safe condition at all times and places and under the changing circumstances of the particular case. *Roos v. Consumers Public Power Dist.* 563

4. One dealing with electricity of high voltage must, because of its highly dangerous character, exercise the utmost degree of care and skill known in the operation of its business to prevent injury to persons or property at any place where they may rea-

sonably be expected to be. *Roos v. Consumers Public Power Dist.* 563

5. The mere fact that an electric line breaks, unless the facts bring it within the rule of res ipsa loquitur, does not establish negligence so as to render an electric company liable for damages to property coming in contact with a fallen wire. *Roos v. Consumers Public Power Dist.* 563

6. If an electric company is shown, without conflict in the evidence, to have used the utmost degree of care and skill, notwithstanding injury has resulted from contact with a fallen wire, the electric company as a matter of law has not failed in the performance of its duty. *Roos v. Consumers Public Power Dist.* 563

7. The festooning of the insulation on electric wires or an abnormal sagging of such wires is not evidence of negligence to support a recovery where such conditions in no way contributed to the injury for which recovery is sought. *Roos v. Consumers Public Power Dist.* 563

8. In the performance of its duty to exercise due care and skill, an electric company must anticipate and guard against events which may reasonably be expected to occur, and a failure in this respect is negligence. *Roos v. Consumers Public Power Dist.* 563

9. It is not negligence to fail to anticipate and guard against happenings which would not have arisen except under exceptional or unusual circumstances. To impose such a liability upon electric companies would constitute them insurers against injury. *Roos v. Consumers Public Power Dist.* 563

10. In the performance of its duty to exercise the utmost care and skill in maintaining its electric wires, an electric company is required to make reasonable inspections to detect defects. *Roos v. Consumers Public Power Dist.* 563

11. An electric company must make reasonable and proper inspections of its appliances with such frequency as appears reasonably necessary and use due diligence to discover and remedy defects to the end that injury may not result therefrom. *Roos v. Consumers Public Power Dist.* 563

12. When an electric company conducts its business with due care and diligence, it ordinarily is not liable for a defective condition of its appliances of

which it has no notice. *Roos v. Consumers Public Power Dist.* 563

13. In the absence of evidence of a practical and customary means of discovering an inherent defect in a power line or a defect which is imperceptible to the human eye, and of which the electric company has no notice, liability ordinarily does not attach. *Roos v. Consumers Public Power Dist.* 563

14. Where fatigue fracture of an electric line could only be discovered upon examination under a high-powered microscope, liability for improper inspection did not attach. *Roos v. Consumers Public Power Dist.* 563

15. An electric company is liable only for its own negligence and where the proof does not establish a pleaded act of negligence, either of omission or commission, the basis for a recovery does not exist. *Roos v. Consumers Public Power Dist.* 563

Eminent Domain.

1. A holder of a mere option to purchase land which is sought to be condemned is not entitled to any compensation to be paid therefor nor to any damages by reason of the severance of a part of the land from the remainder of it, the subject of the option. *Phillips Petroleum Co. v. City of Omaha* 457

2. A holder of an option to purchase land being condemned, whether contained in a lease in which the holder is lessee or evidenced by separate writing, has no interest in the land which entitles him to compensation. *Phillips Petroleum Co. v. City of Omaha* 457

3. Private property cannot be taken without compensation for public use under a police regulation relating strictly to the public health, the public morals, or the public safety any more than under a police regulation having no relation to such matters but only to the general welfare. *Phillips Petroleum Co. v. City of Omaha* 457

4. A landowner must recover in the condemnation proceeding all his damages caused by the taking of land which may arise on account of the proper construction and the future operation of an improvement for which the land was taken. *Phillips Petroleum Co. v. City of Omaha* 457

5. The purchase of land for a right-of-way in lieu of condemnation carries with it all of the incidents

of eminent domain insofar as damages by reason of construction are concerned. *Clary v. State* 691

6. For all injuries which arise on account of the proper construction or future operation of an improvement, an adjoining landowner must be compensated in the original condemnation proceedings. *Clary v. State* 691

7. The owner of adjoining land is entitled to compensation not only for such injuries as might result from the use of the land appropriated in its natural state, but also for all which would result from a proper construction, improvement, and maintenance of the highway, taking into consideration, where channel changes are involved, the contingency of erosion. *Clary v. State* 691

Equity.

1. Laches is an equitable doctrine and it does not result from the mere passage of time. *State ex rel. Nebraska State Bar Assn. v. Jensen* 1

2. Lapse of time since the acts on which a disciplinary proceeding is based is generally not available to the respondent as a defense. *State ex rel. Nebraska State Bar Assn. v. Jensen* 1

3. The act of filing a bill in equity is sufficient as an exercise of an option when accompanied by the payment into court of the purchase price fixed by the option agreement. *Standard Reliance Ins. Co. v. Schoenthal* 490

4. A prayer for general relief in equity is as broad as the pleadings and the equitable powers of the court. *Standard Reliance Ins. Co. v. Schoenthal* 490

5. The claim that the exercise of the option by optionee was ineffectual in that optionee failed to tender payment of installments on an assessment for a public improvement is without merit where the optionee, by pleading in an equity action properly brought, unqualifiedly exercises the option and unconditionally agrees to comply with its terms as determined by the court. *Standard Reliance Ins. Co. v. Schoenthal* 490

6. Where by a bill in equity an optionee exercises his option to purchase and prays for the specific performance of the option agreement, the doctrine of laches is not available as a defense where the suit is brought within the time fixed by the option agreement for its exercise and no delay chargeable

to the optionee resulting in prejudice to the rights of optioner has occurred since the right to exercise the option arose. *Standard Reliance Ins. Co. v. Schoenthal* 490

Estoppel.

1. Ordinarily the doctrine of equitable estoppel cannot be invoked against a municipal corporation in the exercise of governmental functions but exceptions are made where right and justice so demand, particularly where the controversy is between one class of the public as against another class. *Talbott v. City of Lyons* 186
2. The doctrine of estoppel may be invoked against a municipal corporation where there have been positive acts by the municipal officers which may have induced the action of a party and where it would be inequitable to permit the corporation to stultify itself by retracting what its officers have done. *Talbott v. City of Lyons* 186
3. The positive assertion of a fact, and not the mere expression of an opinion, is necessary to constitute an estoppel. Likewise, a statement which is honestly made and which is intended or understood to be a mere estimate will not support an estoppel. *Talbott v. City of Lyons* 186
4. The doctrine of equitable estoppel is frequently applied to prevent a person from maintaining inconsistent positions. Acceptance of benefits, with knowledge of the facts, will create an estoppel. *Securities Acceptance Corp v. Brown* 406

Evidence.

1. A qualified expert, upon laying a proper foundation, may give his opinion as to the speed of an automobile, based on the length of skid marks made by it when brakes were applied. *Nisi v. Checker Cab Co.* 49
2. Various factors, such as skid marks, distance traveled after impact, and force of impact, constitute pertinent evidence in arriving at an estimate of the rate of speed of an automobile, either by those involved in an accident or those in authority investigating the accident immediately thereafter. *Nisi v. Checker Cab Co.* 49
3. Circumstantial evidence concerning an accident may be sufficient to overcome direct evidence as to the

speed of an automobile involved therein. *Hilferty v. Mickels* 246

4. The presumption against death by suicide is prima facie only and rebuttable. Such presumption is overcome and disappears when either direct or circumstantial evidence is introduced showing that death was caused by suicide. The burden is then upon plaintiff to adduce evidence that the death was accidental and not from suicide. *Haith v. Prudential Ins. Co.* 281

5. When a witness has been previously examined in open court with the opportunity for cross-examination, which has been fully availed of, and the witness cannot be procured for examination at the second trial, the evidence so given upon a former trial for the same offense may be used on the second trial. *Davis v. State* 333

6. A photograph proved to be a true representation of the person, place, or thing which it purports to represent is proper evidence of anything of which it is competent and relevant for a witness to give a verbal description. *Davis v. State* 333

7. While evidence admitted generally is in the case for any legitimate purpose, evidence which is offered and admitted for a limited purpose cannot be used for another and totally different purpose. *Baer v. Schaap* 347

8. When a witness gives testimony which as to material facts is in such obvious and irreconcilable conflict that if part of it be true the rest must be false, it cannot be accepted as the basis of a judicial conclusion. *Baer v. Schaap* 347

9. Where several inferences are deducible from facts presented, which inferences are opposed to each other but equally consistent with the facts proved, the plaintiff does not sustain his position by a reliance alone on the inference which would entitle him to recover. *Baer v. Schaap* 347

10. Inquiry by a party of his own witness as to prior statements inconsistent with his testimony is permissible for certain specified purposes. *Welton v. State* 643

11. 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 negli-

gently is generally competent evidence. *Freeport Motor Cas. Co. v. McKenzie Pontiac, Inc.* 681

12. Negligence is a question of fact and may be proved by circumstantial evidence. All that the law requires is that the facts and circumstances proved, together with the inferences that may be legitimately drawn from them, shall indicate, with reasonable certainty, the negligent act of which complaint is made. *Freeport Motor Cas. Co. v. McKenzie Pontiac, Inc.* 681

13. The testimony of an alleged paramour that he had adulterous relations with a wife whose husband is seeking a divorce on the ground of adultery should be received with caution and carefully scrutinized. *Ivins v. Ivins* 838

False Pretenses.

1. The gist of the offense of obtaining the money of another by false pretenses is false pretense with intent to cheat and defraud. *Harger v. State* 342

2. A conviction for obtaining money by false pretenses may not be sustained in the absence of proof of false pretense and of intent to cheat and defraud. *Harger v. State* 342

Fines.

1. Where fines, penalties, and license money arise and are paid in under rules, by-laws, or ordinances of cities, villages, precincts, or other subdivisions less than a county, such money shall be appropriated and used exclusively for the support of the common schools in the respective subdivision wherein it accrues. *School Dist. No. 54 v. School Dist. of Omaha* 769

2. Where fines, penalties, and license money arise and are paid in under the general laws of the state, such money shall be paid over to the counties respectively wherein the same may be levied or imposed, and appropriated exclusively to the support of common schools in the several school districts of such county. *School Dist. No. 54 v. School Dist. of Omaha* 769

Guaranty.

An action instituted in Nebraska on a written guaranty executed in and to be performed in Nebraska is subject to the provisions of the statute of limita-

tions in Nebraska. *Dunlop Tire & Rubber Corp. v. Ryan* 820

Guardian and Ward.

1. Appeals to the Supreme Court in the matter of the appointment of guardians are heard and determined de novo. *Workman v. Workman* 554
2. A proceeding for the appointment of a guardian is a probate matter. *Workman v. Workman* 554
3. By statute, a minor over the age of 14 years has a right to nominate his own guardian. Ordinarily the county court should approve the person so nominated unless, in the exercise of its discretion, it comes to the conclusion that the person nominated is disqualified to act as such. *Workman v. Workman* 554
4. The selection and appointment of guardians is a matter within the discretion of the county court making such selection and appointment. Ordinarily the Supreme Court will not interfere therewith unless an abuse of discretion is shown. *Workman v. Workman* 554
5. If one having a legal right to the appointment of guardian, such as a parent, is a fit and proper person to act in that capacity, he should not ordinarily be denied such right. *Workman v. Workman* 554
6. Where a minor has, for a number of years, been in the custody and care of a certain person who is competent and otherwise a suitable person to perform the duties of a guardian, the appointment of such person as guardian would be in the best interest of the minor. *Workman v. Workman* 554

Health.

1. The Sexual Psychopath Act was intended to permit the removal of a sexual psychopath from society until he is cured or is no longer a menace to the safety of others. *State v. Noll* 831
2. The Sexual Psychopath Act is not intended as a legal bypass whereby a sexual psychopath, after a relatively short stay in a mental institution, could be released to continue as a menace to society. *State v. Noll* 831
3. The intent of the Sexual Psychopath Act is to require confinement until such time as the offender is not likely to attack or otherwise inflict injury, loss, pain, or other evil on the objects of his uncontrolled and uncontrollable desires. *State v. Noll* 831

Highways.

1. A motorist entering a public highway from a private driveway is not required to yield the right-of-way to an automobile being driven on the left hand side of the highway. *Hilferty v. Mickels* 246
2. A right-of-way does not include a right to encroach on that part of a highway on which a vehicle from the opposite direction is entitled to travel. *Hilferty v. Mickels* 246
3. It is a motorist using a public highway approaching a private driveway who is proceeding in his proper lane of travel in a prudent and reasonable manner, who is given the statutory right-of-way. *Hilferty v. Mickels* 246
4. The user of a public highway is required at all times to use reasonable care considering the existing conditions and circumstances. *Hilferty v. Mickels* 246
5. A motorist must be attentive to where he is traveling on a highway, to what is ahead of him in the direction of his travel or in the direction from which others may be expected to approach, and to know what is in front of him for a reasonable distance. *Hilferty v. Mickels* 246
6. One who attempts to cross a street between intersections without looking is guilty of such negligence as will bar a recovery as a matter of law. If he testifies that he did look, it is implied that he looked in such a manner that he would see that which was in plain sight, unless some reasonable excuse for not seeing is shown. *Palmer v. McDonald* 727

Husband and Wife.

1. The method by which a married man or woman can be divested of his or her estate of inheritance in the property of the other is provided by statute. *Hughes v. de Barberi* 780
2. An estate of inheritance can be voluntarily divested only by a conveyance executed by such husband and wife while residents of this state. *Hughes v. de Barberi* 780
3. A party to a written contract for the sale of her real estate, not a homestead, will not be excused from performance because her husband did not sign the agreement and refused to join in the deed, if the other party is willing to accept the convey-

ance by the wife without the husband joining in the deed. *Hughes v. de Barberi* 780

4. A court may decree specific performance of an agreement to sell real estate against the wife alone, if the other party consents thereto; the husband's marital rights in such real estate not being affected by the decree. *Hughes v. de Barberi* 780

5. Where the purchaser fails to indicate by evidence or pleading that he will accept the deed of the wife without the husband joining therein, specific performance of the agreement will ordinarily be denied. *Hughes v. de Barberi* 780

Injunction.

1. Injunction should not be granted to enforce a negative covenant in a contract of employment, unless the court is satisfied that the enforcement will be just and equitable and will not work undue hardship or oppression. *Securities Acceptance Corp. v. Brown* 406

2. Satisfactory proof is required where injunctive relief is sought in cases dealing with the performance of personal services. *Securities Acceptance Corp. v. Brown* 406

3. Injunction is the appropriate remedy for the protection against unlawful interference with flow of surface waters in a well-defined channel. *Turnell v. Mahlin* 513

4. The injunctive process is available to a user of water against a water district furnishing water to the public generally to prevent the enforcement of a rate which is discriminatory. *Erickson v. Metropolitan Utilities Dist.* 654

Insurance.

1. Where the word "permission" or "consent" appears in the omnibus clause of an insurance policy without definition, it is construed to include implied permission. This implication may be a product of the present or past conduct of the insured. *State Farm Mutual Automobile Ins. Co. v. Kersey* 212

2. No liability attaches under a policy of insurance for accidental injury where automobile is being used without the express or implied consent of the insured. *State Farm Mutual Automobile Ins. Co. v. Kersey* 212

3. An insured may have a written policy reformed to

conform to the contract actually made, and acceptance of policy without examination thereof until after loss does not prevent reformation. *Rodine v. Iowa Home Mutual Cas. Co.* 263

4. An insured cannot disregard a written contract as evidenced by a policy of insurance furnished him by the insurer and have an action at law upon an alleged oral agreement inconsistent with the policy or a recovery thereon not warranted by the terms of the policy of insurance. *Rodine v. Iowa Home Mutual Cas. Co.* 263

5. The presumption against death by suicide is prima facie only and rebuttable. Such presumption is overcome and disappears when either direct or circumstantial evidence is introduced showing that death was caused by suicide. The burden is then upon plaintiff to adduce evidence that the death was accidental and not from suicide. *Haith v. Prudential Ins. Co.* 281

6. Generally, when the evidence, either direct or circumstantial, shows that the only reasonable hypothesis would be that of suicide, and the evidence is clearly inconsistent with any other explanation, the trial court should, when the question is properly raised, take the case from the jury, treat the matter as a question of law, and direct a proper verdict. *Haith v. Prudential Ins. Co.* 281

7. The parties to an insurance contract may make the contract in any legal form they desire. In the absence of statutory provisions to the contrary, insurance companies have the same right as individuals to limit their liability and to impose whatever conditions they please upon their obligations, not inconsistent with public policy. If plainly expressed, insurers are entitled to have such exceptions and limitations construed and enforced as expressed. *Morton v. Travelers Indemnity Co.* 433

8. An insurance policy should be construed in the same manner as any other contract in order to give effect to the intent of the parties at the time it was made. *Morton v. Travelers Indemnity Co.* 433

9. The language of an insurance contract should be considered not in accordance with what the insurer intended the words to mean, but what a reasonable person in the position of insured would have understood them to mean. *Morton v. Travelers Indemnity Co.* 433

10. If the contract was prepared by the insurer and contains provisions reasonably subject to different interpretations, the one favorable to the insured will be adopted. *Morton v. Travelers Indemnity Co.* 433

11. The clause, "collapse of the building or any part thereof," appearing in an insurance policy means a sudden or unusual shrinking, settling, or falling of the building or any part thereof, or a loss of firm support, rigidity, or connection with other parts. The wall or walls or other parts of the building need not have actually fallen down or together into an irregular mass. *Morton v. Travelers Indemnity Co.* 433

12. The power of the court to award attorneys' fees taxed as costs in legal proceedings is generally dependent upon statutory authority. Statutes so providing must be strictly construed and applied. *Morton v. Travelers Indemnity Co.* 433

13. Under the statutes which were effective and controlling in this case, in order to effect the cancellation of a policy of insurance by the insurer, it was necessary that there be a tender back to the insured of the paid but unearned premium. *Sculley v. Sullivan* 795

Joint Adventures.

1. To constitute a partnership or joint adventure, in a legal sense, there must be an agreement to share the profits and losses, and an absence of mutual interest in the profits or benefits is conclusive that a partnership or joint adventure does not exist. *Carey v. Humphries* 578

2. A joint adventure is defined. *Carey v. Humphries* 578

3. Necessary elements of a joint adventure stated. *Carey v. Humphries* 578

4. The existence of a joint adventure is a question of fact. The burden of establishing it is on the litigant who asserts its existence. More evidence is required to prove the existence of a joint adventure if alleged joint adventure parties are the only litigants than where the controversy is between a third party and the joint adventurers. *Carey v. Humphries* 578

5. Persons engaged in a common enterprise by way of a joint adventure or other similar association of persons stand in a fiduciary relation and are bound

by strict standards of good conduct and fair dealing the one to the other. *Carey v. Humphries* 578

6. If a joint adventure or a like association of persons is formed for the acquisition, ownership, or development of certain defined property, its scope will not be extended so as to forbid the acquisition, ownership, or development by one of the parties for his own benefit of property not owned by or concerned in the enterprise and which is outside of its scope. *Carey v. Humphries* 578

Joint Tenancy.

A contract by joint tenants to sell real estate in joint tenancy destroys the joint tenancy in the real estate. If the contract of sale is silent as to the relationship of the vendors as owners of the contract, they own it as tenants in common. *Hughes v. de Barberi* 780

Judgments.

1. Where there is a material, genuine issue of fact to be determined, a motion for summary judgment is properly overruled. *State ex rel. Nebraska State Bar Assn. v. Jensen* 1
2. The summary judgment process as defined by statute is a special proceeding. *Otteman v. Interstate Fire & Cas. Co., Inc.* 148
3. The process prescribed by the Summary Judgments Act is not a trial within the meaning of that term and a judgment in favor of a movant is not one rendered as the result of a trial. *Otteman v. Interstate Fire & Cas. Co., Inc.* 148
4. A court of general jurisdiction has inherent power to vacate an adjudication made by it in a civil case at any time during the term of court in which it was made. *Otteman v. Interstate Fire & Cas. Co., Inc.* 148
5. When a proceeding under the Uniform Declaratory Judgments Act involves the determination of an issue of fact, such issue may be tried and determined in the same manner as issues of fact are tried and determined in other civil actions in the court in which the proceeding is pending. *State Farm Mutual Automobile Ins. Co. v. Kersey* 212
6. The Summary Judgments Act authorizes summary judgment only where the moving party is entitled to judgment as a matter of law, where it is clear what the truth is, and that no genuine issue re-

mains for trial. The purpose of the statute is not to cut litigants off from their right of trial by jury if they really have issues to try. *Ingersoll v. Montgomery Ward & Co., Inc.* 297

7. 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. *Ingersoll v. Montgomery Ward & Co., Inc.* 297

8. 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. *Ingersoll v. Montgomery Ward & Co., Inc.* 297

9. 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. *Ingersoll v. Montgomery Ward & Co., Inc.* 297

10. Requisities for entry of a judgment or order nunc pro tunc stated. *Bower v. Butcher* 452

11. The function of a nunc pro tunc order is not to correct some affirmative action of the court which ought to have been taken, but its purpose is to correct the record which has been made, so that it will truly express the action taken but which through inadvertence or mistake was not truly recorded. *Bower v. Butcher* 452

12. A nunc pro tunc order must conform to and be no broader in its terms than the one originally rendered. *Bower v. Butcher* 452

13. The order nunc pro tunc may be supported by the judge's notes, court files, or other entries of record. It may also be based upon other evidence, oral or written, which is sufficient to satisfy the court that the order is required to make the record reflect the truth. *Bower v. Butcher* 452

14. Where there is an actual controversy between the parties and justiciable issues are presented by all the interested parties, who are parties in the proceedings, the Uniform Declaratory Judgments Act is applicable. *Metropolitan Utilities Dist. v. City of Omaha* 609

15. A petition for an allowance of attorney's fees and expenses in a class action is an independent proceeding, supplemental to the original proceeding, and not a request for a modification of the original

judgment. *Summerville v. North Platte Valley Weather Control Dist.* 695

16. A petition for an allowance of attorney's fees and expenses in a class action may be filed after the expiration of the term at which the original judgment was entered. *Summerville v. North Platte Valley Weather Control Dist.* 695

17. A motion for summary judgment is a proper pleading to raise the question of constitutionality if the pleading and admissions show there is no genuine issue of fact. *Anderson v. Carlson* 741

18. When the question of liability is for the jury and plaintiff has adduced evidence of damages for injuries sustained, a verdict for the plaintiff in the amount of "$ no money" is contrary to law and insufficient to sustain a judgment for the defendant. *Bushey v. French* 809

19. When a question of fact is once determined on its merits, that question is settled so far as the litigants are concerned and it may not be relitigated between the same parties. *Frey v. Hauke* 852

Landlord and Tenant.

1. A provision in a lease of real estate giving to the the lessee the right to purchase the land upon conditions therein stated is no part of the lessee's leasehold estate in the land and it creates in the lessee no estate in the land. It is only a contract right and is not an extension or amplification of the estate granted by the lease. *Phillips Petroleum Co. v. City of Omaha* 457

2. The volume of business done on any given leasehold has a direct relation to the value of the leasehold as volume is directly connected with the success of the business and diminution of business means decrease in volume. *Phillips Petroleum Co. v. City of Omaha* 457

Larceny.

In a prosecution for larceny, proof of the value of the property stolen must be made by at least one witness affirmatively shown to possess knowledge of the value concerning which he is called upon to give evidence. *Davis v. State* 333

Liens.

1. A positive legislative enactment prescribing conditions essential to the existence and preservation of

a statutory lien may not be disregarded. *County Board of Platte County v. Breese* 37
2. A lien created by statute is limited in operation and extent by the terms of the statute and can arise and be enforced only in the event and under the facts and conditions provided in the statute. It cannot be extended by the court to a case not within the terms of the statute. *County Board of Platte County v. Breese* 37
3. The existence of a lien securing an original loan furnishes a presumption that a renewal was not a discharge of the original lien where the renewal is not secured. *Kehr v. Blomenkamp* 304

Limitations of Actions.
1. A petition showing on its face that the cause of action stated therein is barred by the statute of limitations is subject to general demurrer. *Dunlop Tire & Rubber Corp. v. Ryan* 820
2. In pleading the statute of limitations of a foreign state, it is unnecessary to set out in the pleading an exact copy thereof, or to give its title and date of approval. It is sufficient, as against a general demurrer, to allege the substance of the statute relied on. *Dunlop Tire & Rubber Corp. v. Ryan*..... 820
3. A contract which provides that no action shall be brought thereon, or for a breach thereof, unless within a time therein specified, which is different from the time which the statute fixes for bringing an action on such contract or for a breach thereof, is against public policy and will not be enforced by the courts of this state. *Dunlop Tire & Rubber Corp. v. Ryan* 820
4. An action instituted in Nebraska on a written guaranty executed in and to be performed in Nebraska is subject to the provisions of the statute of limitations in Nebraska. *Dunlop Tire & Rubber Corp. v. Ryan* 820

Mandamus.
1. Mandamus is not a prerogative writ in this state, but a remedy given to the citizen to enable him to assert his rights and obtain justice. *State ex rel. Krieger v. Board of Supervisors* 117
2. The proper practice in a mandamus action is to issue the writ in the name of the state upon the relation of the party or parties claiming the relief

sought. *State ex rel. Krieger v. Board of Supervisors* 117

3. The regular procedure in mandamus, after a petition therefor has been filed, is to make an application for a writ by motion supported by affidavit. The court may grant the writ without notice, may require notice to be given, or may grant an order to show cause why the writ should not be allowed. *State ex rel. Krieger v. Board of Supervisors* 117

4. When the right to the writ is clear, and it is apparent that no valid excuse can be given for failure to perform the duty, a peremptory writ should be issued. In all other cases, when a writ is issued, it should be in the alternative and contain an order to show cause. *State ex rel. Krieger v. Board of Supervisors* 117

5. The alternative writ and the answer thereto constitute the pleadings in any case wherein an alternative writ has been issued. No other pleadings are permitted. *State ex rel. Krieger v. Board of Supervisors* 117

6. If no answer is filed to an alternative writ then a peremptory writ must be allowed. *State ex rel. Krieger v. Board of Supervisors* 117

7. Procedure on issuance of an alternative writ of mandamus stated. *State ex rel. Krieger v. Board of Supervisors* 117

8. If no writ has been issued the case may be heard on the petition and response thereto when a hearing or order to show cause has been ordered. *State ex rel. Krieger v. Board of Supervisors* 117

9. The ordinary rules of pleading, where there are no special provisions of the statute to the contrary, apply to proceedings by mandamus. *State ex rel. Krieger v. Board of Supervisors* 117

10. A writ of mandumus is not a writ of right. Before a court is warranted in granting a peremptory writ it must be made to appear that the relator has a clear legal right to the performance by the respondent of the duty which it is sought to enforce. *State ex rel. Krieger v. Board of Supervisors* 117

11. To warrant the issue of mandamus against an officer to compel him to act, (1) the duty must be imposed upon him by law, (2) the duty must still exist at the time the writ is applied for, and (3) the duty to act must be clear. *State ex rel. Krieger v. Board of Supervisors* 117

Master and Servant.

1. One of the implied terms of a contract of employment is that the employee will hold sacred any trade secrets or other confidential information which he acquires in the course of his employment. An employee who has left his employment is under an implied obligation not to use trade secrets or other confidential information which he has acquired in the course of his employment. *Securities Acceptance Corp. v. Brown* 701
2. In the absence of any statutory regulation of the subject, where a servant continues work with knowledge, actual or constructive, of dangers to which an ordinarily prudent man would refuse to subject himself, he is guilty of contributory negligence, particularly where he has created the danger. *Gamble v. Gamble* 826
3. Where an employee, capable of understanding and discretion, fails to exercise ordinary care and prudence to avoid defects and dangers which are open and obvious, he will ordinarily be deemed to have assumed the risk, and no liability attaches to the employer. *Gamble v. Gamble* 826
4. A servant cannot undertake the performance of a service where the danger is so obvious that injury could be anticipated, even in obedience to the command of the master, and then maintain a cause of action for injuries sustained. The servant will be deemed to have assumed the risk. *Gamble v. Gamble* 826

Mines and Minerals.

1. Where the state has given a contract to sell school land, and agreed to give a deed in fee simple when the contract was paid in full, a change thereafter made in the Constitution of Nebraska would not prevent the state from being bound to carry out the contract. *Stoller v. State* 93
2. Acceptance and recording of a deed containing a mineral reservation which was unauthorized and invalid will not estop a vendee of school lands from demanding a proper deed. *Stoller v. State* 93

Money Received.

An action for money had and received is an action at law. *Barker v. Wardens & Vestrymen of St. Barnabas Church* 574

Mortgages.

If the consideration for a note and mortgage is the suppression of a criminal prosecution, the transaction is illegal and void and no recovery can be had thereon. *Grasso v. Dean* 648

Motor Carriers.

1. The railway commission has authority to prescribe reasonable rates and charges for the transportation of property by common carrier. *L. E. Whitlock Truck Service v. Shippers Oil Field Traffic Assn.* 78
2. Where the evidence is in conflict in a hearing before the railway commission to fix the rates and charges which a common carrier may charge for the transportation of property, the power to resolve such conflicts rests with the commission and not the courts. *L. E. Whitlock Truck Service v. Shippers Oil Field Traffic Assn.* 78
3. An increase in the rates of a common carrier of intrastate commerce over the interstate rates for the same service is not discriminatory as to interstate users of a similar service. *L. E. Whitlock Truck Service v. Shippers Oil Field Traffic Assn.* 78
4. Controlling questions in determining the issuance of a certificate of public convenience and necessity stated. *Young v. Morgan Drive Away, Inc.* 784
5. The declared policy of the Motor Carrier Act is, in part, to regulate transportation in the public interest, and to promote efficient service without undue preferences or advantages, and prevent unfair or destructive competitive practices. The declared policy does not condemn competition. It does condemn unfair or destructive competitive practices. *Young v. Morgan Drive Away, Inc.* 784
6. The primary object of the regulation of public utilities by the railway commission is not to establish a monopoly or to guarantee the security of investment in public service corporations, but first and at all times, to serve the interests of the public. *Young v. Morgan Drive Away, Inc.* 784

Municipal Corporations.

1. Ordinarily the doctrine of equitable estoppel cannot be invoked against a municipal corporation in the exercise of governmental functions but exceptions are made where right and justice so demand, particularly where the controversy is between one

class of the public as against another class. *Talbott v. City of Lyons* 186

2. The doctrine of estoppel may be invoked against a municipal corporation where there have been positive acts by the municipal officers which may have induced the action of a party and where it would be inequitable to permit the corporation to stultify itself by retracting what its officers have done. *Talbott v. City of Lyons* 186

3. A sinking fund is defined to be a fund arising from particular taxes, imposts, or duties, which is appropriated toward the payment of the interest due on a public loan and for the payment of the principal. *Talbott v. City of Lyons* 186

4. Requirements for creation of sinking fund for the payment of municipal bonds stated. *Talbott v. City of Lyons* 186

5. The owner of property abutting on a street is not entitled as against the public to access to his land at all points on the boundary between it and a street although entire access cannot be denied him. The measure of the right of the property owner is reasonable ingress and egress under all the circumstances. *Phillips Petroleum Co. v. City of Omaha* 457

6. When a city makes provision by sewers or drains for carrying off surface water, it may not discontinue or abandon the same when it leaves a lot owner in a worse condition that he would have been if the city had not constructed such sewers or drains. *Young v. City of Scribner* 544

7. Where a city of the second class constructs sewers or drains, it is bound to use ordinary care to keep such sewers or drains in proper condition and repair. It will be held liable for damages to property resulting from failure to do so. *Young v. City of Scribner* 544

8. A city is liable for negligence of its agents in obstructing a gutter or drain resulting in damage to private property. *Young v. City of Scribner* 544

9. Neither the owner of land nor a municipal corporation has any right to collect waters and discharge them upon the lands of another in a greater quantity than what would have reached the property by natural drainage. *Young v. City of Scribner* 544

10. Like an individual, a municipality may, in a proper case, be enjoined from creating or maintaining a

nuisance, or be required to abate one already created by it. *Young v. City of Scribner* 544

11. A public sewer system is a public utility. A municipality may, by ordinance, fix and collect reasonable service charges for the use thereof upon a proper basis; and in doing so, it relates to a matter of statewide concern. *Metropolitan Utilities Dist. v. City of Omaha* 609

12. Validity of statutes and ordinances is favored and when susceptible of two constructions the one holding such statute or ordinance valid will ordinarily be followed. *Metropolitan Utilities Dist. v. City of Omaha* 609

13. Nature of powers of municipal corporation stated. *Metropoliton Utilities Dist. v. City of Omaha* 609

14. A public sewer system is a public utility the same as a water system. The Legislature has the right to delegate to a municipal corporation the authority to manage and operate the same or any phase thereof. *Metropolitan Utilities Dist. v. City of Omaha* 609

15. A regulation promulgated by municipal ordinance which provides that the water supply be shut off to residents delinquent in the payment of sewer charges is valid and not an unreasonable or arbitrary regulation. *Metropoliton Utilities Dist. v. City of Omaha* 609

16. A metropolitan water district, organized pursuant to statute, is a body corporate and possesses all of the usual powers of a corporation for public purposes. *Erickson v. Metropolitan Utilities Dist.* 654

17. A metropolitan water district is empowered to exercise any and all powers that are possessed by or which may be granted to cities and villages by the general statutes of this state for the construction and extension of waterworks. *Erickson v. Metropolitan Utilities Dist.* 654

18. A metropolitan water district in the conduct of its affairs functions in the nature of a private enterprise for the convenience, advantage, and benefit of the area in which it functions, the inhabitants thereof, and the property owners therein. *Erickson v. Metropolitan Utilities Dist.* 654

19. Power and authority of directors of a metropolitan water district with respect to rates and charges for water service stated. *Erickson v. Metropolitan Utilities Dist.* 654

20. Where a water district furnishes water to the public

at large it may classify users and charge different rates to the different classes provided the charges are reasonable and not discriminatory. *Erickson v. Metropolitan Utilities Dist.* 654

21. Those engaged in serving water to the public generally may not make unreasonable and unjust discrimination either in service or rates among their patrons. *Erickson v. Metropolitan Utilities Dist.* 654

22. A metropolitan water district having power to adopt rules and regulations is required to enact reasonable requirements, the reasonableness of which may be inquired into in a full hearing de novo in the courts. *Erickson v. Metropolitan Utilities Dist.* 654

23. The question of whether or not a metropolitan water district has acted unreasonably and arbitrarily in the performance of its functions in the matter of service rendered and rates charged is one of those which is properly subject to judicial review and examination. *Erickson v. Metropolitan Utilities Dist.* 654

24. The injunctive process is available to a user of water against a water district furnishing water to the public generally to prevent the enforcement of a rate which is discriminatory. *Erickson v. Metropolitan Utilities Dist.* 654

Negligence.

1. Proof of violation of a statute or city ordinance relating to speed does not of itself establish negligence in an action for damages but it is evidence which is to be considered in determining whether a party is guilty of negligence. *Nisi v. Checker Cab Co.* 49

2. In the absence of a prohibition by statute or ordinance a person may cross a street at any place and is not limited to crossing at intersections. The driver of an automobile owes to one crossing a street at a point not a regular crossing the duty of reasonable and ordinary care under the circumstances. *Nisi v. Checker Cab Co.* 49

3. It is a question for the jury whether the operator of a motor vehicle equipped with headlights should have observed a pedestrian crossing a street. *Nisi v. Checker Cab Co.* 49

4. In those cases where reasonable minds may differ on the question of whether or not the operator of an automobile exercised the care, caution, and pru-

dence required of him under the circumstances of the particular situation, the issue of negligence on the part of the operator is one of fact to be determined by a jury. *Nisi v. Checker Cab Co.* 49

5. Proximate cause is that cause which in a natural and continuous sequence, unbroken by an efficient intervening cause, produces the injury, and without which the injury would not have occurred. *Jarosh v. Van Meter* 61

6. It is not sufficient that the negligence charged furnishes only a condition by which the injury is made possible, for if such condition causes an injury by the subsequent independent act of a third person, the two acts are not concurrent and the existence of the condition is not the proximate cause of the injury. *Jarosh v. Van Meter* 61

7. Doctrine of proximate cause, as affected by the intervening agency of others, stated. *Jarosh v. Van Meter* 61

8. Ordinarily, where the negligence of one party is merely passive and potential causing only a condition while that of the other is the moving and effective cause of the accident, the latter is the proximate cause. *Jarosh v. Van Meter* 61

9. Definition of contributory negligence stated. *Jarosh v. Van Meter* 61

10. A pedestrian crossing a street at a place other than a street intersection or crosswalk in direct violation of a city ordinance is required to keep a constant lookout for his own safety in all directions of anticipated danger. *Jarosh v. Van Meter* 61

11. Doctrine of right-of-way as between driver of an automobile and a pedestrian stated, *Jarosh v. Van Meter* 61

12. Degree of care required to be exercised by a pedestrian crossing a street stated. *Jarosh v. Van Meter* 61

13. When different minds may reasonably draw different conclusions from the same facts as to whether or not they establish negligence or contributory negligence, such issues should be submitted to the jury. *Buie v. Beamsley* 181
Wrona v. Schrawger 814
Sekora v. Mangers 868

14. The speed of an automobile may be unlawful even though it is within the statutory prima facie limits if it is unsafe or if it is greater than is reason-

able and prudent under the existing circumstances. *Hilferty v. Mickels* 246

15. Speed of an automobile, as a basis for negligence, may be established by circumstantial evidence. *Hilferty v. Mickels* 246

16. The observance of a practice or custom which is contrary to a statute does not prevent a motorist from being guilty of a violation of the statute. *Hilferty v. Mickels* 246

17. Doctrine of causal connection between negligence complained of and injury stated. *Baer v. Schaap* 347

18. The burden of proving a cause of action is not sustained by evidence from which negligence can only be surmised or conjectured. *Baer v. Schaap* 347

19. A definition of proximate cause generally has no materiality and is not required to be given in order to avoid prejudicial error when, under the facts of the case, the legal causation is obvious and unmistakable. *Morton v. Travelers Indemnity Co.* 433

20. Negligence may be proved by circumstantial evidence. All the law requires is that the facts and circumstances proved, together with the inferences that may be legitimately drawn from them, shall indicate, with reasonable certainty, the negligent act of which complaint is made. *Graves v. Bednar* 499
Freeport Motor Cas. Co. v. McKenzie Pontiac, Inc. 681

21. Negligence is the omission to do something which a reasonable and prudent man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a reasonably prudent man would not do. *Turnell v. Mahlin* 513

22. In an action for negligence based on specified acts of negligence the plaintiff, in order to recover, must establish the specific negligence alleged and the doctrine of res ipsa loquitur cannot be applied. *Roos v. Consumers Public Power Dist.* 563

23. An electric company maintaining wires carrying electricity is required to exercise the care that a person of ordinary prudence would exercise under the circumstances. It is not an insurer against injury. *Roos v. Consumers Public Power Dist.* 563

24. Among the circumstances to be considered in an action for damages arising out of a break in a wire carrying electricity is the well-known dangerous character of electricity and the inherent

risk of injury to persons or property when it is uncontrolled. Therefore, the care used must be commensurate with and proportionate to that danger. *Roos v. Consumers Public Power Dist.* 563

25. The duty of due care with which an electric company is charged consists not only in the installation of the dangerous instrumentality but in the maintenance thereof in a safe condition at all times and places and under the changing circumstances of the particular case. *Roos v. Consumers Public Power Dist.* 563

26. One dealing with electricity of high voltage must, because of its highly dangerous character, exercise the utmost degree of care and skill known in the operation of its business to prevent injury to persons or property at any place where they may reasonably be expected to be. *Roos v. Consumers Public Power Dist.* 563

27. The mere fact that an electric line breaks, unless the facts bring it within the rule of res ipsa loquitur, does not establish negligence so as to render an electric company liable for damages to property coming in contact with a fallen wire. *Roos v. Consumers Public Power Dist.* 563

28. If an electric company is shown, without conflict in the evidence, to have used the utmost degree of care and skill, notwithstanding injury has resulted from contact with a fallen wire, the electric company as a matter of law has not failed in the performance of its duty. *Roos v. Consumers Public Power Dist.* 563

29. The festooning of the insulation on electric wires or an abnormal sagging of such wires is not evidence of negligence to support a recovery where such conditions in no way contributed to the injury for which recovery is sought. *Roos v. Consumers Public Power Dist.* 563

30. In the performance of its duty to exercise due care and skill, an electric company must anticipate and guard against events which may reasonably be expected to occur, and a failure in this respect is negligence. *Roos v. Consumers Public Power Dist.* 563

31. It is not negligence to fail to anticipate and guard against happenings which would not have arisen except under exceptional or unusual circumstances. To impose such a liability upon electric companies

would constitute them insurers against injury. *Roos v. Consumers Public Power Dist.* 563

32. In the performance of its duty to exercise the utmost care and skill in maintaining its electric wires, an electric company is required to make reasonable inspections to detect defects. *Roos v. Consumers Public Power Dist.* 563

33. An electric company must make reasonable and proper inspections of its appliances with such frequency as appears reasonably necessary and use due diligence to discover and remedy defects to the end that injury may not result therefrom. *Roos v. Consumers Public Power Dist.* 563

34. When an electric company conducts its business with due care and diligence, it ordinarily is not liable for a defective condition of its appliances of which it has no notice. *Roos v. Consumers Public Power Dist.* 563

35. In the absence of evidence of a practical and customary means of discovering an inherent defect in a power line or a defect which is imperceptible to the human eye, and of which the electric company has no notice, liability ordinarily does not attach. *Roos v. Consumers Public Power Dist.* 563

36. Where fatigue fracture of an electric line could only be discovered upon examination under a high-powered microscope, liability for improper inspection did not attach. *Roos v. Consumers Public Power Dist.* 563

37. An electric company is liable only for its own negligence and where the proof does not establish a pleaded act of negligence, either of omission or commission, the basis for a recovery does not exist. *Roos v. Consumers Public Power Dist.* 563

38. 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. *Freeport Motor Cas. Co. v. McKenzie Pontiac, Inc.* 681

39. When one, being in a place of safety, sees or could have seen the approach of a moving 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. *Palmer v. McDonald* 727

40. One who attempts to cross a street between intersections without looking is guilty of such negligence as will bar a recovery as a matter of law. If he testifies that he did look, it is implied that he looked in such a manner that he would see that which was in plain sight, unless some reasonable excuse for not seeing is shown. *Palmer v. McDonald* 727

41. To constitute actionable negligence, an act must be a proximate cause of the accident and the ensuing injuries. *Palmer v. McDonald* 727

42. Rules to be applied in the application of the comparative negligence statute stated. *Sayers v. Witte* 750

43. 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. *Sayers v. Witte* 750

New Trial.

1. When testimony is offered and admitted in evidence without objection being made thereto, error cannot be predicated thereon on appeal. This rule applies to the district court when reviewing its own proceedings on motion for a new trial. *Law v. Gilmore* 112

2. A new trial does not involve an original examination of issues, but only re-examination. *Otteman v. Interstate Fire & Cas. Co., Inc.* 148

3. When a party litigant has appropriately filed a motion for judgment notwithstanding the verdict or in the alternative for new trial, the granting of the motion for new trial operates as a denial of the motion for judgment notwithstanding the verdict. *Haith v. Prudential Ins. Co.* 281

4. Where verdict is contrary to the evidence, it should be vacated. A request for judgment notwithstanding the verdict should in that event be sustained if motion therefor has been timely made. *Haith v. Prudential Ins. Co.* 281

5. A new trial is to be granted for a legal cause and where it appears that a legal right has been invaded or denied. A new trial is not to be granted for arbitrary, vague, or fanciful reasons. *Graves v. Bednar* 499

6. Errors sufficient to cause the granting of a new

trial must be errors prejudicial to the rights of the unsuccessful party. *Graves v. Bednar* 499

7. Where a party has sustained the burden and expense of a trial and has succeeded in securing the judgment of a jury on the facts in issue, he has a right to keep the benefit of that verdict unless there is prejudicial error in the proceedings by which it was secured. *Graves v. Bednar* 499

Nuisances.

Like an individual, a municipality may, in a proper case, be enjoined from creating or maintaining a nuisance, or be required to abate one already created by it. *Young v. City of Scribner* 544

Officers.

1. A provision in a statute that a county officer shall have necessary clerks and assistants at such salaries as he may determine, with the approval of the county board, invests the county officer with the duty of fixing the salaries of clerks and employees in his office. *Bass v. County of Saline* 538
2. In discharging the duty of fixing salaries of clerks and employees in his office the county officer must not act arbitrarily, capriciously, or unreasonably. *Bass v. County of Saline* 538
3. The expression, "with the approval of the county board," authorizes the county board to approve or disapprove the salary fixed by the officer, but such county board must not act arbitrarily, capriciously, or unreasonably in so doing. *Bass v. County of Saline* 538
4. Where a county officer has fixed the salary of a clerk or employee, and the evidence is undisputed that the salary so fixed is fair and reasonable for the service rendered, a disallowance or reduction of the salary claim by the county board is arbitrary and unreasonable. *Bass v. County of Saline* 538

Parent and Child.

1. In awarding custody of a child, the primary concern of the court in its sound discretion is the best interest and welfare of the child, having due regard for the rights of fit, proper, and suitable parents. *Waldbaum v. Waldbaum* 625
   Ivins v. Ivins 838
2. In a case where the fixing of the custody of a minor child is concerned, the wishes of the

child are not controlling, but if the child has reached sufficient age and has the ability to express an intelligent preference, such an expression is entitled to consideration. *Waldbaum v. Waldbaum* 625

3. A father's legal duty to support his child ceases when the child becomes of age, especially when the record is void of any reason for such support. *Waldbaum v. Waldbaum* 625
4. Where a parent is induced to execute an instrument by threats and fear of criminal punishment of a child, the instrument is the result of duress and the contract may be voided. *Grasso v. Dean* 648
5. In awarding the custody of minor children of tender years the best interests of the children usually require that they be given into the care and custody of the mother if she is a suitable and fit person. *Ivins v. Ivins* 838

Partnership.

1. To constitute a partnership or joint adventure in a legal sense, there must be an agreement to share the profits and losses, and an absence of mutual interest in the profits or benefits is conclusive that a partnership or joint adventure does not exist. *Carey v. Humphries* 578
2. The burden of proof is upon the plaintiff to prove an oral contract of partnership for a fixed term by clear, satisfactory, and unequivocal evidence. *Frey v. Hauke* 852
3. The fact that a partnership incurred debts and charged its assets for their payment is no proof of an agreement that the partnership shall continue until its debts are paid. The debts may be paid as well after as before dissolution. *Frey v. Hauke* 852
4. A managing partner who acquiesces in the matter of depreciation relating to the partnership business as set up by an accountant is in no position to complain about such depreciation. *Frey v. Hauke* 852
5. If a partner claiming an interest in the profits earned after the dissolution of the partnership has no interest in the assets or capital of the partnership after dissolution, he is not entitled to share in the profits earned. *Frey v. Hauke* 852
6. The good will of a partnership consists of every possible advantage acquired by it in carrying on its business. *Frey v. Hauke* 852
7. The chief elements of value in partnership good

will are continuity of name, place, and organization. *Frey v. Hauke* 852

Penalties.

1. A penalty statute must be strictly construed. It will not be applied to situations or parties not fairly or clearly within its provisions. *Johnson Fruit Co v. Story* 310
2. In construing a penalty statute nothing will be recognized, presumed, or inferred that is not expressed, unless necessarily or unmistakably implied in order to give effect to the statute. *Johnson Fruit Co. v. Story* 310
3. A taxpayer who is not within the scope of a statute providing penalties for failure to make a return of personal property subject to taxation or for omitting taxable property from his return may not properly question the constitutionality of the act. *Johnson Fruit Co. v. Story* 310
4. Penalties imposed on a taxpayer for failure to return property for taxation are not a part of the tax. *Creigh v. Larsen* 317
5. The imposition of penalties for failure to return property for taxation is a method commonly used to induce the return of taxable property for taxation. The remission of penalties imposed for failure to comply with taxing statutes, by a general law, is likewise a method that may be employed to induce compliance therewith. *Creigh v. Larsen* 317
6. Since the imposition of a penalty is not the assessment of a tax, the principle of uniformity as to class required by the Constitution has no application thereto. *Creigh v. Larsen* 317
7. Sections of the statute provide a statewide uniform rate of taxation on intangible property as classified therein. A failure to return such property for taxation is therefore an identical offense in all of the taxing districts of the state. *Creigh v. Larsen* 317
8. Statute imposing a penalty at tangible property rate for failure to return intangible property for taxation was not uniform as to class and discriminatory. *Creigh v. Larsen* 317
9. Where fines, penalties, and license money arise and are paid in under rules, by-laws, or ordinances of cities, villages, precincts, or other subdivisions less than a county, such money shall be appropriated and used exclusively for the support of the common

schools in the respective subdivision wherein it accrues. *School Dist. No. 54 v. School Dist. of Omaha* 769

10. Where fines, penalties, and license money arise and are paid in under the general laws of the state, such money shall be paid over to the counties respectively wherein the same may be levied or imposed, and appropriated exclusively to the support of common schools in the several school districts of such county. *School Dist. No. 54 v. School Dist. of Omaha* 769

Pleading.

1. 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. *Stoller v. State* 93
2. A general demurrer tests the substantive legal rights of parties upon admitted facts, including proper and reasonable inferences of law and fact which may be drawn from facts which are well pleaded. *Stoller v. State* 93
3. In order that a recovery may be had in an action, the pleadings and the proof must agree. *School Dist. No. 145 v. Robertson* 176
4. A party will not be permitted to plead one cause of action and upon the trial rely on proof establishing another. The allegations and proof must agree. *School Dist. No. 145 v. Robertson* 176
   Lincoln Service & Supply, Inc. v. Lorenzen 671
5. The rule that a party will not be permitted to plead one cause of action and upon the trial rely on proof establishing a different cause applies to suits on contracts. *School Dist. No. 145 v. Robertson* 176
6. There can be no recovery if there is a material variance between the allegations and the proof. The allegations and proof must agree. *Talbott v. City of Lyons* 186
7. The prayer of a petition is not a part of the allegations of fact constituting the cause of action. Where the facts state a cause of action which are supported by the evidence, the court will grant the proper relief, although it may not conform to the relief prayed for. *Standard Reliance Ins. Co. v. Schoenthal* 490
8. The prayer of a petition is no part of the essen-

tial pleading, it tenders no issue, and neither adds to nor takes from the evidence required of either party. *Standard Reliance Ins. Co. v. Schoenthal* 490

9. A prayer for general relief in equity is as broad as the pleadings and the equitable powers of the court. *Standard Reliance Ins. Co. v. Schoenthal* 490

10. In an action on an express contract the defendant may show under a general denial that the contract differed in terms from that pleaded, or that no contract was in fact made. *Lincoln Service & Supply, Inc. v. Lorenzen* 671

11. A petition showing on its face that the cause of action stated therein is barred by the statute of limitations is subject to general demurrer. *Dunlop Tire & Rubber Corp. v. Ryan* 820

12. In pleading the statute of limitations of a foreign state, it is unnecessary to set out in the pleading an exact copy thereof, or to give its title and date of approval. It is sufficient, as against a general demurrer, to allege the substance of the statute relied on. *Dunlop Tire & Rubber Corp. v. Ryan* 820

13. Where a party answers after an adverse ruling on his motion or demurrer and goes to trial on the merits of an issue he has elected to join, he waives the error, if any, in the ruling. *Ivins v. Ivins* 838

Principal and Agent.

1. The apparent authority or agency for which a principal is liable must be traceable to him. A principal is only liable for that appearance of authority or agency caused by himself. *Rodine v. Iowa Home Mutual Cas. Co.* 263

2. Evidence of acts or declarations of an agent concerning the existence or extent of his authority is not admissible against a principal to prove its existence or extent. *Rodine v. Iowa Home Mutual Cas. Co.* 263

3. A principal is not bound if the agent exceeds the scope of his authority and the absence of authority is known to the person dealing with him or if the third person knows or should know the limitation of the authority of the agent. *Rodine v. Iowa Home Mutual Cas. Co.* 263

4. It is an essential requirement of a valid and effective ratification of an unauthorized act by the principal that he have complete knowledge of the un-

authorized act and of all matters related to it. *Rodine v. Iowa Home Mutual Cas. Co.* 263

Public Lands.

1. The rights of a lessee of school lands are determined by the law as it was at the time the lease was made. The lessee may not thereafter be deprived of any substantial right resulting from the lease in his favor by subsequent legislation. *Stoller v. State* 93
2. Where the state has given a contract to sell school land, and agreed to give a deed in fee simple when the contract was paid in full, a change thereafter made in the Constitution of Nebraska would not prevent the state from being bound to carry out the contract. *Stoller v. State* 93
3. Acceptance and recording of a deed containing a mineral reservation which was unauthorized and invalid will not estop a vendee of school lands from demanding a proper deed. *Stoller v. State* 93

Public Service Commissions.

1. The railway commission has authority to prescribe reasonable rates and charges for the transportation of property by common carrier. *L. E. Whitlock Truck Service v. Shippers Oil Field Traffic Assn.* 78
2. Where the evidence is in conflict in a hearing before the railway commission to fix the rates and charges which a common carrier may charge for the transportation of property, the power to resolve such conflicts rests with the commission and not the courts. *L. E. Whitlock Truck Service v. Shippers Oil Field Traffic Assn.* 78
3. An order of the railway commission which ignores the undisputed or admitted facts and a proper application of the law to such facts is arbitrary and unreasonable. *L. E. Whitlock Truck Service v. Shippers Oil Field Traffic Assn.* 78
4. Rulings of 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. *L. E. Whitlock Truck Service v. Shippers Oil Field Traffic Assn.* 78
5. An increase in the rates of a common carrier of

intrastate commerce over the interstate rates for the same service is not discriminatory as to interstate users of a similar service. *L. E. Whitlock Truck Service v. Shippers Oil Field Traffic Assn.* 78

6. An order of the railway commission that is arbitrary and unreasonable will be vacated and set aside on appeal to the Supreme Court. *L. E. Whitlock Truck Service v. Shippers Oil Field Traffic Assn.* 78

7. Rate tariffs and rules of interpretation thereof are exempted from requirements of filing statute. *City of Scottsbluff v. United Tel. Co. of the West* 229

8. The power of the railway commission to fix the rates to be charged by common carriers is legislative and not judicial in character. *City of Scottsbluff v. United Tel. Co. of the West* 229

9. The railway commission may authorize a telephone company to impose upon its subscribers within the territorial limits of a city a pro rata charge to reimburse it for an occupation tax levied by the city. *City of Scottsbluff v. United Tel. Co. of the West* 229

10. On appeal from a decision of the railway commission involving the rates to be charged by common carriers, it is presumed that the rates prescribed are just, reasonable, and not arbitrary. *City of Scottsbluff v. United Tel. Co. of the West* 229

11. Under the statutes of this state it is only unjust discriminations and undue preferences under substantially similar circumstances and conditions which are unlawful and prohibited. *City of Scottsbluff v. United Tel. Co. of the West* 229

12. On appeal from a decision of the railway commission, which requires the exercise of legislative authority, the only questions to be determined are whether or not the commission acted within the scope of its powers and whether or not the order complained of is reasonable and not arbitrarily made. *City of Scottsbluff v. United Tel. Co. of the West* 229

13. Where there is substantial evidence supporting factors by which rates of common carriers are fixed which are in conflict with other recognized factors, the power to resolve such conflicts ordinarily rests with the railway commission and not the courts. *City of Scottsbluff v. United Tel. Co. of the West* 229

14. Where it is shown that an order of the railway commission is within the scope of the powers vested in it, is not unreasonable, arbitrary, or prohibited, and is supported by competent and relevant evidence, the courts have no authority to interfere with the judgment of the commission. *City of Scottsbluff v. United Tel. Co. of the West* 229

15. The railway commission has the duty to give full, adequate, and fair consideration to the claims of an applicant for rate increases. The applicant has the right to require that it be done. *Oakdale Tel. Co. v. Wilgocki* 425

16. On appeal to the Supreme Court from an order of the railway commission, while acting within its jurisdiction, the question for determination is the sufficiency of the evidence to prove that the order is not unreasonable or arbitrary. *Oakdale Tel. Co. v. Wilgocki* 425

17. Courts should, upon review, interfere with administrative and legislative action of the railway commission only so far as it is necessary to keep it within its jurisdiction and protect legal and constitutional rights. *Bower v. Butcher* 452

18. An order of the railway commission, making ultimate findings of fact in the language of the statutes, is not void because of the failure of the commission to make basic findings of fact in the order upon which the ultimate facts rest. *Young v. Morgan Drive Away, Inc.* 784

19. Controlling questions in determining the issuance of a certificate of public convenience and necessity stated. *Young v. Morgan Drive Away, Inc.* 784

20. The declared policy of the Motor Carrier Act is, in part, to regulate transportation in the public interest, and to promote efficient service without undue preferences or advantages, and prevent unfair or destructive competitive practices. The declared policy does not condemn competition. It does condemn unfair or destructive competitive practices. *Young v. Morgan Drive Away, Inc.* 784

21. The primary object of the regulation of public utilities by the railway commission is not to establish a monopoly or to guarantee the security of investment in public service corporations, but first and at all times, to serve the interests of the public. *Young v. Morgan Drive Away, Inc.* 784

Public Utilities.

1. A public utility is entitled to rates for its service that may normally be expected to yield a fair return upon the reasonable value of the property that is being used for the public convenience and necessity. *Oakdale Tel. Co. v. Wilgocki* 425
2. A public sewer system is a public utility the same as a water system. The Legislature has the right to delegate to a municipal corporation the authority to manage and operate the same or any phase thereof. *Metropolitan Utilities Dist. v. City of Omaha* 609

Railroads.

1. It is the law of Missouri that a railroad track of itself is a sign and warning of danger, requiring one who is about to cross the track to look and listen for approaching trains before driving onto the railroad track. *Fisher v. Chicago, B. & Q. R. R.* 804
2. Under the law of Missouri, a driver of a motor vehicle, particularly one familiar with a railroad crossing and about to drive thereon, must exercise the highest degree of care to keep a lookout and to observe and watch for the approach of trains. *Fisher v. Chicago, B. & Q. R. R.* 804
3. Under the law of Missouri, the driver of a motor vehicle, who has a clear view along a railroad track and who drives upon the track in daylight when by looking he could have seen an approaching train, is guilty of negligence as a matter of law. *Fisher v. Chicago, B. & Q. R. R.* 804
4. Under the law of Missouri, failure of driver of motor vehicle to see approaching train, when under physical facts he should have seen it, was the proximate cause of a collision at crossing. *Fisher v. Chicago, B. & Q. R. R.* 804
5. Under the law of Missouri, the negligence of the driver of the motor vehicle in such a situation is the proximate cause of the collision, and the railroad company is not liable in damages for the death of the driver. *Fisher v. Chicago, B. & Q. R. R.* 804

Rape.

1. In a prosecution for rape, if the prosecutrix testifies to facts constituting the crime charged and the accused unequivocally denies the commission of the offense, the testimony of the prosecutrix must be

corroborated on material points by other evidence to sustain a conviction of the accused. *Ware v. State* 74

2. It is not essential in a prosecution for rape that the prosecutrix be corroborated by other evidence as to the principal act constituting the offense, but it is indispensible that she be corroborated as to facts and circumstances which tend to support her testimony as to the principal fact in issue. *Ware v. State* 74

3. It is the duty of a trial court in a rape case, after denying a motion for a mistrial on the ground that defendant was prejudiced by manifestations of emotion and hysteria by the prosecutrix, to admonish the jury to disregard such manifestations and to determine the verdict solely upon the evidence. *Wamsley v. State* 197

4. In a prosecution for rape, it is the duty of the trial court to take necessary steps to remove prejudice arising from misconduct of the father of the prosecutrix. *Wamsley v. State* 197

5. Where incidents occur during the trial of a rape case which tend to create sympathy for the prosecutrix and hostility toward the defendant, it is the duty of the court, on request, to instruct the jury to disregard such incidents and to arrive at the verdict solely upon the evidence. A failure to give such an instruction under such circumstances ordinarily constitutes prejudicial error. *Wamsley v. State* 197

Reformation of Instruments.

An insured may have a written policy reformed to conform to the contract actually made, and acceptance of policy without examination thereof until after loss does not prevent reformation. *Rodine v. Iowa Home Mutual Cas. Co.* 263

Sales.

1. Generally, in the absence of any contrary intention or agreement, the risk of loss follows the title. *Goedeker v. Peter Kiewit Sons' Co.* 532

2. In order to have a passing of title to personal property, there must be a delivery and acceptance thereof within the intent and meaning of the parties' agreement. *Goedeker v. Peter Kiewit Sons' Co.* 532

3. Where, pursuant to the terms of an executory con-

tract, materials are to be furnished and labor is to be performed in placing the same in usable condition, the contract is not divisible as between the material and labor so as to pass title to the materials before the required labor is performed, unless, by the terms of the contract, it is evident the parties intended otherwise. *Goedeker v. Peter Kiewit Sons' Co.* 532

Schools and School Districts.

1. The powers and duties imposed upon county superintendents of schools by annexation of lands to school district statute are legislative in character. *McDonald v. Rentfrow* 479
2. The exercise of the powers and duties delegated to county superintendents by annexation of lands to school district statute are mandatory if the conditions exist which are described therein. *McDonald v. Rentfrow* 479
3. Before the powers and duties prescribed in annexation of lands to school district statute may be exercised, a county superintendent must give at least 15 days' notice to the legal residents of the district, which notice may be by mail or by publication in a newspaper of general circulation in the area. *McDonald v. Rentfrow* 479
4. Under annexation of lands to school district statute, an appeal may be taken from the action of the county superintendent to the district court but without providing a method. *McDonald v. Rentfrow* 479
5. A proceeding in error from the action of a county superintendent must come to the district court on a petition in error and a transcript. *McDonald v. Rentfrow* 479
6. In the case of a proceeding in error from the action of a county superintendent to the district court where no error is found, it is the duty of the district court to affirm the action of the county superintendent and of the clerk of the district court to certify the decision to the county superintendent. *McDonald v. Rentfrow* 479

Specific Performance.

1. Where the optionee prays for specific performance of the option agreement and makes an unconditional offer to exercise the option in accordance with its

terms, and in all respects offers to do equity, the basis exists for the granting of such relief. *Standard Reliance Ins. Co. v. Schoenthal* 490

2. A court may decree specific performance of an agreement to sell real estate against the wife alone, if the other party consents thereto; the husband's marital rights in such real estate not being affected by the decree. *Hughes v. de Barberi* 780

3. Where the purchaser fails to indicate by evidence or pleading that he will accept the deed of the wife without the husband joining therein, specific performance of the agreement will ordinarily be denied. *Hughes v. de Barberi* 780

States.

The state by entering into a contract abandons its attributes of sovereignty and binds itself, to the extent of its power to contract, substantially as an individual does who becomes a party to a contract. *Stoller v. State* 93

Statutes.

1. A legislative act operates prospectively only unless the legislative intent and purpose that it should operate retrospectively is clearly disclosed. *County Board of Platte County v. Breese* 37

2. If a right has been created by statute which did not exist in the common law, the Legislature may impose restrictions thereon. The conditions so imposed qualify and are an integral part of the statute and must be fully complied with in the manner therein prescribed. *County Board of Platte County v. Breese* 37

3. A legislative body which creates a right of action has power to determine the conditions under and the time within which it must be brought. *County Board of Platte County v. Breese* 37

4. Purpose of proviso in a statute stated, and rule of construction as to last expression in case of conflicting provisions outlined. *Stoller v. State* 93

5. Existing law becomes part of every contract. This is true not only between individuals but between individuals and the government. *Stoller v. State* 93

6. In construing a statute to determine the legislative intent a court may consider the history of its passage, the amendments offered, and action taken by

the Legislature thereon. *Hueftle v. Eustis Cemetery Assn.* 293

7. The enumeration of certain powers implies the exclusion of all others not fairly incident to those enumerated, and an affirmative description of cases in which certain powers may be exercised implies a negative on the exercise of such powers in other cases. *Hueftle v. Eustis Cemetery Assn.* 293

8. A penalty statute must be strictly construed. It will not be applied to situations or parties not fairly or clearly within its provisions. *Johnson Fruit Co. v. Story* 310

9. In construing a penalty statute nothing will be recognized, presumed, or inferred that is not expressed, unless necessarily or unmistakably implied in order to give effect to the statute. *Johnson Fruit Co. v. Story* 310

10. Where two statutes dealing with the same subject matter are amended at the same session of the Legislature, and are in conflict, the last of the two acts enacted supersedes the former. *Johnson Fruit Co. v. Story* 310

11. Where the latter of two statutes passed at the same session of the Legislature does not cover the entire field of the first and fails to embrace within its terms a material portion of the first, it will not repeal so much of the first as is not included within its scope, but the two will be construed together so far as the first still stands. *Johnson Fruit Co. v. Story* 310

12. The Legislature may make a reasonable classification for purposes of legislation, but the classification must rest upon real differences in situations and circumstances. To be valid the law must operate uniformly and alike upon every member of the class so designated. *Creigh v. Larsen* 317

13. A provision in a statute that a county officer shall have necessary clerks and assistants at such salaries as he may determine, with the approval of the county board, invests the county officer with the duty of fixing the salaries of clerks and employees in his office. *Bass v. County of Saline* 538

14. Ordinances and statutes are presumed to be constitutional; unconstitutionality must be clearly established; and courts will not pass on a question of constitutionality unless it becomes necessary to do so. *Metropolitan Utilities Dist. v. City of Omaha* 609

15. Validity of statutes and ordinances is favored and when susceptible of two constructions the one holding such statute or ordinance valid will ordinarily be followed. *Metropolitan Utilities Dist. v. City of Omaha* 609

16. In case of doubt as to the meaning of a statute resort may be had to the title of the act as an aid to discover the legislative intent, but not to enlarge the scope of the statute so as to include a subject not fairly expressed in the body of the act. *Metropolitan Utilities Dist. v. City of Omaha* 609

17. Rules for construction of statute of doubtful meaning stated. *Metropolitan Utilities Dist. v. City of Omaha* 609

18. The power of classification rests with the Legislature. This power cannot be interfered with by the courts unless it is clearly apparent that the Legislature has, by an artificial and baseless classification, attempted to avoid and violate the provisions of the Constitution prohibiting local and special legislation. *Metropolitan Utilities Dist. v. City of Omaha* 609

19. In the construction of statutes, when the word "may" appears, permissive or discretionary action is presumed. When the word "shall" appears, mandatory or ministerial action is presumed. *Anderson v. Carlson* 741

20. A word or phrase repeated in a statute will bear the same meaning throughout the statute, unless a different intention appears. *Anderson v. Carlson* 741

21. A statute vesting an arbitrary discretion in a public officer without furnishing a guide or standard for the exercise of such discretion violates the constitutional provision prohibiting undue delegation of legislative power. *Anderson v. Carlson* 741

22. A statute permitting private individuals to fix the boundaries of a district to be supported by taxation, without affording property owners the opportunity to be heard by a competent tribunal as to the propriety of being included therein, is an unconstitutional delegation of legislative power and a taking of property without due process of law. *Anderson v. Carlson* 741

23. The Legislature can legalize no act which it could not have authorized before it was done. In other words, it cannot validate that which the Constitution either in express terms or by necessary implication

prohibits. *School Dist. No. 54 v. School Dist. of Omaha* 769

24. In general, the word "may" used in statutes will be given ordinary meaning unless it would manifestly defeat the object of the statutes, and when used in a statute is permissive, discretionary, and not mandatory. *State v. Noll* 831

25. In defining the term "discretion" when invoked as a guide to judicial action, it means a discretion exercised not arbitrarily or willfully, but with regard to what is right and equitable under the circumstances and the law, and directed by the reason and conscience of the judge to a just result. *State v. Noll* 831

26. The Sexual Psychopath Act was intended to permit the removal of a sexual psychopath from society until he is cured or is no longer a menace to the safety of others. *State v. Noll* 831

27. The Sexual Psychopath Act is not intended as a legal bypass whereby a sexual psychopath, after a relatively short stay in a mental institution, could be released to continue as a menace to society. *State v. Noll* 831

28. The intent of the Sexual Psychopath Act is to require confinement until such time as the offender is not likely to attack or otherwise inflict injury, loss, pain, or other evil on the objects of his uncontrolled and uncontrollable desires. *State v. Noll* 831

Subrogation.

A payment of a liability of another by one who is under no legal or moral obligation to pay the same does not entitle the volunteer to subrogation in the absence of an agreement to that effect. *Freeport Motor Cas. Co. v. McKenzie Pontiac, Inc.* 681

Taxation.

1. Taxation statute imposing severe penalty construed and held applicable to a situation where a taxpayer fails to make a return of personal property subject to taxation or omits taxable property from his return, and not applicable to a voluntary return made later than the time fixed by statute. *Johnson Fruit Co. v. Story* 310

2. A taxpayer who is not within the scope of a statute providing penalties for failure to make a return of personal property subject to taxation or for omitting

taxable property from his return may not properly question the constitutionality of the act. *Johnson Fruit Co. v. Story* 310

3. Penalties imposed on a taxpayer for failure to return property for taxation are not a part of the tax. *Creigh v. Larsen* 317

4. The imposition of penalties for failure to return property for taxation is a method commonly used to induce the return of taxable property for taxation. The remission of penalties imposed for failure to comply with taxing statutes, by a general law, is likewise a method that may be employed to induce compliance therewith. *Creigh v. Larsen* 317

5. Since the imposition of a penalty is not the assessment of a tax, the principle of uniformity as to class required by the Constitution has no application thereto. *Creigh v. Larsen* 317

6. Taxpayers who fail to return property for taxation may properly be designated by the Legislature as a class for the purpose of enacting legislation dealing with their failure to return property for taxation. *Creigh v. Larsen* 317

7. Sections of the statute provide a statewide uniform rate of taxation on intangible property as classified therein. A failure to return such property for taxation is therefore an identical offense in all of the taxing districts of the state. *Creigh v. Larsen* 317

8. Statute imposing a penalty at tangible property rate for failure to return intangible property for taxation was not uniform as to class and discriminatory. *Creigh v. Larsen* 317

9. Where statutes imposing tax penalties were not uniform as to class and were discriminatory, they were violative of designated constitutional provisions. *Creigh v. Larsen* 317

10. A tax deed is not required to state that the land has been offered at public sale. All that it requires is a statement therein as to whether the sale, pursuant to which it is being issued, was public or private. *Podewitz v. Gering Nat. Bank* 380

11. The burden of proof is upon the taxpayer to establish his contention that the value of his property has been arbitrarily or unlawfully fixed by the county board of equalization at an amount greater than its actual value. *L. J. Messer Co. v. Board of Equalization* 393

12. 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. The presumption disappears when there is competent evidence on appeal to the contrary, and from that point on the reasonableness of the valuations fixed by the board becomes one of fact based upon evidence unaided by presumption. *L. J. Messer Co. v. Board of Equalization* 393

13. A taxpayer is required by statute to furnish information as to his federal income tax return. The information so furnished does not constitute the conclusive actual value of the property to be taxed. *L. J. Messer Co. v. Board of Equalization* 393

14. A formula is provided by statute to be followed by the taxing authorities in taxing property. Such formula is applicable to personal property as well as real estate, and should be considered by the taxing authorities in taxing either real or personal property. *L. J. Messer Co. v. Board of Equalization* 393

Telecommunications.

1. The railway commission may authorize a telephone company to impose upon its subscribers within the territorial limits of a city a pro rata charge to reimburse it for an occupation tax levied by the city. *City of Scottsbluff v. United Tel. Co. of the West* 229

2. A public utility is entitled to rates for its service that may normally be expected to yield a fair return upon the reasonable value of the property that is being used for the public convenience and necessity. *Oakdale Tel. Co. v. Wilgocki* 425

Tenancy in Common.

A contract by joint tenants to sell real estate in joint tenancy destroys the joint tenancy in the real estate. If the contract of sale is silent as to the relationship of the vendors as owners of the contract, they own it as tenants in common. *Hughes v. de Barberi* 780

Torts.

1. Doctrine of proximate cause, as affected by the intervening agency of others, stated. *Jarosh v. Van Meter* 61

2. Where there are two or more possible causes of injury, for one or more of which defendant is not

responsible, plaintiff, in order to recover, must show by evidence that the injury was wholly or partly the result of that cause which would render defendant liable. *Baer v. Schaap* 347

Trial.

1. Where there is a material, genuine issue of fact to be determined, a motion for summary judgment is properly overruled. *State ex rel. Nebraska State Bar Assn. v. Jensen* 1
2. Rule for consideration of motion for directed verdict stated. *Nisi v. Checker Cab Co.* 49
   Buie v. Beamsley 181
   Johnston v. Robertson 324
   Wrona v. Schrawger 814
3. Duty of court in passing on motion for a judgment notwithstanding the verdict stated. *Jarosh v. Van Meter* 61
   Baer v. Schaap 347
4. Where a party has sustained the burden and expense of a trial and has succeeded in securing the verdict of a jury on the facts in issue, he has a right to keep the benefit of that verdict unless there is prejudicial error in the proceedings by which it was secured. *Law v. Gilmore* 112
5. Instructions not complained of in such a way as to be reviewable in the Supreme Court will be taken as the law of the case, and if, when tested by such instructions, the verdict is not vulnerable to the objections lodged against it, the assignments will not be sustained. *Law v. Gilmore* 112
6. A party is not permitted to proceed with the trial without objection and speculate on the outcome of the jury's verdict, and, if unfavorable, contend that a mistrial should have been declared, when he did not ask for the same at the time. *Law v. Gilmore* 112
7. Where a motion for a directed verdict was made at the close of plaintiff's evidence and sustained by the trial court, the ruling of the trial court thereon cannot be reviewed by the Supreme Court in the absence of a motion for a new trial assigning such error and a ruling thereon secured in the trial court. *Hungerford v. Knudsen* 125
8. Where it is sought to review the judgment of the district court in a law action, no required motion for a new trial having been filed, the Supreme Court will examine the record to ascertain if the

pleadings state a cause of action or defense which support the judgment. It will not go back of the verdict rendered by the jury or findings of fact made by the trial court to review anything done or any proceeding had. *Hungerford v. Knudsen* 125

9. A final order within the meaning of appeal statute is one which determines the action and prevents a judgment; one which affects a substantial right in a special proceeding; or one which is made on a summary application in an action after judgment. *Otteman v. Interstate Fire & Cas. Co., Inc.* 148

10. An exception to the general rule that only final orders are appealable appears in statute authorizing appeal from entry of judgment notwithstanding the verdict. *Otteman v. Interstate Fire & Cas. Co., Inc.* 148

11. An order is final only when no further action is required to dispose of the cause pending, but when the cause is retained for further action the order is interlocutory. *Otteman v. Interstate Fire & Cas. Co., Inc.* 148

12. An order sustaining a motion for new trial is in its essence interlocutory. *Otteman v. Interstate Fire & Cas. Co., Inc.* 148

13. The interlocutory character of an order sustaining a motion for new trial is not destroyed by the fact that by the terms of statute authorizing entry of judgment notwithstanding the verdict, an appeal may be taken therefrom. *Otteman v. Interstate Fire & Cas. Co., Inc.* 148

14. A trial is the examination before a competent tribunal, according to law, of facts or law put in issue in a cause, for the purpose of determining such issue. *Otteman v. Interstate Fire & Cas Co., Inc.* 148

15. The process prescribed by the Summary Judgments Act is not a trial within the meaning of that term and a judgment in favor of a movant is not one rendered as the result of a trial. *Otteman v. Interstate Fire & Cas. Co., Inc.* 148

16. Rule as to sufficiency of circumstantial evidence in a criminal case stated. *Kennedy v. State* 160

17. In a criminal case, the Supreme Court will not interfere with a verdict of guilty based upon the evidence, unless it is so lacking in probative force that it can say, as a matter of law, that it is in-

sufficient to support a finding of guilt beyond a reasonable doubt. *Kennedy v. State* 160
18. Rule as to when a trial court is justified in directing a verdict of not guilty in a criminal case stated. *Kennedy v. State* 160
19. In order that a recovery may be had in an action, the pleadings and the proof must agree. *School Dist. No. 145 v. Robertson* 176
20. A party will not be permitted to plead one cause of action and upon the trial rely on proof establishing another. The allegations and proof must agree. *School Dist. No. 145 v. Robertson* 176
Lincoln Service & Supply, Inc. v. Lorenzen 671
21. When different minds may reasonably draw different conclusions from the same facts as to whether or not they establish negligence or contributory negligence, such issues should be submitted to the jury. *Buie v. Beamsley* 181
Graves v. Bednar 499
Wrona v. Schrawger 814
Sekora v. Mangers 868
22. There can be no recovery if there is a material variance between the allegations and the proof. The allegations and proof must agree. *Talbott v. City of Lyons* 186
23. Where competent evidence is adduced to support every element of the offense charged, it is ordinarily for the jury to determine if the offense has been established by evidence beyond a reasonable doubt. *Wamsley v. State* 197
24. It is the duty of a trial court in a rape case, after denying a motion for a mistrial on the ground that defendant was prejudiced by manifestations of emotion and hysteria by the prosecutrix, to admonish the jury to disregard such manifestations and to determine the verdict solely upon the evidence. *Wamsley v. State* 197
25. In a prosecution for rape, it is the duty of the trial court to take necessary steps to remove prejudice arising from misconduct of the father of the prosecutrix. *Wamsley v. State* 197
26. It is improper and generally prejudicial for a prosecuting attorney in a criminal case to declare to the jury his personal belief in the guilt of the defendant unless the belief is expressed as a deduction from the evidence. *Wamsley v. State* 197
27. When a proceeding under the Uniform Declaratory

Judgments Act involves the determination of an issue of fact, such issue may be tried and determined in the same manner as issues of fact are tried and determined in other civil actions in the court in which the proceeding is pending. *State Farm Mutual Automobile Ins. Co. v. Kersey* 212

28. Where the record in a civil case shows that a law action was tried to the court without a jury and discloses no protest or objection thereto on the part of a litigant, and no application by him for a jury to try the issues, the Supreme Court will presume that a jury was waived. *State Farm Mutual Automobile Ins. Co. v. Kersey* 212

29. When a party litigant has appropriately filed a motion for judgment notwithstanding the verdict or in the alternative for a new trial, the granting of the motion for new trial operates as a denial of the motion for judgment notwithstanding the verdict. *Haith v. Prudential Ins. Co.* 281

30. Generally, when the evidence, either direct or circumstantial, shows that the only reasonable hypothesis would be that of suicide, and the evidence is clearly inconsistent with any other explanation, the trial court should, when the question is properly raised, take the case from the jury, treat the matter as a question of law, and direct a proper verdict. *Haith v. Prudential Ins. Co.* 281

31. Where verdict is contrary to the evidence, it should be vacated. A request for judgment notwithstanding the verdict should in that event be sustained if the motion therefor has been timely made. *Haith v. Prudential Ins. Co.* 281

32. The Summary Judgments Act authorizes summary judgment only where the moving party is entitled to judgment as a matter of law, where it is clear what the truth is, and that no genuine issue remains for trial. The purpose of the statute is not to cut litigants off from their right of trial by jury if they really have issues to try. *Ingersoll v. Montgomery Ward & Co., Inc.* 297

33. 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. *Ingersoll v. Montgomery Ward & Co., Inc.* 297

34. 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. *Ingersoll v. Montgomery Ward & Co., Inc.* 297

35. 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. *Ingersoll v. Montgomery Ward & Co., Inc.* 297

36. It is presumed in an action at law that controverted facts were decided by the jury in favor of the successful party, and its finding based on conflicting evidence will not be disturbed unless clearly wrong. *Johnston v. Robertson* 324

37. Where different minds may draw different inferences or conclusions from the facts proved, or if there is a conflict in the evidence, the matter at issue must be submitted to the jury to be determined. *Johnston v. Robertson* 324

38. Whenever the facts stated in the record are consistent with the duty of the court, and nothing is shown to establish a contrary theory, it will be assumed that the court acted properly and all things were rightly done. *Davis v. State* 333

39. A party is not permitted to proceed with the trial without objection and speculate on the outcome of the jury's verdict, and, if unfavorable, contend that a mistrial should have been declared, when he did not ask for the same at the time. *Davis v. State* 333

40. It is proper to instruct the jury that the flight of the accused is a circumstance which may be considered by it, and from which it may draw an inference of guilt in connection with other circumstances. *Davis v. State* 333

41. An instruction that prior conviction of the accused may be considered only for the purpose of affecting his credibility is not prejudicial error as commenting on his credibility. *Davis v. State* 333

42. It is the better practice for the court, even when no request is made, to instruct the jury that evidence as to the previous conviction of the accused of a felony is to be considered as affecting his credibility as a witness, and not as tending to prove the crime as charged. *Davis v. State* 333

43. A party may not complain of misconduct of counsel if, with knowledge of such misconduct, he does not ask for a mistrial, but consents to take the chance of a favorable verdict. *Davis v. State* 333

44. Duty of court stated as to preliminary determina-

tion of sufficiency of evidence to require submission of case to a jury. *Baer v. Schaap* 347

45. Where several inferences are deducible from facts presented, which inferences are opposed to each other but equally consistent with the facts proved, the plaintiff does not sustain his position by a reliance alone on the inference which would entitle him to recover. *Baer v. Schaap* 347

46. Rule for determination of motion for directed verdict stated. *Morton v. Travelers Indemnity Co.* 433

47. Where different minds may draw different inferences or conclusions from the facts proved, or if there is a conflict in the evidence, the matter at issue must be submitted to the jury to be determined; but, where the evidence is undisputed, and but one reasonable inference can be drawn from the facts, the question is one of law for the court. *Morton v. Travelers Indemnity Co.* 433

48. A definition of proximate cause generally has no materiality and is not required to be given in order to avoid prejudicial error when, under the facts of the case, the legal causation is obvious and unmistakable. *Morton v. Travelers Indemnity Co.* 433

49. Instructions to a jury must be considered together, so that they may be properly understood, and, if as a whole they fairly state the law applicable to the evidence when so construed, error cannot be predicated on the giving thereof. *Morton v. Travelers Indemnity Co.* 433
Graves v. Bednar 499

50. Instructions must be considered and construed together. If they are not sufficiently specific in some respects, it is the duty of counsel to offer requests for instructions that will supply the omission. Unless this is done, the judgment will not ordinarily be reversed for such defect. *Morton v. Travelers Indemnity Co.* 433

51. It is the duty of the trial court to inform the jury as to each item or element of damage it should consider in reaching its verdict. *Phillips Petroleum Co. v. City of Omaha* 457

52. The proof on the trial of a jury case should be confined to legal evidence tending to prove or disprove an issue made by the pleadings. An improper matter submitted to the jury for its consideration by the trial court is prejudicial error if it

may have influenced the verdict. *Phillips Petroleum Co. v. City of Omaha* 457

53. The reception of improper evidence in a jury trial must be considered prejudicial error unless it appears that it did not affect the result. *Phillips Petroleum Co. v. City of Omaha* 457

54. In determining whether there was error in a sentence or part of an instruction, the entire instruction and all the other instructions should be considered. The meaning should be determined from the instructions as a whole. *Phillips Petroleum Co. v. City of Omaha* 457

55. In determining the sufficiency of evidence to sustain a verdict it must be considered most favorably to the successful party, any controverted fact resolved in his favor, and he must have the benefit of inferences reasonably deducible from it. *Graves v. Bednar* 499

56. If instructions are not sufficiently specific in some respects, it is the duty of counsel to offer requests for instructions that will supply the omission. Unless this is done, the judgment will not ordinarily be reversed for such defects. *Graves v. Bednar* 499

57. The reading by the official reporter of the testimony of a witness examined on the trial is within the spirit if not within the letter of a statute requiring the court to give its recollection of the testimony, since the reporter's notes of the testimony are liable to be more accurate than the judge's recollection of what was testified to. *Graves v. Bednar* 499

58. Proof of misconduct on the part of a jury to avoid a verdict must be of such a character that prejudice may be presumed. Evidence of misconduct which is to the advantage of the party complaining does not afford a basis for a new trial. *Graves v. Bednar* 499

59. In an action for negligence based on specified acts of negligence the plaintiff, in order to recover, must establish the specific negligence alleged and the doctrine of res ipsa loquitur cannot be applied. *Roos v. Consumers Public Power Dist.* 563

60. 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 a proper instruction has not been requested by the party complaining. *Welton v. State* 643

61. Rule for consideration of motion for directed verdict

or for judgment notwithstanding the verdict stated. *Palmer v. McDonald* 727

62. There is a preliminary question for the court to decide, when properly raised, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it upon whom the burden of proof is imposed. *Palmer v. McDonald* 727

63. It is the duty of the Supreme Court to sustain motion for judgment notwithstanding the verdict where the trial court improperly overruled motion for directed verdict at close of all the evidence. *Palmer v. McDonald* 727

64. 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. *Palmer v. McDonald* 727

65. 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. *Sayers v. Witte* 750

66. In a civil action tried to a jury, in which either party is entitled to recover money from the adverse party, the jury is required to assess the amount of the recovery in its verdict. *Bushey v. French* 809

67. When the question of liability is for the jury and plaintiff has adduced evidence of damages for injuries sustained, a verdict for the plaintiff in the amount of "$ no money" is contrary to law and insufficient to sustain a judgment for the defendant. *Bushey v. French* 809

68. The assessment of "$ no money" in a verdict nullifies its effect as a verdict in favor of plaintiff. Being neither a verdict for the plaintiff nor a verdict for the defendant, it is in effect no verdict at all. *Bushey v. French* 809

69. It is the duty of the trial court to point out defects in a verdict to the jury and send it back to the jury with directions to return a verdict in accordance with law and the instructions of the court. *Bushey v. French* 809

70. If there is any evidence which will sustain a finding for the party having the burden of proof in a

cause, the trial court may not disregard it and direct a verdict against him. *Wrona v. Schrawger* 814

71. Where a party answers after an adverse ruling on his motion or demurrer and goes to trial on the merits of an issue he has elected to join, he waives the error, if any, in the ruling. *Ivins v. Ivins* 838

72. Duty of driver of an automobile approaching a highway intersection and consideration of evidence in such a case stated. *Sekora v. Mangers* 868

73. Before a verdict can be properly directed in a highway intersection case, the position of the defendant's automobile must be definitely located in a favored position, otherwise the question becomes one for the jury. *Sekora v. Mangers* 868

74. In a law action when the evidence is conflicting, a verdict of the jury or a finding of fact by the court where a jury is waived will be set aside where manifestly excessive and clearly wrong. *Moyer v. Nebraska E. G. & T. Coop.* 879

Trusts.

1. The burden of proof is on one seeking to establish the existence of a constructive trust to do so by evidence that is clear, satisfactory, and convincing. *Carey v. Humphries* 578

2. A constructive trust is defined. *Carey v. Humphries* 578

3. Each case in which it is sought to establish a constructive trust must be determined from its facts and circumstances. *Carey v. Humphries* 578

4. The cardinal rule applicable to the construction of a written instrument creating a trust is to determine the intent of the settlor and to give effect thereto if it is not in conflict with law. *Conway v. County of Adams* 677

5. Rules of construction of trusts are intended for use in doubtful cases when language used is not clear, but these rules have no application when the language used clearly expresses the settlor's intent. *Conway v. County of Adams* 677

6. Where an instrument creating a trust declares the trust estate to be personal property, and the declaration does not conflict with law, it has binding force and effect. *Conway v. County of Adams* 677

Vendor and Purchaser.

1. A merchantable title is a title which a man of rea-

sonable prudence, familiar with the facts and the questions of law involved, would accept as a title which could be sold to a reasonable purchaser. *Podewitz v. Gering Nat. Bank* 380

2. An option to purchase real estate is a unilateral contract by which the owner of the property agrees with the optionee that he has the right to buy the property according to the terms and conditions of the option. *Phillips Petroleum Co. v. City of Omaha* 457

3. An option to purchase real estate does not constitute an estate or interest in land but it is a mere right of election to accept or reject a present offer within the time and upon the terms designated. *Phillips Petroleum Co. v. City of Omaha* 457

4. A holder of a mere option to purchase land which is sought to be condemned is not entitled to any compensation to be paid therefor nor to any damages by reason of the severance of a part of the land from the remainder of it, the subject of the option. *Phillips Petroleum Co. v. City of Omaha* 457

5. A provision in a lease of real estate giving to the lessee the right to purchase the land upon conditions therein stated is no part of the lessee's leasehold estate in the land and it creates in the lessee no estate in the land. It is only a contract right and is not an extention or amplification of the estate granted by the lease. *Phillips Petroleum Co. v. City of Omaha* 457

6. A holder of an option to purchase land being condemned, whether contained in a lease in which the holder is lessee or evidenced by separate writing, has no interest in the land which entitles him to compensation. *Phillips Petroleum Co. v. City of Omaha* 457

7. The exercise of an option to purchase real estate, in order to be effectual, must be identical with the terms of the option agreement and unconditional. *Standard Reliance Ins. Co. v. Schoenthal* 490

8. An option holder cannot enforce an option to purchase real estate until he elects to and binds himself to perform it, thereby giving mutuality to optioner's offer to sell by optionee's acceptance of it. *Standard Reliance Ins. Co. v. Schoenthal* 490

9. The act of filing a bill in equity, within the time for exercising the option, declaring an acceptance and election is sufficient when accompanied by the payment into court of the purchase price fixed by the

option agreement. *Standard Reliance Ins. Co. v. Schoenthal* 490

10. Where the optionee prays for specific performance of the option agreement and makes an unconditional offer to exercise the option in accordance with its terms, and in all respects offers to do equity, the basis exists for the granting of such relief. *Standard Reliance Ins. Co. v. Schoenthal* 490

11. A demand for a warranty deed contrary to the terms of the option agreement is not an acceptance or exercise of the option, but is a counteroffer. *Standard Reliance Ins. Co. v. Schoenthal* 490

12. The claim that the exercise of the option by optionee was ineffectual in that optionee failed to tender payment of installments on an assessment for a public improvement is without merit where the optionee, by pleading in an equity action properly brought, unqualifiedly exercises the option and unconditionally agrees to comply with its terms as determined by the court. *Standard Reliance Ins. Co. v. Schoenthal* 490

13. Where by a bill in equity an optionee exercises his option to purchase and prays for the specific performance of the option agreement, the doctrine of laches is not available as a defense where the suit is brought within the time fixed by the option agreement for its exercise and no delay chargeable to the optionee resulting in prejudice to the rights of optionor has occurred since the right to exercise the option arose. *Standard Reliance Ins. Co. v. Schoenthal* 490

14. A party to a written contract for the sale of her real estate, not a homestead, will not be excused from performance because her husband did not sign the agreement and refused to join in the deed, if the other party is willing to accept the conveyance by the wife without the husband joining in the deed. *Hughes v. de Barberi* 780

Waters.

1. Surface water is that which is diffused over the surface of the ground, derived from falling rains or melting snows, and continues to be such until it reaches some well-defined channel in which it is accustomed to and does flow with other waters. *Turnell v. Mahlin* 513

2. Rule for determination of liability for deflection

and repulsion of surface waters stated. *Turnell v. Mahlin* 513

3. Where surface water flows in a well-defined course, whether the course be ditch, swale, or drain in its primitive condition, the flow cannot be arrested or interfered with to the injury of neighboring proprietors. *Turnell v. Mahlin* 513
4. When a city makes provision by sewers or drains for carrying off surface water, it may not discontinue or abandon the same when it leaves a lot owner in a worse condition that he would have been if the city had not constructed such sewers or drains. *Young v. City of Scribner* 544
5. Where a city of the second class constructs sewers or drains, it is bound to use ordinary care to keep such sewers or drains in proper condition and repair. It will be held liable for damages to property resulting from failure to do so. *Young v. City of Scribner* 544
6. A city is liable for negligence of its agents in obstructing a gutter or drain resulting in damage to private property. *Young v. City of Scribner* 544
7. Neither the owner of land nor a municipal corporation has any right to collect waters and discharge them upon the lands of another in a greater quantity than what would have reached the property by natural drainage. *Young v. City of Scribner* 544

Weapons.

As a general rule, absolute invisibility to other persons is not indispensable to concealment of a weapon on or about the person of a defendant. A weapon is so concealed when it is hidden from ordinary observation and is readily accessible on his person or in a motor vehicle operated by defendant. *Kennedy v. State* 160

Wills.

1. The court, in construing a will, is required to give effect to the true intent of the testator to the extent it can be ascertained from the whole instrument, if such intent is consistent with applicable rules of law. *Gaughen v. Gaughen* 763
2. A patent ambiguity in a will is one which appears upon the face of it. Such an ambiguity must be removed by interpretation according to legal principles and not by evidence, and the intention of

the testator must be found within the four corners of the will. *Gaughen v. Gaughen* 763

3. A bequest or devise to the children of two or more persons is distributed per capita unless a different intention is otherwise indicated in the will. *Gaughen v. Gaughen* 763

Witnesses.

1. As a general rule, a party calling a witness vouches for his credibility and is ordinarily bound by any evidence he gives which is not contradicted or shown to be unreliable by evidence which would justify the trier of facts in arriving at a different conclusion. *State ex rel. Nebraska State Bar Assn. v. Jensen* 1
2. While the plaintiff who calls defendant as a witness cannot impeach his character for veracity generally, the plaintiff may show that the whole or any part of what defendant has sworn to is untrue either by his own examination and the improbability of his story or by other contradictory evidence material to the case. *State ex rel. Nebraska State Bar Assn. v. Jensen* 1
3. In order to use evidence of a witness given at a former trial, it must affirmatively appear that the personal attendance of the witness at the trial cannot be had. This question is in the sound discretion of the trial court, and that discretion will not be interfered with upon appeal unless an abuse of discretion is affirmatively shown. *Davis v. State* 333

Workmen's Compensation.

1. On appeal to the Supreme Court in a workmen's compensation case the cause is considered de novo upon the record. *Knaggs v. City of Lexington* 135
2. Where the evidence is conflicting and cannot be reconciled, the Supreme Court will consider the fact that the district court that tried the cause de novo and observed the demeanor of witnesses gave credence to the testimony of some rather than to the contradictory testimony of others. *Knaggs v. City of Lexington* 135
3. A claimant must prove, in order to recover under the Workmen's Compensation Act, that an accident occurred arising out of and in the course of employment which accident produced injury that re-

sulted in disability or death. *Knaggs v. City of Lexington* 135

4. In order to recover in a workmen's compensation case, there must be a causal connection between an accident suffered by the claimant and the cause of his disability. *Knaggs v. City of Lexington* 135

5. Disability or death for which compensation is claimed may just as legitimately be attributed to the accidental injury where undeveloped and latent physical conditions are set in motion and accelerated as where the same result follows directly from visible violence done to the physical structure of the body. *Knaggs v. City of Lexington* 135

6. The acceleration, aggravation, or lighting up of a preexisting disease by an injury may constitute disability of a character such as to come within the meaning of the Workmen's Compensation Act. *Knaggs v. City of Lexington* 135

7. Where an employee, while engaged in the work of his employment, aggravates or accelerates the condition of diseased blood vessels, thereby causing death or disability, it may constitute an injury of a character such as to come within the Workmen's Compensation Act. *Knaggs v. City of Lexington* 135

8. An accident, within the meaning of the statute, is 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 injury. *Knaggs v. City of Lexington* 135

9. Symptoms of pain and anguish, such as weakness, pallor, sickness, nausea, expressions of pain clearly involuntary, or any other symptoms indicating a deleterious change in the bodily condition may constitute objective symptoms as required by our statute. *Knaggs v. City of Lexington* 135

10. Mere exertion that would not by itself produce compensable disability, and which is not greater in extent than that ordinarily incident to an employment, but which combines with a preexisting disease to produce a disability, is not an injury caused by accident compensable under the Workmen's Compensation Act. *Knaggs v. City of Lexington* 135

11. 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. The rule does not dispense with the necessity that claimant prove his right to

compensation; that is, it does not permit a court to award compensation when the required proof is lacking. *Knaggs v. City of Lexington* 135

12. For workmen's compensation purposes "total disability" does not mean a state of absolute helplessness, but means disablement of an employee to earn wages in the same kind of work, or a work of a similar nature, that he was trained for, or accustomed to perform, or any other kind of work which a person of his mentality and attainments could do. *Knaggs v. City of Lexington* 135

13. Statutory time for filing claim and commencing action does not apply until the employee has knowledge that the accident has caused a compensable disability. *Webb v. Consumers Cooperative Assn.* 758
Plambeck v. Natkin & Co. 774

14. 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. *Plambeck v. Natkin & Co.* 774